



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

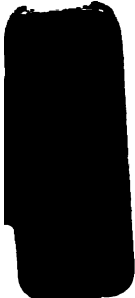
We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

LAW LIBRARY
Univ. of Calif.
Berkeley



COPY 2

READING
ROOM



CITE THIS VOLUME 9 A.L.R.

AMERICAN LAW REPORTS ANNOTATED

Editors in Chief

BURDETT A. RICH AND M. BLAIR WAILES

Consulting Editor

WILLIAM M. MCKINNEY

Managing Editors

H. NOYES GREENE

HENRY P. FARNHAM

GEORGE H. PARMELE

ASSISTED BY THE EXCEPTIONALLY EXPERIENCED EDITORIAL
ORGANIZATIONS OF THE PUBLISHERS

VOL. IX.

THE LAWYERS CO-OPERATIVE PUBLISHING COMPANY	-	ROCHESTER, N. Y.
EDWARD THOMPSON COMPANY	- - - - -	NORTHPORT, L. I., N. Y.
BANCROFT-WHITNEY COMPANY	- - - - -	SAN FRANCISCO, CALIF.

1920

Copyright 1920

BY

THE LAWYERS CO-OPERATIVE PUBLISHING COMPANY

EDWARD THOMPSON COMPANY

BANCROFT-WHITNEY COMPANY

E. R. ANDREWS PRINTING CO., ROCHESTER, N. Y.

TABLE OF CASES REPORTED

A.

Abrams, The Samuel Stores v.	
	(Conn.) 1450
Alba, Durante v.	(Pa.) 485
Allen v. Wolf River Lumber	
Co.	(Wis.) 271
Anderson v. Fidelity & C. Co.	
	(N. Y.) 1544
Armstrong-Turner Millinery	
Co. v. Round ...	(Kan.) 1255
Aumiller, Gordon v.	(Wash.) 369

B.

Bailey, Maynard v.	(W. Va.) 981
Baltimore Enamel & N. Co.,	
Standard Scale &	
Supply Co. v. ...	(Md.) 1502
Bank, Battery Park Nat.,	
Wagner Trading	
Co. v.	(N. Y.) 340
First Nat., Traders'	
Nat. Bank v. ...	(Tenn.) 382
First State, Johnson v.	
	(Minn.) 960
First State, Kelly v. (Minn.)	929
First State, v. Lang (Mont.)	1139
Linn County, v. Davis (Kan.)	468
Milan, v. Richmond .. (Mo.)	353
State, Keller v. (Ill.)	1082
State, v. Shepherd .. (Kan.)	1014
Traders' Nat., v. First	
Nat. Bank (Tenn.)	382
Bank of California v. Starrett	
	(Wash.) 177
Barber Asphalt Pav. Co. v.	
Jurgens	(Cal.) 597
Barnes, Savannah v.	(Ga.) 419
Barrow v. State (Okla. Crim. App.)	207
Bartlesville v. Holm	(Okla.) 627
Barton v. Matthews	(Ark.) 1594
Battery Park Nat. Bank, Wag-	
ner Trading Co. v.	
	(N. Y.) 340

Baxter v. Philadelphia & R. R.	
Co.	(Pa.) 504
Beach v. Williamson	(Fla.) 1438
Bebb v. Jordan	(Wash.) 1035
Beck v. Wilkins-Ricks Co. ..	(N. C.) 554
Bersch v. Morris & Co.	(Kan.) 1374
Bilderback v. Clark	(Kan.) 1622
Billings v. Marshall Furnace	
Co.	(Mich.) 1239
Black, People ex rel., v. Smith	(Ill.) 183
Blair, Burleson v.	(Mich.) 531
Bombardier v. Goodrich	(Vt.) 1028
Booser, Central Clay Drainage	
Dist. v.	(Ark.) 1021
Brackett v. Burnham	(Mich.) 1299
Breen, McLean v.	(Tex.) 459
Breisch v. Locust Mountain	
Coal Co.	(Pa.) 1330
Broadhurst, Vetter v.	(Neb.) 578
Brooke Tool Mfg. Co. v. Hy-	
draulic Gears Co.	
	(Eng. C. A.) 1507
Bryan v. Comstock	(Ark.) 1346
Buena Vista, Com. ex rel., Vir-	
ginia-Western Pow-	
er Co. v.	(Va.) 1148
Bugg v. Houlika	(Miss.) 480
Burack, Tremont Trust Co. v.	
	(Mass.) 1067
Burleson v. Blair	(Mich.) 531
Burnham, Re	(Mich.) 1299
Brackett v.	(Mich.) 1299
Bush, State ex rel., v. Sturgis	(Mo.) 1315

C.

Canty, Cochran v.	(Iowa) 288
Cary, Re	(Minn.) 1272
Central Clay Drainage Dist.	
v. Booser	(Ark.) 1021
Chicago G. W. R. Co., Des	
Moines Union R.	
Co. v.	(Iowa) 1557
Chicago, M. & St. P. R. Co. v.	
Holverson ..	(C. C. A.) 1401

Clark, Bilderback v. (Kan.)	1622
Cleveland, Fowler v. (Ohio)	131
Cleveland Trinidad Pav. Co., Partee v. (Okla.)	606
Clifton Forge, Com. ex rel., Virginia - Western Power Co. v. (Va.)	1148
Cochran v. Canty (Iowa)	288
Collins, Snyder v. (Iowa)	283
Collotta v. Western U. Teleg. Co. (Miss.)	1233
Commercial Motor Truck Co., Haddad v. (La.)	1380
Com. v. Frishman (Mass.)	549
Jackson v. (Ky.)	955
v. Smith (Pa.)	922
ex rel. Buena Vista, Vir- ginia-Western Pow- er Co. v. (Va.)	1148
ex rel. Clifton Forge, Virginia - Western Power Co. v. (Va.)	1148
ex rel. Covington, Vir- ginia-Western Pow- er Co. v. (Va.)	1148
ex rel. Lexington, Vir- ginia-Western Pow- er Co. v. (Va.)	1148
Comstock, Bryan v. (Ark.)	1346
Cornelius v. Smith (Okla.)	233
Covington, Com. ex rel., Vir- ginia-Western Pow- er Co. v. (Va.)	1148
Cross v. State (Tenn.)	1354
Crouch v. Ringer (Wash.)	374
Crystal Coal & Coke Co., Far- ley v. (W. Va.)	933

D.

Damron v. Huntington .. (W. Va.)	623
Davis, Linn County Bank v. (Kan.)	463
De Long, Thompson v. (Pa.)	1326
Denton v. Sapulpa (Okla.)	1031
Dermott v. Stinson (Ark.)	1367
Des Moines Union R. Co. v. Chicago G. W. R. Co. (Iowa)	1557
District Ct., State ex rel. Wooten v. (Mont.)	1212
Donovan, Re (S. D.)	1497
Dorris, People ex rel., v. Le Tempt (Ill.)	835
Dorsett v. Watkins (Okla.)	278
Drake v. Drake (Minn.)	1064
Durante v. Alba (Pa.)	485

E.

E. B. & A. L. Stone Co., Newell v. (Cal.)	993
Eisner v. Macomber (U. S.)	1570
Ex parte Hudgins (W. Va.)	1361
Taylor (Tex.)	963

F.

Farley v. Crystal Coal & Coke Co. (W. Va.)	933
Farnon v. Silver King Coalition Mines Co. (Utah)	248
Fidelity & C. Co., Anderson v. (N. Y.)	1544
Firemen's Fund Ins. Co., Gulf Transp. Co. v. (Miss.)	1307
First Nat. Bank, Traders' Nat. Bank v. (Tenn.)	382
First State Bank, Johnson v. (Minn.)	960
Kelly v. (Minn.)	929
v. Lang (Mont.)	1139
Foster v. Roberts (Tenn.)	431
Foulke v. New York Consol. R. Co. (N. Y.)	1384
Fowler v. Cleveland (Ohio)	131
Fraser v. Portland (Or.)	614
Frishman, Com. v. (Mass.)	549

G.

Gamble-Robinson Fruit Co., State ex rel. Langer v. (N. D.)	98
Gary, Los Angeles Invest. Co. v. (Cal.)	115
Gebhardt v. United R. Co. .. (Mo.)	1076
Geib v. Morrison (Minn.)	839
Georgia Public Service Corp., Union Dry Goods Co. v. (U. S.)	1420
Goodrich, Bombardier v. (Vt.)	1028
Gordon v. Aumiller (Wash.)	369
v. Marburger (Wash.)	369
Gorham, State v. (Wash.)	365
Green, Millard v. (Conn.)	1610
Greenfield v. Russel (Ill.)	1334
Greenlee, Owens v. (Colo.)	1184
Gulf Transp. Co. v. Firemen's Fund Ins. Co. .. (Miss.)	1307
Gulick v. Hamilton (Ill.)	1629

H.

Haddad v. Commercial Motor Truck Co. (La.)	1380
Hall, Hempel v. (Md.)	1245
Hamilton, Gulick v. (Ill.)	1629
Hammond Lumber Co. v. Pub- lic Service Commis- sion (Or.)	1223
Harrigan, White v. (Okla.)	1041
Hempel v. Hall (Md.)	1245
Henderson v. Lieber (Ky.)	620
Hepworth Mfg. Co. v. Ryott (Eng. Ch.)	1484
Heva v. Seattle School Dist. (Wash.)	267
Hodges, Nickerson v. (La.)	361
Raley v. (La.)	361
Holm, Bartlesville v. (Okla.)	627

CASES REPORTED.

vii

Holverson, Chicago, M. & St. P. R. Co. v. (C. C. A.)	1401
Houlka, Bugg v. (Miss.)	480
Hudgins, Ex parte (W. Va.)	1361
Hudson, Missouri, K. & T. R. Co. v. (Okla.)	223
Huntington, Damron v. ... (W. Va.)	623
Hydraulic Gears Co., Brooks Tool Mfg. Co. v. (Eng. C. A.)	1507

I.

Insurance Co., Firemen's Fund, Gulf Transp. Co. v. (Miss.)	1307
Standard Acci., Tracey v. (Me.)	521
Travelers, Kaufman Beef Co. use of, v. United R. & Electric Co. (Md.)	476
Iring v. Iring (Ky.)	1070

J.

Jackson v. Com. (Ky.)	955
Johnson v. First State Bank (Minn.)	960
Jordan, Bebb v. (Wash.)	1035
Jurgens, Barber Asphalt Pav. Co. v. (Cal.)	597
Juul v. School Dist. (Wis.)	904

K.

Kaufman Beef Co. use of Trav- elers Ins. Co. v. United R. & Elec- tric Co. (Md.)	476
Keane, Kvale v. (N. D.)	972
Keith v. Kilmer (C. C. A.)	1287
Keller v. State Bank (Ill.)	1082
Kelly v. First State Bank .. (Minn.)	929
Kilmer, Keith v. (C. C. A.)	1287
King Realty & Invest. Co., Schwartz v. (N. J.)	471
Kirby, Welch v. (C. C. A.)	1409
Koehler v. Rowland (Mo.)	107
Kohler & Chase, Silverstin v. (Cal.)	1177
Kvale v. Keane (N. D.)	972

L.

Landry, Morency v. (N. H.)	123
Lang, First State Bank v. (Mont.)	1139
Langer, State ex rel., v. Gam- ble-Robinson Fruit Co. (N. D.)	98
Leon v. State (Ariz.)	1393
Le Tempt, People ex rel. Dorris v. (Ill.)	835

Lexington, Com. ex rel., Vir- ginia-Western Pow- er Co. v. (Va.)	1148
Lieber, Henderson v. (Ky.)	620
Linn County Bank v. Davis (Kan.)	468
Locust Mountain Coal Co., Breisch v. (Pa.)	1330
Los Angeles County, Los An- geles Gas & E. Co. v. (Cal.)	1277
San Gabriel Valley Country Club v. ... (Cal.)	1200
Los Angeles Gas & E. Co. v. Los Angeles County (Cal.)	1277
Los Angeles Invest. Co. v. Gary (Cal.)	115
Louisville & N. R. Co. v. Rob- erts (Ky.)	94
Louisville Gayety Theater Co. v. Ragan (Ky.)	294
Lyman v. State (Md.)	401

M.

McLean v. Breen (Tex.)	459
Macomber, Eisner v. (U. S.)	1570
Marburger, Gordon v. (Wash.)	369
Marshall Furnace Co., Billings v. (Mich.)	1239
Matthews, Barton v. (Ark.)	1594
Maynard v. Bailey (W. Va.)	981
Meridian Light & R. Co., Mul- lican v. (Miss.)	165
Milan Bank v. Richmond (Mo.)	353
Millard v. Green (Conn.)	1610
Missouri, K. & T. R. Co. v. Hudson (Okla.)	223
Mohney, New York C. R. Co. v. (U. S.)	496
Monroe v. Railroad Commis- sion (Wis.)	1007
Moore v. Yonkers (C. C. A.)	590
Morency v. Landry (N. H.)	123
Morris & Co., Bersch v. ... (Kan.)	1374
Morrison, Geib v. (Minn.)	839
Morse v. Stober (Mass.)	78
Mullican v. Meridian Light & R. Co. (Miss.)	165

N.

Newell v. E. B. & A. L. Stone Co. (Cal.)	993
New York C. R. Co. v. Mohney (U. S.)	496
New York Consol. R. Co., Foulke v. (N. Y.)	1384
Nickersón v. Hodges (La.)	361

O.

O'Connor, Rost v. (Minn.)	1265
Owens v. Greenlee (Colo.)	1184

P.

Partee v. Cleveland Trinidad	
Pav. Co. (Okla.)	606
Pearson v. Sullivan (Mich.)	438
People ex rel. Dorris v. Le	
Tempt (Ill.)	835
v. Santow (Ill.)	1524
ex rel. Black v. Smith (Ill.)	183
Philadelphia & R. R. Co., Bax-	
ter v. (Pa.)	504
Pittsburgh & W. Va. Gas Co.	
v. Richardson (W. Va.)	86
Portland, Fraser v. (Or.)	614
Public Service Commission,	
Hammond Lumber	
Co. v. (Or.)	1223

R.

Ragan, Louisville Gayety The-	
ater Co. v. (Ky.)	294
Railroad Commission, Monroe	
v. (Wis.)	1007
Railroad Co., Louisville & N.,	
v. Roberts (Ky.)	94
New York C., v. Mohney	
(U. S.)	496
New York Consol.,	
Foulke v. (N. Y.)	1384
Railway Co., Chicago, G. W.,	
Des Moines Union	
R. Co. v. (Iowa)	1557
Chicago, M. & St. P., v.	
Holverson .. (C. C. A.)	1401
Des Moines Union, v.	
Chicago, G. W. R.	
Co. (Iowa)	1557
Meridian Light &, Mul-	
lican v. (Miss.)	165
Missouri, K. & T., v.	
Hudson (Okla.)	223
Philadelphia & R., Bax-	
ter v. (Pa.)	504
Railways Co., United, Geb-	
hardt v. (Mo.)	1076
Raley v. Hodges (La.)	361
Re Burnham (Mich.)	1299
Cary (Minn.)	1272
Donovan (S. D.)	1497
Richardson, Pittsburgh & W.	
Va. Gas Co. v. (W. Va.)	86
Richmond, Milan Bank v. .. (Mo.)	353
Ringer, Crouch v. (Wash.)	374
Roberts, Foster v. (Tenn.)	431
Louisville & N. R. Co.	
v. (Ky.)	94
v. Vaughn (Tenn.)	1528
Rosenfield v. Wall (Conn.)	1189
Rost v. O'Connor (Minn.)	1265
Round, Armstrong-Turner Mil-	
linery Co. v. .. (Kan.)	1255
Rowland, Koehler v. (Mo.)	107

Royal Indemnity Co. v. Sangor

	(Wis.)	397
Russel, Greenfield v. (Ill.)		1334
Ryott, Hepworth Mfg. Co- v.		
	(Eng. Ch.)	1484

S.

Samuel Stores v. Abrams .. (Conn.)		1450
San Gabriel Valley Country		
Club v. Los Angeles		
County (Cal.)		1200
Sangerville, Stanley v. (Me.)		348
Sangor, Royal Indemnity Co. v.		
	(Wis.)	397
Santow, People v. (Ill.)		1524
Sapulpa, Denton v. (Okla.)		1031
Savannah v. Barnes (Ga.)		419
School Dist., Juul v. (Wis.)		904
Schwartz v. King Realty &		
Invest. Co. (N. J.)		471
Seattle School Dist., Heva v.		
	(Wash.)	267
Shepherd, State Bank v. .. (Kan.)		1014
Shoaf, State v. (N. C.)		426
Silver King Coalition Mines		
Co., Farnon v. .. (Utah)		248
Silverstin v. Kohler & Chase		
	(Cal.)	1177
Simonsen v. Swenson (Neb.)		1250
Smith, Com. v. (Pa.)		922
Cornelius v. (Okla.)		233
People ex rel. Black v. (Ill.)		183
Snook v. Snook (Wash.)		262
Snyder v. Collins (Iowa)		283
Spokane & E. Trust Co., State		
ex rel., v. Superior		
Ct. (Wash.)		157
Standard Acci. Ins. Co., Tracey		
v. (Me.)		521
Standard Scale & Supply Co.		
v. Baltimore Enamel		
& N. Co. (Md.)		1502
Stanley v. Sangerville (Me.)		348
Starrett, Bank of California v.		
	(Wash.)	177
State, Barrow v. (Okla. Crim. App.)		207
Cross v. (Tenn.)		1354
ex rel. Wooten v. Dis-		
trict Ct. (Mont.)		1212
ex rel. Langer v. Gam-		
ble-Robinson Fruit		
Co. (N. D.)		98
v. Gorham (Wash.)		365
Leon v. (Ariz.)		1393
Lyman v. (Md.)		401
v. Shoaf (N. C.)		426
ex rel. Bush v. Sturgis (Mo.)		1315
ex rel. Spokane & E.		
Trust Co. v. Supe-		
rior Ct. (Wash.)		157
v. Taft (C. C.) Co. .. (Iowa)		390
v. Wilcox (Kan.)		1091
Zell v. (Ind.)		336

CASES REPORTED.

ix

State Bank, Keller v. (Ill.)	1082
v. Shepherd (Kan.)	1014
Stinson, Dermott v. (Ark.)	1367
Stober, Morse v. (Mass.)	78
Stovall v. Toppenish School Dist. (Wash.)	908
Sturgis, State ex rel. Bush v. (Mo.)	1315
Sullivan, Pearson v. (Mich.)	438
Superior Ct., State ex rel. Spo- kane & E. Trust Co. v. (Wash.)	157
Swenson, Simonsen v. (Neb.)	1250

T.

Taft (C. C.) Co., State v. .. (Iowa)	390
Taylor, Ex parte (Tex.)	963
The Samuel Stores v. Abrams (Conn.)	1450
Thompson v. De Long (Pa.)	1326
Thress v. Zemple (N. D.)	1
Toppenish School Dist., Stovall v. (Wash.)	908
Tracey v. Standard Acci. Ins. Co. (Me.)	521
Traders' Nat. Bank v. First Nat. Bank (Tenn.)	382
Travelers Ins. Co., Kaufman Beef Co. use of, v. United R. & Elec- tric Co. (Md.)	476
Tremont Trust Co. v. Burack (Mass.)	1067

U.

Union Dry Goods Co. v. Geor- gia Public Service Corp. (U. S.)	1420
United R. & Electric Co., Kauf- man Beef Co. use of Travelers Ins. Co. v. (Md.)	476
United R. Co., Gebhardt v. .. (Mo.)	1076
Utah Sav. & T. Co., Weyant v. (Utah)	1119

V.

Vaughn, Roberts v. (Tenn.)	1528
Vetter v. Broadhurst (Neb.)	578
Virginia-Western Power Co. v. Com. ex rel. Buena Vista (Va.)	1148
v. Com. ex rel. Clifton Forge (Va.)	1148
v. Com. ex rel. Coving- ton (Va.)	1148
v. Com. ex rel. Lexing- ton (Va.)	1148

W.

Wagner Trading Co. v. Bat- tery Park Nat. Bank (N. Y.)	340
Wall, Rosenfield v. (Conn.)	1189
Watkins, Dorsett v. (Okla.)	278
Welch v. Kirby (C. C. A.)	1409
Western U. Teleg. Co., Collotta v. (Miss.)	1233
Weyant v. Utah Sav. & T. Co. (Utah)	1119
White v. Harrigan (Okla.)	1041
Wilcox, State v. (Kan.)	1091
Wilkins-Ricks Co., Beck v. .. (N. C.)	554
Williamson, Beach v. (Fla.)	1438
Wolf River Lumber Co., Allen v. (Wis.)	271
Wooten, State ex rel., v. Dis- trict Ct. (Mont.)	1212

Y.

Yonkers, Moore v. .. (C. C. A.)	590
---------------------------------	-----

Z.

Zell v. State (Ind.)	336
Zemple, Thress v. (N. D.)	1

AMERICAN LAW REPORTS

ANNOTATED

VOL. 9

OTTO THRESS, Respt.,

v.

F. W. ZEMPLE, Appt.

North Dakota Supreme Court—June 30, 1919.

(— N. D. —, 174 N. W. 85.)

Army — Moratorium Act — duty to vacate judgment.

1. Upon a motion made to vacate a judgment non obstante rendered in accordance with a mandate from the appellate court, upon the ground that, at the time of the rendition thereof, the appellant was in the active military service of the Federal government, and it so appearing upon the hearing of such motion, it was the express duty of the trial court, pursuant to chapter 10 of the Special Session Laws N. D. 1918 (the Moratorium Act), to vacate such judgment and to not take any further proceedings in such action during the time our government is engaged in the present war and for an additional period of one year, except pursuant to the provisions of said Moratorium Act.

[See note on this question beginning on page 6.]

Appeal — order granting new trial — judgment for nonappellant.

2. Upon an appeal from an order granting a new trial, where the entire record is before the court and the question involved is the sufficiency of the evidence to justify the verdict rendered, the supreme court, under §§ 7643 and 7844, Comp. Laws 1918, has authority to order a judgment in favor of the party entitled thereto pursuant to his motions made therefor, even though such party has not appealed from such order.

— judgment non obstante — error.

3. Upon such appeal, where it appears that this court held that as a matter of law the respondent, upon the record, was entitled to a directed verdict or to judgment non obstante, and in its mandate to the trial court directed that the case be remanded for further proceedings in accordance with the opinion rendered, it is held, that the trial court did not err in directing and causing to be entered a judgment non obstante in favor of the respondent.

Headnotes by BRONSON, J.

(Robinson, J., dissents.)

APPEAL by defendant from an order of the District Court for Stark County (Crawford, J.) refusing to vacate a judgment for plaintiff in an action brought to recover the balance of insurance money collected and held by defendant on property of which plaintiff was the owner. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Jacobsen & Murray, for appellant:

The appellate court will not grant relief to a party who has not appealed or complained, in the mode provided by law, of the judgment or decree.

Schumacher v. Great Northern R. Co. 23 N. D. 231, 136 N. W. 85.

The division of the money between the parties constituted a good consideration which cannot be destroyed by simply showing that Zemple in fact had no claim to the money.

McGlynn v. Scott, 4 N. D. 18, 58 N. W. 460.

In order for a party to have judgment notwithstanding the verdict it must appear from the whole record that he is entitled to it.

First State Bank v. Kelly, 30 N. D. 84, 152 N. W. 125, Ann. Cas. 1917D, 1044.

Mandates and decisions of similar character have been construed in other states to mean the granting of a new trial.

Cahn v. Tootle, 58 Kan. 260, 48 Pac. 919; Ball v. Rankin, 23 Okla. 801, 101 Pac. 1105; Gazos Creek Mill & Lumber Co. v. Coburn, 8 Cal. App. 150, 96 Pac. 359; Oakland v. Oakland Water Front Co. 162 Cal. 675, 124 Pac. 251.

Mr. W. F. Burnett for respondent.

Bronson, J., delivered the opinion of the court:

This is an appeal from a judgment rendered October 7, 1918, and from the order refusing to vacate the same. The action, originally commenced in March, 1914, was tried in December, 1915, before a jury, and, pursuant thereto, judgment was rendered for the defendant in December, 1916. Thereafter, in June, 1917, upon a motion made for judgment non obstante, or, in the alternative, for a new trial, the trial court granted a new trial. Thereupon, the defendant appealed from such order, and in the month of September, 1918, this court in its opinion (40 N. D. —, 169 N. W. 79) held that the trial court should have directed a verdict for the plaintiff,

or allowed the motion for judgment notwithstanding the verdict.

In the latter part of such opinion it is stated: "Order affirmed and case remanded for proceedings in accordance with this decision."

After the remittitur was filed, the trial court, following this court's opinion and deeming that a new trial would not result otherwise than in plaintiff's favor, ordered judgment in favor of the plaintiff. Judgment was so entered in October, 1918. In November, 1918, the defendant made a motion to vacate such judgment upon the ground that he was entitled to a new trial under the mandate of this court, and upon the further ground that, the defendant being in the active military service of the United States at the time of the rendition of such judgment, the Moratorium Act (chap. 10, Sp. L. 1918) applied. Accordingly, the defendant has again appealed to this court from the order refusing to vacate such judgment. The appellant contends that neither the mandate nor the remittitur directed the trial court to enter such judgment, and that such court had no jurisdiction to so do. That the effect of the trial court's action is to grant to the respondent a greater relief than he secured in the trial court upon a matter concerning which he did not appeal, and upon a subject-matter that was not before this court for consideration. These contentions involve the construction to be placed upon the former decision of this court and the right of this court to direct, and the trial court to enter, a judgment non obstante, where an appeal has been taken only from an order granting a new trial.

It is clear that this court determined in its opinion upon the former appeal (169 N. W. 79) that the plaintiff, as a matter of law upon the record, was entitled to a directed ver-

dict or to judgment non obstante. If any lack of clarity exists as to the meaning of such decision, it is found only in the last paragraph thereof, which states that the order is affirmed and the case remanded for proceedings in accordance with the decision. If such last paragraph had stated in words, "It is therefore ordered that judgment be entered in the trial court for the plaintiff in accordance with this decision," there would be no difficulty whatsoever in apprehending exactly what this court intended to do. There can be little question, upon the plain language of the opinion, that it did so intend.

Under § 7643, Comp. Laws 1913, this court is granted the specific power, upon an appeal from an order granting or denying a motion for a new trial in an action where a motion is made by either party at the close of the case to direct a verdict, to order and direct a judgment in favor of the party who was entitled to have such verdict directed in his favor. See Ennis v.

Appeal—order granting new trial—judgment for non-appellant.

Retail Merchants Asso. Mut. F. Ins. Co. 33 N. D. 20, 36, 156 N. W. 234; Schumacher v. Great Northern R. Co. 23 N. D. 231, 136 N. W. 85. Such motion for a directed verdict was made in this case. Under Comp. Laws 1913, § 7844, this court, upon an appeal from a judgment or order, may reverse, affirm, or modify the judgment or order, and in all cases this court shall remit its judgment or decision to the court from which the appeal was taken, to be enforced accordingly.

The appellant, upon the former appeal, appealed from an order granting a new trial. He brought for review before this court the entire record. He questioned the sufficiency of the evidence to warrant such order. He contended that no new trial should be granted. The trial court did grant a new trial upon the ground that evidence was insufficient to warrant the verdict rendered. This court necessarily con-

sidered the sufficiency of such evidence which the trial court considered in connection with the motion for the new trial, involving therein, also, the motions made for a directed verdict and for judgment non obstante. This court upon such former appeal did determine that as a matter of law, upon the record, no new trial should be granted, and that the motion for a directed verdict or for judgment non obstante in favor of the plaintiff should have been granted by the trial court. The opinion of this court in the former case is not now in question. The appellant now contends for a new trial pursuant to that opinion.

Plainly his contention must be denied. The court possessed the power to so order judgment for the respondent even

—judgment non obstante—error.

though he contended simply for a new trial. Comp. Laws 1913, § 7643. It did, in fact, exercise such power, apparently deeming it to be a useless legal ceremony to remand this case for a new trial when such action would be futile, and would simply serve to prolong litigation.

The appellants further contend that under the Moratorium Act the trial court, in any event, should have vacated the judgment for the reason that at the time the defendant was engaged in the military service of the United States. Under chap. 10, Sp. Laws, N. D. 1918 (the Moratorium Act), it is specifically provided, under § 1 thereof, that no further proceedings shall be taken in any action that was pending at the time the act took effect, in which any person who is in the active military service of the United States is a party, over the objection of such party, his attorney, or any person interested in his behalf. Under § 3 thereof, it is provided that any proceeding taken against any such person shall be vacated and declared void as a matter of course upon proper application to vacate the same. The respondent, in his brief, suggests to this court that if the trial court transgressed the terms of

the act, it was done unwittingly, and that proper safeguards have been ordered, in that the trial court has directed that no proceedings be had for the enforcement of the judgment until the further order of the court. In the record it appears that the defendant was inducted into the military service in the month of February, 1918, and ever since that time, up to the 25th day of November, 1918, when the affidavit was made, has been in the active military service of the United States. The act is explicit and direct in its terms. It must be given effect in accordance with its express terms. In this action a judgment was likewise rendered against the garnishee. Apparently no showing was made to the trial court under the provisions of § 4 of the Moratorium Act, providing for the giving of a bond and the taking of property, when the court should so order upon the grounds stated in said § 4. The trial court accordingly erred in not vacating the judgment pursuant to the terms of the Moratorium Act.

It is therefore ordered that the order of the trial court be reversed and the judgment be vacated, and that no further proceedings be taken in such action during the time the United States is engaged in the present war, and for an additional period of one year, unless otherwise ordered by the trial court pursuant to the terms of such Moratorium Act. The appellant will recover the costs in this court of this appeal.

Christianson, Ch. J., and Birdzell, J., concur.

Grace, J., concurs in the result.

Robinson, J., dissenting:

In this case a former appeal was heard and decided on July 10, 1918. A motion for rehearing was denied September 24, 1918. 40 N. D. —, 169 N. W. 79. The court held thus: "On the record and undisputed evidence the case presents no question of fact to submit to a jury. The court should have directed a verdict

in favor of the plaintiff or allowed the motion for judgment notwithstanding the verdict."

That was a direction to the trial court to enter judgment in favor of the plaintiff. Hence, on filing the remittitur, judgment was entered in accordance with the decision of this court. On October 2, 1918, a notice of taxation of costs was duly served on defendant's attorney, which appears by his written admission. He appeared and filed written objections to the taxation of the cost of printing the brief. Then on November 14, 1918, defendant's attorneys served notice of a motion to vacate the judgment on the ground that the court had not jurisdiction to enter the same without a new trial. Subsequently, defendant added in pencil another cause, to wit, "that at the time of the entry of judgment herein defendant was in the United States Army," and on December 27, 1918, at the time of the hearing of the motion, there was filed an affidavit by Mr. Murray "that in February, 1918, defendant was drafted into military service of the United States, and that at all times since then he has been, and still is, in the military service of the United States at Camp Lewis, in the state of Washington, as appears from a letter written by defendant dated November 18, 1918." The court made an order denying the motion to vacate the judgment and directing that execution from the judgment be suspended for the period of one year after peace has been declared. Thus the court gave defendant the full benefit of the Moratorium Statute, though defendant did not ask for it in the original notice of motion, and though he did not claim the same at the time of the taxation of costs. Now the law does not require idle acts, and surely an order that the judgment be set aside and reinstated after the lapse of the year would have been an idle act, imposing costs on the defendant.

The statute provides that no action for the recovery of any indebtedness against any person in the

military service of the United States shall be maintained during the time the United States is at war, and for an additional period of one year, and that during such time no further proceedings shall be taken in any action that is pending against the party, over the objection of such party or of his attorney, nor shall any judgment against such person be enforced against him or his property during such period. In the opinion of the writer the act is void because it impairs the obligations of contracts, and because the subject of the act is not expressed in its title. The title is: "An Act Regulating Civil Rights of Members of the Military and Naval Establishments of the United States Engaged in the Present War." Now the word "civil," is from "civis," a citizen, and "civil rights" mean the rights of citizens, and not an exemption from due process of law. But in this case there is no reason to pass on the constitutionality of the act. It does not debar anyone who is in the Army from voluntarily appearing in court and contesting his rights to property. In this case the defendant appeared and contested his claim to \$700, which was garnished, and the real purpose of the appeal was to contest that right or claim. It was to give defendant a further opportunity to contest his right to the money. Now the statute does not provide that any court must take judicial notice of the fact that any person is in the active military service, or by reason of such service deny him the right to prosecute or defend an action. It does provide that no proceeding in an action shall be taken against him over his objection on the ground that he is in the active military service, but when this case was before the court no such objection was made. When defendant appeared and contested the taxation of costs, no such objection was made. When defendant gave notice of motion to set aside the judgment, no such objection was made. It was not made until December 28, 1918, when the motion was submitted to

the court and decided, and then the court made its order giving defendant the full benefit of the statute. Now to say that the judgment must be vacated, with directions to reinstate the same after the lapse of a year, would be ridiculous and absurd—and it would be an idle act. If the judgment as entered by the district court should be held void, then, for the same reasons, the judgment of this court on the former appeal should be held void.

Furthermore, the Moratorium Act is void because it conflicts with the provision that no state shall pass any law impairing the obligation of contracts. The decisions of the United States Supreme Court do establish this rule:

"The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced—by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation. If it tend to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened." *Louisiana v. New Orleans*, 102 U. S. 206, 26 L. ed. 132; *Planters' Bank v. Sharp*, 6 How. 301, 12 L. ed. 447; *Edwards v. Kearzey*, 96 U. S. 595, 600, 24 L. ed. 793, 796; *Barnitz v. Beverly*, 163 U. S. 118, 41 L. ed. 93, 16 Sup. Ct. Rep. 1042.

"The obligation of a contract . . . is that duty of performing it. . . . And, if the law is so changed that the means of enforcing this duty are materially impaired, the obligation of the contract no longer remains the same." *Curran v. Arkansas*, 15 How. 304, 319, 14 L. ed. 705, 712; *Seibert v. United States*, 122 U. S. 284, 30 L. ed. 1161, 7 Sup. Ct. Rep. 1190; *Bronson v. Kinzie*, 1 How. 311, 11 L. ed. 143; *McCracken v. Hayward*, 2 How. 608, 612, 11 L. ed. 397, 399; *Gantly v. Ewing*, 3 How. 707, 11 L. ed. 794; *Butz v. Muscatine*, 8 Wall. 575, 583, 19 L. ed. 490, 493; *Walker v. Whitehead*, 16 Wall. 314, 21 L. ed. 357.

But Congress had power to pass

all laws necessary for the protection of the soldiers, and it did pass a moratorium statute which provides that, when a person in the military service has appeared in an action, and his rights have been in no way prejudiced by reason of his military service, then there is not even a stay of the judgment against him. U. S.

Comp. Stat. § 3078½bb, Fed. Stat. Anno. Supp. 1918, p. 814. Certainly there is no occasion for this court supplementing, adding to, or taking anything from the act of Congress. The judgment should be affirmed.

Petition for rehearing denied, September 8, 1919.

ANNOTATION.

Validity and construction of war legislation in nature of moratory statute.

- I. Introductory, 7.
- II. American statutes:
 - a. Validity:
 1. Statute applicable to persons generally, 7.
 2. Statute applicable to persons in military service, 11.
 - b. Construction:
 1. District of Columbia, 18.
 2. Georgia, 20.
 3. Illinois, 20.
 4. Iowa, 20.
 5. Missouri, 22.
 6. North Dakota, 23.
 7. Oregon, 23.
 8. Pennsylvania, 24.
 9. South Carolina, 26.
 - 9a. South Dakota, 27.
 10. Texas, 27.
- III. English statutes:
 - a. Postponement of Payments Act:
 1. Introductory, 28.
 2. Scope of act, 28.
 3. Interest for period of postponement, 29.
 - b. Courts (Emergency Powers) Act:
 1. Introductory, 30.
 2. Meaning of "sum of money," 30.
 3. Meaning of "enter into possession," 33.
 4. Meaning of "foreclosure," 34.
 5. Meaning of "realizing any security," 35.
 6. Meaning of "joined his Majesty's forces," 36.
 7. Power of court to suspend act:
 - (a) Generally, 36.
 - (b) Annulment or suspension of lease, 39.
 - (c) Effect of Defense of Realm Act, 41.
- III.—continued.
 - c. Increase of Rent and Mortgage Interest Act, 44.
- IV. Canadian statutes:
 - a. Alberta:
 1. Volunteers and Reservists Relief Act:
 - (a) Effect of act, 48.
 - (b) Persons exempted, 50.
 2. Soldiers Relief Act, 51.
 3. War Relief Act, 52.
 - b. British Columbia:
 1. Scope of War Relief Act, 53.
 2. Persons exempted, 56.
 3. Conflict of laws, 58.
 - c. Manitoba:
 1. Act respecting contracts relating to land:
 - (a) Scope of act, 59.
 - (b) Effect on pending suit, 59.
 - (c) Effect on contract:
 - (1) Right of action for foreclosure, 60.
 - (2) Right of action to recover payment, 65.
 - (3) Right to interest, 66.
 - (4) Right to possession, 66.
 2. War Relief Act:
 - (a) Generally, 67.
 - (b) Persons exempted, 67.
 - (c) Payment of rent by mortgagor, 69.
 - d. Ontario, 71.
 - e. Saskatchewan:
 1. Moratory proclamation, 73.
 2. Volunteers and Reservists Relief Act:
 - (a) Persons exempted, 73.
 - (b) Effect of act, 76.

I. Introductory.

The emergencies arising from the existence of a state of war have at various times given birth to statutes, ordinarily termed "stay" or "moratory" statutes, providing in some manner for the temporary relief of debtors. A "moratory statute" is a statute granting a "moratorium," and a "moratorium" may be defined as a period during which an obligor has a legal right to delay meeting an obligation. See Webster's New Int. Dict.

The present note, in discussing the validity and construction of war legislation in the nature of a moratory statute, concerns itself only with those acts which have been passed for the benefit of the debtor. No discussion is attempted of similar statutes enacted for the benefit of creditors, such as a statute extending the period of the Statute of Limitations. Nor does the note include cases arising under the Federal Soldiers' & Sailors' Civil Relief Act, except as they involve the effect of the Federal act to supersede state legislation. For an exhaustive discussion of the validity and construction of that statute, see the note to *MORSE v. STORER*, post, 78. Likewise, cases wherein relief by way of continuance or otherwise has been granted in the absence of a statute, because of the absence of a party or a witness in the military or naval service, are not included.

*II. American statutes.**a. Validity.**1. Statute applicable to persons generally.*

While as a general rule a mere change of remedy is open to no constitutional objection unless it amounts to the impairment of the obligation of a contract, it has been generally held that war legislation, in the nature of a moratory law which suspends or delays the creditor's right to enforce his remedy against the debtor at maturity, is unconstitutional in its application to existing contracts, as being an impairment of their obligation.

Alabama. — *Hudspeth v. Davis* (1867) 41 Ala. 389.

Arkansas. — *Burt v. Williams* (1863) 24 Ark. 91.

Missouri. — *Stevens v. Andrews* (1861) 31 Mo. 205.

North Carolina. — *Jones v. Crittenden* (1814) 4 N. C. (1 Car. Law Repos. 385), 6 Am. Dec. 531; *Barnes v. Barnes* (1861) 53 N. C. (8 Jones, L.) 366.

Pennsylvania. — *Miller v. Ripka* (1861) 4 Phila. 309; *Bunn v. Gorgas* (1862) 41 Pa. 441. Compare *Billmeyer v. Evans* (1861) 40 Pa. 324, and *Lewis v. Lewis* (1864) 47 Pa. 127.

South Carolina. — *State v. Carew* (1866) 47 S. C. L. (13 Rich.) 498, 91 Am. Dec. 245.

South Dakota. — See *Granger v. Luther* (1920) — S. D. —, 176 N. W. 1019.

Texas. — *Luter v. Hunter* (1868) 30 Tex. 689, 98 Am. Dec. 494; *Canfield v. Hunter* (1868) 30 Tex. 712; *Culbreath v. Hunter* (1868) 30 Tex. 713; *Levison v. Norris* (1868) 30 Tex. 713; *Levison v. Krohne* (1868) 30 Tex. 714.

Thus, in *State v. Carew* (S. C.) supra, the South Carolina Act of 1861, entitled "An Act to Extend Relief to Debtors, and to Prevent the Sacrifice of Property at Public Sales," which prohibited the service or execution of "any mesne or final process of any of the courts of this state for the collection of money until after the expiration of the first session of the next general assembly," with certain exceptions, was held to be invalid in its application to contracts in force at its passage, as being repugnant to that provision of the Federal Constitution which prohibits the states from impairing the obligation of a contract.

The foregoing act, however, was, in *Barry v. Iseman* (1866) 48 S. C. L. (14 Rich.) 129, 91 Am. Dec. 262, held to be constitutional as regards its application to contracts entered into subsequent to its passage.

The Missouri Stay Law of March 7, 1861, provided that all executions issued on any judgment rendered by any court of record should be returnable to the second term after their issuance. In *Stevens v. Andrews* (Mo.) supra, the act was held to be

unconstitutional as impairing the obligation of existing contracts.

In *Jones v. Crittenden* (N. C.) *supra*, the North Carolina Act of 1812, designed "to suspend executions for a limited time," which provided that any court rendering a judgment against a debtor for debt or damages, between the 31st of December, 1812, and the 1st of February, 1814, should stay the judgment until the first term after the latter date, on the defendant's giving two freeholders as security, was held to be void as impairing the obligation of contracts entered into prior to its passage.

A subsequent North Carolina statute (Act of May 11, 1861) passed during the Civil War, provided as follows: "No execution of *fieri facias* or *venditioni exponas* founded upon a judgment in any suit or action for debts and demands due on bonds, promissory notes, bills of exchange, covenants for the payment of money, judgments, accounts, and all other contracts for money demands, or contracts for specific articles, other than those upon official bonds or in favor of the state, or against nonresidents, shall be issued from the passage of this act, by any court of record or magistrate, for the sale of property, until otherwise provided by law; nor shall there be any sales under deeds of trust or decrees, unless by the consent of parties interested, until otherwise provided by law." In *Barnes v. Barnes* (N. C.) *supra*, it was held that the act was invalid as being an impairment of the obligation of contracts entered into prior to its passage.

For a like reason, a provision in the Pennsylvania Stay Law of 1861, entitled "An Act Relating to Judgments and Executions," which directed the court to issue no execution against a defendant debtor except in accordance with an agreement entered into by a certain proportion of his creditors, was held to be unconstitutional. *Miller v. Ripka* (1861) 4 Phila. (Pa.) 309, wherein the court said: "Two thirds in value and a majority in number of the creditors decide what is reasonable, and the act gives the

court no power to review their action. The stay ordered to be entered by the court must be in precise conformity to that reported as the terms of the agreement of the creditors. We cannot say that the act is constitutional as to such agreements as we deem reasonable, and unconstitutional as to such as we think unreasonable. Such a matter cannot be the subject of judicial discretion. We have no power to do what the legislature has not done—annex a proviso that the stay shall not exceed a certain limit. If it be true that the legislature may grant a reasonable stay, it is not reasonable to leave it to the decision of a majority in number and two thirds in value of the creditors—a tribunal not recognized by law, and which may be unduly influenced in favor of the debtor. It must be competent for the plaintiff in each case to deny the bona fides of the assenting creditors; yet no provision is made by the law for the decision of that question, unless it be by the prothonotary, and no power of revision is given to the court over his determination. On the whole we are of opinion that this provision of the Stay Law is so clearly and palpably unconstitutional that we ought not to refer the case before us to the prothonotary." To the same effect, see *Bunn v. Gorgas* (1862) 41 Pa. 441.

Similarly, the Civil War Acts, which suspended all actions until the ratification of peace between the Confederate States and the United States, were held to impair the obligation of existing contracts. Thus in *Burt v. Williams* (1863) 24 Ark. 91, the Arkansas Act of December, 1862, which declared that "all suits at law or equity, now pending or hereafter to be commenced, in any of the courts of this state, shall be continued until after the ratification of peace between the United States and the Confederate States," was held to be unconstitutional. The court said: "Under the operation of the law we are now considering, every remedy to secure the performance of a contract is taken away until the happening of an event which may never happen; and

as to all contracts made before the passage of the act, the act is unconstitutional, and therefore void."

An Alabama statute (Act December 10, 1861, § 5) prohibited the issue of an execution, without the written consent of the defendant, until after the expiration of one year from the ratification of a treaty of peace between the Confederate States and the United States, except in certain specified cases, and under certain specified conditions. In *Hudspeth v. Davis* (1867) 41 Ala. 389, it was held that the foregoing statute was void as impairing the obligation of contracts, whether tested by the Constitution of the United States, or by that of the Confederate States.

A Florida statute (Act of December 13, 1861), which prohibited all "executions and judgments at common law or decrees in chancery in this state, until twelve months after peace is made and proclaimed or until otherwise provided by law, between the Confederate States of America and the United States of America, except by the consent of the defendant or defendants," was held to be unconstitutional in *Garlington v. Priest* (1870) 13 Fla. 559, as being against public policy, since it contemplated the success of the Confederate States, and the destruction of the national integrity.

And a similar statute in Texas (Act December 7, 1861, § 1, as amended by Acts December 2, 1863, § 1, and December 16, 1863, § 1), which stayed the collection of debts until the ratification of peace between the United States and the Confederate States, was held to be unconstitutional for the same reason. *Luter v. Hunter* (1868) 30 Tex. 689, 98 Am. Dec. 494; *Canfield v. Hunter* (1868) 30 Tex. 712; *Culbreath v. Hunter* (1868) 30 Tex. 713; *Levison v. Norris* (1868) 30 Tex. 713; *Levison v. Krohne* (1868) 30 Tex. 714.

Where the parties to a contract make a special agreement concerning the remedy, by stipulating in the contract that in case of failure of payment there shall be no stay of execution, or that the mortgagee may enter,

or that all exemption rights are waived, the rule is that the remedy becomes a part of the obligation of the contract, and any subsequent statute which affects the remedy under the contract impairs its obligation, and is unconstitutional. Thus, in the Pennsylvania Act of May 21, 1861, granting to judgment debtors a year's stay of execution on certain conditions, it was declared that the provisions of the act should "extend to all judgments or debts upon which stay of execution has been or may be waived by the debtor, in any original obligation or contract upon which such judgment has been or may hereafter be obtained, or by any stipulation entered into at any time separate from said obligation or contract." In *Billmeyer v. Evans* (1861) 40 Pa. 324, it appeared that certain debtors authorized judgment to be entered against them for a certain sum, "with interest, costs of suit, release of errors, and without stay of execution after the day of payment." It was held that this stipulation as to the remedy became a part of the obligation, and therefore that the proviso of the act, extending its operation to this class of cases, was unconstitutional and void. The court said: "The Act of 1861 is said to be merely a modification of the plaintiff's legal remedies. But a statute strictly remedial may impair the obligation of a contract, and when this happens the act is unconstitutional. *Bronson v. Kinzie* (1843) 1 How. (U. S.) 322, 11 L. ed. 147. This always happens where the parties make legal remedies a subject of their contract, and subsequent legislation conflicts with what they have expressed in their agreement. If they do not prescribe the rule of remedy in their contract, the lawmaking power is free; but if they do, they become a law to themselves, and the legislature must let them alone. Stay laws, exemption laws, and limitation laws are ordinarily constitutional, though applied to existing and prior contracts, but the cases in which such laws have been sustained have been cases in which the parties have not contracted about the subject-

matter to which the laws were applicable. . . . But if the thing provided for by the legislature be within their general competence, and yet be the very thing expressly excluded by a particular contract, it is plain that, as to the parties to that contract, the law is unconstitutional and void, because it impairs the obligation of their contract. Nor do you rescue the law from this consequence by calling it remedial. The legislature can no more overthrow the lawful contracts of parties, under guise of remedial legislation, than by direct assault. They can pass no law that impairs the obligation of contracts. Exemption statutes illustrate this whole subject. What portion of a man's property shall be liable for his debts, and what shall be exempt, is a fair subject of legislative discretion. Manifestly exemption statutes are regulations of the creditor's remedies against the debtor's property. They are, therefore, constitutional. But in a particular contract the debtor stipulates that he will have no exemption, and devotes all of his property to the payment of his debts. Now, whilst he cannot repeal the law by his agreement, he can refuse its favors. His contract is lawful and binding. His waiver of legal rights has become parcel of the obligation of his contract, and the legislature can no more impair that obligation than they can annul the entire contract. So, when these defendants stipulated for twelve months' credit, and agreed that there should be no stay of execution beyond that limit, can the legislature say there shall be a stay beyond that limit, without impairing the obligation of the contract? How would it be possible more directly to impair a contract? What is it but setting aside the contract made by the parties, and substituting a different one for it? To say that a contract which waives a stay of execution is not impaired by a law which gives a stay is to talk language which is unintelligible. If the legislature may do this, the constitutional provisions are a vain parade of words, a mere theoretical rule without any practical

force or value. Our opinion is that the clause of the act above quoted is in conflict with § 10, art. 1, of the Constitution of the United States, and with § 17, art. 9, of the Constitution of Pennsylvania, and that it is, therefore, null and void."

To the same effect as, and following, *Billmeyer v. Evans* (Pa.) *supra*, see *Lewis v. Lewis* (1864) 47 Pa. 127.

But while the legislature cannot grant a second stay additional to a former legal stay, they may superadd a legal stay to a prior one voluntarily given by the creditor. Thus, in *Breitenbach v. Bush* (1863) 44 Pa. 313, 84 Am. Dec. 442, it appeared that a confession of judgment contained these words: "Execution to stay until the first day of April next." It was argued on the authority of *Billmeyer v. Evans* (Pa.) *supra*, that this was a stipulation concerning a stay which the Act of April 18, 1861 (heretofore quoted) could not alter. The court said: "The words in that case were 'without stay of execution after the day of payment,' and we held that the legislature could not add a stay in violation of the agreement. The difference in the two cases is apparent. Here, the creditor granted a stay to a fixed date, the debtor stipulating nothing in respect to his liability after that date; there, the debtor stipulated that there should be no stay after the day of payment. The legislature there contradicted the express stipulation; here, it does not."

A Kentucky statute passed in 1861 limited the jurisdiction of the courts, during a period of seven months, to the trial of cases other than those wherein money judgments were to be rendered. In *Johnson v. Higgins* (1861) 3 Met. (Ky.) 566, it was contended that so much of the act as forbade the courts from rendering judgments for debt, or limited their jurisdiction to other cases during the time specified in the act, impaired the appellee's legal remedy to enforce his contract, by preventing him from obtaining his judgment as soon as he could have done under the previous law, and that therefore, to such extent, it im-

paired the obligation of his contract. The court said: "This act, or rather the first section thereof, relates not to the remedy whereby a contract is to be enforced, but to the courts of the state which administer the remedy. . . . Its whole province is to fix the periods within which the courts shall or shall not hear and decide such cases, and to prescribe what business they may or may not transact within such times. It is, in other words, substantially an act to limit—to regulate—the jurisdiction of the courts, an exercise of power over a subject placed, as we have seen, expressly within the control of the legislature by the Constitution. . . . Now, the section of the act complained of does not alter or abolish the courts, nor does it change their sessions. It does less than either—it merely prescribes what business they may do within a certain period of time; or, in other words, it limits their jurisdiction during such period to certain classes of cases, a species of legislation of common occurrence and undoubted constitutionality. . . . We conclude, therefore, that the section of the act referred to does not conflict with the constitutional provisions prohibiting the enactment of laws impairing the obligation of contracts." To the same effect, see *Barkley v. Glover* (1862) 4 Met. (Ky.) 44.

In the Louisiana case of *Johnson v. Duncan* (1915) 3 Mart. (La.) 580, 6 Am. Dec. 675; it was held that an act which suspended all legal proceedings during an actual invasion was not violative of the constitutional provision against the impairment of the obligation of a contract.

2. Statute applicable to persons in military service.

Impairment of obligation of contract.

As a general rule, a moratory law which stays all actions against persons in the military or naval service for a definite and reasonable time does not impair the obligation of a contract, since the application of the statute is solely to the remedy. *McCormick v. Rusch* (1863) 15 Iowa, 128, 83 Am. Dec. 401; *Johnson v. Higgins*

(1861) 3 Met. (Ky.) 566; *Barkley v. Glover* (1862) 4 Met. (Ky.) 44; *Edmondson v. Ferguson* (1848) 11 Mo. 344; *Lindsey v. Burbridge* (1848) 11 Mo. 545; *Donnell v. Stephens* (1865) 35 Mo. 441; *Pierrard v. Hoch* (1919) — Or. —, 184 Pac. 494; *Breitenbach v. Bush* (1863) 44 Pa. 318, 84 Am. Dec. 442; *Coxe v. Martin* (1863) 44 Pa. 322. See also *Clark v. Martin* (1863) 3 Grant, Cas. (Pa.) 393.

During the Mexican War, Missouri enacted a law (Sess. Acts 1846–7, p. 109) which provided as follows: "All process of any kind whatever, commenced or issued against the person or property of any volunteer of this state, engaged as such in any regiment or company of Missouri volunteers, and absent from the state on such service, be and the same is hereby suspended, until such regiment or company to which such volunteer belongs shall return home. That all suits in any court of this state, to which any volunteer, as aforesaid, may be a party defendant, shall stand continued until the return home of the regiment or company to which said volunteer belongs." In *Edmondson v. Ferguson* (1848) 11 Mo. 344, it was contended that the foregoing provision was repugnant to the provision in the Constitution of the United States, prohibiting the states from passing any law impairing the obligation of a contract. The court said: "There is an obvious and long-recognized distinction between the obligation of a contract and the remedy given by law for the time being to enforce it. The one springs from the acts of the contracting parties, whilst the other is the creature of the legislative will. The remedy exists to enforce contracts, in most cases, prior to the contract, and contracts may be made in the absence of any remedy being prescribed by law. The obligation of a contract receives its inception at its execution; the remedy when the breach occurs. The right derived from the contract is transitory, and accompanies the person everywhere; but the remedy is according to the law of the forum to which application is made, and must be in

conformity to the rules prescribed by the laws of that country. . . . Whilst the legislature may not impair the obligation of contracts, . . . it may change the remedy given by law for their enforcement, at its will and pleasure, expediting or retarding their enforcement as may best comport with the public welfare." To the same effect, see *Lindsey v. Burbridge* (1848) 11 Mo. 545.

At the outbreak of the war between the states, Missouri passed "An Act for the Relief of Persons While Doing Actual Military Service for the State." This act was approved on March 15, 1861, and provided that "no civil suit shall be commenced, nor, if commenced, shall the same be prosecuted against any person while he shall be in the actual military service of the state of Missouri; but such suit, if commenced, shall be continued until the expiration of thirty days after his discharge." On March 17, 1873, an amending act was approved which extended the privileges of the Act of 1861 to persons in the military service of the United States, and increased the time from thirty days after discharge, to twelve months. In *Donnell v. Stephens* (1865) 35 Mo. 441, the court said: "It will be observed from the general tenor and scope of these acts that the object of the lawmaking power was to prevent the courts from adjudicating upon the rights and property of persons, who, by reason of being absent and in the military service, were unable to appear and defend in person, and not to interfere or in any wise impair the obligation of the contract upon which said defendant may be sued."

The Iowa Statute of 1862 (Laws 1862, chap. 109, § 1) provided as follows: "In all actions now pending or hereafter brought in any of the courts of the state, . . . it shall be a sufficient cause for a continuance, on motion of the defendant, his agent or attorney, if it shall be shown to the satisfaction of the court, . . . that the defendant is in the actual military service of the United States, or of this state, and upon such showing

being made, said action shall stand continued during the actual continuance of said defendant in the military service." In *McCormick v. Rusch* (1863) 15 Iowa, 127, 83 Am. Dec. 401, the court said: "The legislature has said that a person in the military service of the United States, or of this state, shall be entitled to a continuance in all actions then pending or afterwards to be brought. It certainly relates to the remedy, and the question is, Does it take away all remedy upon this and similar contracts, or impose upon it such new burdens and restrictions as to materially impair its value and benefit? For if it does not, then, according even to the majority of those cases which have gone the farthest in connecting the remedy with the contract or its obligation, the act will be upheld. . . . But this act only gives a new rule of judicial procedure in that it extends the time for pleading. The obligation of the contract itself remains in all its integrity. The party is delayed in the enforcement of his right, but all remedy is not taken away. How far the value or benefit of the remedy may be impaired (and especially materially) by what are termed the new burdens or restrictions imposed by the act, we cannot know in this or any other particular case. Nor is this the true inquiry. At most, the proper inquiry is whether, as a rule, this law, as applied to all cases coming within its terms, so far affects the value and benefit of the remedy to which parties were previously entitled as to impair the obligation of their contracts. And, satisfied that the legislature has not so far exceeded its power in this respect as to justify our interference, we shall sustain the law and affirm the judgment of the court below."

The Pennsylvania Act of April 18, 1861 (P. L. 409) provided that "no civil process shall issue or be enforced against any person mustered into the service of this state or of the United States, during the term for which he shall be engaged in such service, nor until thirty days after he

shall have been discharged therefrom: Provided, that the operation of all limitation shall be suspended upon all claims against such person during such term." In *Breitenbach v. Bush* (1863) 44 Pa. 313, 84 Am. Dec. 442, the question presented was whether the period of exemption was reasonable. The court said: "The stay is a long one, it must be confessed,—longer than is usual,—longer than can be justified, except by most peculiar and pressing circumstances. There is great force in the reasons which the learned judge below urged against it. The enforced delay of a civil right, the deterioration of the mortgaged estate, and the consequent pecuniary loss are entitled to great consideration in judging of the reasonableness of the law. Everybody feels that a stay of remedies on a mortgage for fifty years, for instance, would be a wanton sacrifice of the constitutional rights of the citizen. What better is a stay for a less time, if it be long enough to work essential depreciation of the security? . . . Now if a stay of execution for three years would not be tolerated in ordinary times, did not these circumstances constitute an emergency that justified the pushing of legislation to the extreme limit of the Constitution? No citizen could be blamed for volunteering. He was invoked to do so by appeals as strong as his love of country. In the nature of things, there is nothing unreasonable in exempting a soldier's property from execution whilst he is absent from home, battling for the supremacy of the Constitution and the integrity of the Union. And when he has not run before he was sent, but has yielded himself up to the call of his country, his self-sacrificing patriotism pleads, trumpet-tongued, for all the indulgence from his creditors which the legislature have power to grant. If the term of indulgence seem long in this instance, it was not longer than the time for which the President and Congress demanded the soldiers' services. It was not for him, nor is it for us, to rejudge the discretion of the President and Congress in this regard.

Basing ourselves on what they did, constitutionally the question for us is whether the stay granted by our own legislature to our citizen soldiers was unreasonable. In view of the extraordinary circumstances of the case, we cannot pronounce it unreasonable. We see in it no wanton or careless disregard of the obligation of contracts, but only a sincere effort to enable the general government to prosecute with success a war which, in its exclusive right of judgment, it resolved to wage." To the same effect, see *Coxe v. Martin* (1863) 44 Pa. 322. In *Pierrard v. Hoch* (1919) — Or. —, 184 Pac. 494, the court, in sustaining an Oregon act of similar purport passed in 1917, followed *Breitenbach v. Bush* (Pa.) *supra*, and after quoting at length from the opinion said: "All that is said about existing conditions at the time when the statute was enacted, and what is said about the reasonableness of the suspension of the remedy in that case, is equally true and impressive in the consideration of the case at bar, and demands no elaboration at our hands."

But the suspension by statute of all actions against persons in the military service, for a period which is indefinite and incapable of exact ascertainment, is unconstitutional, as impairing the obligation of contracts entered into prior to its enactment. Thus, in *Hasbrouck v. Shipman* (1862) 16 Wis. 297, it was held that the Wisconsin Moratory Law of May 25, 1861 (Gen. Laws 1861, p. 334), "exempting from civil process all persons who have or may volunteer or enroll themselves as members of any military company mustered into the service of the United States or of the state, during such service," was unconstitutional, as impairing the obligation of a contract. The court said: "The objection to the law in question is that it takes away all existing remedies for enforcing the obligation of contracts, while the debtor is in the military service of the United States or of this state. So long as this military service continues, the creditor is without redress. Should the debtor continue in the service three, five, or

ten or twenty years, he is, under the law, exempted from all civil process. It is very evident that this is a suspension, for an indefinite period, of all remedies whatever. And such being the character of the law, we cannot see upon what ground its validity can be sustained."

So, in *Clark v. Martin* (1863) 3 Grant, Cas. (Pa.) 393, involving the construction of the Pennsylvania Stay Law of April 18, 1861, which exempted persons in the military service from the service of process during the term of such military service, the court said: "Under the pressure of such extraordinary events as have crowded into our history for the last two years, the Supreme Court went to the extremest verge of the Constitution to sustain the Stay Law for three years and thirty days from the date of enlistment. I have no right to anticipate that they will sustain a legislative suspension of civil remedies for a period so indefinite as during the war. What can be more indefinite? The prevalence of a contagious disease, the duration of a panic in the money market, the successive failures of crops, or any other great public calamity would afford a rule of legislation quite as certain and definite as this deplorable war.

Whether it shall last as long as the most timid fear, or shall be determined as soon as the most confident hope, its duration is essentially and in a very high degree uncertain, and that is all that I need to take notice of in this case. According to the settled doctrine of the courts, the legislature have not the constitutional power to suspend the civil remedies of a citizen for an unascertained and uncertain period. The Act of 1861, if applied here, would be such legislation, and therefore I have no right to give it effect."

And in *Granger v. Luther* (1920) — S. D. —, 176 N. W. 1019, the court declared that the power to suspend, modify, or change a remedy by a moratorium law does not authorize the enactment of a law which would so modify or change an existing remedy, or suspend a remedy for such length

of time, as in effect to deny a remedy to one seeking to enforce a right or redress a wrong growing out of a contract existing at the time of the enactment of such law. In this case the court, while construing a provision of the State Moratorium Law suspending any right of entry to apply only to legal proceedings, and not to a contractual right of entry reserved in an existing lease, expressed the opinion that if the provision were to be construed to apply to such a contractual right, it would be unconstitutional as impairing the obligation of a contract.

Exercise of war power.

It has been held that the Wisconsin Act of 1917, granting an exemption from civil process and from the prosecution of civil suits to all persons in the military service of the United States, is not an exercise of the war power which is exclusively vested in the United States. *Konkel v. State* (1919) 168 Wis. 335, 170 N. W. 715.

Abridgment of privileges or immunities of citizens.

Nor does the Wisconsin act, referred to in the preceding paragraph, constitute an abridgment of the privileges or immunities of the citizens of other states, in contravention of the 14th Amendment to the United States Constitution, or of § 2 of article 4 thereof. *Konkel v. State* (Wis.) *supra*, wherein the court said: "The privileges of the act not being denied to the citizens of other states by the express terms of the act, it must be held to apply to the citizens of other states in the Union. The citizens of other states are entitled, under the Federal Constitution, to enjoy the same privileges and immunities as are conferred upon citizens of this state. Therefore, all the privileges and immunities conferred by the act upon the citizens of this state are conferred upon the citizens of other states, in the absence of language expressly limiting the act to citizens of this state."

Special legislation.

A moratory statute granting privileges and exemptions to persons absent in the military service does not

constitute special legislation, in contravention of the provisions of a state constitution. *McCormick v. Rusch* (1863) 15 Iowa, 127, 88 Am. Dec. 401, wherein the court said: "To the suggestion that it conflicts with § 6, art. 1, of our state Constitution, which provides that 'all laws of a general nature shall have a uniform operation,' we give but little weight. The provision was not intended to cover or reach any such case. In the first place, it may be doubted whether it is a law of a 'general nature' within the meaning of the Constitution. This conceded, however, why is not its operation uniform? It gives the same rule to all persons placed in the same circumstances. It does not prescribe one rule for one citizen or soldier, and another for his neighbor, if they are in the same situation. We have a statute regulating continuances on account of the absence of witnesses, which gives a uniform rule to all litigants. And yet one may be entitled to a continuance, and another not. This results not because a different rule is prescribed for each, but because one brings himself within its terms, and the other does not. So all persons in the actual military service of the United States, or of this state, can claim the benefit of the statute, and anyone can have the same benefit if in the service. Those that are not, are not entitled to the same advantage (so to speak), because, in the discretion and wisdom of the legislature, it was deemed inexpedient. And yet this advantage may be, and is, extended to all upon the same terms."

Denial or delay of justice.

Nor does a moratory law, by suspending the remedy on a contract, amount to a denial or delay of justice in contravention of the provisions of a state constitution. *Johnson v. Higgins* (1861) 3 Met. (Ky.) 566; *Barkley v. Glover* (1862) 4 Met. (Ky.) 44; *Bruns v. Crawford* (1864) 34 Mo. 330. Thus, in the case last cited, it was contended that the Missouri Acts of 1861 and 1863, suspending the commencement and prosecution of civil suits against persons in the military service until after their discharge,

were repugnant to the provision of the Missouri Constitution that "courts of justice ought to be open to every person, and certain remedy afforded for every injury to person, property, or character, and that right and justice ought to be administered without sale, denial, or delay." The court held that there was no denial or delay of justice, saying: "The law is required to furnish a remedy for all wrongs; but it is within the power of the lawmakers to determine the proceedings which may be necessary to attain the great end,—the administration of right and justice,—and the judiciary has no power to control the exercise of that discretion."

In *Johnson v. Higgins* (Ky.) supra, it appeared that a money judgment was rendered shortly after the passage of the Kentucky Act of 1861, which suspended for a period of seven months the service of process and the holding of courts, except to hear cases where a judgment or decree for money was not to be rendered. It was contended that the court had the power to render the judgment notwithstanding the act, on the ground that it was repugnant to a provision of the state Constitution that "all courts shall be open, and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law; and right and justice shall be administered without sale, denial, or delay." The court said: "This provision is found in the Bill of Rights. It prescribes certain general duties for the courts of the state, and also lays down general rules for the manner of conducting their business, the effect of which may be thus stated: (1) They are to be held in an open and public manner, and their proceedings are not to be secret or concealed from public view; (2) they are to administer justice without sale—that is, they are not to accept compensation from litigants; and (3) they are not to deny anyone a fair trial, nor to delay the same, except upon sufficient legal grounds for continuance. The terms and import of this provision show that it relates altogether to the judicial department

of the government, which is to administer justice 'by due course of law,' and not to the legislative department, by which such 'due course' may be prescribed. . . . To say, for instance, that it demands that courts shall be constantly in session, would virtually deny to the legislature the power to fix the terms of the several courts throughout the state."

Conflict with Federal legislation.

There are apparently but two decisions, and those are in conflict, passing on the effect of the Federal Soldiers' & Sailors' Civil Relief Act (Act of March 8, 1918, 40 Stat. at L. 440, chap. 20, Comp. Stat. § 3078½, Fed. Stat. Anno. Supp. 1918, p. 810) on state legislation granting privileges and exemptions to residents of the state, absent in military service.

The case of *Konkel v. State* (1919) 168 Wis. 335, 170 N. W. 715, arose under § 4232a of the Wisconsin Act of 1917, providing as follows: "All persons, residents of this state, now in the military service of the United States or of this state, and all those who may hereafter enlist, be appointed, or drafted into the military service of this state or of the United States, for the purpose of the present war, shall, during such service, be exempt from all civil process, and in all civil cases now pending against any person in such service, the proceeding shall be continued and stayed until the discharge of such person from such service," etc. It was contended that this provision was in conflict with the Federal Soldiers' & Sailors' Relief Act, because it provided a more liberal exemption from civil liability than that granted by the Federal enactment. In holding the Wisconsin statute to be void on this ground, the court said: "The question . . . arises whether or not there is a conflict between chapter 409 and the Soldiers' & Sailors' Civil Relief Act, for, if there be a conflict, the act of Congress, by subdivision 2 of article 6 of the Federal Constitution, is made the supreme law of the land. . . . We think it must be held that the laws clearly conflict. . . . In the first place, they speak upon identically the

same subject-matter,—that is, the exemption of persons in the military service of the United States from the process of civil courts. The Soldiers' & Sailors' Civil Relief Act prescribes what that exemption shall be in the courts of the United States and of the states, including the state of Wisconsin. Chapter 409 prescribes what that exemption shall be within the state of Wisconsin, and it prescribes a different exemption than that prescribed by the Soldiers' & Sailors' Civil Relief Act. It is argued that, because chapter 409 grants a more generous immunity or greater exemption than that granted by the Soldiers' & Sailors' Civil Relief Act, there is no conflict, within the principles laid down in *Savage v. Jones* (1912) 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715, and in *McDermott v. Wisconsin* (1913) 228 U. S. 115, 57 L. ed. 754, 47 L.R.A.(N.S.) 984, 33 Sup. Ct. Rep. 431, Ann. Cas. 1915A, 39. Viewed from the standpoint of the person in the military service of the United States, there may be some force to this argument, but he is not the only person concerned. In this case the defendant soldier is the father of a child; which he is legally and morally bound to support. The United States prescribes the conditions under which the delinquent father may be proceeded against. Chapter 409 provides that he may not be so proceeded against. Upon what theory can it be said there is no conflict between the two acts?"

But in *Pierrard v. Hoch* (1919) — Or. —, 184 Pac. 494, it was held that the Federal Soldiers' & Sailors' Civil Relief Act did not supersede or suspend the Oregon statute which prohibited the issue or enforcement of civil process against any person in the military service of the state or the United States, during the term of such service, and thirty days after his discharge. The decision was based on the ground that state legislation on the subject of remedies and procedure in state courts is superior to a Federal enactment on the same subject.

In this connection, the quotation of an extract from the dissenting opinion of Owen, J., in *Konkel v. State* (Wis.) supra, may not be amiss. The learned judge said: "The state is primarily and ultimately concerned with the care of its citizens and of those dependent upon them. In obedience to this duty, the state has expended considerable sums of money during the last two years in the support of the dependents of those engaged in military service. Upon the state falls the financial burden of dependency. Upon the state falls directly the far heavier burden of the demoralization of its citizenry and of the social unrest which attend destitution and the denial of opportunity. The state has a direct interest in preserving the property status of those of its citizens who entered the military service, so that upon their return they may find their property and their business as they left it, and not be relegated to the army of unemployed, to become dependencies of the state. . . . The subject is one over which the state has plenary power as an incident of sovereignty, except in so far as it may have been delegated to Congress. . . . The majority opinion of the court, as I understand it, proceeds on the theory that the Federal enactment is to be construed as covering the subject, thereby excluding any further enactments on the part of the states with reference thereto. This construction obtains where full power to regulate the subject has been delegated to Congress, such as the power to regulate interstate commerce, and where the Federal enactment affirmatively discloses the intent on the part of Congress that its regulation shall be exclusive. But, even where full power has been delegated to Congress, such intent will not be imputed to the congressional act, unless it clearly appears therefrom. As said in *Reid v. Colorado* (1902) 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506: 'It should never be held that Congress intends to supersede, or by its legislation suspend, the exercise of the police powers of the

9 A.L.R.—2.

states, even when it may do so, unless its purpose to effect that result is clearly manifested.' There is nothing about the phraseology of the Federal Soldiers' & Sailors' Civil Relief Act to indicate such an intent. Neither can it be inferred from the purposes to be accomplished by its enactment. Plainly, it was the purpose of Congress to secure certain immunity for soldiers and sailors. The securing of such immunity is not hindered by the voluntary action of the state in granting further immunity. Congress simply demanded such immunity as was required by its military exigencies, and, in my opinion, had no power to demand any more. The granting of further relief on the part of the states was of no concern to Congress. Its power was to demand the immunity necessary for its military purposes. It had no power to forbid further immunity on the part of the state. But, whether this be true or not, the circumstances under which the legislation was passed furnish no justification for the conclusion that, by the enactment of the Soldiers' & Sailors' Civil Relief Act, Congress intended to forbid the states from granting further immunity to the special objects of its gratitude, and unless such an intent can be gathered from the act, or from the purposes of its enactment, as said in *Reid v. Colorado* (U. S.) supra, it will not be so construed. Where there is a conflict between a state statute and a Federal enactment, a state court should not hesitate to acknowledge the supremacy of the Federal act. The power of a state to enact legislation which it deems beneficial to its own interest, however, should not be lightly yielded. I feel that the decision in this case is a voluntary and unnecessary surrender of a sovereign power. I cannot join in the capitulation."

The court, in *Granger v. Luther* (1920) — S. D. —, 176 N. W. 1019, expressly refrained from passing on the question whether a state moratorium law can exist and be in force in favor of those in the Federal service when there is also in existence a Federal law

covering the same subject-matter, no question in that regard having been raised.

b. Construction.

1. District of Columbia.

The Joint Resolution of May 31, 1918 (40 Stat. at L. 593, chap. 90, Fed. Stat. Anno. Supp. 1918, p. 151), commonly called the Saulsbury Resolution, was passed to prevent rent profiteering in the District of Columbia. Its preamble recites the existence of a state of war and the necessity of establishing governmental control of real estate in the District of Columbia. It provides as follows: "Until a treaty of peace shall have been definitely concluded between the United States and the Imperial German Government, unless in the meantime otherwise provided by Congress, no judicial order, decree, or judgment for the recovery of possession of any real estate in the District of Columbia, now or hereafter held or acquired by oral or written agreement of lease for one month or any longer period, or for the ejectment or dispossession of a tenant therefrom, shall be made, and all leases thereof shall continue so long as the tenant continues to pay rent at the agreed rate and performs the other conditions of the tenancy which are not inconsistent herewith, unless the tenant has committed waste, or has been guilty on the premises of conduct which constitutes a nuisance or a breach of the peace, or other misdemeanor or crime, or that the premises are necessarily required by a landlord or bona fide purchaser for occupation either by himself or his wife, children, or dependents while he is in the employ of or officially connected with any branch of the government, or where the property has been sold to a bona fide purchaser for his own occupancy; and where such order, decree, or judgment has been made, but not executed before the passage of this resolution, the court by which the order, decree, or judgment was made shall, if it is of the opinion that the order, decree, or judgment would not have been made if this resolution had been in

force at the date of the making of the order, decree, or judgment, rescind or modify the order, decree, or judgment in such manner as the court may deem proper for the purpose of giving effect to this resolution; and all remedies, at law or in equity, of the lessor, based on any provision in any oral or written agreement of lease that the same shall be determined or forfeited if the premises shall be sold, are hereby suspended while this resolution shall be in force, and every purchaser shall take the conveyance of any premises subject to the rights of all tenants in possession thereof under the provisions of this resolution. That the term 'real estate' as herein used shall be construed to include any and all land, any building, any part of any building, house, or dwelling, any apartment, room, suite of rooms and every other improvement or structure whatsoever on land situated and being in the District of Columbia."

In *Maxwell v. Brayshaw* (1919) 49 App. D. C. —, 258 Fed. 957, it was held that all bona fide purchasers of real estate for their own occupancy, both before and after the passage of the resolution, were excepted from the provisions thereof. The court said: "Until a treaty is concluded between the United States and Germany, the act broadly prohibits any judicial proceeding to recover possession of any leased premises in the District of Columbia. In other words, during the life of the act, it purports to perpetuate existing leases at the rental in force at the date of the passage of the act. There are, however, three exceptions to the sweeping provisions of the act: (1) Where 'the tenant has committed waste, or has been guilty on the premises of conduct which constitutes a nuisance or a breach of the peace, or other misdemeanor or crime;' (2) where 'the premises are necessarily required by a landlord or bona fide purchaser for occupation either by himself or his wife, children, or dependents while he is in the employ of or officially connected with any branch of the government;' and (3) 'where the property has been sold to a bona fide purchas-

er for his own occupancy.' Under the second exception the usual remedy for procuring possession is open to a landlord or bona fide purchaser connected with the government, where the property is required for occupancy by himself, his family, or dependents. In this instance, the right of action is reserved only to a person employed by or connected with the government. The third exception relates broadly to purchasers of property for their own occupancy, whether the purchaser be a person, company or corporation. The exemption also applies, whether the purchaser be connected with the government or not. Doubt may be indulged as to whether this provision of the act relates to property sold before the passage of the act or before the inception of proceedings to recover possession. The latter construction, however, is in harmony with the debates in Congress when the act was passed, and is also in harmony with the object of the act. The act is dealing primarily with limitations upon the right of action to recover possession of property, and relates to the status of the property and the parties at that date. We are not unmindful of the rule that courts, in statutory interpretation, must be guided by the terms of the act itself; but where, as in this instance, the congressional debates are in harmony with a fair construction of the act, they are highly persuasive in arriving at the legislative intention. This exception came into the act as an amendment in the Senate. The Senator proposing it made the following statement: 'It permits property to be sold to a person other than a government employee. It might be that an individual owning property in the District of Columbia would find it necessary to sell his property to protect some interest, or perhaps in a case where a mortgage was being called, and he could not find a purchaser who was a government employee, but could find one who was not. It seems to me it would be very unfair if he was prevented from selling it and giving possession to a man

who was not a government employee.' Clearly the exception was intended to apply to future sales of property within the District, and was not confined to sales made prior to the passage of the act. The act is aimed at the regulation of leasing in the District of Columbia, in view of the crowded conditions existing and made necessary by the war, and further to prevent profiteering by speculating upon the necessities of those in the employ of the government. It placed no restrictions upon the sale of real estate where conducted in good faith for the use and occupancy of the purchaser, and not for the purpose of evading the provisions of the act. We think, therefore, that all bona fide purchasers of real estate in the District of Columbia for their own occupancy, both before and after the passage of the act, are excepted from its provisions; and, though the relation of landlord and tenant may be created technically where the purchaser acquires title to leased premises in the possession of a tenant, it should not be construed as preventing the purchaser from promptly bringing the usual proceeding to recover possession. To hold otherwise would, in effect, foreclose a bona fide purchaser of leased premises from securing possession; for, immediately upon title passing to the purchaser, he, ipso facto, becomes a landlord until possession is procured. It is inconceivable that Congress would confer this exemption upon a purchaser, and, by the same act, deprive him of the means of enforcing it. If the purchaser, therefore, does nothing which would operate legally to establish a new relation of landlord and tenant, he is entitled to avail himself of the exemption afforded bona fide purchasers."

Nor is the provision that "every purchaser shall take the conveyance of any premises, subject to the rights of all tenants in possession thereof under the provisions of this resolution," a restriction on the right of a purchaser to recover possession of property purchased for his own occupancy. *Maxwell v. Brayshaw*, supra,

wherein the court said that the provision amounted merely "to a declaration that any purchaser not coming within the exception to the act takes the premises subject to the rights of a tenant in possession under this resolution, and that even a bona fide purchaser takes the premises subject to an unexpired lease thereon, and cannot proceed to recover possession until the termination thereof, at which time the usual remedy provided by statute is open to him, regardless of the present act."

Hence, under the ruling in the case just cited, a bona fide purchaser can recover the possession, though the tenant is engaged in war work (*Gilder v. Dickens* (1919) 49 App. D. C. —, 258 Fed. 962), or is harboring war workers (*White v. Hickman* (1919) 49 App. D. C. —, 258 Fed. 963; *Williams v. Jacobs* (1919) 49 App. D. C. —, 258 Fed. 964) and irrespective of whether the purchaser himself is engaged in war work (*White v. Hickman*, *supra*; *Biggs v. Sparks* (1919) 49 App. D. C. —, 258 Fed. 964).

2. Georgia.

The Georgia Act of 1861 (Pamph. Acts, p. 59) "authorized" the courts to grant a continuance on the ground of the absence of a party in the military service. In *Crawford v. Brady* (1866) 35 Ga. 184, the attorney for an absent volunteer moved for a continuance on the ground that he "desired the presence" of his client. The motion was overruled, and on appeal the court said: "The Act of 1861 . . . only 'authorized' the courts to continue for this cause. It was not compulsory. In this case, it does not appear that any harm was done the absent party; it was not alleged that his presence was necessary to enable the attorney to represent his rights. The statement of the attorney was that he desired the presence of his client. This is no legal reason for a continuance. In showings for providential absence, the counsel must state, in his place, that he cannot go safely to trial without the presence of his client. Code, § 3453."

3. Illinois.

In *Duncan v. Niles* (1863) 32 Ill. 541, a motion for a continuance was made under the Moratory Act of 1861, on the ground that the defendant was absent in the military service. The affidavit recited that "affiant verily believes that said defendant's presence is in some degree necessary for a full and fair defense of said cause." In denying the motion the court said: "This application is made under the Act of May 3, 1861 (Sess. Act 26), which declares that it shall be sufficient cause for a continuance, on motion of the defendant, if it shall be shown to the satisfaction of the court that the defendant is in the military service of the United States, or of this state, and that his presence is in any degree necessary for a full and fair defense to the suit. The affidavit in this case is insufficient. The court must be satisfied, upon the facts set forth, that the presence of the defendant is in some degree necessary; the mere statement in the affidavit that his presence is necessary will not suffice."

4. Iowa.

The first moratory act in Iowa was passed at the extra session of the legislature in 1861, and provided as follows: "In all actions now pending in any courts of this state, it shall be sufficient cause for a continuance, on motion of defendant, his agent or attorney, if it shall be shown to the satisfaction of the court that the defendant is absent from home in the military service of the United States; and that the defendant's presence is in any degree necessary for a full and fair defense of the suit."

In *Lucas v. Casady* (1861) 12 Iowa, 567, it was said: "This court is disposed to give this section a liberal construction, as its design was to protect that class of our citizens who were ready to leave their homes and lay down their lives, if necessary, in this the hour of our country's peril." That case involved a construction of the words, "in any degree necessary." It appeared that the papers and all matters relating to the plaintiff's action were in the possession of the de-

fendant, who was absent in the military service. The court said: "We are of the opinion that as a matter of right, under this statement of facts and under the provision of the act above referred to, the defendant Crocker was entitled to a continuance. The words, 'in any degree necessary,' as used in this section, indicate an intention upon the part of the legislature to give a defendant absent from home in the military service of the United States a continuance, if for any purpose whatever his presence was required at the trial, not for a full or complete defense, but even for a partial one."

That act was amended in 1862 (Laws 1862, chap. 109, § 1), to read as follows: "In all actions now pending or hereafter brought in any of the courts of the state, . . . it shall be a sufficient cause for a continuance, on motion of the defendant, his agent or attorney, if it shall be shown to the satisfaction of the court, . . . that the defendant is in the actual military service of the United States, or of this state, and, upon such showing being made, said action shall stand continued during actual continuance of said defendant in the military service." In *McCormick v. Rusch* (1863) 15 Iowa, 127, 83 Am. Dec. 401, it was held that the act permitted a continuance to be granted before issue was joined. The court said: "The theory of the statute is that such defendants are necessarily absent, engaged in the service of their country; that, while thus situated, they should not be called upon to defend suits and actions brought against them at home; and to compel them to plead or answer before asking a continuance would frequently defeat the very object and purpose of the statute. We need do no more than suggest that the advice and assistance of the party are frequently absolutely necessary to the proper preparation of the pleadings, and the law provides for such continuances as much on account of such known necessity as to give him an opportunity of being present at the final trial. To say that until he pleads it is not known that he

has a defense, and that unless he has some defense there is no necessity for a continuance, substantially begs the whole question. It is because, among other things, he is not in position to present this pleading, that the law secures him the continuance. To hold that he shall not have the benefit of a law, because he fails to do that which the law itself presumes him incapable of doing, would make the statute inconsistent, and defeat the very object proposed by the legislature." And in *Butler v. McCall* (1863) 15 Iowa, 430, it was held that under the amending act it was not imperative for the defendant to show that his presence was necessary to a full and fair defense of the suit. The court said: "All that is required of the defendant is to show to the satisfaction of the court that he is in the service, and desires a continuance, and when this is done, all further proceedings against him are continued." In *Abrahams v. Bartlett* (1865) 18 Iowa, 513, it was held that the Act of 1862, relating only to persons "in the actual military service of the United States," did not include a person in the "naval service."

A subsequent act was passed in 1863, entitled, "An Act to Exempt the Property of Iowa Volunteers from Levy or Sale" (Laws 1862, chap. 113, p. 128). The act provided that the individual property of every volunteer soldier from Iowa, not above the rank of captain, "shall be and is hereby declared exempt during the term he shall be in said service and two months thereafter, from levy and sale under or by virtue of any deed of trust or mortgage of any description, or under or by virtue of any judgment or decree rendered or hereafter to be rendered by any of the courts of this state." It was provided further that "when property has been duly levied on and sold or disposed of before the officer selling or disposing of the same had knowledge of the passage of this act, the same proceedings shall be had as if this act had not been passed, and that in all other cases, when property has been levied on, it shall be returned to the party from whom taken,

and the levy discharged, and the costs that have accrued shall, if in the district court, be entered on the judgment docket and fee book, and if in the justice's court, on his docket, and thereafter become a part of the judgment." In *Steffenbiel v. Gifford* (1867) 23 Iowa, 515, the question was presented for adjudication whether the provision applied to trust deeds executed prior to April, 1861, which by the law in force at that time could be foreclosed without court proceedings. The court said: "Now, when it is remembered that the legislature had by a prior enactment, impliedly at least, recognized the necessity of limiting its action to instruments of this nature subsequently executed, it is hardly fair to conclude that it has intended to apply this statute to all deeds and mortgages. For while in the one case they refrain from requiring all such contracts to be thus foreclosed, in the other, according to appellant's theory, they have suspended the power to sell upon any of them during the time of the trustor's service, and for two months thereafter. To require the party to come into court would scarcely be regarded as impairing the obligation of his contract so much as to suspend absolutely his right to sell the land two or three years beyond the time fixed in the contract. In any view of the subject, therefore, we feel constrained to hold with the court below that the Act of 1862 was not intended to apply to trust deeds made prior to April, 1861, and which, by the law, could be foreclosed without proceedings in court."

5. Missouri.

The Missouri Act of 1861 (Sess. Acts 1861, p. 46) provided that "no civil suit shall be commenced, nor, if commenced, shall the same be prosecuted against any person while he shall be in the actual military service of the state of Missouri; but such suit, if commenced, shall be continued until the expiration of thirty days after his discharge." A subsequent act, in 1863, extended the privileges to persons in the military service of the United States. Neither act con-

tained any provision suspending all Statutes of Limitation in favor of the person absent, during the time he was exempt from service of process.

In the first case arising under the act, *Bruns v. Crawford* (1864) 34 Mo. 330, it was held that, if a defendant proved his exemption under the act, the suit must be dismissed. But this holding was modified in the subsequent case of *Donnell v. Stephens* (1865) 35 Mo. 441, a suit by a landlord to recover a year's rent, wherein the court said: "Upon a more careful view of the law, we are of the opinion that the proper direction would have been to continue the case, or to suspend all further proceedings under it for the time prescribed in said acts. . . . If the Act of 1861 is to be construed as prohibiting the institution of suit, it would in many cases impair the obligation of contracts, and be liable to the constitutional objection urged in the *Bruns Case*. Under the *Landlord & Tenant Act* the landlord has a lien upon the crops grown on the demised premises, which lien continues for eight months after the rent becomes due and payable, and no longer. Now if he is not permitted to enforce his lien by a proper suit within the prescribed time, he necessarily loses his lien, and to that extent the obligation of the contract is impaired. . . . The legislature never contemplated any such result to flow from the above-recited acts, nor do we think that a fair and proper construction of the acts will sustain the position assumed by the respondent."

The effect of the act was not to prohibit the bringing of suits against persons engaged in military service, but to make that fact a sufficient ground for a continuance of the cause. *Piper v. Aldrich* (1867) 41 Mo. 421. Hence, in that case, wherein it appeared that the plaintiff prosecuted his suit to judgment, the judgment was set aside and the execution issued thereon quashed. The court said: "From the very nature of the case this provision of the law cannot be considered as a privilege merely, the benefit or loss of which is made

to depend upon the act of the soldier himself. It would be the merest mockery to place a person in military service and take him hundreds of miles away from his home, and tell him to rest secure in reference to any suits that might be commenced against him in his absence, because the legislature had passed a law permitting him to appear and plead the fact of his service, and that would be sufficient to authorize a continuance of the cause. If, however, for any reasons he should fail to appear and set up that fact, he must lose all the protection which the act could give him."

But in the subsequent case of *Reed v. Wangler* (1870) 46 Mo. 509, the contrary view was taken, and the court refused to set aside a judgment that had been rendered against a volunteer, on the ground that the defendant, in not appearing to plead his exemption, waived the benefits of the act. The court said: "The practical effect of the enactments, therefore, was to secure to persons in the military service the right, when sued, to have their cases continued from term to term until twelve months after their release from military duty. But the party, in order to avail himself of the right, must claim it, and claim it at the proper time and place, or he must be regarded as having waived it. A party in the military service was not bound to have suits against him continued. He might insist on his trial, as he might insist on or waive his right to a continuance. If he would insist upon the continuance and the consequent delay of trial and postponement of judgment, he should, in some proper way, make the court acquainted with the facts entitling him to the desired delay. The court could not, without proof, take judicial notice of such facts. The court could not judicially know that Dr. Reed was or ever had been in the military service of the country. That was a matter for him to show, but he made no showing of the kind, nor did he ever claim a continuance in virtue of the statute. . . . If there was any fault on the part of anyone it was the

fault of the present complainant in neglecting a long-pending suit. He wholly omitted to claim a continuance under the statute, and he must now submit to the consequences of his own remarkable negligence."

6. North Dakota.

In the reported case (*THRESS v. ZEMPLE*, ante, 1) it is held that an order of the lower court granting a stay of execution on a judgment rendered against a person in the military service is insufficient, and that the judgment itself must be vacated, the Moratory Act of 1918 expressly declaring that such a judgment shall be "vacated and declared void as a matter of course."

The state law was held in *Strand v. Larson* (1920) — N. D. —, 176 N. W. 736, to be available to a soldier who has been in actual military service, even after his discharge, for the period prescribed by this act.

7. Oregon.

The Oregon Act of 1917 (chap. 275, § 1) provided as follows: "No suit or action shall be commenced or maintained, during the period hereinafter provided for, to foreclose any mortgage upon real property, or to collect the debt secured thereby, if the land covered by the mortgage be owned, wholly or in part, by an enlisted man in the Army or Navy of the United States, who shall have enlisted therein in the volunteer forces or who shall have been enlisted in the National Guard of the United States and of the state of Oregon and his organization called into the service of the United States; and the lands of any such soldier or sailor shall be exempt from judicial sale for the satisfaction of any judgment during the period hereinafter provided for; provided, that this moratorium shall extend only during the period of actual service in the Army or Navy forces of the United States, and in no case shall begin prior to the day on which the Congress of the United States shall declare war, nor continue after sixty days subsequent to the conclusion of such war: provided, that all Statutes of Limitation in ef-

fect in the state of Oregon shall be suspended during the period above described, as to the mortgages, debts and judgments in this act described."

A member of an organization which is purely a state affair, and is for service within the state, and who could not be called into the service of the United States, is not within the purview of the act. *Gearin v. Fleckenstein* (1918) 89 Or. 146, 173 Pac. 569, wherein it appeared that the defendant was a member of what was known as the Oregon state guard, which had occasionally been called to do guard duty at the shipyards and other places of that character. It was held that the defense, so far as it related to the defendant's military status, was a mere subterfuge and without merit, the court saying: "The defendant Adams is neither an enlisted man in the Army of the United States, nor of the state of Oregon, which has been called into the service of the United States. The organization is purely a state affair, and is for service within the state, and could not under any existing law be called into the service of the United States in the present war. The Act of 1917 was passed to protect those in actual military service in the war from being harassed by actions or suits while absent defending their country. The defendant Adams is a lawyer fifty years of age and not subject to military service, is a member of this voluntary military organization, and has performed guard duty for a few hours, for fifteen days, at one of the shipyards. He practises his profession in the city, and there is nothing to interfere with his defending any suit brought against him if he has any legitimate defenses, although the record here indicates that he has none."

As to the effect of the Federal Soldiers' & Sailors' Relief Act on the Oregon statute, see *Pierrard v. Hoch* (1919) — Or. —, 184 Pac. 494, set out at length *supra*, II. a, 2.

S. Pennsylvania.

The 4th section of the Pennsylvania Act of April 18th, 1861, provided as follows: "No civil process

shall issue or be enforced against any person mustered into the service of this state or of the United States, during the term for which he shall be engaged in such service, nor until thirty days after he shall have been discharged therefrom: Provided, that the operation of all statutes of limitation shall be suspended upon all claims against such person during such term."

The words, "no civil process shall issue or be enforced," were held to include all forms of execution, as well as original or mesne process. *Breitenbach v. Bush* (1863) 44 Pa. 313, 84 Am. Dec. 442.

Hence in *Jefferis v. Shearer* (1863) 5 Phila. 330, it was held that a *fi. fa.* was "process" within the meaning of the inhibition, and that therefore the court would set aside a levy on the property of a volunteer in active service, though the property was bought subject to the lien of the plaintiff. The court said: "The argument of the plaintiff's counsel is that no process has issued against Thompson; that the process is against Shearer; and therefore the case is not within the provisions of the act. It is true, the process is not against Thompson, and therefore not within the letter of the law; but it is being enforced against his property. There are but few kinds of civil processes in Pennsylvania that can be enforced against the person of a debtor, and these are generally limited to judgments obtained in actions for torts or wrongs committed against the person or property of the plaintiff. But to limit the Act of 1861 to such process as could be literally enforced against the person of a debtor would be to subvert the intention of the legislature, and almost wholly obviate their object and design, and the act ought not to receive such a narrow and illiberal construction."

Similarly, in *Davidson v. Barclay* (1869) 63 Pa. 413, it was held that a person within the exemption of the act was not concluded by the issuance of any process which would operate indirectly on his property, and have the effect of nullifying the

exemption. In that case it appeared that the plaintiff sold three lots to the defendant. Subsequently to the defendant's enlistment in the Army, the plaintiff brought an ejectment suit and served process on an adult member of the defendant's family. An award was made, but when the defendant returned from military service an action was brought to vacate the judgment. It was held that since the defendant was not a party to the ejectment he was not concluded by the judgment. The court said: "If Barclay was a party, in fact or in law, to that ejectment, his failure to pay the purchase money in the time allowed by the award would conclude him. He was not a party, in fact, for the ejectment was not against himself, but against others not privies to his contract. Was he a party by operation of law? We think not. And, first, he was not liable to suit, being at the time in military service; and any attempt to deprive him of his exemption by indirection must fail."

Under [Act of 1861] . . . had the writ issued against Barclay, the court would have abated it. Now, on inspection of the præcipe in ejectment, it is evident the writ was intended to operate indirectly upon Barclay's contract, without making him a party. This the court would not permit, because it would be an evasion of the Act of 1861."

So, too, in the case of *Drexel v. Miller* (1865) 49 Pa. 246, it was held that a scire facias sur mortgage was process within the inhibition of the act.

And the protection of the act was held to extend to the grantee of mortgaged premises, where the grantee was a volunteer in active service. *Semple v. Elsasser* (1865) 6 Phila. 13.

Under the foregoing act a soldier was exempted from the service of any civil process from the time he was sworn into actual military service. In *Re Smith* (1865) 6 Phila. 104, wherein the court said: "In common parlance, a soldier is understood to be in actual military service from the time of his enlistment until his dis-

charge, whether he be in camp, garrison, hospital, at home on furlough, on the march, or engaged in battle or siege."

But in *Sheetz v. Wynkoop* (1873) 74 Pa. 204, it was held that a soldier was exempt only when actually mustered into active service.

So, the exemption to a person in "actual military service" was held not to attach to a person en route to a place where he was to be mustered into the service. *Rank v. Wenger* (1863) 1 Pearson, 532. In that case a writ was issued against the defendant after he was drafted, but prior to his being mustered into the service. It was sought to abate the writ on the ground that the exemption under the act attached immediately on a volunteer leaving to be sworn into the service. It was held that the words, "mustered into service," as used in the act, mean the actual date the volunteer was sworn in and became a soldier. The court said: "This [act] differs in its language from the 70th section of the Act of April 2, 1822, which made substantially a similar provision, except that it prohibited it from the time the man was 'called into actual service.' The defendant in this case was 'called' into actual service from the time he was ordered to the place of rendezvous under the draft, and certainly from the time he reached that place. Are both sections in force? . . . The legislature, in passing that section, evidently considered the Act of 1822 no longer in force; and the two laws are inconsistent with each other, and cannot stand together. If the defendant's case does not come within the Act of 1861, he is not regularly protected from the process, and the same was regularly issued. That it does not is clear, unless he was 'mustered into service' before the 30th; and that he was not is equally clear, if the state and United States officers are correct in their interpretation of 'mustering into service.'"

But a volunteer who enlisted in the service for the "duration of the war" was held not to be within the exemption of the act. *Clark v. Martin*

(1863) 5 Phila. 251, wherein the decision was based on the ground that the period of enlistment was indefinite, and hence, if the case was within the act, it would be necessary to hold the act unconstitutional.

Similarly, in *Irvine v. Pumroy* (1863) 5 Phila. 329, it was held that the term of an Army paymaster, appointed by the President of the United States "during the pleasure of the present or future President of the United States," was indefinite and of uncertain duration, and hence failed to meet the requirements of the Federal Constitution prohibiting the states from passing any law impairing the obligation of a contract.

It was held in *Mechanics' Sav. Bank v. Sallade* (1862) 1 Woodw. Dec. 23, that the exemption from civil process afforded by the act did not extend to a paymaster of volunteers, appointed by the President under the Act of Congress of 1838, authorizing the appointment of additional paymasters to serve while needed, when volunteers and militia were called into the Federal service and the paymasters were insufficient to pay the troops punctually, since he was not "mustered into service" within the meaning of the statute.

A return of an officer showing that service of summons had been made on one of two joint defendants, but that the other "has gone in the present war," was held in *Hunter v. Yoder* (1861) 1 Woodw. Dec. 6, not to show that the latter was exempt from service of process by reason of military service.

The Pennsylvania Statute of 1822 provided that the militia of the state might be called into actual service by the governor in case of rebellion or invasion, and that no executions or other process should issue against any officer or private when called into actual service under a requisition from the President of the United States, or in pursuance of the order of the governor. It was held in *Heck v. Fink* (1862) 1 Woodw. Dec. 102, that the statute applied to one who, in response to the governor's call, joined a company which received orders to

march on September 12th or 13th, and moved on September 15th, where the writ was issued on September 12th and served on the 17th.

In 1915, a moratory act was passed (P. L. 80, April 9, 1915, § 60) which provided that "no civil process shall issue or be enforced against any person mustered into the service of this commonwealth or of the United States during so much of the term as he shall be engaged in active service under orders, nor until thirty days after he shall have been relieved therefrom."

In *Daron v. Prudential Ins. Co.* (1917) 26 Pa. Dist. R. 691, it was held that an attachment execution was civil process within the meaning of the act, though no effort was made to serve the volunteer personally. It appeared that the volunteer executed a judgment note in favor of the plaintiff. Shortly afterwards the volunteer enlisted in the military service. Subsequently an attachment execution was issued in which the defendant was named, and the defendant insurance company named as garnishee. The court said: "The case falls within the terms of that legislation, and the defendant cannot be deprived of the exemption given by indirection.

. . . The process in this case could not have issued solely against the garnishee, but must be primarily against the defendant to acquire rights against the former. As the issuance of any such writ against him was forbidden, the whole proceeding must fall."

D. South Carolina.

As early as 1794, South Carolina enacted a statute law providing as follows: "No civil officer whatsoever shall, on any pretense, execute any process, unless for treason, felony, or breach of the peace, on any person whatsoever, at any muster, or other time, when such person shall be obliged to bear arms, in pursuance of the directions of said act, nor in going to, or returning from, any muster or place of rendezvous, or within twenty-four hours after such person shall be discharged, under the penalty of £5 sterling; and the service of any

such process shall be void, to all intents and purposes."

A subsequent act was passed in 1813, which prohibited the service of civil process on any person "when he shall be called out into service or imbodyed by the executive authority, or within thirty days after such person shall be discharged from the service." In *Kirkpatrick v. Irby* (1825) 14 S. C. L. (3 M'Cord) 205, it was held that the Act of 1813 applied only to a case where the soldier was called into actual warfare, or an emergency of war, and did not apply on the occasion of a reception to General Lafayette.

9a. South Dakota.

A provision that "the . . . enforcement of any . . . right of entry . . . which may hereafter . . . arise during the continuance of the present war" was construed in *Granger v. Luther* (1920) — S. D. —, 176 N. W. 1019, not to apply to a contractual right of entry reserved by an existing lease. The construction was doubtless influenced by the court's opinion that if construed to apply to such a contractual right, the provision would impair the obligation of a contract.

10. Texas.

Prior to her admission as a state, Texas had a moratory act which provided as follows: "The following persons and their property shall be privileged from arrest, attachment, execution, embargo, and sequestration, in all civil cases, to wit: All officers and soldiers, commissioned or enlisted in the regular army of Texas, or in the navy, for the time being . . . and all members of the late volunteer army, until they return to their respective homes." The act was passed in 1836, and re-enacted without material change in 1843.

The case of *Highsmith v. Ussery* (1860) 25 Tex. Supp. 96, arose under the foregoing acts shortly after Texas was admitted to the Union. The plaintiff was mustered into the militia under an order issued by the Secretary of War. While in active service the plaintiff's property was sold. It

was contended that the sale was regular because the plaintiff was not "mustered into the service of the state (republic) of Texas." In sustaining this contention, the court said: "The Constitution of the United States provides that 'Congress shall have power' 'to declare war;' 'to raise and support armies;' 'to make rules for the government and regulation of the land and naval forces;' 'to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;' 'to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively the appointment of the officers, and the authority of training the militia, according to the discipline prescribed by Congress.' U. S. Const. art. 1, § 8. It provides, further, that 'the President shall be Commander in Chief of the Army and Navy of the United States, and of the militia of the several states when called into the actual service of the United States.' U. S. Const. art. 2, § 2. Also it is provided, that 'no state shall, without the consent of Congress, 'keep troops or ships of war in time of peace,' 'or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.' U. S. Const. art. 1, § 9. The Constitution of this state provides that 'the governor shall be commander in chief of the army and navy of this state, and of the militia, except when they shall be called into the service of the United States.' Art. 5, § 6. Also, that 'the governor shall have power to call forth the militia to execute the laws of the state, to suppress insurrections, and repel invasions.' Tex. Const. art. 6, § 4. . . . The Law of 1843, upon which appellant relies, may be applicable to persons engaged in the military service of the state and under the command of the governor. . . . If it be permissible to look to the extrinsic causes which prompted its enactment in 1843, however much they may be still applicable

equally to the military service of the state, upon the emergencies which authorize the state to raise and control an army, they are not applicable to the military service of the United States. *White v. Lowther* (1847) 3 Ga. 403. Highsmith was not 'mustered into the service of the state (republic) of Texas,' and therefore his property was not 'exempt from forced sale.'"

III. English statutes.

a. Postponement of Payments Act.

1. Introductory.

The first moratory act in England, arising out of the emergency created by the World War, was the Postponement of Payments Act of August 3, 1914, which gave the right to the King in council, by proclamation, to authorize the postponement of the payment of bills of exchange. Pursuant to this authority, on the 6th of August, 1914, the King issued the following proclamation: "All payments which have become due and payable before the date of this proclamation, or which will become due and payable on any day before the beginning of the 4th September, 1914, . . . shall be deemed to be due and payable on a day one calendar month after the date on which the payment originally became due and payable, or on the 4th September, 1914, whichever is the later date, instead of on the day on which the payment originally became due, but payments so postponed shall, if not otherwise carrying interest, and if special demand is made for payment, and payment is refused, carry interest until payment . . . as from the date on which they become due and payable . . . at the Bank of England rate current on the 7th August, 1914." A later proclamation, dated September 3, 1914, made the proclamation of August 6, 1914, applicable to payments which became due and payable on or after September 4, 1914. A similar proclamation was issued on September 30, 1914, respecting payments falling due on or after October 4, 1914, and before November 4, 1914.

2. Scope of act.

The Postponement of Payments Act applies only to bills of exchange and money due, or to become due. *Credito Italiano v. Swiss Bankverein* (1916) 85 L. J. K. B. N. S. 1477. In that case it appeared that the litigants entered into a contract whereby the plaintiffs sold Russian rubles, payable in Petrograd, against British currency, payable in London. In Russia, war was declared prior to the date for the completion of the contract, and on August 6 the first moratory proclamation, quoted supra, was issued in England, followed by the two subsequent proclamations extending the time of payment. The plaintiffs were ready to complete the transaction, but the defendants claimed extension of time under the proclamation. Several days after the final postponement the exchange was completed, but on that date a ruble was worth less than on the day the contract was made. The plaintiff bank at once entered suit to recover interest under the proclamations. It was held that in the absence of an agreement between the parties, the plaintiffs were entitled to interest. *Swinfen Eady, L. J.*, said: "Were the defendants entitled to postpone by reason of the proclamations giving a moratorium? In my opinion this transaction is not within the moratorium. The proclamation of August 6 provides that 'all payments which have become due and payable before the date of this proclamation, or which will become due and payable on any day before the beginning of the 4th day of September, 1914, in respect of any . . . contract made before that time, shall be deemed to be due and payable on a day one calendar month after the day on which the payment originally became due and payable, or on the 4th day of September, 1914, whichever is the later date, instead of on the day on which the payment originally became due.' Then it provides: 'But payments so postponed shall, if not otherwise carrying interest, and if special demand is made for payment and payment is refused, carry interest until payment as from the 4th day of August, 1914,'

if they become due and payable before that day, and as from the date on which they become due and payable if they become due and payable on or after that day, at the Bank of England rate current on the 7th day of August, 1914. . . . That rate was 6 per cent. It will be observed that the effect of this proclamation is to postpone payments which have become or will become due and payable, and it only provides for the date of payment being postponed and for the debt carrying interest upon the terms of the proclamation if it does not otherwise carry interest,—that is to say, if specific demand is made for payment, and payment is refused, then the debt is to carry interest at 6 per cent. But it will be observed that the proclamation has no reference to any matters except bills of exchange, which I have not dealt with, and money due and payable, or becoming due and payable. It does not deal with the execution of contracts where money is payable against goods, or where money is to be paid for value, or generally for the carrying out of contracts. It does not contain any provision, say on the sale of goods, as to the way in which the goods are to be dealt with, as to warehouse charges, delivery or custody of the goods, or any other matters which would arise where money has to be paid against goods; it does not deal with contracts of that kind. In other words, it does not interfere with or affect the carrying out of such contracts, but only extends to those cases where there is what has been called a naked payment, or a bare payment of money to be made."

3. Interest for period of postponement.

In *J. & P. Coats v. Disconto Gesellschaft* (1916) 114 L. T. N. S. 594, it appeared that on July 25, 1914, the plaintiffs deposited a sum of money with the defendants at 3½ per cent interest, repayable August 14, 1914. On the 28th of July another sum was deposited at the rate of 3½ per cent interest, likewise repayable on the 14th of August, but the respective sums were not repaid until October 31, 1914. The defend-

ants paid the interest as agreed, but the plaintiffs contended that under the proclamations they were entitled to 6 per cent interest from the date of the demand (August 14) to the payment (October 30). Lord Reading, Ch. J., said: "This case raises very neatly an interesting point under the proclamation for the postponement of payments, and the question is whether under the proclamation of the 6th August, 1914, the plaintiffs are entitled, in the circumstances which have happened, to interest at the Bank of England rate for the period under discussion, or whether they are only entitled to the rate of interest which had been agreed upon between the parties before the proclamation came into existence, and which was payable only under the contract for a fixed period. That, to my mind, is the real question in this case, and in order to determine it one has to construe these words 'if not otherwise carrying interest,'

. . . This statute was passed on the 3d August. The proclamation under discussion in this case is the one which was made on the 6th August, and the material words for the purposes of this case are these: 'All payments which have become due and payable before the date of this proclamation, or which will become due and payable on any day before the beginning of the 4th September, 1914 . . . in respect of any contract made before that time'—that is, the 4th August, 1914—'shall be deemed to be due and payable on a day one calendar month after the day on which the payment originally became due and payable.' Stopping there for a moment, it is quite clear that the effect of that is that the payment to be made under the contract on the 14th August is a payment which is postponed until one month later—that is to say, until the 14th September. The proclamation then continues: 'But payments so postponed shall, if not otherwise carrying interest, and if specific demand is made for payment and payment is refused, carry interest until payment . . . as from the date on which they become due and payable . . . at the Bank of England rate

current on the 7th day of August.' No question arises in this case on any other words than these words, 'if not otherwise carrying interest.' . . . The principal money, instead of being repayable on the 14th August, is repayable on the 14th September. Is this a payment 'so postponed' within the meaning of the proclamation? Is it a payment which is 'not otherwise carrying interest?' In my judgment it is. This postponed payment does not carry any interest at all. In certain circumstances the right to recover interest would arise; either it may be because of the breach by the debtor to fulfil his obligation, if there is a fixed date for payment, a contract in writing, and so forth, or it may be that under the Statute of 3 & 4 Wm. IV. chap. 42, the creditor would have to make his demand within the conditions prescribed in that statute before the jury could award him damages. Certain things consequently must happen, but in any event he would get damages, not as a matter of course, but as interest, and at the rate at which the tribunal chose to assess it within the limits of the law to which I have just referred. That being the case, it cannot be said that this postponed payment carried interest; it was 'not otherwise carrying interest,' and if it was not carrying interest then the rate of interest payable is the Bank of England rate, which is 6 per cent. I cannot feel any difficulty about it."

b. Courts (Emergency Powers) Act.

1. Introductory.

The Courts (Emergency Powers) Act was designed to meet some of the emergencies to which the World War had given rise. The act was intended to alleviate the position of debtors who were unable to discharge their obligations by reason of circumstances directly or indirectly attributable to the war. It restricted the right of the creditor to resort to his legal remedies for enforcing payment to the extent that it forbade the exercise of any such remedy until after an application had been made to the court for leave to exercise it. The

protection of the act extended to all debtors, and not until the amending Act of 1916 (6 & 7 Geo. V. chap. 13) was there any special exemption granted to the officers and men of his Majesty's forces.

2. Meaning of "sum of money."

Section 1, subsec. 1 (a), of the Courts (Emergency Powers) Act of 1914 (4 & 5 Geo. V. chap. 78), provided that "from and after the passing of this act no person shall—(a) proceed to execution on, or otherwise to the enforcement of any judgment or order of any court (whether entered or made before or after the passing of this act) for the payment or recovery of a sum of money to which this subsection applies, except after such application to such court and such notice as may be provided for by rules or directions under this act."

In *Carpenter v. Farnol Eades Irvine & Co.* [1915] 1 Ch. 22, the court said: "It is important to observe that what that clause seeks to prevent is the doing of something by the person who had recovered judgment for the purpose of proceeding to execution or otherwise to its enforcement. But not only does the act not restrain persons from commencing an action to recover a sum of money, but it actually contemplates that such an action may be brought, by the use of the words 'whether made before or after the passing of this act.'"

In *Dobb v. Dobb* [1918] 1 Ch. 443, it was said: "The effect of § 1, subsec. 1 (a), is that from and after the passing of the act on August 31, 1914, no person can proceed to execution on, or otherwise to the enforcement of, any judgment or order of any court for the payment or recovery of a sum of money to which the subsection applies, without the leave of the court. The difficulty is to determine what is 'a sum of money to which this subsection applies.' The act does not contain any provision which in terms defines it; it proceeds to exclude certain moneys from the act, leaving it to be inferred that what is not excluded must be deemed to be included. Sums of money due and payable under post-war contracts are excluded from its

operation, unless the contracts are for the payment of rent less than £50 a year, when it is obviously intended that they shall be included, although not so provided in express terms. It is then provided that subsec. 1 applies to certain life or endowment policies, thus impliedly excluding all other life or endowment policies. A sum of money payable by or recoverable from the subject of a sovereign or state at war with his Majesty is excluded (§ 1, subsec. 7). It is urged that the act ought to be limited to moneys payable under some contract, but I see no ground for so limiting it. This would be merely guessing at what the legislature intended. By § 2, subsec. 4, his Majesty may, by order in council, provide that the act shall have effect, subject to such limitations as may be contained in the order. Thus, the operation of the act may be limited from time to time, and as often as it may be thought expedient to exclude any sums of money from its operation. It has been limited, both by a subsequent order in council and by statute. An Order in Council of September 17, 1914, which may be cited as 'the Courts (Emergency Powers) Order 1914,' introduced a further limitation to subsec. 1 of § 1 by providing that the same should not apply to proceedings for the levying of any fine, or for the enforcement of any sum due under a recognizance, or for the enforcement of any order of affiliation, or any order enforceable in the same manner as an order of affiliation. By the Courts (Emergency Powers) Act 1917, it is provided by § 6 that § 1, subsec. 1 (a), of the Act of 1914, shall not apply to any judgment or order for recovery or payment of any sum of money or costs given or made in any action of tort. The scheme of the Act of 1914 was, in my opinion, to embrace within it all judgments or orders for any sum of money, unless excluded, and then to leave it to his Majesty in council to exclude from time to time whatever might be thought necessary or proper. . . . In my opinion, the act should be read and construed as extending to any judgment or order for the payment of

any sum whatever, unless such sum be excluded from its operation by the terms of the act itself, or some subsequent statute or order in council. It will thus extend to the costs, the subject of this application, and leave to proceed to execution is necessary."

But this section does not prevent the court from granting leave to proceed to execution or otherwise for the enforcement of an order granting costs. *Dobb v. Dobb*, supra, wherein Bankes, L. J., said: "The objection taken is that the Courts (Emergency Powers) Act 1914 has no application to an order for costs, and that the application is therefore unnecessary and ought to be dismissed. The act in question was passed on August 31, 1914, at a time of great stress. It forms part of a great body of emergency legislation. The framers of the act obviously realized that it had been framed in language more comprehensive than experience might prove to have been desirable. The last subsection of § 2 contains the unusual provision that his Majesty may by order in council at any time provide that the act shall have effect, subject to such limitations as may be contained in the order. This power was exercised by the Order in Council of September 17, 1914, in reference to fines, and the enforcement of the payment of sums due under a recognizance, and of any order of affiliation. Our attention was directed to several decisions by judges of first instance, some of them conflicting, in which a limited construction had been placed upon the very general language of the act. I can find nothing in the language of the section which appears to me to afford a safe guide as to the limitations which should be adopted. Under these circumstances I think that effect must be given to the actual language used, even though the result may be to include cases which very possibly were not within the contemplation of the framers of the act. Any limitation upon the operation of the statute which experience has shown to be necessary should be effected by further legislation, or by an order in council, rather than by judicial inter-

pretation which has no sure guide to direct it. In my opinion an order directing the payment of costs does come within the very wide language of § 1, subsec. 1 (a), and does not come within the exception to that subsection. Under these circumstances the application was properly made and must be allowed."

The case of *Gordon v. Kirk* [1918] 2 Ir. R. 455, involving similar facts, arose shortly after the decision in *Dobb v. Dobb* [1918] 1 Ch. 443, *supra*. The court said: "I agree with the view expressed by Mr. Justice Eve in *Dobb v. Dobb*. . . . The key to the whole matter is, I think, to be found in the Act of 1917. The question which has been debated with considerable divergence of opinion among judges and the profession, prior to the Courts (Emergency Powers) Act 1917, was, on the one hand, that every case was presumed to be included in the Act of 1914, except the one case of money due in pursuance of a contract made after the 4th August, 1914, while, on the other hand, the view was put forward that, at any rate, it did not apply to an order for payment of costs. It is perfectly manifest that different considerations arise with regard to cases where an action is brought in pursuance of an alleged contract, where the contract is found in fact to have been made, and cases where a contract is found not to have been made at all. In the latter case it is extremely difficult to see how the order for costs could be made in pursuance of a contract which never existed. Where an action is brought in pursuance of a contract made before August, 1914, and the order is made afterwards for costs, one may say that the whole subject-matter is attracted back to the date of the contract, but in a case where there is no contract it is perfectly clear that the conditions are totally different. But be that as it may, when I come to the amending Act of 1917, I find it enacted that 'the provisions of § 1, subsec. 1 (a), of the Courts (Emergency Powers) Act 1914, shall not apply to any judgment or order for recovery or payment of any sum of money or

costs given or made in any action of tort . . . whether before or after the commencement of this act.' If, as this section presupposes, an order simpliciter for costs in an action for tort was within the provisions of § 1 of the Act of 1914, an order simpliciter for the payment of costs in an action brought on a supposed contract (held ultimately not to have existed) would also appear to be within the provisions of that section. Accordingly, I see no escape from the decision of the court of appeal in England. The result may lead to inconvenience, and necessitate the making of orders under the acts in numberless cases where orders for the payment of costs have been obtained in the civil bill and chancery courts, but it will require legislation to remedy this."

In a concurring opinion *Ronan, L. J.*, said: "By the Act of 1914, § 1, subsec. 1, sums of money due and payable in pursuance of a contract made after the beginning of August 4th, 1914, are excluded; and I agree with the Lord Chancellor that but for § 6 of the Act of 1917 the Act of 1914 would still include any judgment or order for recovery or payment of any sum of money or costs given or made in an action of tort. The principle of the decision of the court of appeal in England is, as I take it, that everything is included except what is excluded by § 1 of the Act of 1914, as amended by § 6 of the Act of 1917. Only one thing is excluded by § 1 of the Act of 1914, and that is money payable in pursuance of a contract made after August 4th, 1914. I have grave doubts whether money due under an order for costs in an action of contract is money due and payable in pursuance of a contract. It is, in my opinion, money due and payable under an order of the court. Therefore, it follows that in any action of contract in which the defendants succeed in proving that there was no contract, and are awarded costs, the exception cannot possibly apply. If there is a judgment for the defendants with costs, one must inquire on what grounds they succeeded; whether it was on the ground that there was no contract, or whether it was

on the basis that there was a contract. For these reasons, I think the judgment of the Lord Chancellor is right; and if any difficulties arise, it will be for the legislature to provide a remedy."

3. *Meaning of "enter into possession."*

Section 1, subsec. 1 (b), of the original Courts (Emergency Powers) Act provided as follows: "From and after the passing of this act no person shall . . . (b) levy any distress, take, resume, or enter into possession of any property, exercise any right of re-entry, foreclose, realize any security (except by way of sale by a mortgagee in possession), forfeit any deposit, or enforce the lapse of any policy of insurance to which this subsection applies, for the purpose of enforcing the payment or recovery of any sum of money to which this subsection applies, or, in default of the payment or recovery of any such sum of money, except after such application to such court and such notice as may be provided for by rules or directions under this act. . . . This subsection shall not apply to any sum of money . . . due and payable in pursuance of a contract made after the beginning of the 4th day of August, 1914."

In *Carpenter v. Farnol Eades Irvine & Co.* [1915] 1 Ch. 22, it was held that the appointment of a receiver was not an entry into possession by a person by way of execution, since the possession was taken by the court. The court said: "As to the appointment of a receiver, if a receiver is appointed, possession is taken by the court by means of its own officer. There is no entry into possession by any person by way of execution. The court has power to refuse the appointment of a receiver or to give any special directions when and subject to what conditions the receiver shall take possession. The control is left entirely to the court and there is nothing in the act to prevent the court from taking possession by the appointment of a receiver in a proper case. The court knows if the appointment of a receiver is necessary in order to preserve the property, and takes possession for the

benefit of all parties. In my opinion, therefore, the objection taken by the defendants to the present motion fails, and I make the usual order for the appointment of a receiver and manager."

The foregoing case arose prior to the Act of 1916 (No. 2) § 1, which provided that "the Courts (Emergency Powers) Act 1914 . . . shall have effect in favor of officers and men of his Majesty's forces with the following modifications, that is to say (a) subsection 1 of § 1 shall apply to any sum of money due and payable in pursuance of a contract made before the commencement of this act, whether such contract was made before or after the beginning of the fourth day of August, nineteen hundred and fourteen," and § 1, subsec. 1 (a), which provided that "the expression 'enter into possession' shall include the appointment of a receiver of mortgaged property."

The expression "in favor of officers and men" in the foregoing section does not apply to a receivership of mortgaged property, where to allow the mortgagee to proceed with his rights will not injure a volunteer or interfere with his military duties. De *Fonblanque v. Hall* (1917) 117 L. T. N. S. 625. In that case it appeared that the mortgagor appointed the plaintiff his executor. It further appeared that the plaintiff was in military service and that his interests were cared for by his attorney. Notice was served on the attorney to pay the mortgage debt, and in default thereof the mortgagee appointed himself the receiver of the rents. The attorney moved the court to restrain the mortgagee from acting as the receiver, contending that the executor was within the protection of the Emergency Powers Act. The court said: "In this case the mortgagor, who raised the mortgage in 1915, was not a soldier, and the person actually acting in the management of the estate, both now and at the time of the appointment of the receiver, is also not a soldier. It is, therefore, difficult to see how the duties of the plaintiff as an officer can be in any way interfered

with, or he himself in anyway prejudiced by the appointment of this receiver. It is merely a technical point which has been raised, and it seems to me that the question I have to determine is whether the expression used in the amending Act of 1916, that the Act of 1914 should have effect 'in favor of' officers and men serving in his Majesty's forces, can be given a wide enough construction to include a case such as the one before me. It seems to me that to make the order asked for here, and to restrain the defendants from exercising their undoubted legal right, would not favor this officer in any way, nor be of the slightest benefit to him personally, and, in my view, it is not within the true meaning or intention of this statute to construe it in such a way as to hold that it applies to a case such as the one before me. Further, if this receiver were properly appointed, as, in the absence of any evidence to the contrary, I must presume he was, there would not have been any difficulty in obtaining leave for his appointment. In my judgment, therefore, the Courts (Emergency Powers) (Amendment) Act 1916 does not apply."

The protection against execution without leave of the court, in respect to pre-war debts, extends down to the time the volunteer actually joins the forces. A Debtor, No. 391 [1919] 1 K. B. 169, 88 L. J. K. B. N. S. 267, 120 L. T. N. S. 169, [1918-9] B. & C. R. 76.

4. Meaning of "foreclosure."

Section 1, subsec. 1 (a), provided that "from and after the passing of this act no person shall . . . (b) . . . foreclose . . . etc."

In *Reversionary Interest Soc. v. Unwin* [1918] 117 L. T. N. S. 783, the court said that the meaning of "foreclosure" under the original act was to "obtain an order for foreclosure absolute," adding, in that connection: "The meaning which I have held to have been rightly attached to the word 'foreclosure' in the Act of 1914 is to some extent supported by the context in which it is there found. Almost without exception the acts contemplated by the language of § (b) of the

subsection are acts by which possession and ownership pass from one individual to another, and the draftsman must, I think, have had in his mind the final act by which the mortgagor is barred of his equitable right to redeem the security, and have intended to provide that this, at least, should not be brought about without the leave of the court being first obtained under that act."

In *Re Farnol Eades Irvine & Co.* [1915] 1 Ch. 22, a case arising prior to the 1916 amendment, it was held that the word "foreclose" did not mean to prevent a person from issuing a writ of summons for foreclosure. The court said: "Now I return to the word 'foreclose.' What does that mean? Foreclosure, as a thing which can be done by a person, has no meaning. Foreclosure is done by the order of the court, not by any person. In the strict legal sense it is nothing more than the destruction of the equity of redemption which has previously existed. What, then, is meant in this clause by the prohibition against foreclosure? I am not prepared to say what it does mean, but I am prepared to say that in my opinion it does not mean to prevent a person from issuing a writ of summons for foreclosure. All that the court does in such an action is to direct an account of what is due on the security, and that if it is not paid within a certain time, then that the equity of redemption shall be foreclosed. But even that is not foreclosure absolute, to obtain which the mortgagee has to get a further order. Now, looking at the general intention of the act, what possible object can there be in preventing a man from taking the preliminary proceedings as the result of which he may obtain a judgment for foreclosure from the court? I see none whatever. It seems to me that, whatever may be the meaning of the expression 'foreclosure' in this act, it does not mean that a man may not put himself in a position to obtain an order of foreclosure from the court. In my opinion, therefore, the act does not prevent the issue of a writ or originating summons for foreclosure, or the issue of a writ of

summons in a debenture holder's action for the realization of the security."

And in *Re Farnol Eades Irvine & Co.* [1915] 1 Ch. 22, [1914] W. N. 402, 84 L. J. Ch. N. S. 129, 112 L. T. N. S. 151, it was said that the prohibition against "foreclosure" did not preclude a person from commencing a suit for foreclosure.

After the decision in *Re Farnol Eades Irvine & Co.* supra, and as said by Eve, J., in *Reversionary Interest Soc. v. Unwin* (1918) 117 L. T. N. S. 783 "no doubt, consequent upon that decision," the Act of 1916 was passed. That act [Amending Act (No. 2) of 1916 (6 & 7 Geo. V. chap. 18)] as provided in § 1, subsec. 1 (b), as follows: "In subsec. 1 of § 1 of the Courts (Emergency Powers) Act 1914 . . . (b) the provision relating to foreclosure shall extend to the institution of proceedings for foreclosure or for sale in lieu of foreclosure."

In *Reversionary Interest Soc. v. Unwin*, supra, the court said: "As has been pointed out, the expression 'shall extend to' in this ¶ (b) of the subsection differs from the expression 'shall include' in the paragraphs which precede and follow, and the language seems to be more appropriate to an intent to extend the operation of the earlier act than to substitute the institution of proceedings for anything already provided for by the word 'foreclose' in the earlier act. It cannot, I think, be read as a provision by which the institution of proceedings is substituted for the step contemplated by the use of the word 'foreclose.' It comes, therefore, to this, that one must attach some meaning to that word 'foreclose' in the earlier act; and the meaning which has been hitherto attached to it, and which, in my opinion, has been properly attached to it, in practice is, 'obtain an order for foreclosure absolute.'"

A. Meaning of "realizing any security."

Section 1, subsec. 1, of the Courts (Emergency Powers) Act 1914, provided that "from and after the passing of this act no person shall . . . (b) . . . realize any security (except

by way of sale by a mortgagee in possession) . . . except after such application to such court and such notice as may be provided for by rules or directions under this act. . . ."

A mortgagee does not "realize his security" by the sale of land until he has received the purchase money. The sale of the land is merely a step towards realizing the security. *Braybrooks v. Whaley* [1919] 1 K. B. 435, wherein the court said: "Was the contract itself a 'realizing of the security,' before entering into which leave ought to have been obtained, or does realization mean a complete realization in the sense of a completed conveyance when the property will be conveyed and the purchase money paid? There is not very much authority to assist us. There are, however, two matters which I think help to some extent. The first is this: When considering the case of foreclosure which is dealt with by the same subsection of the Act of 1914 with which we are now concerned, *Warrington, Ld. J.*, in *Re Farnol Eades Irvine & Co.* supra, expressed the view that the prohibition against 'foreclosure' did not preclude a person from commencing a suit for foreclosure, and it was in consequence of that that the Courts (Emergency Powers) (No. 2) Act 1916 was passed, which by § 1, subsec. 1, provides, inter alia, that 'the provisions relating to foreclosure shall extend to the institution of proceedings for foreclosure or for sale in lieu of foreclosure.' The second matter which I think assists us is the Increase of Rent and Mortgage Interest (War Restrictions) Act 1915, which, as regards mortgages coming within the act, provides by § 1, subsec. 4, that a mortgagee shall not, so long as certain conditions are fulfilled, 'take any steps for exercising any right of foreclosure or sale, or for otherwise enforcing his security or for recovering the principal money thereby secured.' There it will be seen the subsection deals specifically with steps towards realizing the security. In *National Bank v. Claffey* [1917] 2 Ir. R. 281, it was held that the institution of an action of

ejectment by a mortgagee was not the realization of his security contemplated by § 1, subsec. 1 (b), of the Act of 1914, but was only a step towards realizing the security, and that the leave of the court was not necessary before issuing the writ. In that case *Madden, J.*, drew attention to the section of the Act of 1915 to which I have referred, and said he was asked to extend the principle of that legislation to the case before him, to which admittedly it did not apply. The fact, therefore, that a statute was required to say that the commencement of a foreclosure action, which was a step in the realization of the mortgagee's security, must be treated as foreclosure within the Act of 1914, and the further fact that the Increase of Rent, etc., Act 1915, provides that not only is a mortgagee not to realize his security, but is to take no step to realize it, show that the material words of the section with which we are dealing may fairly be taken to mean 'completely realize any security,' and do not refer to a mere step towards realizing the security. In this case the contract of sale was merely a step by the mortgagee towards realizing his security."

6. Meaning of "joined his Majesty's forces."

In *Re A Debtor*, No. 391 (1918) 35 Times L. R. 58, [1918] W. N. 347, 63 Sol. Jo. 83, 53 L. J. N. C. 394, 146 L. T. Jo. 57, the expression "joined his Majesty's forces" in the Courts (Emergency Powers) Act 1917, § 8, extending to officers and men who have "joined his Majesty's forces," certain exemptions from liability to execution and service of a bankruptcy notice, was held to refer to the expiration of the calling-up notice sent to men in the reserve,—that is, to the time when officers and men were actually called to the colors,—and not to the time when by the Military Service Act of 1916 those subject to the act were "deemed," as from a certain date, "to have been duly enlisted" in his Majesty's forces, for general service with the colors or in the reserve, and to have been "forthwith transferred" to the reserve.

7. Power of court to suspend act.

(a) Generally.

Section 1 (2) of the Court (Emergency Powers) Amending Act of 1916 provided as follows: "If on any such application the court to which the application is made is of opinion that time should be given to the person liable to make the payment on the ground that he is unable immediately to make the payment by reason of circumstances attributable directly or indirectly to the present war, the court may, in its absolute discretion, after considering all the circumstances of the case and the position of all the parties, by order stay execution or defer the operation of any such remedies as aforesaid, for such time and subject to such conditions as the court thinks fit."

In the case of *Re Jobson* (1918) 117 L. T. N. S. 786, the court said: "[The act] confers on the court an absolute discretion in dealing with the application, subject to this limitation, that the discretion is only to be exercised in favor of a defaulting debtor if the court is of opinion that time should be given to him on the ground that he is unable immediately to make the payment by reason of circumstances attributable, directly or indirectly, to the war. When the court is satisfied on this point it has power to suspend the question of any remedy for such time, and subject to such conditions, as it thinks fit."

The difficulty under this section is in determining what facts constitute an inability to make a payment by reason of circumstances directly or indirectly attributable to the war. In the case of *Re Jobson*, *supra*, *Eve, J.*, said: "In what I am about to say I am confining myself to applications of a similar character—that is to say, applications by mortgagees against defaulting mortgagors. In the ordinary way, where a mortgage debt is called in, the mortgagor meets the demand in one of three ways: (1) He realizes the security and pays off the mortgagee out of the proceeds; or (2) he provides the money out of his other resources and takes a reconveyance; or (3) he obtains the assistance of another lend-

er, who pays off the mortgage and takes a transfer of the security. The last of the three courses is the one most usually adopted, and, indeed, it is almost inevitable where the advance is of a large amount, which is treated as capital more or less permanently borrowed for business purposes at a fixed and moderate rate of interest. In considering, therefore, whether the mortgagor qualifies himself for the exercise in his favor of the discretion conferred by subsec. 2, the court ought, as it seems to me, in the first place, to direct its attention to the question how, in the ordinary course, the particular security would be dealt with. In many cases it would not be difficult to conclude that the mortgagor might adopt any one of the three courses; in some, it would, I think, be obvious that his choice was more restricted. I apprehend that a man who had purchased property as an investment and borrowed a portion of the purchase money on mortgage might — where the mortgage money was called in — elect either to realize that investment and pay off the mortgage, or he might prefer to realize other investments and pay it off, or he might just as likely determine to retain his investments and find a transferee of the mortgage. On the other hand, a man who had borrowed money on the security of property in his own occupation would probably be limited to the alternatives of paying the debt off out of his other resources or obtaining a transferee, and a man who had raised money on the security of his business premises, and had employed the money in his business, would of necessity be compelled to meet the mortgagee's requirements by obtaining a transferee. Nor would these more or less personal considerations alone determine the mortgagor's action. A more potent factor would be the value of the security in relation to the amount of the mortgage debt. Realization of a deficient security for payment off of the debt pro tanto is always distasteful; its transfer is well-nigh impracticable, and in determining how any particular security would be dealt with in ordinary cir-

cumstances, it must always be borne in mind that the depreciation of the security may well be of such an extent as to render the obvious course of realization or transfer practically impossible. I am constrained to make these observations because in so many cases arising under this act the owners of mortgaged property who have not, and who had not before the war, any resources outside the property in mortgage, seem to conclude that they are brought within the subsection as soon as they have proved the absence of such resources, and that they cannot sell the property for sufficient to pay off the debt or obtain a transferee of the security. But such evidence does not establish the fact that the inability to pay is directly or indirectly due to the war. It may well have been in existence long before the war. In the absence of other resources available for payment of the debt, the inability to pay by the only other means by which payment would be made—that is to say, by realization of the security or by transfer—arose as soon as the security became deficient, and in cases where it is admitted or proved that the mortgagor has, and had when the war broke out, no resources outside the mortgaged property wherewith to pay the debt, and that the security is insufficient, the court ought not in my opinion to hold that the mortgagor has brought himself within the subsection, unless satisfied that the insufficiency of the security did not exist before and is attributable to the war. But in cases where the security is sufficient, or where the deficiency has arisen since the war, it still remains necessary to inquire whether the mortgagor's inability to make immediate payment is attributable to the war. If he has other resources which can be made available, I apprehend that the mere inability to realize the mortgaged property or to obtain a transferee would not suffice, since in that case the inability could not accurately be said to exist at all. But if he have no other available resources, and by that I mean resources which can be converted into cash and made available

for payment of the debt in money at one point, can he be said judicially to be unable immediately to pay? The answer to this in the case of an insufficient security is simple: As soon as the security became insufficient; and it may therefore, I think, be said that, *prima facie*, a mortgagor with a security which has become of insufficient value since the war is within the subsection, *prima facie* only, because it is of course open to the mortgagee to prove, if he can, that the deficiency is attributable to causes other than the war. But in the case of a sufficient security there is greater difficulty, and a difficulty which at first sight might appear to increase proportionately with the excess value of the security over the mortgage debt. For with a security worth the full amount of the mortgage debt—and a *fortiori* with a value largely in excess of the mortgage debt—it is impossible, it has been argued, to say the mortgagor is unable to pay. He may have to make great sacrifices and submit to very burdensome conditions before he can raise the money elsewhere, but so long as he has property which, *ex hypothesi*, is worth at least what is demanded of him, no court ought to hold him unable to pay, unless he proves that he cannot raise the money by realization or transfer except on extortionate or quite unreasonable terms. I do not think I am bound to impose that construction on the subsection. To do so would bring about this somewhat startling result: every mortgagor who could only produce an insufficient security would be within the subsection, but no mortgagor whose security was ample could bring himself within it unless prepared to prove that he could not raise the amount required to pay off the debt except on extravagant terms. I think that a mortgagor who satisfies the court that he has no other resources available for payment of the debt, and that he has made bona fide efforts to raise the money either by sale of the mortgaged property or transfer of the security for a fair and reasonable price, or on reasonable conditions, and has failed, and that such

failure or the inability to sell is attributable to the exceptional circumstances brought about by the war, brings himself within the subsection, and this even though the mortgaged property exceeds in value the debt. But this last consideration is, of course, an element to be taken into account where the discretion under the latter part of the subsection, to which I am now passing, comes to be exercised. The excess value of the security over the debt is a factor which may properly be regarded as a material one alike from the point of the mortgagee and the mortgagor. On the one hand, the probability of the mortgagor being able to realize or to obtain a transfer of such a security on reasonable terms, within a comparatively short time, may incline the court to defer the operation of the mortgagee's remedies for a brief period only; on the other hand, the fact that the debt is amply secured may furnish good ground for saying that the mortgagor should be given ample time to extricate himself from the difficulties into which circumstances for which he is in no way responsible have plunged him. The particular weight to be attached to this factor must vary largely in different cases, and, after all, it is but one of 'all the circumstances of the case' which the court has to consider in exercising its discretion. It is undesirable, even if it were possible, to attempt to enumerate all the factors which have to be regarded in determining whether and upon what conditions the rights of the mortgagee are to be suspended. In many cases there must be matters peculiar to the particular case, which far outweigh the considerations applicable in ordinary cases, and in such cases orders will be made appropriate to the position brought about by these particular matters."

In the foregoing case the mortgagee out of possession made an application to exercise his right to realize his security. It appeared that prior to the war all payments had been made punctually and all covenants had been strictly performed and observed. The court said: "Now it is clear that in

this case, if there was no war, the mortgagors would have had to provide for repayment by a transfer. It was argued that they had not brought themselves within the protection of the section. But I am satisfied on the evidence, and having regard to the general conditions of which I am bound to take judicial notice, that it is almost impossible to obtain the necessary advance of money by any transfer of the mortgage except on terms which would leave the borrower in a position which is many times worse than that which he occupies in existing circumstances. I am quite satisfied that they have established a case within the section."

It was held in *Charles Schofield & Co. v. Maple Mill* (1918) 34 Times L. R. 423, that the proper course was not to suspend but to annul the contract, where a contract to do work in the erection of a mill, consisting partly in the flooring of the mill with maple boards, became impossible of performance, owing to a prohibition of the importation of maple, and application was made under the statute that the contract should be suspended or annulled.

(b) Annulment or suspension of lease.

Section 2 of the (Emergency Powers) Amending Act 1916 (6 & 7 Geo. V. chap. 13) reads as follows: "Any officer or man of his Majesty's Forces who is the tenant of any premises under a tenancy from year to year, or for any longer period, may apply to the county court . . . for leave to determine such tenancy, and, upon any such application being made, the court may, in its absolute discretion after considering all the circumstances of the case and the position of all the parties, by order authorize the applicant to determine the tenancy by such notice and upon such conditions as the court thinks fit, and thereupon such tenancy may, notwithstanding any provision in the tenancy agreement or lease, be determined accordingly."

In *Tozer v. Viola* (1917) 117 L. T. N. S. 748, the court said: "The purpose of this statute was to relieve officers and men engaged in his Majesty's Forces from the burden of sub-

sisting tenancies, they having to leave their work, or to leave their farm, or to leave their business premises, and engage in the war. The object was to bring their tenancies to an end, and so relieve them from the anxiety of their obligations under tenancy agreements. That is the obvious manifest purpose of this act, and in construing the statute no further effect should be given to it than the words require except so far as is necessary to achieve the purpose of the legislature."

Under this section the court is empowered to adjudicate the rights and liabilities of all the parties to the lease. *Revill v. Bethell* [1918] 1 K. B. 638, 87 L. J. K. B. N. S. 787, 118 L. T. N. S. 303, 34 Times L. R. 323, 62 Sol. Jo. 438, 16 L. G. R. 443; *Daniell v. Carter* [1918] W. N. 380.

In *Revill v. Bethell*, supra, the court said: "I can see no reason why he should not adjudicate upon the rights and liabilities as between all the parties. . . . Nor do I see any reason why the conditions upon which the tenancy is to be determined should be limited to conditions onerous upon the tenant, nor why they should not include, in a case where the circumstances justify it in the opinion of the county court judge, relief from arrears of rent and past breaches of covenant. In my opinion, the county court judge had jurisdiction to make the order."

So, in *Daniell v. Carter*, supra, the court granted leave to the volunteer to determine his lease, but ordered him to give the landlord six weeks' notice, and to pay the rent until the premises were vacated. An appeal from so much of the order as determined the tenancy of the wife was dismissed.

But an order made under the authority of § 2, permitting a tenant to determine his lease, does not necessarily relieve the tenant of liability on the covenants contained in the lease. Thus, in *Tozer v. Viola*, supra, it appeared that the defendant had subleased the premises at a profit for a long term, and that the plaintiff (sublessee) had assigned the lease to one Spero. It also appeared that the defendant had licensed the plaintiff to assign the

lease only on the condition that the assignee would covenant with the plaintiff to pay the rent reserved by, and perform covenants and conditions contained in, the lease. The effect therefore was that, notwithstanding the license, the plaintiff remained liable for the rents and the covenants to the defendant, but that the assignee became directly liable, by the privity of contract. Spero made an application under § 2 to determine the lease. The order was granted, which in part stated that "nothing in this order contained shall affect any question as to the respective rights and liabilities of the respondent and the said William Charles Tozer in respect of the premises under the hereinbefore-mentioned lease, assignment, and license respectively." The present action was brought against the defendant, in which it was claimed that the tenancy had been determined, and that the plaintiff had been discharged from all liability under the lease. The lower court made the following order: "This court doth declare that as from the 25th March, 1917, the indenture of lease dated the 5th June, 1907, in the pleadings mentioned, and the term thereby created, have been determined, and that the plaintiff has been discharged from all further or future liability under the covenants therein contained." On appeal the court said: "What is it that the plaintiff Tozer relies upon in saying that the lease has been determined, and that he has been discharged from liability to the defendant? Simply the order of the county court judge—there is nothing else — and the notice assumed to have been given by the tenant thereunder, determining his tenancy. But the order of the county court judge was made upon terms, and one of those terms was that 'nothing in this order contained shall affect any question as to the respective rights and liabilities of the respondent and the said William Charles Tozer in respect of the premises under the hereinbefore-mentioned lease, assignment, and license respectively.' In my judgment it is not open for Tozer to claim the benefit of an order . . . which in terms contains

the statement that nothing in it is to affect the question of his liabilities . . . under the lease. The whole foundation of Tozer's claim is that, under and by virtue of this order and the notice determining the tenancy, given in pursuance of it, he has been discharged from all further liability. . . . In my opinion that is not so. The present statute provides that the man who is the tenant of any premises may apply, and then the court may authorize the applicant to determine the tenancy upon terms. Having regard to the terms which are embodied in this order, I am satisfied that the liability of lessor and lessee as between themselves continues; the lessee remains liable to the lessor, and the order sanctioning the termination of the tenancy has not the effect which is contended for it. It has not released the original sublessee from his liability to the original sublessor."

But when the court exercises the authority permitted under § 2, notice should be served on all the parties. Thus, in *Tozer v. Viola* (1917) 87 L. J. Ch. N. S. 90, 117 L. T. N. S. 748, *supra*, the court said: "The act gives wide powers to the county court judge. It says: 'The court may in its absolute discretion, after considering all the circumstances of the case and the position of the parties, authorize the applicant to determine the tenancy by such notice and upon such conditions as the court thinks fit.' I am of opinion that that confers the fullest jurisdiction upon the county court judge in considering the matter, in his absolute discretion to impose conditions. The act says so. But, in my judgment, the county court judge ought to take care that notice of the application is given to and served upon all parties who are or may be affected by any order that he proposes to make, and that 'after considering all the circumstances of the case and the position of all the parties' means that he should see that notice is served, before making any order under that section, upon all parties who are or may be affected—that is to say, all parties interested in the premises, or having or claiming an interest in the prem-

ises which are or may be affected by the order which he is about to make." In a concurring opinion, Warrington, L. J., said: "Having regard to the very wide powers given to the county court judge, of affecting the rights and the position of parties who may be interested in the premises subject to the tenancy in question, it is eminently desirable that the county court judge should have before him on any application under § 2 of the act all those parties, so that he may hear what they have to say, and, after hearing what they have to say, settle the conditions upon which the soldier's application should be acceded to."

(c) Effect of Defense of Realm Act.

The Defense of the Realm Act [Courts (Emergency Powers) Act 1917] was a branch of the emergency legislation which had for its object the more successful prosecution of the World War. It was especially directed against the activities of suspicious persons, the control of food, and the conservation of labor and materials. Under that act, in order to conserve labor and materials, the completion of buildings in the course of construction could be prohibited. To guard against any hardship that might befall the parties to any contract, by reason of an order prohibiting the completion of a building, § 1, subsec. 2, of the act provided as follows: "Where, upon an application by any party to any contract whatsoever, the court is satisfied that, owing to any restriction or direction imposed or given by or in pursuance of any enactment relating to the defense of any regulation made thereunder . . . any term of the contract cannot be enforced without serious hardship, the court may, after considering the circumstances of the case and the position of the parties to the contract and any offer which may have been made by any party for the variation of the contract, suspend or annul the contract or stay any proceedings for the enforcement of the contract or any term therefor or any rights arising thereunder on such conditions (if any) as the court may think fit." Subsection 3 provided that "this section shall be construed as one of

the Courts (Emergency Powers) Act 1914."

In order to bring a case within the act it is necessary to show that the nonfulfilment of the contract was due to a requirement of a government department. *Herman v. Morris* [1919] W. N. 152, 35 Times L. R. 328.

An interesting question arose in *Boyce v. Hill* [1918] 2 K. B. 616, as to the meaning of the words "any contract whatsoever," in § 1, subsec. 2. That section provided that "upon an application by any party to any contract whatsoever . . . the court may suspend," etc., and by subsec. 3 it was to be construed as one of the emergency powers under the Act of 1914. The 1914 act, *supra*, prohibited the payment of a sum of money, etc., and provided that "this subsection shall not apply to any sum of money (other than rent not being rent at or exceeding £50 per annum) due and payable in pursuance of a contract made after the beginning of the fourth day of August, nineteen hundred and fourteen." In the case referred to it appeared that the rent was in excess of £50 per annum. It further appeared that the construction of the building was stopped by an order under the Defense of the Realm Act when the structure was half completed. The plaintiff asked relief under the act. Lush, J., said: "This case raises a question of considerable importance as to the construction of § 1, subsec. 2, of the Courts (Emergency Powers) Act 1917. . . . Now subsec. 1 deals in terms with a contract for the construction of a building, or for the supply of materials for a building, entered into before the war, and it provides for relief against enforcement of the contract where, owing to difficulties in procuring the necessary materials or labor, it could not be enforced without serious hardship. Then comes the subsection which I have to construe,—subsec. 2: 'Where upon an application by any party to any contract whatsoever the court is satisfied,' etc., . . . I may say in passing that I think the words, 'or any term thereof,' are to be read along with the words, 'suspend or annul the

contract,' as well as with the words, 'stay any proceedings for the enforcement.' Pausing there, one would have thought the matter was clear. After dealing, in subsec. 1, with a particular kind of contracts,—building contracts made before the war,—the legislature proceeds, in subsec. 2, to deal with 'any contract whatsoever.' Prima facie those general words would apply to all contracts of whatever kind, and whether made before the war or after. But it is said that having regard to subsec. 3, which provides that the section 'shall be construed as one with the Courts (Emergency Powers) Act 1914,' subsec. 2, notwithstanding its wide language, must be read as limited to the particular class of contracts dealt with by the earlier act, namely, contracts made before the war and tenancy contracts at a rent below £50, made after the war. It is contended that it would be absurd to suppose the legislature, after expressly enacting that relief should not be granted in the case of post-war tenancy contracts at a rent over £50 (under which head it is said the present contract falls), should in the same act proceed to extend the relief to the class of contracts which it had already excluded. Further, it was contended that the words 'any contract whatsoever' in subsec. 2 did not include tenancy contracts at all, for that if they did one would be faced with this difficulty, that, on the one hand, the court is empowered to annul or suspend the contract as it thinks fit, and, on the other hand, has to take cognizance of the fact that the legislature has itself provided in § 2 for what is to be done with respect to the very contracts against which the court is asked to give relief in § 1, subsec. 2. In my opinion, neither of those contentions is sound. I do not think that, because the two acts are to be read together, one is forced to the conclusion that § 1, subsec. 2, of the later act, cannot be read as applying to post-war contracts of tenancy at a rent of over £50. Section 1 of the earlier act no doubt provided for relief against such contracts only in the event of their having been made before the war. But

the reason for affording relief exists just as much in the case of a contract of tenancy entered into after the war, where the difficulty of carrying out the contract arises from restrictions imposed by the government after the contract was entered into. In both cases the tenant has been placed in a position of difficulty by reason of unforeseen circumstances which have arisen in consequence of the outbreak of war, and I cannot see any reason why the legislature should not have intended to apply the scheme of relief to the one class of tenants just as much as to the other. With regard to [the] second argument, that § 2 expressly provides that if by reason of restrictions of this kind a tenant is unable to carry out his contract he shall not be liable to any mandatory order or injunction or to pay any sum of money or incur any forfeiture, and that it would be unreasonable to suppose that the legislature, having thereby provided that the contract, although broken, shall be left in force, should give the court power to order that the contract shall be suspended or annulled, it is to be observed that § 2 only applies to a limited class of breaches of a contract of tenancy; but to that extent there is admittedly a difficulty. But there are many ways in which I think that difficulty can be dealt with, though I am not now concerned to define them. I see no ground on that account for refusing to give effect to the plain terms of § 1, subsec. 2. The words 'any contract whatsoever,' in my opinion, mean what they say."

The power of the court to suspend or annul is limited to an entire contract. The relief from a particular term or right thereunder must be by a stay of proceedings. *Metropolitan Electric Supply Co. v. London* [1919] 1 Ch. 357, wherein the court said: "Now, on the plain grammar of the words used (and it is to be remembered that precisely the same words are used in both subsec. 1 and subsec. 2, so that the language is quite deliberately chosen), there are two distinct powers given to the court—namely, first, a power to suspend or annul a

contract; and, secondly, a power to stay proceedings in respect of a contract, or any term thereof, or any rights arising thereunder. It seems to me impossible, as a mere question of grammar, to carry on the force of the verbs 'suspend or annul' over the numerous intervening words, so as to apply these two verbs to the phrase, 'any term thereof, or any rights arising thereunder.' And the result is that, on the face of the words used, the power of annulment or suspension is given only as to the whole of a contract, while the power of staying proceedings is given either as to the whole of a contract, or as to any term thereof, or any rights thereunder. Is there, then, any sufficient reason, either from the nature of the subject-matter or from any context in the statute, for giving a different interpretation to the words used, and holding that the words 'suspend or annul' apply to and have as their object not merely the substantive 'the contract,' but also the substantive phrase, 'any term thereof, or any rights arising thereunder.' I do not think so. The scheme of the section, which accords with its grammatical construction, seems to me quite intelligible, if rather narrow. Contracts within the subsection may be annulled either permanently or temporarily, for it was agreed on both sides that suspension meant an annulment, out-and-out or finally, of rights and obligations accruing during the period of suspension. Or the lesser remedy may be applied of a postponement of the enforcement of the contract, or any term thereof, or any rights arising thereunder. In this latter case, inasmuch as rights are not permanently affected, but only rendered unenforceable for a time, there is no great danger in allowing part only of the terms of the contract, or the rights thereunder, to be dealt with, since the rights ultimately enforceable will be all the various compensating rights under the agreement. In the former case, a final cancelation, whether temporary or permanent, of some only of the terms of a contract, or of the rights thereunder, might amount to an almost complete varia-

tion of the contract; and it might well be considered that a power to vary contracts almost indefinitely (or, in other words, to make new contracts between contracting parties) was one of too sweeping and indefinite a character to thrust upon the court. . . . It is to be noted that the 'any term' in respect of which relief is to be given is in no way identified with the 'any term' whose enforcement would involve serious hardship."

What is a serious hardship within the meaning of the act depends on the facts and circumstances of each case. *Electric Pavilions v. Lorden* [1918] 2 Ch. 399, 87 L. J. Ch. N. S. 609, 118 L. T. N. S. 698, 34 Times L. R. 542, 53 L. J. N. C. 296; *Metropolitan Electric Supply Co. v. London* [1919] 1 Ch. 357, 120 L. T. N. S. 377, 35 Times L. R. 257. And in granting relief, the court will take into consideration the financial status of the parties. *Electric Pavilions v. Lorden*, supra.

It was held in *Wauters v. Association Internationale D'Agences* (1918) 34 Times L. R. 577, that the holding of a party to a contract for the sale of goods, where administrative action has had the effect only of raising the price in the open market, did not constitute serious hardship, within the provision of the statute above referred to, so as to entitle the court to give relief from liability under the contract.

The order restricting the erection of buildings was held to be valid in *Director of Public Prosecutions v. Ford* [1919] W. N. 43, 35 Times L. R. 206, and *Brightman & Co. v. Tate* [1919] 1 K. B. 463, 120 L. T. N. S. 512, 35 Times L. R. 209, and has been held to be binding on the Crown. *Duchy of Lancaster v. Movesby* [1919] W. N. 69.

In *Brightman & Co. v. Tate*, supra, it was held that where work was done in violation of the order requiring a license, the illegal construction constituted a good defense to an action for the recovery of the value of the labor and materials.

An amendment of the Defense of the Realm Act, declaring that, when the fulfilment by any person of any con-

tract is "interfered" with by the necessity of compliance with any requirement, regulation, or restriction of the Admiralty or Army Council under the act, the necessity is a good defense to an action brought for non-fulfilment of the contract, so far as due to that interference, was held in *Healey Box Co. v. C. T. Brock & Co's C. P. Fireworks* (1916) 86 L. J. K. B. N. S. 368, [1916] W. N. 408, 33 Times L. R. 88, not to relieve from liability for breach of contract one who, having made an agreement with the Ministry of Munitions to manufacture certain war material, entered into a contract with the plaintiff to supply boxes for the material, where, before the boxes were all delivered, the Minister of Munitions canceled the contract, and thereupon the defendant attempted to cancel his contract with the plaintiff for the boxes. The court stated that a claim might be made against the Crown by the defendant, by petition of right, for damages sustained in respect to the cancelation, but that the statute did not refer to a case where the Minister of Munitions canceled what might be called a head contract which he had with a firm supplying him with munitions.

c. Increase of Rent and Mortgage Interest Act.

The increase of Rent and Mortgage Interest (War Restrictions) Act of 1915 (5 & 6 Geo. V. chap. 97) was, by its terms, "an act to restrict, in connection with the present war, the increase of the rent of small dwelling houses, and the increase of the rate of interest on, and the calling in of, securities on such dwelling houses."

In *Epson Grand Stand Asso. v. Clarke* [1919] W. N. 170, *Banks, L. J.*, said of the several sections of the act: "These statutes form one branch of the emergency legislation which, in some respects, invades rights at common law and contractual rights. The object of the acts was to prevent profiteering in the smaller classes of house property, partly by forbidding the increase of rent payable by tenants in possession, and partly by prohibiting landlords from evicting tenants and letting the tenements to

others, from whom they might demand higher rents, and unnecessarily disturbing tenants in occupation in times of difficulty and distress."

The act does not affect an increase in rent made prior to its enactment. *Bridges v. Chambers* [1919] W. N. 34, 88 L. J. K. B. N. S. 500, 63 Sol. Jo. 319.

Section 1, subsec. 1, of the act provided as follows: "Where the rent of a dwelling house to which this act applies . . . has been, since the commencement of the present war, or is hereafter during the continuance of this act, increased above the standard rent . . . as hereinafter defined, the amount by which the rent . . . payable exceeds the amount which would have been payable had the increase not been made, shall, notwithstanding any agreement to the contrary, be irrecoverable: Provided that . . . (iv.) Where the landlord pays the rates chargeable on . . . the occupier of any dwelling house, an increase of the rent of the dwelling house shall not be deemed to be an increase for the purpose of this act if the amount of the increase does not exceed any increase in the amount for the time being payable by the landlord in respect of such rates over the corresponding amount paid in respect of the yearly, half-yearly, or other period which included August 3, 1914. . . ." Section 2, subsec. 1, defines "standard rent" as meaning the rent of August 3, 1914. In *Westminster & G. Properties & Invest. Co. v. Simmons* [1919] W. N. 241, it was held that the fact that the lessors undertook the burden of paying the rents did not operate to reduce the amount of the "standard rents," as used in the statute.

Subsection 6 provided: "Wherever an increase of rent is by this act permitted, no such increase shall be due or recoverable until the expiry of four clear weeks after the landlord has served upon the tenant a notice in writing of his intention to increase the rent, accompanied . . . (b) where the increase of rent is on account of an increase in rates, by a statement showing particulars of the

increased amount charged in respect of rates on the dwelling house." In *Sutton v. Hollerton* [1918] W. N. 237 145 L. T. Jo. 256, it was held that the landlord could not allow the increase for rates to run through a current year, and then collect the entire increase in one sum. The landlord was allowed, however, to collect the increase in weekly payments.

The notice provided by the subsection last quoted is sufficient, and no agreement by the tenant is necessary. *Cork Improved Dwellings Co. v. Barry* [1919] 2 Ir. R. 245, wherein the court said: "The whole scope of the act shows that it intended to effect a statutory insertion into the agreement of tenancy of an altered amount of rent, which can be recovered not by force of an agreement to alter the rent, but by force of the statute."

Shortly after the passage of the act an interesting question arose as to the effect of an early statute (11 Geo. II. chap. 19, § 18), which provided that if a tenant gave notice to quit and then held over contumaciously, the landlord might recover double the rental value of the premises. By § 1, subsec. 3, of the Increase of Rent Act, it is provided: "No order for the recovery of possession of a dwelling house to which this act applies or for the ejectment of a tenant therefrom shall be made so long as the tenant continues to pay rent at the agreed rate as modified by this act and performs the other conditions of the tenancy, except on the ground that the tenant has committed waste or has been guilty of conduct which is a nuisance or an annoyance to adjoining or neighboring occupiers, or that the premises are reasonably required by the landlord for the occupation of himself or some other person in his employ, or in the employ of some tenant from him, or on some other ground which may be deemed satisfactory to the court making such order. . . ." In *Crook v. Whitehead* [1919] W. N. 185, 17 L. G. R. 504, 35 Times L. R. 522, it was held that the early statute contemplated the landlord's "right to the possession," and hence, since the tenant was now claiming the possession as a matter of right

under the Increase of Rent Act, his conduct could not be said to be contumacious. And in *Flannagan v. Shaw* [1919] W. N. 139, the court said: "The words of the subsection, 'where the rent . . . has been . . . increased,' being perfectly general, must be taken to apply not only to a case where the rent has been raised by the landlord, but also to a case in which the rent has been automatically increased by the provisions of a statute brought into operation by the act of the tenant himself in failing to comply with the terms of a notice to quit which he has himself given."

For the purpose of applying § 1 (3) of the act, the time to be considered is the date when the court is asked to order the recovery of the possession. The fact that a notice to quit is served before the passage of the act is immaterial. *Harcourt v. Lowe* [1919] 35 Times L. R. 255. And the act applies to new tenants, who have moved into the premises since its passage. *King v. York* [1919] W. N. 59, 35 Times L. R. 256.

The Amending Act of 1918 provided as follows: "The expression 'landlord' in subsec. 3 of § 1 of the earlier act shall not include any person who since September 30, 1917, has become landlord by the acquisition of the dwelling house." In *Stovin v. Fairbrass* [1919] W. N. 68, 17 L. G. R. 310, it appeared that the plaintiff gave the tenant a valid notice to quit, and then entered into an agreement for sale. The tenant refused to give up the possession of the premises. It was held that since the plaintiff wanted the house for a purchaser, and not for himself or an employee, to give him the possession would be in effect to give him what the statute expressly prohibited. To the same effect, see *Vernon Invest. Asso. v. Welch* [1919] W. N. 173, 35 Times L. R. 511, 63 Sol. Jo. 643. And in *Artizans Labourers & G. Dwellings Co. v. Whitaker* [1919] W. N. 165, [1919] 2 K. B. 301, 25 Times L. R. 521, it was held that a provisional notice to quit, given by the tenant, who afterwards refused to deliver the possession of the premises, was not

a satisfactory ground for an order to recover the possession of the premises.

Whether the requirements of the landlord, sufficient to entitle him to the recovery of the possession, are reasonable or not, must depend on all the circumstances of the case, and the landlord must satisfy the court that the premises are reasonably required. *Epson Grand Stand Asso. v. Clarke* [1919] W. N. 170. In that case a question arose as to what was a "dwelling house" within the meaning of the act. It appeared that the building was a public house at a racetrack, and was situated between the race course and the paddock. The court said: "[It is] contended that the acts do not apply to houses, if let for business purposes. I cannot accept that view. No doubt, if the word 'dwelling house' is given its ordinary meaning, the act may seem to include cases not contemplated by the legislature; but a restricted meaning would exclude many cases which were intended to be included. The object of the legislature was to include all houses which are occupied as dwelling houses, provided they are of the class ascertained by their value as prescribed by the act, notwithstanding that they are also used by the tenant for other purposes as well as those of a dwelling house."

An Amending Act in 1919 (§ 4) provided as follows: "As from the passing of this act, the principal act . . . shall extend to houses . . . let as separate dwellings . . . in the case of a house situated in the metropolitan police district . . . [where] both the annual amount of the standard rent and the ratable value of the house . . . exceed £35, and neither exceeds £70." In *Dobson v. Richards* [1919] W. N. 166, 63 Sol. Jo. 663, it was held that a tenant who had been served with notice prior to the passage of the 1919 amendment, and who, at the time of its becoming effective, was a tenant at sufferance, was within the protection of the act. In *Scott v. Austin* [1919] W. N. 85, it was held that an inclosure adjoining the defendant's premises, which the defendant had rented, and sown in vegetables, was

"within the curtilage," as used in the act.

Section 1, subsec. 4, of the act provided as follows: "It shall not be lawful for any mortgagee under a mortgage to . . . call in his mortgage or to take any steps for exercising any right of foreclosure or sale, or for otherwise enforcing his security or for recovering the principal money thereby secured. . . ." In *Welby v. Parker* [1916] 2 Ch. 1, 85 L. J. Ch. N. S. 564, 114 L. T. N. S. 876, 32 Times L. R. 403, 60 Sol. Jo. 417, it was held that this section merely suspended the remedy, and consequently did not affect the obligations. In *Martin v. Watson & Egan* [1919] 2 Ir. R. 332, it was held that an ejectment suit was a step in enforcing the security of a mortgage, on the ground that, after the payment of the interest, the rents and profits would be applied to the principal. But see the earlier case of *National Bank v. Claffey* [1917] 2 Ir. R. 281, wherein it was held that the institution of an action for ejectment on the title, by a mortgagee, was not realizing a security within the inhibition of the section.

Section 2, subsec. 1, provided as follows: "Subject to the provisions of this act, this act shall apply to every mortgage where the mortgaged property consists of or comprises one or more dwelling houses to which this act applies, or any interest therein, except that it shall not apply . . . (b) to an equitable charge by deposit of title deeds or otherwise." In *London County & W. Bank v. Tompkins* [1918] 1 K. B. 515, it was held that a deed is an "equitable charge" within the foregoing section. In that case it appeared that the defendant, in order to obtain an overdraft from the plaintiff bank, gave as security the title deeds to his house and his place of business. He gave the bank the power of sale on default in any payment, and agreed to hold himself as trustee for the bank, subject to removal at any time. He also appointed the bank officials his attorneys to convey his interest in the premises. It appeared that there was a default in the payment of one of the drafts, and the

plaintiff sued to recover that amount. It was held that this particular deed was an equitable charge within the act, the court saying: "This . . . appeal . . . raises an important point as to the proper construction to be placed upon certain sections of the Increase of Rent and Mortgage Interest (War Restrictions) Acts 1915 (5 & 6 Geo. V. chap. 97). That act was passed, as its title implies, *inter alia*, for the purpose of restricting, during the continuance of the present war, the calling in of securities on small dwelling houses. Section 1, subsec. 4, of the act, prescribes the acts which it shall not be lawful for a mortgagee to whom the act applies to do, if and so long as the mortgagor complies with the covenants to the extent indicated in the section. The acts are (a) the calling in of the mortgage; (b) the taking of any steps for exercising any right of foreclosure or sale, or for otherwise enforcing the security, or for recovering the principal money thereby secured. Section 2, subsec. 4, defines the mortgages to which the act shall apply, namely (with certain exceptions), every mortgage where the mortgaged property consists of or comprises one or more dwelling houses to which the act applies. Among the exceptions is (subsec. b) 'an equitable charge by deposit of title deeds or otherwise.' The question which has to be decided in this appeal depends, in my opinion, upon the construction to be placed upon the language of this exception. The question arises in this way: The defendant Tompkins was a customer of the plaintiff bank. To secure his overdraft he deposited the title deeds of his property, which included small dwelling houses within the meaning of the act, and at the same time executed a deed in the printed form adopted by the bank whereby he declared the terms upon which the deeds were deposited, and went on to give certain undertakings, and to make certain declarations, which may be summarized as follows: (1) An undertaking to pay the amount of the overdraft on demand. (2) A declaration that the bank should be deemed to be mort-

gagee, under the deed, of all the premises thereby charged. (3) An undertaking to execute, upon request, a legal mortgage containing a provision that the mortgagee's rights and privileges might be exercised immediately. (4) A declaration that the bank might exercise, at any time after demand for payment of the moneys due had been made, such power of sale or other powers as, by statute, should for the time being be exercisable by a mortgagee after default made in payment of the mortgage money. (5) A declaration that during the continuance of the security the defendant would hold the property comprised in the security as trustee for the bank, and an undertaking to convey the same as directed by the bank. (6) An authority to the bank to remove the defendant at any time from the trusteeship, and to substitute any nominee of their own in his place, and to make a declaration vesting all the defendant's estate and interest in the trustee so appointed. (7) An irrevocable appointment of certain officials of the bank to act as the defendant's attorneys for the purpose of executing documents, including a conveyance of the premises. The deed is dated December 14, 1912. On February 12, 1917, the bank issued a writ, claiming the amount of the overdraft. The writ was specially indorsed, and the claim made is for money due to the bank upon a banking account. No reference was made upon the writ to the deed. By his defense the defendant set up that his case fell within the protection of the statute, and that the bank was suing him for the recovery of the principal money secured by the mortgage deed, which was forbidden by the act. Shearman, J., decided in favor of the bank. He held, in substance, that the operation of the act was confined to legal mortgages, that is to say, to mortgages which contain a conveyance of the property included in them. I cannot take this view of the act. I see nothing in the act to limit the meaning to be attached to the expression 'mortgage,' except such words in the act itself as expressly limit the meaning. On the contrary, I think the fact that certain classes

of mortgages are expressly excluded indicates that all classes, except those excluded, are intended to be included. Apart, therefore, from any words of exclusion, equitable mortgages are included within the protection of the statute. The material words of exclusion I have already referred to. If the subsection had been confined to equitable charges by deposit of title deeds, no difficulty could have arisen. The difficulty arises from the addition of the vague and indefinite words, 'or otherwise.' If the whole sentence is somewhat expanded, and the words used in their natural meaning, it would read: 'An equitable charge, whether created by deposit of title deeds, or in any other way.' So read, it follows that all equitable charges are excluded from the operation of the act. I doubt whether this was the intention of the framers of the act. I have struggled to see whether I could find any satisfactory limitation which could be placed upon the language of the subsection, which would bring it more into accordance with what I conceive to have been the intention of the legislature, as gathered from the rest of the statute. I have failed, and I can see no alternative, having regard to the language of the subsection, which, though vague and indefinite, is unambiguous, and must include the present equitable charge, even though its provisions place the mortgagees, from the point of view of the protection apparently intended to be conferred by the statute, in substantially the same position as if the mortgage had been a legal mortgage."

The act provides that where the landlord has, since the beginning of the war, incurred expenditure for improvements, an increase of rent at a rate not exceeding 6 per cent on the amount expended "shall not be deemed to be an increase" for the purposes of the act. It is also provided that whenever an "increase of rent" is by the act permitted, no such increase shall be due or recoverable until after the expiration of a four weeks' notice served on the tenant, in writing, accompanied, where the increase of rent is on account of expenditures above

mentioned, by a statement of the improvements and their cost. It was held in *Wortley v. Mann* [1916] W. N. 390, that the provisions as to notice applied where the landlord increased the rent on the ground that he had incurred expenditures for improvements, notwithstanding the provision that such an increase should not be deemed an increase for the purposes of the act.

The expression, "in his employ," in the provision of the act that no order for the recovery of possession of a dwelling house, or for the ejectment of a tenant therefrom, shall be made so long as the tenant pays rent at the agreed rate, as modified by the act, and performs the other conditions of the tenancy, except where the premises are reasonably required by the landlord for the occupation of himself or "some other person in his employ," was held in *Rex v. Rogers* [1918] W. N. 128, 118 L. T. N. S. 718, 82 J. P. 144, 53 L. J. N. C. 157, not to refer to a person who might come into the employ of the landlord, but only one who was already in the landlord's employ at the time the order of ejectment was issued.

In *Steel v. Mahoney* [1918] W. N. 253, 62 Sol. Jo. 486, 34 Times L. R. 327, it was held that a landlord was entitled to charge an increase of rent equivalent to an increase of rates, due to a higher assessment of the property made subsequent to the passage of the act.

IV. Canadian statutes.

a. Alberta.

1. *Volunteers and Reservists Relief Act.*

(a) *Effect of act.*

The object of the Alberta Volunteers and Reservists Relief Act of 1916 was to stay all actions against a volunteer, his wife, or any dependent member of his family, during the period of his military service. Section 3 of the act, provided as follows: "No person shall after the passing of this act bring any action or take any proceeding, judicial or extrajudicial, against any volunteer or reservist or against his wife or any dependent member of

his family for the enforcement of payment of any debt, liability or obligation incurred before the passing of this act, nor for the enforcement of any mortgage, charge, lien, encumbrance or other security created or arising before the passing of this act, nor for the recovery of possession of any goods and chattels or lands and tenements in the possession of such volunteer or reservist or in the possession of his wife or any dependent member of his family until one year after the termination of the said state of war or until one year after the discharge of such volunteer or reservist, whichever shall first happen."

In *Merchants Bank v. Arnöld* (1917) 11 Alberta L. R. 24, 2 West. Week. Rep. 39, it appeared that a renewal note had been made by a volunteer, but was dated subsequently to the passage of the Volunteers and Reservists Relief Act. There was no dispute as to the fact that it was a renewal note, and that the original indebtedness was incurred prior to the passage of the act, but it was contended that the renewal note operated to waive the exemption. The court said: "The original note was given and the liability incurred before the passing of the said act, and which liability is, in part, outstanding. The defendant, as I have said, had enlisted before action was commenced, after passing of said act, and was a volunteer or reservist at the time he was sued by plaintiff, and therefore this action is in direct contravention of the statute."

And in *Royal Trust Co. v. Fraser* [1919] 3 West. Week. Rep. 48, wherein it appeared that a volunteer had a vendor's lien on the property in litigation, the court said: "This action, undoubtedly, is a proceeding against him, and in my opinion is prohibited by § 3 of the said act. A very similar case to this case was decided recently by Mr. Justice Scott, viz., *Duncan v. North American Life Assur. Co.* (unreported), in which he held that a second mortgagee in an action for foreclosure was entitled to protection under the act."

But under § 8, providing that the act "shall not deprive a mortgagee or per-

son having a charge or security on land of the right to collect and receive the rents or rentable value of such land," it has been held that a mortgagee is entitled to the rents, where it appears that the mortgagor is in arrears, even though he is a volunteer within the meaning of the act. *General Financial Corp. v. Wood* (1918) — Alberta, —, [1918] 1 West. Week. Rep. 780; *Mutual Life Assur. Co. v. Blackett* (1918) — Alberta, —, [1918] 2 West. Week. Rep. 521.

Thus, in the case last cited, it appeared that the defendant mortgagor defaulted in the payment of the principal and interest secured by the mortgage. The plaintiff claimed the payment of rent, which was met by the defense that the mortgagor was a volunteer within the meaning of the Relief Act, and that the plaintiff's claim was stayed by the act. The court said: "In my opinion § 8 must be construed as being a proviso which restricts, to the extent therein mentioned, the effect and operation of § 3 [supra], and the effect as well as the intention of the restriction is that § 3 [supra] does not apply to cases where a mortgagee merely seeks to compel a mortgagor in default to pay rent or a rental value for the premises comprised in the mortgage. . . . Section 3 merely prohibits actions and proceedings against a volunteer or reservist mortgagor, or the members of his family, or for the recovery of lands in his or their possession. Where a tenant of the mortgagor is in possession, the latter cannot be held to be in possession, nor can an action or proceeding by the mortgagee against the tenant to recover rent be held to be one against the mortgagor. Even if § 8 were eliminated from the statute, I see no reason why the mortgagee could not proceed against the tenant for rent and dispossess him, in default of payment, and if the contention referred to were upheld it would practically be a holding that § 8 is of no effect, as it would not give the mortgagee any greater right than he would have had if it had not been enacted. This, in view, affords a strong argu-

ment against giving it the restrictive effect contended for."

And in *General Financial Corp. v. Wood* (1918) — Alberta, —, [1918] 1 West. Week. Rep. 780, Hyndman, J., ordered that "the respondents pay to the applicant such rentable value of the premises as might be agreed upon by applicant and respondents, and in default of such agreement, such amount as should be fixed by a judge, or the master of chambers, at Edmonton, calculating such rent from the date of service of the notice to attorn and pay rent, the same to be paid within such time as should be agreed upon, or as the judge or the master should direct, and that the respondent Ward continue to pay thereafter such monthly rentable value as should in like manner be agreed upon, or fixed from time to time."

In default of the payment of the rents, the mortgagee is entitled to the possession of the mortgaged premises to enable him to obtain the rental value. See *Mutual Life Assur. Co. v. Blackett*, *supra*.

And in *General Financial Corp. v. Wood*, *supra*, the court ordered that, in default of the rent, "the respondents and each of them give up possession of the said lands and premises to the applicant, with leave to either the applicant or the respondents to apply to a judge from time to time for such change in the amount of rentable value so fixed, or other modifications in respect thereof, or for an absolute order for possession by reason of default, as the applicant might think himself entitled to."

But the court may determine the existence of an obligation by a volunteer, as such a proceeding is not an enforcement of payment. Thus, in *Camrose Stock & Dairy Farm v. Claxton* [1919] 1 West. Week. Rep. 984, wherein it appeared that the defendant volunteer agreed to subscribe for certain shares of stock, and transferred his house and lot in part payment, and the company subsequently transferred the property without authority, to the defendant's wife, it was held that the volunteer's name could be placed on the list of contributors,

for the purpose of determining the obligation. The court added, however, that the wife of the volunteer could resist an action to recover the possession of the premises.

(b) Persons exempted.

Section 2, subsec. 3, of the *Alberta Volunteers and Reservists Relief Act*, defined a volunteer or reservist as follows: "'Volunteer or reservist' means any person, male or female, resident in the province of Alberta on the 1st day of August, 1914, or at any time thereafter, who has before the passing of this act enlisted as a volunteer in the active military or naval forces raised by the government of Canada for service in the said war, or who shall after the passing of this act so enlist, and any person resident as aforesaid who has before the passing of this act joined either as a volunteer or as a reservist the military or naval forces of his Majesty or any of his allies, or who shall after the passing of this act so join."

In *Calgary Brewing & Malting Co. v. McManus* (1916) — Alberta, —, 29 D. L. R. 455, 34 West. L. R. 1027, the question, who was a volunteer or reservist within the meaning of the act, was presented for adjudication. The court said: "It was admitted that the members of the 103d regiment do not come within the meaning of the words, 'enlisted as a volunteer in the active military or naval forces raised by the government of Canada for service in the said war; that is, that the regiment still stood in the same position as ordinary Canadian militia regiments, with which we have always been acquainted in times of peace. The real question to be decided is whether they come within the meaning of the words of the latter part of the clause, viz., 'who has joined either as a volunteer or a reservist the military or naval forces of his Majesty or any of his allies.' It is peculiar that in giving an interpretation of the words, 'volunteer or reservist,' the legislature should have used in the interpretation the very words which were being interpreted. This would seem to be a violation of the rules of logical definition. But the present is not an

isolated instance, for the peculiarity is frequently to be noticed in interpretation clauses. A principal point in the matter is what we are to understand by the term 'his Majesty's forces.' . . . I think the only rule of interpretation to apply is to take the words in their ordinary meaning, if that meaning will give good sense, and not violate the evident purpose of the statute. . . . I can find no statutory authority for sending what are called the overseas battalions out of Canada, which would not apply equally to the ordinary militia regiments. They seem to stand on the same footing, except that the ordinary militia regiments could be forced, under § 73, to serve in actual war for only one year, while those who enlist, as the members of the overseas battalions no doubt did, for the period of the war, can be forced to fulfil their engagement; but as to being forced to go beyond Canada it would appear that they both stand on the same footing, and that § 69, above quoted, is the only statutory authority for sending any troops out of Canada. . . . It follows that the 103d regiment could at any moment be placed on active service, and could be called upon to serve in the war for the period of one year. . . . In the one case, as in the other, the crucial phrase is, 'for the defense of Canada,' contained in § 69, and unless the struggle on the fields of France and Flanders can be said to be 'in the defense of Canada,' there is no legal basis for the organization and despatch of even the overseas battalions. We are all strongly inclined to believe that what those boys are doing is 'in the defense of Canada.' But the point is that, if that is so, then the 103d regiment is just as liable, legally, to be put on active service and sent over there to fight as any other battalion, except, of course, that it could only be asked to serve for one year, and not 'for the war.'"

But the act does not protect the estate of a volunteer or reservist who was killed before it became effective. *Royal Trust Co. v. Fraser* [1919] 3 West. Week. Rep. 48, wherein the court said: "The defendant Fraser was

killed while serving with the Canadian Expeditionary Force in the month of May, 1915. The Volunteers & Reservists Relief Act was assented to on April 19, 1916, and therefore, at the time of his death, the said Fraser was not entitled to any protection. Counsel for his estate contends that the act is applicable to his estate. I am afraid, however, that I am unable to come to that conclusion. It seems to me that the act contemplates relief in favor of the volunteer, but that if the volunteer himself never at any time had the benefit of the act, I do not see how the estate, his successors, can claim this protection. They succeed to all the rights which he had, but in my opinion nothing more, and in this case, he never having had such protection, I do not see by what process the estate can be considered as entitled to it."

Nor does the act stay an action against the wife of a volunteer for her personal debts, where the husband is not a party to the action. *British Columbia Life v. Davis* (1917) — *Alberta*, —, [1917] 3 West. Week. Rep. 661. The court in that case said: "The debt is not the husband's, but the wife's personally, and it was evidently the intention of the legislature to protect the volunteer, his wife, and family against his debts or obligations, but not the wife in respect of her own debts."

2. *Soldiers Relief Act.*

The *Alberta Soldiers Relief Act* of 1918 extended the exemption period created by the *Volunteers and Reservists Relief Act* to two years after the date of the volunteer's discharge.

In *Metals v. Frost* [1919] 3 West. Week. Rep. 247, an action brought against a former volunteer within two years after his discharge from the military service was dismissed, and while costs were awarded to the plaintiff, the court directed that they should be set off against the mortgage debt.

In *Aucelle v. Aucelle* [1919] 1 West. Week. Rep. 620, it was held that the *Soldiers Relief Act* did not protect a former volunteer from a decree for judicial separation and alimony, where it appeared that two years had elapsed

since his letters showed an intent to desert his wife.

3. War Relief Act.

The Alberta War Relief Act (Laws 1918, chap. 24) was passed April 18, 1918, and had for its object the relief of mortgagors and purchasers.

Section 3 of the act provided as follows: "No person shall take or continue proceedings by way of foreclosure or sale or otherwise, or proceed to execution on, or otherwise to the enforcement of, any judgment or order of any court, whether entered or made before or after the passing of this act, for the recovery of principal money secured by any mortgage of land or any interest therein made or executed prior to the fourth day of August, 1914." Section 4 provided as follows: "Where default is made in payment of interest, rent, taxes, insurance or other disbursements which the mortgagor or purchaser has covenanted or undertaken to pay, the mortgagee or vendor, his assignee, or personal representative shall have the same remedies, and may exercise them to the same extent, and the consequences of such default shall in all respects be the same as if this act had not been passed: Provided, however, that before any action or proceeding shall be commenced for default for any cause mentioned in this section leave shall be obtained from a judge."

Under the foregoing sections a mortgagor is immune from any proceedings for the principal debt, if he keeps his interest and other specified charges paid. But "if he fails in this, then, unless he can show that his failure is attributable to the war, the mortgagee or vendor shall not be interfered with by the act in any respect, subject, however, to the right of the debtor at any time, by paying up all interest, taxes, etc., to render the proceedings proceedings for principal money only, and so prohibited to be further continued by § 2." *Re War Relief Act (1918)* 13 Alberta L. R. 303, 40 D. L. R. 542.

When the act came into force, the foregoing case was pending. The question immediately arose as to the effect of the act on pending litigation.

The court said: "The first question which naturally presents itself is, Does the act apply to proceedings begun before it was passed; or is it only intended to apply to future proceedings? . . . We must then start with the presumption that the legislature did not intend to affect the rights of parties to pending proceedings, and endeavor to see whether there is anything in the act which seems to rebut that presumption. At once is suggested the view that, since § 3 prohibits without exception the taking of proceedings, there can be no future proceedings, and therefore the only ones which could be continued would be those pending. If the section stood alone, it seems to me that that consideration would be conclusive in establishing the application to pending proceedings. But § 4 authorizes the taking of proceedings in the cases and under the conditions specified, and when these proceedings are begun they may be begun to recover not merely interest, etc., but the principal, because the section preserves all the mortgagee's rights and remedies; but, after the proceedings have been begun, the mortgagor may pay up all arrears of interest and other charges specified, leaving nothing but principal in arrear, and if the proceedings were then continued they would be continued for principal, and for principal alone. Such proceedings, though properly begun, and begun after the commencement of the act, would then come within the prohibition of the section, and could be continued only in contravention of § 3. It is thus apparent that there are proceedings other than those pending to which the prohibition of § 3 can apply, and there is thus no value in an argument which rests solely on the view that such is not the case. There appear to me also to be other reasons for concluding affirmatively that the legislature intended what the general rule of interpretation states it is presumed to have intended. The paragraph of § 3 above set out prohibits in terms the taking or continuance of proceedings to enforce any judgment or order of any court, whether made before or

after the passing of the act. That clearly prohibits the continuance of pending proceedings to the extent specified, but if the continuance of all pending proceedings were prohibited it would be quite unnecessary to make this special provision. But it does more, it prohibits the continuance of proceedings for the enforcement of any judgment or order entered or made after the passing of the act. Now there could not be a judgment after the passing of the act unless proceedings could be continued to it. As I have pointed out, the proceedings commenced after the act, under the provision of § 4, could not be continued to judgment for principal money, other than as part of the whole indebtedness, because, upon the interest, taxes, etc., being paid, all further proceedings would be stayed; but if the interest, etc., remain in default, § 2 would not apply, because the remedies in that case are not affected by the act. Hence, it is only by the continuance of pending proceedings that there can be any judgment for principal money, as such, or any judgment including principal money to which the act applies, after the passing of the act, and while the provision as respecting the enforcement of a judgment before the passing of the act would be simply unnecessary if the prohibition applies to pending proceedings, yet, in so far as it relates to judgments after the act, it would be meaningless and could have no application."

Section 6 of the War Relief Act provided that the judge might grant or refuse the leave applied for by a mortgagee. This section contained a proviso that the vendor or mortgagee "shall be entitled in any event to the payment of the full amount of the net income from the property, or the amount which in the opinion of the judge the property should earn, if carefully managed, to the extent of such default, and the judge may make such order as to possession or the collection of rents as to him seems meet." In the case of *Re Mortgagee Co. of Canada & Stennett* [1919] 1 West. Week. Rep. 8, it was held that

no leave was necessary to give validity to the notice of a mortgagee of intent to proceed for rents and profits. The court said: "This proviso means, I think, that no matter what may happen to a mortgagee's application for leave to pursue any of his other remedies, his right to payment of the full amount of the net income from the property is absolute, for he is to have it 'in any event.' The concluding words of the proviso, that 'the judge may make such order as to possession or the collection of rents as to him seems meet,' are, in my opinion, simply meant to implement this right, so that if the mortgagee cannot otherwise get possession or collect the rents, the judge may give him an order which will set the machinery of the court to work to his relief. Leave is only necessary for the commencement of an action or proceeding. A notice to at-torn is not an action, and I doubt very much if it is a proceeding within the statute. Be that as it may, I think the legislature has so clearly recognized the mortgagee's right to the rents and profits to the extent of the mortgagor's default that no leave is necessary to give validity to such a notice."

b. British Columbia.

1. Scope of War Relief Act.

The object of the British Columbia War Relief Act of 1916 was to stay all actions against a resident of British Columbia who had been mobilized in the government forces, and to extend the same protection to his wife and dependents. Section 2 of the act provided as follows: "During the continuance of the said war it shall not be lawful for any person or corporation to bring any action or take any proceeding, either in any of the civil courts of this province or outside of such courts, against a person who is or has been at any time since the 1st day of August, 1914, a resident of British Columbia, and has either enlisted and been mobilized as a volunteer in the forces raised by the government of Canada in aid of his Majesty in said war, or has left Canada to join the navy or army of his Majesty or any of his allies in the said

war as a volunteer or reservist, or against the wife or dependent members of the family of any such person, or the executors, administrators, or trustee of any such person deceased for the enforcement of payment by any such person of his debts, liabilities, and obligations existing or future, or for the enforcement of any lien, encumbrance, or other security, whether created before or after the coming into force of this act, or for the recovery of possession of any goods and chattels or land and tenements now in the possession of his wife or any dependent member of his family; and, if any such action or proceeding is now pending against any such person, the same shall be stayed until after the termination of the said war."

An application to register title is a "proceeding" outside of a civil court, within the meaning of the act. *Re Smith* (1916) — B. C. —, 35 West. L. R. 332, 31 D. L. R. 702.

The act operates to prevent the issuance of a tax sale deed to land of a soldier who is absent in military service. *Hunter v. Point Grey* [1917] — B. C. —, [1917] 1 West. Week. Rep. 1244, wherein it appeared that the plaintiff purchased the property at a tax sale, and received the purchaser's usual certificate for the lot. After due notice the plaintiff demanded the title. It was admitted that the owner of the lot was a soldier, and within § 2 of the War Relief Act. The question presented was whether the collector of the defendant municipality could issue a tax sale deed. It was held that the War Relief Act prevented the issuance of the deed. The court said: "The legislature, in my opinion, never intended to interfere with contracts between parties to the extent of terminating the contract, but thought it advisable, in the interest of those who might be serving their country, that proceedings to deprive them of their property should simply be stayed until the termination of the conflict. This position is emphasized by § 7 of the War Relief Act, which states that the 'running of all statutes of limitations of actions or proceedings in favor

of all persons for whose benefit this act is passed is hereby suspended during the period from the 1st day of August, 1914, to the termination of the said war.' . . . The conclusion, then, is, to the questions submitted for opinion, that, as to the first question: The War Relief Act, in my opinion, applies, and the collector of the defendant corporation is not at liberty to issue the tax sale deed to the plaintiff. Then, as to the next question: I do not think the collector is either bound, nor is he liable, in carrying out the provisions of the Municipal Act, to refund to the plaintiff the amount paid at the tax sale of the property in question. The intention of the War Relief Act would be carried out by all matters remaining in statu quo during the duration of the war."

But libel actions do not come within the purview of the War Relief Act, and a plaintiff in such an action is not required to comply with the provisions of that act. *Nelson v. Balderson & Valley Dairy* (1917) — B. C. —, [1917] 3 West. Week. Rep. 448.

Neither does the term "liabilities," as used in § 2, include damages recovered in a tort action. *Bouch v. Rath* (1918) 25 B. C. 445.

Under § 9 of the War Relief Act providing that "this act shall not prevent a mortgagee or person having a charge or security on land from the right to collect and receive the rents of such lands, or with the leave of the court to enter into possession unless paid the rentable value thereof, to be fixed by the court," the court is empowered to grant leave to the mortgagee to enter into possession of the mortgaged premises, on default in the payment of the rentable value. *Re War Relief Act* (1918) — B. C. —, [1918] 3 West. Week. Rep. 475, wherein the court said: "In my opinion two questions come up for decision under § 9 of the War Relief Act, viz., first, Will the court grant leave to enter into possession in default of payment of rentable value? and, secondly, if it does, What is such rentable value?— such questions to be decided on the facts of each case. I further think that such decisions are not matters of

arbitrary discretion, but are to be made on the evidence adduced. In considering the first, the court is to have regard not to the ability of the mortgagor to pay, but to the question whether or not there exists at the time the application is made a sufficient equity owned by the mortgagor to, in the opinion of the court, make it reasonably certain that the mortgagee will ultimately recover his principal and interest. If there is, leave will be refused. If not, it will be granted. I arrive at this view from a consideration of the scheme of the act in reference to premises actually used as a residence, set out in § 5, and of the history of the amendment of § 9 as originally passed, and as it now stands. If the legislature intended to burden individual mortgagees with the obligation to furnish, at their own expense, homes for soldiers or their dependents, it would, I think, have clearly said so. The consideration aforesaid leads me to the conclusion that the legislature has impliedly said the contrary. In deciding what is the rentable value, assuming the first question resolved in favor of the applicant, I think the court has no discretion to fix an arbitrary rent, but must, on evidence adduced, decide what is the rentable value as fixed by the market at the time application is made. Section 9 contains no words authorizing the court to fix a rent lower than that fixed by the market. There may well be a dispute as to what this rent is, and it is, I think, the settlement of such dispute that is meant when the section says the rentable value is to be fixed by the court."

And in *Re Canada Permanent Mortg. Corp.* (1915) 9 West. Week. Rep. 180, it was held that no relief could be given where it appeared that the interest, or principal and interest, were in default. The court also held that where the mortgagee failed to give the requisite notice, such failure did not operate to give the court jurisdiction.

The delivery of a statement of claim with the writ of summons is in contravention of § 10, which provided:

"Every plaintiff or party commencing, instituting or taking any proceedings in or out of court shall after service of the writ, notice or other process whereby any proceedings either in or out of court are instituted, and before taking any further step, furnish evidence to the satisfaction of such court or an officer or tribunal in whose office or before which any such proceedings out of court are being taken that the defendant was not at the time of such service entitled to the benefit of the act." The case of *Blackett v. Westcott* (1917) — B. C. —, [1917] 3 West. Week. Rep. 460, arose under this section, and therein it was claimed that the service of a statement of claim with the writ of summons was irregular, in view of the fact that the delivery of the statement of claim with the writ was a further step within the meaning of the act. This contention was upheld by the court, and the statement of the claim was ordered to be struck out.

So, in *Manacher v. Gray* [1919] 1 West. Week. Rep. 505, it was held that an application to proceed, coupled with an application for possession, must be dismissed.

In *Pilkington v. Kent* (1918) — B. C. —, [1918] 3 West. Week. Rep. 584, it was held that application to proceed under the War Relief Act must be made to the court, and not to the registrar.

The War Relief Act applies only to defendants. A plaintiff may not go into court voluntarily, and then invoke the provisions of the act. *John Hing Co. v. Sit Way* (1918) 25 B. C. 153, wherein the court said: "In my opinion, § 10 of the War Relief Act, as amended by § 8 of the act of the present year, was passed for the protection of volunteers who might be made defendants in proceedings commenced by process, such as a writ, petition, or originating summons. It would be absurd to suppose that this act was intended to protect plaintiffs. The plaintiff goes voluntarily into court. If he chooses to go voluntarily into court, he must submit to any judgment which the court may make against him. The defendant, on the

other hand, does not go voluntarily into court, and he is the person sought to be protected by this section."

The act does not apply to appellate proceedings. *Bell v. Johnston* (1917) 25 B. C. 82, [1918] 2 West. Week. Rep. 549; *Shorting v. Shorting* (1918) 25 B. C. 351. In *Bell v. Johnston*, supra, it appeared that in the lower court the plaintiff recovered a judgment. The defendant appealed, and raised an objection that the plaintiff had not obtained the leave required by § 10 to proceed. The court said: "The position is, shortly, this: If you want to take the benefit of a statute, you must move in time. The benefit of a statute may be waived. Here is the defendant moving—appealing; the plaintiff is content to rest upon his judgment,—the plaintiff is not taking any step which entitles the defendant to invoke the statute." So, in *Shorting v. Shorting*, supra, the court held that where the parties voluntarily ignored the act in the lower court, on reaching the appellate court they would be deemed to have waived the provisions of the act.

And the leave to proceed, required under § 10, applies to the Dominion Winding-up Act. *Re Winding-up Act & R. Invest. Co.* (1918) — B. C. —, [1918] 1 West. Week. Rep. 779.

Section 13 of the Act provided that "notwithstanding anything contained in this or any other act, or in the rules of court, a judge of the supreme court may dispense with the restrictions, prohibitions, and conditions herein contained or any of them, and permit any act to be done, or proceedings to be taken, or any action or proceeding to be carried on at such times and upon such terms and conditions as he may think fit, as if this act had not been passed." In *McLennan v. Colpitts* (1918) 25 B. C. 459, it was held that this section could be invoked at any stage of the proceedings.

2. Persons exempted.

Whether a widowed mother of a volunteer is within the privilege and exemption of the war Relief Act depends on whether she is dependent on him for support. *Parsons v. Norris* (1917) 24 B. C. 41, [1917] 2 West. Week. Rep.

606, 33 D. L. R. 593; *North American Life v. Gold* (1917) 24 B. C. 50, [1917] 2 West. Week. Rep. 613, 34 D. L. R. 735. In *Parsons v. Norris*, supra, the court held that a widowed mother was within the act, though the proceeding was against her separate estate. In that case it was sought to enforce specific performance of a lease owned by the mother. *Macdonald, C. J. A.*, said: "Section 2 makes it unlawful to take legal proceedings against the volunteer, or his wife, or dependent, to enforce payment of the debts, liabilities, and obligations of 'any such person,' viz., the volunteer. So far, the section, on a construction of it the most favorable to the plaintiff, deals with the liabilities of the volunteer only, but protects also his wife or dependent from suit on account thereof, that is to say, the protection to the wife or dependent is merely incidental to that afforded the volunteer. In that view of it, it does not protect the wife or dependent from proceedings against either of them to enforce payment of debts of their own, with which the volunteer is in no way connected." In *North American Life v. Gold*, supra, turning on the question whether a widowed mother was within the act, *Martin, J. A.*, said: "As I read the section in question, there are under it four classes of persons who cannot be sued or otherwise proceeded against, as therein provided, viz.: (1) Volunteers, being residents of British Columbia and enlisting in the forces of Canada; (2) volunteers from Canada joining the navy or army of his Majesty or his allies; (3) wives of such persons; and (4) any dependent member of the family of any such person. There was much discussion upon the meaning of the word 'family.' It is an elastic term, having various meanings in varying circumstances, and must be considered in relation to the particular subject-matter, and I think the wider meaning should be given to it here in a case of remedial legislation of this most exceptional kind; the preamble of the act recites that 'it is desirable to pass this act for the protection and relief of all such persons and their families,' etc. . . . It is,

however, clear to me at least, with all due respect for other views, that it includes the present appellant, and I think she is entitled to the relief she asks, since she has made out a *prima facie* case of dependency."

In *Barker v. Eadie* (1917) — B. C. —, [1917] 2 West. Week. Rep. 1013, it was held that the parents of a volunteer were within the scope of the act, where it appeared that they were over middle age, and their only source of income was a salary of \$79.13 a month, except for the \$15 sent home monthly by the volunteer.

The wife of a volunteer is within the protection of the act, though she is not actually dependent on her husband for support, for "a wife gets her protection *qua* wife, and not *qua* dependent." *Mortgage Co. v. Hall* (1918) 25 B. C. 280, wherein, however, the court added, that the wife was not protected in an action against her own property.

But the widow of a soldier who was killed at the front is not within the act, though she was dependent before his death. *Anderson v. Stollery* (1918) — B. C. —, [1918] 3 West. Week. Rep. 580.

An officer is within the provisions of the War Relief Act, although, strictly speaking, he does not "enlist." *Re Smith* (1916) — B. C. —, 35 West. L. R. 332, 31 D. L. R. 702.

It seems that a person who has enlisted and has been discharged is entitled to the exemptions and privileges of the act. *Buntzen v. Hill-Tout* (1917) — B. C. —, [1917] 2 West. Week. Rep. 286, 33 D. L. R. 383. In that case it appeared that the defendant, after an action had been commenced, assigned his property for the benefit of his creditors, and enlisted in the army. It appeared that he left for overseas with his battalion, but was rejected at Montreal as being physically unfit, and given his discharge. He then moved the court to stay the proceedings against him, claiming the relief under the War Relief Act. While not dealing specifically with the question, the chief justice appeared to be of the opinion that he would be entitled to relief in view

of the fact that he had enlisted and been discharged.

In *Walker v. British Canadian Securities* (1917) 24 B. C. 119, it was held that a manager of a munition factory, who was placed in the Army Reserve, section B, was entitled to the protection of the act as long as he worked in the factory.

But the retroactive provision of the act, "If any such action or proceeding is now pending against any such person the same shall be stayed until after the termination of the war," does not operate to exempt the dependents of a volunteer. He alone comes within the exemption. *Copethorne v. Elliott* (1916) — B. C. —, 34 West. L. R. 943, 28 D. L. R. 773, wherein the court said: "The expression 'such person,' or 'such persons,' occurs in the preamble and in § 2, and clearly refers only to residents of British Columbia who have, within the terms of the act, joined the forces. The extension of protection to the 'families' or 'dependent member of the family' of such person is accomplished, both in the preamble and in § 2, by the use of express words. Section 2 makes it unlawful to bring any action or take any proceeding not only against those who have joined the forces, as understood by the act, but also against, *inter alia*, 'any dependent.' When, however, it proceeds to deal with pending actions, it stays them only against 'such person.' Assuming without deciding, for the moment, that the father here is a dependent, he can only obtain the protection of this section of the act by giving a different and much wider meaning to the expression, 'such person,' than it clearly has when used in the preamble, and in the earlier part of said § 2. The matter was made perfectly clear as to fresh actions, by using apt words and carefully enumerating the protected classes. If it was intended to make this protection retroactive, one would expect to find a like enumeration instead of the use of an expression already several times used in a sense exclusive of such classes. In view of the principle of strict construction to be applied to

retroactive legislation, I am of opinion the applicant does not fall within § 2."

However, an incorporated club is not within the exemption provided by the act, even though its members are volunteers. An incorporated club is a legal entity, and its assets are the property of the club itself, and not of the members. *Inman v. Western Club* (1918) 25 B. C. 276, 40 D. L. R. 9. In that case, the lower court held that the club was a statutory trustee of the property held in its name, and hence if its members were volunteers, the club itself was within the act. But on appeal the court said: "In my opinion, the ownership of the property is vested in the society; no individual member has any ownership, or right to ownership, in the property. The society holds it as owner, and the trusteeship that is imposed by the act is that, when owned, it shall be held for the use of the members for the time being, or they are further empowered by the act to sell or dispose of it, or exchange, mortgage, or lease, and with the proceeds acquire, other lands, etc. I do not think the word 'trustee' in the War Relief Act should be extended so as to cover a case where the member on active service has no property interest in the land; but merely an interest to have it retained as a club to which he can resort for social purposes."

The indorser of a promissory note cannot claim the benefits of the statute on the ground that an action will not lie against the surety when an action will not lie against the principal. *Royal Bank v. Gold* (1918) 25 B. C. 409, 41 D. L. R. 276, wherein the court said: "Then, with respect to the contention advanced that the appellant being a surety (although as to this and as affecting the bank the evidence is not satisfactory,—in fact, inconclusive), and the maker for whom he is surety not being capable of being proceeded against by the surety, in case he, the surety, pays the debt, that, therefore, the action is not maintainable against him, or should be stayed, is, with all deference, idle argument. The situation is not one of the bank's creation; further, it is in no way a

defense. At most, all that can be said is that the surety is prevented from bringing or proceeding with any such action until the end of the war."

In *Hunt v. Royal Bank* [1918] 2 West. Week. Rep. 547, it was held that an injunction would not be granted under the War Relief Act to restrain the defendant bank from dealing with the funds of a labor union.

3. *Conflict of laws.*

The British Columbia War Relief Act relates only to procedure, and is therefore no defense to an action in the English courts against a volunteer who enlisted in the province, and on whom service of process was made in England. *Merchants Bank v. Eliot* [1918] 1 West. Week. Rep. 698. In that case the plaintiffs conceded that the War Relief Act of British Columbia would completely debar them from commencing any proceedings against the defendants in the courts of British Columbia, but they insisted that the statute of British Columbia had no juristic relevance to a defendant on whom process was served in England, although he came from British Columbia. The court said: "The contracts in the present case are valid according to the law of British Columbia; they are valid by English law; hence it is my prima facie duty to enforce them against the defendant at the plaintiff's suit. But before doing so it is essential to consider the true effect of the British Columbia Act of 1917. Is it a mere procedure act, or does it go to the substance of the parties' contractual rights and obligations? If it be but a procedure act, then it cannot avail the defendant. . . . Upon considering the British Columbia act I am bound to hold that it is an act of procedure only; it does not invalidate any bargain; it does not limit any contractual rights; it does not affect the substance of any agreement; it merely precludes the creditors from commencing legal proceedings. Nor is the preclusion absolute, for, by § 13 of the act, discretionary jurisdiction is vested in the British Columbia courts to dispense with the prohibition of the act, and to permit any action to be commenced in special

circumstances on such terms as the court may impose. . . . I conceive that the War Relief Acts of British Columbia were passed under the powers conferred by § 92 of the Act of 1867. They are, I think, procedure acts. The Act of 1917 does not purport to destroy or postpone obligations—the obligations remain,—but there is a prohibition of access to the courts without special leave, for the purpose of enforcing them. I observe that § 2 of the Act of 1917 prohibits any person from taking proceedings in the cases mentioned, either in any of the civil courts of the province or outside of such courts. It is unnecessary to determine in this action the important question which arises on the words 'outside of such courts.' It will suffice to say that any such prohibition does not include the English courts, for it is clear that the jurisdiction of the province of British Columbia is a territorial jurisdiction only."

c. Manitoba.

1. Act respecting contracts relating to land.

(a) Scope of act.

The first moratory act passed in Manitoba as a result of the World War was entitled "An Act Respecting Contracts Relating to Land," and was assented to on September 18, 1914.

In *Ronald v. Lillard* (1915) 25 Manitoba L. R. 393, 7 West. Week. Rep. 1128, 23 D. L. R. 392, the court said, "Unusual financial conditions, attributed mainly to the war in which our country, in common with the motherland, is now engaged, was the reason for the passing of such drastic legislation. Its object seems to have been to protect men against losing their land upon which they had given mortgages, or which they had acquired by purchase upon terms of credit, and were unable to pay for in consequence of temporary financial inability brought about by war conditions."

In *Chapman v. Purtell* (1915) 25 Manitoba L. R. 76, 22 D. L. R. 860, it was said: "It seems to me that the whole scope of this act, including its title, indicates that the legislature was dealing with mortgages, agree-

ments, and other instruments creating rights against land by the act of the parties themselves, and not with rights which owe their existence to operation of law alone. To interpret the act otherwise would, in my opinion, be giving it a very wide and not a strict construction, as the law requires."

The act applies only to lands within the boundaries of Manitoba. *Stanley v. Struthers* (1915) — Manitoba, —, 7 West. Week. Rep. 1060, 22 D. L. R. 60.

(b) Effect on pending suit.

The case of *Fisher v. Ross* (1914) 24 Manitoba L. R. 773, 19 D. L. R. 69, was pending when the Act of 1914 was passed. The question presented was, To what relief, if any, were the plaintiffs entitled, with regard to the provisions of the act? It appeared that the defendant agreed to purchase certain lands from the plaintiffs. It was agreed that a certain amount should be paid annually. It also appeared that the defendant assumed two mortgages, and covenanted to pay the taxes and insure the buildings on the land. It was further provided that in the event of any default in any of the payments assumed, the remaining unpaid amount should immediately fall due. The plaintiffs alleged a default in the payment of the principal and interest, and claimed: (a) specific performance; (b) payment of all amounts due for principal and interest; (c) in default of payment, that the agreement be canceled, and the mortgage foreclosed of all equity of redemption; (d) and that the defendant be ordered to deliver up possession of the land. The court held that the plaintiffs were entitled to judgment for the principal, interest, and taxes, and ordered a foreclosure of the mortgage in the event of nonpayment of the judgment within a year after the master's report. In construing § 4 (set out *infra*), dealing with the personal remedy for the recovery of payment, the court said: "The first clause of this section need not be considered, as it relates to actions not yet commenced. The second clause applies to actions pending, but 'wherein final judgment has not

been entered before the said 1st day of August, 1914.' Suppose a case in which final judgment was entered on July 31st; the act does not appear to affect such a case at all. Suppose another case in which final judgment was entered on August 1st; all proceedings upon the judgment are stayed for six months from the coming into force of the act, namely, September 18th, if the judgment recovered includes the principal money secured by such instrument, or any portion thereof. Section 4 prohibits proceedings to enforce any judgment which may be recovered after August 1st, but does not appear to interfere with the entering up of judgment." Construing next § 3 (set out *infra*), dealing with the right to foreclosure, the court said: "If the first clause of the section had been limited to actions not yet commenced, as is the case with § 4, I should have to hold the section inapplicable, because, although the action is pending, no time has yet been fixed for redemption. But there appears to be no such limitation. The words are: 'In all actions for the redemption of land, foreclosure, etc. . . . the period to be allowed for redemption . . . shall be one year.' I think these words apply to all actions, whether pending or not at the date of the act." Dealing next with § 5, set out *infra*, the court said: "This clause manifestly stays all pending proceedings for the recovery of possession until after the lapse of six months from September 18th." And further, dealing with the claim for interest under § 4 (a) of the act (set out *infra*), the court said: "The language employed by the legislature in §§ 3 and 4 is far from clear, but § 4 (a), at least, allows actions to be brought upon covenants or agreements for the payment of interest on unpaid principal, and for taxes, and premiums of insurance. Even this clause is ambiguous to this extent that, while it provides that actions may be brought, it says nothing about actions now pending, of which there are a great number already before this court. Bearing in mind that the act operates as an interference with

the legal rights of persons, I think it ought to be construed in such a manner as to minimize the hardship imposed upon those who are legally entitled to their money. No good reason can be suggested for allowing persons to bring an action for interest, and yet denying this relief to those who have already brought their actions. I would, therefore, construe § 4(a) as applying to pending as well as future actions. But it will be necessary to sever the interest from the principal. I see no reason why this should not be done. . . . The plaintiffs were quite within their rights when they commenced this action, and relied upon the acceleration clause in their agreement. The legislature has intervened and stayed proceedings as far as regards the principal money, but it expressly authorized the plaintiffs to recover their interest. The amount due for interest, taxes, and costs can readily be ascertained by a reference to the master."

To the same effect, see *United Investors v. Gaynor* (1914) 24 Manitoba L. R. 781. See also *Armstrong v. Siebels* (1914) 24 Manitoba L. R. 782.

(c) *Effect on contract.*

(1) *Right of action for foreclosure.*

Section 2 of the Manitoba act provided as follows: "No proceedings for the sale of any land for default in payment of moneys due thereon shall take place until after the lapse of six months from the 1st day of August, 1914, if such default took place on or before that date, or until the lapse of six months from the happening of such default if the same took place after the said 1st of August, 1914, or after the coming into force of this act, and any such proceedings now pending are hereby stayed until after the lapse of six months from the said 1st of August, 1914, or six months from the date of default if such default took place since the said 1st day of August, 1914."

Under this section, it has been held that a registered judgment is not a contract within the meaning of the act. *Chapman v. PurteLL* (1915) 25 Manitoba L. R. 76, 22 D. L. R. 860, wherein

the court said: "If an action to sell land under a registered judgment is stayed by the first part of § 2, it must be because such a judgment is either a 'mortgage of land,' or an 'agreement to purchase land,' or another 'instrument charging land with the payment of money.' Obviously, I think, a registered judgment is not a 'mortgage of land,' or 'an agreement to purchase land,' within the meaning of the act. If covered by the act at all, it must be because it comes within the words 'other instrument.' The general rule of construction is that a general word which follows particular and specific words of the same nature as itself takes its meaning from them, and is presumed to be restricted to the same genus as those words; or, in other words, as comprehending only things of the same kind as those designated by them, unless, of course, there is something to show that a wider sense was intended. Maxwell, Interpretation of Statutes, 5th ed. p. 538. A judgment in its widest sense is an 'instrument;' but is it an instrument of the same genus as a mortgage of land or an agreement to purchase land? Both of those instruments come into existence by agreement of the parties, but that is not the case with a judgment, which comes into existence by the action of a court, and, in the great majority of cases, contrary to the will of one of the parties at least. But it may be said that when a certificate of the judgment is registered, from that time the judgment binds and forms a lien and charge upon the lands of the judgment debtor 'the same as though charged in writing by the judgment debtor under his hand and seal.' The 'instrument' referred to in § 2 is one which, by virtue of a 'provision' contained in it, forms a charge upon land. A judgment for the payment of money contains no such provision, neither does the certificate which is registered. The charge arises not because of any provision in either the judgment, the certificate, or the memorandum of registration made by the registrar, but by virtue of the artificial effect which the statute gives the judgment in con-

sequence of the registration of the certificate. Without the statute the registration of a certificate of the judgment would be ineffectual to create a charge upon the debtor's lands. It requires the concurrence of the three things, the judgment, the certificate and its registration, plus the statute, to obtain that result. An involuntary charge upon land which comes into existence in this way, and is indebted for its effect and operation to such a combination of circumstances, is, to my mind, not an 'instrument' at all, much less is it an instrument of the same kind as a mortgage of land or agreement to purchase land, as these terms are used in § 2 of the act."

But compare the earlier cases of *Ledoux v. Cameron* (1915) 25 Manitoba L. R. 71, 7 West. Week. Rep. 687, 30 West. L. R. 774, 21 D. L. R. 864, and *Slobodian v. Harris* (1915) 25 Manitoba L. R. 74, 7 West. Week. Rep. 1017, 30 West. L. R. 381, 21 D. L. R. 75, wherein it was held that a registered judgment is a "contract," within the meaning of § 6 of the Moratory Act, which provides that "nothing in this act shall apply to proceedings or the rights of the parties under any mortgage, agreement of sale, or other contract made or entered into after the 31st day of July, 1914."

In *Ledoux v. Cameron*, *supra*, the court said that a judgment in itself did not bind any interest in land, and it is only when a certificate is registered that it becomes a lien or charge on the land, and is made so by statute, independent of any agreement between the parties.

In *Slobodian v. Harris*, *supra*, the court said: "Can it be said that a registered judgment is a 'contract?' Under §§ 215 and 216 of the County Courts Act, a registered judgment binds and forms a lien and charge on all the lands of the judgment debtor, the same as though charged in writing by the judgment debtor, under his hand and seal, with the amount of the judgment. In my opinion, a registered judgment, under the provisions just mentioned, becomes a contract, and the case thus falls within the excep-

tion provided for in § 6 of the Moratory Act."

But § 2 does not affect the power of the court to enforce an equitable right by a sale of the land; and the enforcement of a vendor's lien for the whole of the purchase price, nothing having been paid, is not affected by the act. *Ronald v. Lillard* (1915) 25 Manitoba L. R. 393, 23 D. L. R. 392, wherein the court said: "Section 2 of the Moratory Act prohibits proceedings for the sale of any land under any power of sale contained in any mortgage of land, agreement to purchase land, or in any other instrument charging land with the payment of money, or otherwise existing, for default in payment, etc. What do the words 'or otherwise existing' mean? I think they mean this, at all events, that the power of sale so 'otherwise existing' must be a power existing under some authority before the proceedings are taken, and that it does not include the exercise of the power of the court to enforce by sale of land an equitable right conferred by law. The act interferes with contract rights, and is in derogation of such rights. Its scope ought not to be extended beyond what the wording of the statute makes perfectly clear.

. . . It is true there is only one exception in § 2 from the inhibition, namely, liens under the Mechanics' & Wage Earners' Lien Act. Such liens were expressly created by statute for the protection of certain classes of persons. Why this exception was deemed necessary in the act, I do not know, unless the words 'or otherwise existing' were inserted with the intention of extending the operation of the act to every description of lien, however arising, created, or declared, and hence to mechanics' liens also. If this be so, then doubtless the act does prevent the enforcement of a vendor's lien for unpaid purchase money. I do not hold this view, or so construe the act, and I think that the enforcement of a vendor's lien, arising as in this case for the whole of the purchase price, nothing whatever having been paid, is not interfered with by the act,

and must be given effect to in the usual way."

The Act of 1914, respecting contracts relating to land, was amended on April 1, 1915, by an act also known as "An Act Respecting Contracts Relating to Land." Under the amending Act of 1915, § 3 substitutes a new section for the former § 2 of the Act of 1914. It declares that in the case of mortgages of land, or agreements to sell land, no action or proceeding for foreclosure or sale shall be taken by or on behalf of the mortgagee, vendor, or other person to whom such money may be payable, until after some interest, or taxes, or premium of fire insurance, or money paid for such taxes or premium, is unpaid and in arrear for one year, or, in case no interest is payable under such instrument, then until some instalment of principal is overdue for one year. A new section (7) was added which provides as follows: "As soon as the period has elapsed during which any action or proceeding mentioned in § 3 of this act may not be commenced, the same or any other action or proceeding may be continued, or commenced and continued in all respects as if neither said act nor this act had been passed." In remarking on the purpose of the act in *Campbell v. Roubert* (1915) — Manitoba, —, 9 West. Week. Rep. 855, 25 D. L. R. 652, *Perdue, J. A.*, said: "The object of the act and the amending act was to give mortgagors and purchasers of land further time to fulfil their obligations. The amending act prevents proceedings on mortgages and agreements of sale until after some interest, or taxes, or premium of insurance 'is unpaid and in arrear for one year,' and if there is no interest payable, then until some instalment is overdue for one year. In the case of agreements such as the one in question, the act gives to the debtor an extension of time covering a period of one year from the date of his default in paying interest, taxes, or insurance. When that period elapses, the restriction that was placed upon the taking of proceedings by the mortgagee or vendor is removed."

The extension of time under the Act of 1914 constituted a vested right, and the second act did not operate to divest the mortgagor of that right. *Re Real Property Act (1915)* — Manitoba, —, 31 West. L. R. 966, 22 D. L. R. 921, wherein the court said: "With respect to the second moratorium.

. . . I would only say that the extension of time which the defendant derived under the first act seems to me to constitute a vested right which the second act, even in its aspect of a repealing statute, does not do away with."

The case of *Campbell v. Roubert* (1915) — Manitoba, —, 9 West. Week. Rep. 855, 25 D. L. R. 652, affirming (1915) 9 West. Week. Rep. 175, 32 West. L. R. 444, arose under the sections added in 1915. In that case the defendant contended that, although she allowed the whole period of one year to elapse after her default in paying the 1913 taxes, the restriction against bringing an action revived as soon as she paid the taxes. The court said: "It seems indisputable that when the year had elapsed the plaintiff had a right to sue not for the arrears of taxes only, but for his whole claim on the agreement. The restriction upon bringing an action had run its course and was at an end. There is nothing in the statute enabling the debtor to revive the restriction by paying the taxes. The period during which all the plaintiff's rights were suspended in this case was measured by the period of a year from the default in respect of the taxes. When the period prescribed had elapsed and the plaintiff's right of action had revived, there is no power conferred on the defendant to give herself another period of a year by paying the taxes in arrear. Section 7, I think, was intended to make this clear. As soon as the period has elapsed during which any action or proceeding mentioned in § 3 of this act may not be commenced, . . . any . . . action or proceeding . . . may be commenced and continued in all respects as if neither said act nor this act had been passed. Applying this to the present case, the period had elapsed during

which an action might not have been commenced; then an action might be commenced and continued as if the acts had not been passed. The extension of time given by the statute had to be measured from some point of time. The point chosen was that when a default was made in paying interest, or taxes, or insurance. Then, when a year had run without the default being made good, the period of extension would have lapsed and the operation of the statute would have ceased. I think the proper interpretation is that when once the right of action is restored, there is nothing in the act which again takes it away." In a concurring opinion, Haggart, J. A., said: "The sole question here is the interpretation to be given to § 2 of chap. 1, of the Statutes of Manitoba, passed in 1914, as amended by chap. 10, passed by the legislature in 1915, and also § 7 of the latter or amending act. Eliminating portions of § 2, the text to be considered is as follows: 'No action or proceeding . . . for foreclosure or sale . . . shall be taken by or on behalf of the . . . vendor . . . until after some interest or taxes . . . is unpaid and in arrear for one year.' If this section alone governed the rights of the parties, then I would hold that the conditions for continuing the absolute stay of proceedings had not only arisen, but continued to exist, and did exist when this action was commenced. But § 7 has to be interpreted. It is peculiarly worded. The text is as follows: 'As soon as the period has elapsed during which any action or proceeding mentioned in § 3 of this act may not be commenced the same or any other action or proceeding may be continued, or commenced and continued in all respects as if neither said act nor this act had been passed.' This certainly limits the signification of the former § 2 in the original act, and § 3 in the amending act, and applies to the question before us. 'The same or any other action or proceeding may be continued, or commenced and continued . . . as if neither the said act nor this act had been passed.' If what was given by the former section to the

debtor was as I have above indicated, then it was taken away by this § 7."

In *Holmes v. Barnett* (1917) 27 Manitoba L. R. 558, Mathers, Ch. J., referred to a yet later act, saying: "[But] in 1916 a declaratory act, chap. 21 of that year, was passed. As I understand it, this latter act was passed primarily to overcome the difficulty pointed out in *Campbell v. Roubert*, supra. . . . It says that notwithstanding anything contained in either of the acts mentioned in the title to this act, it is hereby declared that the payment, before the commencement of any action or proceeding under any of the instruments referred to in said acts, of interest . . . so as to leave no such interest . . . more than one year in arrear and unpaid shall restore to the person making such payments . . . the protection of the said acts until some interest . . . is again in arrear and unpaid for one year; also that, upon payment after the commencement of any action or proceeding, whether now pending or hereafter brought, of all interest . . . so as to leave no interest . . . more than one year in arrear and unpaid . . . further proceedings in any such action or proceeding shall be stayed until some interest . . . is again in arrear and unpaid for one year. The acts mentioned in the title are the Moratorium Act of 1914 and the amending Act of 1915, already mentioned. Plainly the above-quoted section is intended to deal with some provision in the former acts which permits actions to be brought or proceedings taken after, and only after, default in the payment of interest, etc., for one year. It does not purport to deal with provisions under which proceedings may be taken immediately after default, and it does not expressly repeal subsec. (a) of § 4 of the Act of 1915, under which an action for interest may be brought immediately after default, subject to the right of the party liable, to show that the rentable value for the period covered was less than the interest claimed. As that subsection is not expressly repealed, I must assume that the legislature did not intend to repeal it, un-

less the language used cannot otherwise be given its proper operation. There is no doubt a presumption that the legislature did not intend to keep really contradictory enactments in the statute book, but, on the other hand, it is equally to be presumed that it did not intend to effect so important a measure as the repeal of a law without expressing an intention to do so. In such a case the rule is that the later act must be so construed, so far as possible, as to be consistent with the earlier enactment, and not that it was intended to repeal it, unless such an interpretation is inevitable. Any reasonable construction which offers an escape from holding that the one is contradictory of the other is more likely to be in consonance with the real intention. Section 2 of the earlier act deals with sale or foreclosure, and provides that no such proceeding shall be taken until after some interest, etc., is unpaid in arrear for one year. *Campbell v. Roubert*, supra, decided that when interest, etc., was allowed to fall into arrear for more than a year, the protection of the statute was lost, and was not revived by the payment of the excess over a year before action."

By § 3 of the Act of 1914, dealing with the right to foreclosure, it was provided as follows: "In all actions for the redemption of land or any mortgage or charge thereon and in all actions or proceedings, whether before a court or a district registrar, foreclosure or sale of land under any instrument referred to in § 2 hereof, the period to be allowed for redemption, whether by the court or by the master on a reference or by the district registrar, shall be one year, and in all pending actions for such redemption, foreclosure or sale, in which the time fixed for redemption is after the 31st day of July, 1914, the same is hereby extended for one year from the date so fixed for redemption, and no final order for foreclosure or sale shall be made in any such action until after the lapse of such extended period."

That section has been held to apply only to actions on such "instruments"

as are referred to in § 2. Per Mathers, Ch. J., in *Chapman v. Purtell* (1915) 25 Manitoba L. R. 76, 7 West. Rep. 1155, 22 D.L.R. 860.

In the case of *Re Real Property Act* (1915) — Manitoba, —, 31 West. L. R. 966, 22 D. L. R. 921, it was held that a memorandum sufficient to satisfy the Statute of Frauds as an "agreement to purchase" constituted an "agreement for sale" within §§ 2 and 3 of the act. The court said: "As to whether there is in this case an instrument within § 3, and whether, as required by the reference in this § 3 to § 2, the instrument was an agreement to purchase, is a matter of great doubt in my mind. There seems to be an instrument consisting as a whole of the several writings signed by the plaintiff, and which would probably constitute a sufficient memorandum to satisfy the Statute of Frauds in an action brought against him. But whether those writings, none of which are signed by the defendant, constitute an agreement to purchase under said §§ 2 and 3, is a much more difficult and uncertain question. At the same time, when an agreement for sale is executed by the vendor only, the purchaser, although not binding himself in any way, is nevertheless truly and really a party to it. The obligation to sell which the vendor assumes at once gives rise to a corresponding right which immediately vests in the purchaser. True, as a unilateral contract it binds only one; but it really and truly changes the legal status of the purchaser as well as of the vendor, without which it would not be a contract at all. In this sense, it may be said that an agreement for sale implies an agreement to purchase. This may, perhaps, appear doubtful, and may not commend itself as a warranted departure from the golden rule of interpretation. But to hold a different view in the matter is to be confronted with still greater difficulties; as what appears to be the general scheme of the act would then be so much disturbed, without there appearing any substantial reason why such distinction should have been intended. In short, the spirit of the act seems to

9 A.L.R.—5.

require, in my opinion, that the words 'agreement to purchase' should be taken to include an agreement for sale. It may also be observed, as perhaps of some significance, that the new § 2 of the first moratorium, as re-enacted by the last act, contains the words, 'agreement to sell or purchase,' in lieu of 'agreement to purchase,' as it stood before."

(2) *Right of action to recover payment.*

Section 4 of the Act of 1914, dealing with the personal remedy for the recovery of a payment, provided as follows: "No action shall be brought to enforce a covenant or agreement to pay money contained in any such instrument, except as hereinafter provided, until after the lapse of six months from the happening of the default in payment giving rise to such action, and proceedings to enforce payment by writ of execution or registration of certificate of judgment in any such action now pending, wherein final judgment has not been entered before the said 1st day of August, 1914, are hereby stayed for a period of six months from the coming into force of this act if the judgment recovered includes the principal money secured by such instrument or any portion thereof."

It has been held that the foregoing section did not affect the right of a plaintiff to recover on an agreement providing that the purchase price should be paid from the proceeds of one half of the whole crop grown each year. *Haight v. Davies* (1915) 25 Manitoba, L. R. 187, 22 D. L. R. 507, wherein the court said: "I accordingly hold that § 4 of the Moratorium Act does not affect the plaintiff's rights. But § 3 of the act contains the following provision applicable to the circumstances of this case, and in all pending actions for such redemption, foreclosure, or sale, in which the time fixed for redemption is after July 31, 1914, the same is hereby extended for one year from the date so fixed for redemption, and no final order for foreclosure or sale shall be made in any such action until after the lapse of such extended period. The plaintiff

is entitled to immediate payment for his principal, interest, and costs, but no final order for foreclosure, nor for removal of caveat, can be made until after the lapse of a year from January 2, 1915."

A covenant concerning instalment payments, contained in an assignment, to the effect that the vendee, in case of default, will pay the money due to her assignee, is not within the act, and hence the assignee is entitled to his action. *Vivian v. Strain* (1916) — *Manitoba*, —, 9 West. Week. Rep. 1174.

(3) *Right to interest.*

Section 4 (a) of the *Manitoba* act respecting contracts relating to land provided as follows: "Notwithstanding anything contained in this section, actions may be brought upon covenants or agreements for the payment of interest on unpaid principal at the rate specified in any such instrument or of taxes or premiums of insurance on buildings on any such land as soon as the same shall be in arrear, and, upon the recovery of judgment in any such action, a writ or writs of execution against the goods of the defendant may be issued and enforced, but no certificate of the judgment shall be issued or registered against any lands of the defendant, until after the lapse of six months from the date of such judgment."

Galt, J., in *Fisher v. Ross* (1914) 24 *Manitoba L. R.* 773, 7 West. Week. Rep. 359, 19 D. L. R. 69, said that under this section "it will be necessary to sever the interest from the principal. I see no reason why this should not be done."

In *Maxwell v. Cameron* (1914) — *Manitoba*, —, 7 West. Week. Rep. 365, 20 D. L. R. 71, it was held that, under the act, a plaintiff was entitled only to the relief asked for. In that case the plaintiff made no claim for either principal or interest.

(4) *Right to possession.*

Section 5 of the Act of 1914, dealing with the right to the possession of land, provided as follows: "Notwithstanding any provision contained in any such instrument, no action or pro-

ceeding in court for the recovery of possession of the land charged by any such instrument shall be brought or taken until after the lapse of six months from the happening of default in payment of any of the moneys secured thereby; and, if any such action or proceeding be pending at the time of the coming into force of this act, the same shall not be proceeded with or continued until after the lapse of six months from the said last-mentioned date, nor shall any order or judgment for the recovery of possession of any of such land, made after the 31st day of July, 1914, and before the coming into force of this act, be enforced by any writ or order or other process of any court until after the lapse of six months from the date thereof."

In *Fisher v. Ross* (1914) 24 *Manitoba L. R.* 773, 19 D. L. R. 69, the court said: "I think this section ought to be construed as being intended to deal only with a claim to possession, and that it leaves untouched any personal or other remedies sought in the action, which are dealt with in the earlier sections of the act."

By the amending act, assented to April 1, 1915, § 5 was amended to read as follows: "Notwithstanding any provisions contained in any such instrument, no action or proceeding in court for the recovery or possession of the land charged by any such instrument shall be brought or taken until after the lapse of the period provided in § 2 of the said act."

In *Harris v. Dalgleish* [1917] — *Manitoba*, —, 8 West. Week. Rep. 439, 37 D. L. R. 194, it was held that the protection afforded by this section is against default in the payment of money, and that there is no protection for the purchaser where he is guilty of breaches other than the payment of money. The court said: "The failure to hand over the crop or the proceeds thereof by the purchasers, as provided for by subsec. (a) of § 4, would entitle the vendor to an action in damages for breach of covenant, but would not entitle her to possession by reason of such breach."

2. War Relief Act.**(a) Generally.**

The Manitoba War Relief Act was enacted in 1915, subsequent to the acts respecting contracts relating to lands, discussed in the preceding subdivision. This act introduced for the first time a provision exempting volunteers in the armed forces.

In *Shipman v. Imperial Canadian Trust Co.* (1916) — Manitoba, —, 35 West. L. R. 297, 31 D. L. R. 137, the court said: "The statute . . . is entitled 'An Act for the Protection of Volunteers Serving in the Forces Raised by the Government of Canada in Aid of His Majesty and Other Persons.' The preamble recites the existence of the war, that a large number of residents of Manitoba have volunteered to serve in the forces raised by the government of Canada, or left Canada to join the armies of his Majesty and of his allies, and that it was desirable to pass the act for the protection and relief of all such persons and their families from proceedings for the enforcement of payment by all such persons of debts, etc., and for the enforcement of all liens, etc., and for depriving them of the possession of any or all goods and chattels, lands, and tenements during the continuance of the war. The expression 'all such persons,' where it occurs in the second place, naturally means the persons indicated by the same expression where it is first used, and there the persons indicated are those which have either joined the Canadian forces or the forces of the Allies."

The act refers to contracts only. Hence a stay of proceedings will not be granted in an action of tort. *Stokes v. Leavens* (1918). 28 Manitoba L. R. 479, 40 D. L. R. 23, wherein the court said: "The cause of action in this case is not a 'debt.' Neither can it be included in the term 'obligation,' which refers to something in the nature of a contract, such as a covenant, bond, or agreement. It would therefore, if at all, have to be included in the meaning of the word 'liability.' The statute speaks of an action or proceeding for the 'enforcement of payment' of a liability. This implies that there is

an existing liability, payment of which may be demanded and enforced. But in a pure action of tort like this there is no liability to pay on the part of the defendant, until a verdict has been found and the damages have been assessed. I think the act refers only to matters arising out of contract. If the intention of the legislature was to stay proceedings in actions of tort, it would have expressed that intention in clear words."

Section 5 of the War Relief Act provided as follows: "In case any person against whom any action or proceeding is prohibited or stayed by this act, is, or would be, according to law or practice, a necessary party to any action or proceeding against any other person or persons, such action or proceeding may, notwithstanding anything in this act, be commenced and carried on as between such other person or persons and the party or parties commencing or carrying on such proceeding," etc. Section 5 is further amended by chap. 122 of "An Act to Amend the War Relief Act" (1916), as follows: The provisions of this section shall not apply to the case of joint debtors who were such August 1, 1914, one of whom is a person for the benefit of whom this act was passed, but, in such case, the provisions of § 2 hereof as amended shall apply for the relief of all the joint debtors and dependent members of their families.

In *Harris v. Dalglish* (1917) — Manitoba, —, [1917] 3 West. Week. Rep. 439, 37 D. L. R. 194, it was held that an action was barred against one of two joint purchasers, where it appeared that the agreement was entered into prior to August 1, 1914.

(b) Persons exempted.

Section 2 of the Act of 1915 (chap. 88) provided as follows: "During the continuance of the said war it shall not be lawful for any person or corporation to bring any action or take any proceeding, either in any of the civil courts of this province or outside of such courts, against a person who is, or has been at any time since the 1st day of August, 1914, a resident of Manitoba, and has either enlisted and been mobilized as a volunteer in the

forces raised by the government of Canada in aid of his Majesty in said war or has left Canada to join the army of his Majesty or of any of his allies in the said war as a volunteer or reservist, or against the wife or any dependent member of the family of any such person, for the enforcement of payment by any such person of his debts, liabilities and obligations existing or future, or for the enforcement of any lien, encumbrance or other security, whether created before or after the coming into force of this act, or for the recovery of possession of any goods and chattels or lands and tenements now in his possession or in the possession of his wife or any dependent member of his family, and, if any such action or proceeding is now pending against any such person, the same shall be stayed until after the termination of the said war."

In *Shipman v. Imperial Canadian Trust Co.* (1916) — Manitoba, —, 35 West. L. R. 297, 31 D. L. R. 137, the court said: "[Section 2] shows that the act is intended to protect the property of two classes of persons: First, residents of Manitoba who have enlisted or have been mobilized as volunteers in the forces raised by the government of Canada; second, residents of Manitoba who have left Canada to join the army of any of his Majesty's allies as volunteers or reservists. The 'other persons' referred to in the title of the act may be identified as those of the second class, that is, persons who have gone to join the army of any of his Majesty's allies. The protection granted is that during the continuance of the war it shall not be lawful to bring any action or proceeding against any person belonging to either of these two classes, or against his wife or any dependent member of his family, for the enforcement of payment by any such person of his debts, etc., or for the enforcement of any lien, encumbrance, or other security, or for the recovery of any goods, chattels, lands, etc., now in his possession, or in the possession of his wife or any dependent member of his family."

However, the exemption does not ex-

tend to the wife to protect her against suits to enforce payment of debts of her own creation. *Shipman v. Imperial Canadian Trust Co.* supra, wherein the court said: "There is nothing in the clause which protects the wife of any such person against suits to enforce payment of debts of her own creation. There is nothing which expressly protects the wife against proceedings to enforce payment of encumbrances upon her separate property. Down to the portion of the section which commences with the words, 'or for the recovery of possession,' it seems clear that the protection granted is the prohibiting of proceedings against a person belonging to either of the two classes mentioned, for the enforcement of payment by 'any such person of his debts, liabilities, and obligations,' or for the enforcement of any lien, encumbrance, or other security, existing, as we must assume, against his property. The expression, 'or for the recovery of possession of any goods and chattels or lands and tenements now in his possession or in the possession of his wife or any dependent member of his family,' must refer to goods and chattels and lands and tenements which are the property of the person previously referred to, and included in one or other of the protected classes. The expression refers to chattels or lands in the possession of his wife. These may be his property, but in her possession. The section nowhere mentions property belonging to the wife. If the intention was to prohibit proceedings against her or her property, it should have been so expressed. It is argued that the including of the wife and the dependents of the volunteer in the prohibition against suits or proceedings for any of the purposes mentioned shows that the intention is to afford protection to the wife and dependents. With this I quite agree. The volunteer can, under the protection given by the act, leave his wife or his children in possession of his house or his farm, and no action or proceeding can be brought against them or any of them to turn them out of possession. So, also, his goods, chattels,

implements, tools, etc., may be left by him in the possession and use of his wife or family, and they will be protected by the statute against any proceedings on the part of any lienholder or chattel mortgagee. If he has made a voluntary conveyance of his property to his wife, no creditor can bring suit to set it aside. In such a case the suit would regularly be brought against her, and the husband would not be a necessary party. These instances sufficiently indicate the nature of the protection given to wives and dependents. To explain the presence in the section of the words 'wife or any dependent member of the family of any such person,' it is enough to show that some of the actions or proceedings prohibited might be taken against the wife or dependent member of the family without the husband being made a party. It is not necessary to make the words referable to all the actions and proceedings against which the enlisted person is protected."

Neither does the exemption extend to protect the wife against separate proceedings to realize an encumbrance against her separate property. *Palmason v. Kjærsted* (1918) 28 Manitoba L. R. 429, [1918] 1 West. Week. Rep. 607, 39 D. L. R. 237, affirming [1917] 3 West. Week. Rep. 312, 36 D. L. R. 448, wherein the court said: "The land was neither in the possession of the appellant nor her husband when the act came into force, but in the possession of the respondent. She cannot, therefore, invoke the benefit of its provisions."

The War Relief Act was held, in *Canadian Credit Men's Trust Assn. v. Anderson* (1917) — Manitoba, —, 37 D. L. R. 805, not to afford relief to the maker of notes given as collateral for the purchase of property, on the theory that the real undisclosed purchasers were the sons of the maker, who had enlisted for the war, the latter not being parties to the action, and extrinsic evidence not being admissible to show that the defendant signed the notes as a trustee only for the sons.

In *Douglas v. O'Brien* (1917) 27

Manitoba L. R. 46, it was held that a resident of another province, who came to Manitoba for the purpose of enlisting in the armed forces, was not entitled to the privileges and exemptions of the Manitoba War Relief Act. The court said: "O'Brien, up to a few weeks ago, was domiciled in and a resident of the province of Saskatchewan. He left his home there and came to Winnipeg with the intention of enlisting in the forces raised by the government of Canada, in aid of his Majesty during the present war, and did so enlist within a couple of days after his arrival here. He claims that this constitutes him a resident of Manitoba, and as such entitled to the benefit of the act. The authorities upon the meaning of the word 'resident' appear to me to be against this contention. . . . 'The actual place where he is, is prima facie to a great many given purposes, his domicile. You encounter that if you show it is either constrained, or from the necessity of his affairs, or transitory; that he is a sojourner; and you take from it all character of permanency.' It seems to me, therefore, that the defendant was a mere sojourner or visitor here at the time he enlisted, and could not be said to be a resident of Manitoba within the meaning of the War Relief Act."

In *First Nat. Invest. Co. v. Oddson* [1919] 3 West. Week. Rep. 591, it was held that the act did not prevent an action being brought to recover the possession of goods or chattels or lands and tenements from a volunteer; that the protection in such a case was extended to the wife, only if dependent, or members of his family, if dependent.

(c) *Payment of rent by mortgagor.*

In 1917, a new section (12) was added to the War Relief Act, which enabled a judge to order that rent should be paid to the mortgagee in a case where the tenant claimed the privileges of the act. In *Gregory v. Nicholson* (1917) — Manitoba, —, [1917] 3 West. Week. Rep. 8, 35 D. L. R. 565, the court said: "The provisions of the War Relief Act before the amendment, while affording protec-

tion to a deserving class of persons, were capable of being abused and made the instruments of great injustice. 'No better instance of this could be found than the case we are now considering. Nicholson claimed the protection of the act, and declined to pay any rent for the hotel premises he occupied under his lease. The shops on the ground floor, which were not used as part of the hotel, had been sublet by him to tenants, and the rents from these amounted in the aggregate to \$850 a month. These rents he was collecting and retaining instead of applying them in paying the rent and taxes for which he was liable under his lease. The amending act was passed for the purpose of providing a remedy in cases where the provisions of the original act might be capable of working a hardship or injustice. It should, therefore, receive a liberal construction."

So, in *Patterson v. Wickson* (1916) — *Manitoba*, —, [1916] 10 West. Week. Rep. 875, it was held that the judge had the power to order the payment of the rents to the mortgagee, even though the tenant was a person within the act. It was said, however, that the order was not necessarily final. "The effect of chap. 23 of the Statutes of 1916 is to stay the action until some interest, taxes, or premiums of insurance are again in arrear and unpaid for one year."

In 1918, an amendment was added (§ 10) to enable a vendor or mortgagee to claim and recover the rents or rentable value of the land to the extent of the interest due. In *Jameson v. Moore* [1919] 2 West. Week. Rep. 49, it was said that "if the property sold or mortgaged has a rental value, or vendor or mortgagee has a right to such rent, and the maximum amount that can be collected as rent shall not exceed the interest due, but if the rental value is less than the interest due, then such vendor or mortgagee is entitled to the actual rental value, and rental value under § 10 shall be recoverable from the person liable to pay the same."

As a general rule the act must be specially pleaded, but under some of

its sections, since a party's rights are wholly extinguished, different considerations apply. In *Great West Life Assur. Co. v. Howden* (1917) — *Manitoba*, —, [1917] 1 West. Week. Rep. 1531, 35 D. L. R. 617, the court said: "The question as to whether the Moratorium Act is applicable to litigants who have not pleaded it does not appear to have been made the subject of any reported judgment in our courts. It is an important and intricate question; important because it applies to so many cases in practice, and intricate because some of the provisions of the act expressly alter the existing law, while others merely provide a ground of defense if a party chooses to rely upon them. Take, for instance, § 3 of the original act passed on September 18, 1914 (re-enacted by § 4 of the act passed on April 1, 1915); —the period to be allowed for redemption, whether by the court or by the master on a reference, is fixed at one year, whereas formerly this period was usually fixed at three months. Then again, under § 4 of the earlier act (re-enacted by the Act of 1915 with a variation), 'proceedings are hereby stayed for a period of six months.' These provisions, and perhaps other ones, must be applied whether a party pleads them or not. On the other hand, § 2 of the earlier act (amplified by § 3 of the later act) provides that no proceedings (or action) shall be taken until after some interest or taxes or premium of fire insurance, etc., is unpaid and in arrears for one year. This section, and there are others like it, is expressed in similar phraseology to the Statute of Limitations; and it is trite law that as a general rule, this latter statute must be pleaded in order to secure its benefit. It is true that § 2 of our earlier act (§ 3 of the later one) contains a further absolute provision that 'any sale made or purporting to be made in contravention of this section shall be absolutely null and void.' But this does not necessarily interfere with a party's right to bring an action and recover judgment, and register it. The ground upon which parties are not allowed the benefit of the Stat-

ute of Limitations, unless it has been pleaded, is based upon the maxim, 'quilibet potest renunciare juri pro se introducto.' By not setting up the statute in their defense, they waive the benefit of it. But when a party's rights are wholly extinguished under the provisions of a statute, different considerations apply."

In *Colonial Invest. & Loan Co. v. Richardson & McMeans* (1918) — *Manitoba*, —, [1918] 2 West. Week. Rep. 389, it appeared that the plaintiff obtained an order nisi for foreclosure on certain lands. Possession of the mortgaged property was not claimed. After the date of the nisi order the defendant enlisted in the armed forces, and on that account the final order could not be obtained. Later, the plaintiff brought an action for possession. It was held that the plaintiff was entitled to a judgment for the possession of the premises and for the rent in arrears.

d. Ontario.

The Ontario Mortgages and Purchasers Relief Act (Acts 1915, 5 Geo. V. chap. 22), as its name implies, was designed to protect mortgagors and purchasers from financial ruin, by staying actions for the recovery of money secured by a mortgage, during the period of financial distress caused by the World War. Section 2 (1) provided that: "No person shall: (a) take or continue proceedings by way of foreclosure or sale or otherwise, or proceed to execution on or otherwise to the enforcement of, any judgment or order of any court, whether entered or made before or after the passing of this act, for the recovery of principal money secured by any mortgage of land or any interest therein made or executed prior to the 4th day of August, 1914; . . . except by leave of a judge granted upon application as hereinafter provided."

Where property mortgaged prior to 1914 was sold, subject to the mortgage, and the purchaser in 1915 executed another mortgage to the assignee of the original mortgage for substantially the same sum, it was held in *Appelbe v. Windsor Secur. Co.* (1917) 13 Ont. Week. N. 139, that the

Mortgages and Purchasers Relief Act of 1915 applied, since the mortgage was substantially an extension or renewal of the pre-existing mortgage, and, being made for a term of less than three years, and at a higher rate of interest than that provided for by the original mortgage, it was not covered by the exception in the act to the effect that the act should not apply to any extension or renewal made after August 4th, 1914, of a mortgage made prior to that date, where the extension or renewal was for not less than three years and the rate of interest not increased. On appeal, however (1917) 13 Ont. Week. N. 239, the judgment was reversed on the ground that the later mortgage was not a renewal, and that the act above referred to, by express provision, applied only to mortgages executed prior to August 4th, 1914.

In *Re Wade* (1917) 11 Ont. Week. N. 418, a motion was made under the act by an assignee of the mortgage, for a continuance of foreclosure proceedings, alleging that if the mortgagor could not pay the debt and desired more time, he should pay a higher rate, since the current rate was higher than that stipulated in the mortgage. The court ordered that, on the making of an agreement by the mortgagor for renewal of the mortgage at 6½ per cent for three years, no proceedings should be begun on the mortgage, unless there should thereafter be default.

In the case of *Re Shepard* (1919) 42 Ont. L. Rep. 184, the company made a motion for an order allowing the commencement of an action against the mortgagors. It appeared that the mortgage had been assigned by way of a derivative mortgage. It was contended that a derivative mortgage is a mortgage of personal property, and hence without the statute. The court said: "No doubt, a mortgage is personal property; it is a security for money, and will so descend; but this does not appear to me to be the real question. What must be ascertained is the intention of the statute. It relates to 'the recovery of money secured by mortgage' (§ 2 (1) (a)), and

prohibits action, in certain circumstances, to recover money 'secured by any mortgage of land, or any interest therein.' *Ibid.* A mortgagee has an 'interest in land,' and the loan upon the derivative mortgage is money secured by a mortgage of this interest, and so the statute prevents action to recover it, not only as against the land, but by any collateral remedy. The statute is one calling for a liberal interpretation; and the case of a derivative mortgage falls within its provisions without doing any violence to them. . . . On the merits, the application should be granted and proceedings stayed; the interest of the original mortgagees is too great to be sacrificed, and their bona fides is manifest from the interest they are paying. No doubt in many instances, as here, the mortgagee is inconvenienced by the delay; but the intention of the act is to permit delay; and, as I understand it, my duty is to see that the delay is granted so long as the ultimate recovery of the money is not jeopardized, and reasonable compensation by way of interest is paid."

Section 4 (3) of the act provided as follows: "Where default is made in payment of interest, rent, taxes, insurance or other disbursements which the mortgagor or purchaser has covenanted or undertaken to pay, the mortgagee or vendor, his assignee, or personal representatives shall have the same remedies, and may exercise them to the same extent, and the consequences of such default shall in all respects be the same as if this act had not been passed, but where such interest, rent, taxes or other disbursements are paid into court or tendered to the mortgagee, vendor, assignee or personal representatives he shall not continue any proceedings already commenced by him without the order required by § 2 or by § 3, as the case may be."

The case of *George v. Lang* (1916) 36 Ont. L. Rep. 180, 30 D. L. R. 502, arose under that section. In that case it was contended that, as the act made an exemption in favor of interest in arrears, the mortgagee could proceed with an action for foreclosure and

sale, without the leave by the court required under § 2(1)(a), set out supra. It was further claimed that the mortgagee might proceed where the interest was in arrears for one day, and particularly where interest was made payable *de die in diem*. The lower court dismissed the action. On appeal the court said: "I think the judge below was quite right in dismissing this action. It seems to me to be brought in the teeth of the Mortgages and Purchasers Relief Act 1915. The act left it open to mortgagees to enforce payment of the incidentals of a mortgage,—the interest, taxes, and so forth; but not to enforce by action payment of the principal without the leave of a judge. 'Interest' means the interest which the mortgagor has covenanted to pay. If he pay that, he is not to be prosecuted in any action upon the mortgage for principal money, without the leave mentioned. It is against the spirit as well as the letter of the act to commence an action of this kind without such leave. The act takes away the right of action for principal money due on the mortgage, then makes an exception of the interest, etc. The onus is upon the plaintiff of showing that his claim comes within the exception. In my judgment, the exception applies only to interest contracted, in the ordinary manner, to be paid. I do not think it applies to interest such as Mr. Arnoldi contends is payable *de die in diem* under the clause of the mortgage relied upon by him. Nor do I think that the case comes within the provisions of that clause. There are the usual clauses in the mortgage, dealing with payment of principal and interest, one of which provides that, in default of the payment of interest, the principal secured shall become payable. I decline to give to the obscure words of this clause an effect differing from the plain effect of the words of the mortgage dealing directly and solely with such payments. They may very well be applicable only to the default dealt with in it." In a concurring opinion, Masten, J., said: "I agree, and will add only one word. If the contention of Mr. Arnoldi on be-

half of the plaintiff were maintained, it would practically nullify the effect of the statute whenever the mortgage contained a covenant to pay interest on overdue principal. Most well-drawn mortgages contain such a covenant, and this customary form was well known to exist when the statute was passed. The statute ought not to be construed in such a way as to nullify its effect. If the construction contended for was maintained, the result would be that, whenever principal falls due (for which no action can be instituted without leave), the mortgagee only has to wait until the close of the next day, when one day's interest would fall due and be payable under the covenant, and he could launch his action without leave, because that interest was due under a covenant. For this reason, my opinion is that the statute is to be construed as relating only to the regular gales of interest falling due at the periods mentioned in the mortgage."

In *Young v. Harty* (1917) 12 Ont. Week. N. 17, where an extension agreement was made when the principal and interest on a mortgage became due, providing for payment of the aggregate sum of the principal and interest in two years, with semi-annual interest on such sum, it was held that when the extension period expired the rights under the original mortgage revived and the interest again became due, for nonpayment of which, as well as for nonpayment of taxes, the mortgagee could sue without leave under the act, although semiannual interest was not in default under the extension agreement.

e. Saskatchewan.

1. Moratory proclamation.

On September 30, 1914, there was issued a proclamation by the lieutenant governor of the province of Saskatchewan, "protecting the property and interest of persons who volunteered for service in the forces raised by the Dominion of Canada, or who were reservists belonging to the armies of the Allies of Great Britain in the present war." That proclamation rendered nugatory "anything which the regis-

trar may have done prior to the issue of the proclamation, which may have been contradictory to the terms of the proclamation." *Re Moratorium Proclamation* (1914) 7 West. Week. Rep. 795, wherein it was held that the proclamation did not forbid the registration of a transfer of land subsequent to its issuance.

2. Volunteers and Reservists Relief Act.

(a) Persons exempted.

Section 2 of the Saskatchewan Volunteers and Reservists Relief Act of 1916 provided as follows: "This act is passed only for the protection of the property and interests held bona fide in their own right by persons who have joined or who may at any time hereafter join as volunteers the forces raised by the government of Canada on account of the war now existing, or who have left or who may at any time hereafter leave Canada to join the British, French, Belgian, Russian, Italian or Servian Armies or the army of any other power which may hereafter become an ally of Great Britain for the purposes of this war, either as volunteers or reservists, and its provisions shall apply to such persons exclusively; and whenever land or other property is referred to herein, the same shall mean only the land or property of such a volunteer or reservist, or in which such a volunteer or reservist is interested bona fide and in his own right as purchaser, mortgagor or encumbrancer, caveator, as the case may be."

The protection accorded a volunteer under the act does not cease with his death, but extends to protect the interest of his heirs during the entire exemption period. *Re Land Titles Act* (1917) — Sask. —, [1917] 2 West. Week. Rep. 1089, wherein the master of titles said: "The protection continued until the end of the war, and the further period provided for in the act, which has by amendment been since extended from six months to one year after the conclusion of the war, and I pointed out that, in my opinion, the preamble of the act shows that the protection given was to the property and interests of the volunteer, and

that there was no indication in the act that this protection ceased with the death of the volunteer and reservist, but that the wording of the act throughout indicated clearly to me the intent of the legislature to protect the property and interests of a volunteer during the continuance of the war, and for six months (now one year) thereafter. I have seen no reason to change my opinion, and would point out that, in a case of mortgaged lands, § 7 of this act allows the mortgagee to enter into possession for his own protection during the continuance of the war, and until sale or foreclosure may be decreed. Moreover, by § 15 of this act, power is given to a judge of the supreme court to dispense with the restrictions, prohibitions, and conditions contained in the act, and to permit any act to be done or proceeding to be taken as if this act had not been passed; all of which indicates to me that there was ample protection given by the legislature to mortgagees without the necessity of my reading into the act something which is certainly not at present in it."

In a subsequent case, *McCausland v. Griffiths* (1917) — Sask. —, [1917] 3 West. Week. Rep. 52, Lamont, J., said: "In my opinion, the act for the Relief of Volunteers and Reservists affords no defense to the action, as the land in question is no longer the land of the volunteer, nor has he any interest therein, and the act does not protect the land in the hands of his personal representatives." The reasoning of Justice Lamont is shown in a dissenting opinion in *Colonial Invest. & Loan Co. v. Smythe*, *infra*, dealing with the effect of a discharge.

Shortly afterwards, the same question was presented in the case of *Re Canada Life Assur. Co.* (1917) — Sask. —, [1917] 3 West. Week. Rep. 349. Referring to the decision in *McCausland v. Griffiths*, *supra*, the master of titles said: "Before this decision . . . I had held otherwise on two separate applications coming before me, and I have seen no reason to change my view on the meaning of this Act for the Relief of Volunteers and Reservists. The question before

me is, however, only indirectly affected by the decision above referred to, for, outside of the help which one may get from the general policy of the act as expressed in its preamble and in its sections, very little aid can be obtained for the interpretation of § 15 by reference to the other sections of the act." The *Re Canada Life Assur. Co.* Case, *supra*, involved the construction of § 15 of the act. That section provided: "The protection hereby granted to the property and interests of volunteers and reservists is extended to the property and interests of their wives and mothers, if widows, and, unless the context otherwise requires, the expressions 'volunteer' and 'reservist' in this act include persons belonging to the above classes." It was admitted that the defendant was the wife of a volunteer within the act, but it was contended that he had since been killed. It was further admitted that if the defendant was still a "wife" within § 15, the proceeding was barred. The question presented for adjudication was whether the protection given to the wife of a volunteer remains with her during the period covered by the act, or is it taken from her on the death of her soldier husband? The master of titles said: "This § 15 originally protected the wives of volunteers, but last session this section was amended to include their widowed mothers. No proof has been submitted to the registrar or to me of the death of the volunteer, and counsel for the petitioner admits that this would require to be submitted to the registrar before he could approve of the sale and foreclosure proceedings. . . . It seems to me that the intent of the legislature was that the protection given to the wives of volunteers and reservists was intended to continue during the period provided by the act, irrespective of whether their husbands lived or died. In fact, one can hardly conceive that the legislature intended that a protection given to the wife of a volunteer should be removed because that wife had become a widow, for it would seem that the widow of a volunteer requires the protection even more than she did

when her volunteer husband was alive, and one can scarcely conceive that the legislature intended that the reward to be paid to a volunteer for his supreme sacrifice was the removal of the protection given to his wife, simply because she now becomes his widow. It is contended by counsel for the petitioner that to read § 15, chap. 7, of the Acts of 1916, so as to extend the protection to the widows of volunteers, is to legislate something into that section which is not already there; I do not agree with this view. In my opinion, the intention of the section is to extend the protection to the person who is his wife at the time of the volunteer joining the forces of Canada for overseas unless she has, by her own act, changed that status by remarriage, when, by becoming the wife of some other person, she could no longer be said to be the wife of a volunteer. For while it is quite true that, in the ordinary usage of the terms, 'wife' and 'widow' are not interchangeable, yet the intention of the legislature seems to have been to extend this protection to the wife, regardless of her subsequent status caused by the volunteer's death."

The protection of the act extends to a volunteer who has since been discharged. Colonial Invest. & Loan Co. v. Smyth (1918) 11 Sask. L. R. 186, 40 D. L. R. 586, wherein the court said: "At the time the action was brought the defendant had ceased to be a volunteer. Does the act, therefore, apply to him? I think both the preamble and § 2 show that it does. The act is for the protection of the property of persons who join the forces as volunteers; the defendant did that. Section 3 refers to him as a 'volunteer.' That, I think, must be given the interpretation contained in the preamble and § 2: 'A person who has joined the forces as a volunteer.' Having once joined these forces, he became a volunteer and was entitled to the protection of the act, and that protection was to continue during the present war and until the expiration of six months after the conclusion thereof. This time has not yet arrived." In a dis-

senting opinion, Lamont, J. A., after quoting § 3, *supra*, said: "In my opinion, the clause, 'any mortgage made by a volunteer,' is capable of two interpretations. One is that it means a mortgage made by one who was a volunteer at the time the mortgage was made; the other is that it means a mortgage made by one who is a volunteer at the time the action is begun. The latter, in my opinion, is the true meaning. The section affords protection to actual volunteers, and this is in no way affected by § 2 or the preamble to the act. It is a matter of common knowledge that hundreds who enlisted were rejected after a few weeks' service, on the ground that they were physically unfit, and were discharged. If the contention on behalf of the defendant prevailed, all such would be exempt from paying their honest debts until after the close of the war. I cannot think that such ever was the intention of the legislature. Since this action was begun, the legislature has made legislative provision for such cases."

In *Quebec Bank v. Milding* (1917) 10 Sask. L. R. 227, 33 D. L. R. 694, it appeared that a mortgage was made by the defendant as the personal representative of a solvent estate. The evidence showed that the representative was one of the next of kin of the deceased, and entitled to a share of the estate. It was held that the personal representative was a person interested in his own right under the act. The court said: "If § 3 of the . . . act were standing alone, it seems to me that there could be no doubt that the plaintiff would be prevented from proceeding with the sale, because the mortgage in question was made by a volunteer. In another matter which came before me, I expressed the opinion that § 3 must be considered in conjunction with § 2 above. I am, however, of the opinion that § 2 does not, in this case, prevent the act from applying, because I am of the opinion that the volunteer is interested bona fide in his own right in the land covered by the mortgage. I take the words 'in his own right' to be intended to distinguish land so held from land

which is held by him solely as trustee for some person else, and in which latter case he has no personal interest."

But the fact that a codefendant is a volunteer is no defense to an action against one who is not a volunteer. *Northern Trusts Co. v. Peart* (1917) 10 Sask. L. R. 69, wherein the court said: "Notwithstanding the very wide provisions of § 3 of the act, I am of the opinion that those provisions are subject to the provisions of § 2 of the act, and that, as far as this action is concerned, § 3 cannot protect the two defendants who have been served, because the action does not affect the interest of the volunteer in the land covered by the mortgage. The mere fact that these defendants would have a right to apply to have the volunteer joined as a defendant cannot affect the consideration of this application, because, if such an application were made, I apprehend it could be successfully opposed by the volunteer, on the ground that the act prevents his being joined. Neither can the fact that these defendants would have their right of proceeding against the volunteer postponed, affect the question. It might be a hardship on these defendants to have their right of proceeding against the volunteer postponed, but it can be conceived that many hardships may occur as the result of the act. The act was passed for the protection only of the volunteer, and these defendants do not, in my opinion, come within that protection."

(b) *Effect of act.*

Section 8 of the act provided as follows: "Notwithstanding any provision in any agreement for sale of land, or in any bond, mortgage or other lien or encumbrance affecting land, made by a volunteer or reservist, or the obligations of which have been assumed by or have devolved upon a volunteer or reservist, either before or after the date when this act comes into force, no action or other proceeding judicial or extrajudicial, for cancelation, sale or foreclosure or upon a personal covenant contained in any such instrument shall be had or taken during

the continuance of the present war or until the expiration of six months after the conclusion thereof."

It has been held that this section prohibited the issuance of a writ of summons against a volunteer. *Alton v. Skelton* (1917) 10 Sask. L. R. 57, wherein the court said: "According to the wording of said § 3, . . . I am of opinion that said section prohibits the issue of a writ of summons against a volunteer under the circumstances of this case, as he was, at the time the writ issued, registered owner of part of the land sought to be foreclosed or sold, and it must be presumed he was a bona fide holder in his own right, as the law will not presume fraud."

The act (§§ 8 and 16) empowers the court to permit a case to proceed in certain instances. Nevertheless, leave to issue a writ against a volunteer within the meaning of the act must be obtained prior to its issue. *Alton v. Skelton*, *supra*. In that case the court said: "In my opinion the order allowing the proceedings to go forward should be obtained before the prohibited act is done. I think such is the meaning to be given to the act. The closing paragraph of § 8 reads, 'The court or judge . . . may allow the proceedings to go forward;' and § 16 says that 'a judge may dispense with the restrictions, and may permit any act to be done or proceeding to be taken as if this act had not been passed.' Then § 14 expressly says that any cancelation, sale, seizure, order, or other proceeding, had, made, or obtained in contravention of this act, shall be absolutely null and void, etc. The doing of the prohibited act being made absolutely null and void, I think the legislature would have used some other language in §§ 8 and 16 than that above referred to, if the intention was that the order could be obtained after the doing of such prohibited act. For instance, words to the effect that such prohibited acts could be validated or confirmed."

But an order under § 16 to suspend the act cannot be made to the court of appeal. *Colonial Invest. & Loan Co. v. Smyth* (1918) 11 Sask. L. R. 106,

2 West. Week. Rep. 482, 40 D. L. R. 586.

But the act does not prohibit the commencement of an action for the possession of land as to which a purchaser is in default. Thus, in *Riach v. Elliott* (1916) 9 Sask. L. R. 408, 31 D. L. R. 681, the action was brought under an agreement of sale for the amount due thereunder, and, in default of payment, for cancelation and possession. After service of process, the defendant enlisted as a volunteer, whereupon the plaintiff abandoned all claims except to possession. The court said: "The question for us to decide is whether, where an agreement of sale is in default, an action for possession of the lands in question is prohibited by the above act. Section 3 of said act provides that no action on an agreement of sale or mortgage shall be commenced against any volunteer during the continuance of the war, or for six months thereafter, for cancelation, sale, or foreclosure, or upon a personal covenant contained in any such instrument. Section 4 provides that in case any such action or other proceeding for foreclosure, sale, or judgment already begun, no judgment shall be recovered, and no order for sale or foreclosure shall be made. The words, 'such an action,' in § 4, refer to the actions mentioned in § 3, i. e., an action on agreement of sale or mortgage, for cancelation, sale, or foreclosure, or on a personal covenant; and the words, 'no judgment shall be recovered,' refer to a judgment for cancelation, or on a personal covenant in such an action, sale or foreclosure being expressly provided for. Now, in an action on a mortgage, possession may be taken by virtue of

subsec. 2 of § 93 of the Land Titles Act, where there is a covenant to that effect in the mortgage. This proceeding, however, is not to be considered an action on a personal covenant, as it is expressly provided by § 7 of the Volunteers and Reservists Relief Act that the taking possession of lands mortgaged and encumbered, and receiving the rents and profits thereof, shall not be held to be a proceeding upon a personal covenant within the meaning of § 3. Now, if there is a covenant in a mortgage under which the mortgagee is entitled to enter into possession, and proceedings under such a covenant are not to be considered a proceeding upon a personal covenant, and are, therefore, not forbidden by that act, how much more should the plaintiffs be allowed to take such proceedings on an agreement of sale, not upon any personal covenant therein, but upon the vendor's common-law right to enter into possession on the purchaser's default? In the first place, I am of the opinion that in this action the claim for possession is not an action on a personal covenant, and is not, therefore, forbidden by the act; and in the second place, if it was necessary to bring an action on a covenant for possession, § 7 shows that it was not the intention of the legislature to forbid such action. As the defense defendant wishes to set up is no defense, the order for possession should not be set aside."

So, in *Rose v. Edmonds* [1919] 3 West. Week. Rep. 47, it was held that, where a vendor sued for one half of the crop under an agreement of sale, the action was not a proceeding on a personal covenant in contravention of § 3 of the act.

A. S. M.

ROBERT M. MORSE et al., Trustees under the Will of Benjamin Adams,
v.
WILLIAM J. STOBBER et al.

Massachusetts Supreme Judicial Court — June 23, 1919.

(233 Mass. 223, 123 N. E. 780.)

War — Soldiers' Civil Relief Act — foreclosure of mortgage.

1. Foreclosure of a mortgage should not be made without order of court since the passage of the Soldiers' and Sailors' Civil Relief Act by Congress, since otherwise the mortgagee cannot be sure that he is not acting in violation of the statute, because some interested party may be in the military service of the United States.

[See note on this question beginning on page 81.]

Real property — marketable title — what is.

2. A title to real estate may be good and clear and sufficient within the meaning of a contract of sale, although there may be a possibility of defect, if such possibility is not sufficient to raise a reasonable doubt.

— marketable title — strict foreclosure of mortgage — Soldiers' Civil Relief Act.

3. That a mortgage was foreclosed without the court's order after the passage by Congress of the Soldiers'

and Sailors' Civil Relief Act does not prevent the title being good and clear if it is shown that no one interested in the property was in the military service of the United States.

Trial — question for jury — person in military service.

4. Whether or not any person interested in a mortgage foreclosed after the passage by Congress of the Soldiers' and Sailors' Civil Relief Act was in the military service of the United States is a question of fact for the jury.

RESERVATION by the Supreme Judicial Court for Suffolk County for the determination of the full court, of questions arising in a suit for the specific performance of an agreement to buy real estate. *Case to stand for hearing.*

The facts are stated in the opinion of the court.

Messrs. Charles S. Rackemann and John Noble, for plaintiffs:

Plaintiffs did not do anything forbidden by the Soldiers' and Sailors' Civil Relief Act, or omit to do anything required by the act.

Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; *Freeman v. Alderson*, 119 U. S. 185, 80 L. ed. 372, 7 Sup. Ct. Rep. 165; *Arndt v. Griggs*, 134 U. S. 316, 33 L. ed. 918, 10 Sup. Ct. Rep. 557; *People ex rel. Kern v. Chase*, 165 Ill. 527, 36 L.R.A. 105, 46 N. E. 454; *State ex rel. Monnett v. Guilbert*, 56 Ohio St. 575, 38 L.R.A. 519, 60 Am. St. Rep. 756, 47 N. E. 551; *McKenna v. McArdle*, 191 Mass. 96, 77 N. E. 782; *Lowrie v. Castle*, 198 Mass. 82, 83 N. E. 1118; *Tourtillotte v. Tourtillotte*, 205 Mass. 547, 91 N. E. 909; *Curry v. Dorr*, 210 Mass. 430, 97 N. E. 87; *Corbett v. Gallagher*, 225 Mass. 480, 114 N. E. 751; *Chace v. Gardner*, 228 Mass. 533, 117

N. E. 841; *Keown v. Keown*, 230 Mass. 313, 119 N. E. 785.

Messrs. John D. Graham and George A. Sawyer for respondents.

Rugg, Ch. J., delivered the opinion of the court:

This is a suit in equity praying for the specific performance of an agreement to buy real estate. The question is whether the plaintiffs are able to convey "a good and clear title thereto free from all encumbrances" except certain taxes and party-wall agreements. The pertinent facts are that the plaintiffs, being the holders of a first mortgage in the common form, containing the statutory conditions and the statutory power of sale created by Stat. 1912, chap. 502, made entry in due form to foreclose the mortgage on

August 5, 1918, certificate whereof was seasonably recorded, and without order of court sold the premises in accordance with the power at public auction on September 4, 1918, all for breach of the condition of the mortgage, and became themselves the purchasers at the foreclosure sale. Deed in usual form was executed and recorded. Contract of sale was thereafter made between the plaintiffs and the defendants Holdsworth and Farrington. The latter refuse to carry out the contract and accept the deed on the ground that the foreclosure was not made in pursuance of an order of court, as provided by § 302 (3), chap. 20, of Act of Congress approved March 8, 1918 (40 Stat. at L. 444, Comp. Stat. § 3078½ff, Fed. Stat. Anno. Supp. 1918, p. 818), known as the Soldiers' and Sailors' Civil Relief Act.

The affidavit of sale, made and filed in accordance with the power of sale, set forth that the owner of the equity of redemption was not in the military service of the United States. Three persons, being all whose names appear of record as having had an interest in the premises in question since August, 1915, a date antecedent to the entry of the United States into the great War, are joined as defendants, and it is alleged that no persons other than these have any legal or equitable interest in the premises. The bill has been taken for confessed against one of these three defendants, and the other two have answered that they have never been in the military service of the United States and have no interest in the premises. The answer of the defendants Holdsworth and Farrington admits all the allegations of fact in the bill, and that, according to their information and belief, no party interested in said premises was in the military service of the United States, as defined in said act of Congress; but it avers that because the power of sale to foreclose the mortgage was not exercised under and by authority of a court, as required by said act of Congress, the plaintiff

cannot give a good and sufficient title to the premises, and that therefore specific performance of the agreement ought not to be enforced.

The meaning of a good and clear and sufficient title is settled in this commonwealth by repeated decisions. It was said by Knowlton, J., in Conley v. Finn, 171 Mass. 70, at 72, 68 Am. St. Rep. 399, 50 N. E. 461, summarizing the effect of numerous earlier cases there collected: "The general rule is that, in order to maintain a suit for specific performance against a purchaser of real estate, the plaintiff must show that the title is good beyond a reasonable doubt. . . . But the mere

possibility or suspicion of a defect is not enough to relieve a purchaser from liability under his contract. . . . In First African M. E. Soc. v. Brown, 147 Mass. 296, 298, 17 N. E. 549, Mr. Justice Devens says of the doubt which will relieve a purchaser of real estate from his obligation specifically to perform his contract, that it 'must be reasonable, and such as would cause a prudent man to pause and hesitate before investing his money. It would be seldom that a case could occur where some state of facts might not be imagined which, if it existed, would defeat a title. When questions as to the validity of a title are settled beyond reasonable doubt, although there may be still the possibility of a defect, such mere possibility will not exempt one from his liability to complete the purchase he has made. . . . It would be often practically impossible for a party to negative all objections which might be imagined, and which, if they existed, would defeat his title.'"

In Close v. Martin, 208 Mass. 237, at 239, 94 N. E. 389, it was said: "When the defendant insisted upon a title which the attorney could absolutely guarantee never would cause him trouble, he asked for a better title than equity requires a purchaser to accept. A title which is good beyond a reasonable doubt is

Real property
—marketable
title—what is.

a title which equity requires a purchaser to take." *Foster, H. & A. Co. v. Sayles*, 213 Mass. 319, 321, 100 N. E. 644.

In the application of these principles it has been held that a defect in title which had been cured by disseisin might be found good and marketable (*Aroian v. Fairbanks*, 216 Mass. 215, 103 N. E. 629), and that the condition of a bond, secured by mortgage, although undischarged of record, had been fully performed (*Shanahan v. Chandler*, 218 Mass. 441, 105 N. E. 1002). A title not good on the record thus may be shown by oral or other evidence outside the record to be marketable beyond any reasonable doubt, so that specific performance of a contract for conveyance will be enforced in equity. The contract here in suit did not call for a title clear and perfect on the record of the registry of deeds. The rights of the parties to the suit now at bar must be determined according to these well-settled principles.

The act of Congress does not require in terms that all mortgages upon real estate be foreclosed under order of court. Grave constitutional questions might lie in the way of an act of such sweep. It does provide that "no sale under a power of sale" to enforce an obligation originating prior to the date of the approval of that act of Congress, "and secured by mortgage . . . upon real or personal property owned by a person in military service [as defined in the act] at the commencement of the period of the military service and still so owned by him," "shall be valid if made during the period of military service or within three months thereafter, unless upon an order of sale previously granted by the court, and a return there-to made and approved by the court." Comp. Stat. § 3078½ff, Fed. Stat. Anno. 2d ed. p. 817.

It was held in *Hoffman v. Charlestown Five Cents Sav. Bank*, 231 Mass. 324, 121 N. E. 15, decided last November, that the act of Congress applies to equitable as well as legal

interests constituting property in real estate and owned by a person in military service, without limitation as to use or amount, whether known to the mortgagee or not, and whether appearing of record or not. The act of Congress in this regard takes no account of our statutes as to registration of deeds. The foreclosure of a mortgage by sale, under a power of sale affecting any such property right of a person in military service, is forbidden by the act unless made under order of court, as therein provided. It further was said in that opinion: "Clause 3 of § 302 was enacted to secure to every person in the military service of the United States who owns property subject to a mortgage within the act the relief to which he is entitled under the act. The defendant has urged against this construction of the section that if that be the true construction of it the result is that until the termination of the time specified in the act no mortgage can be foreclosed by any mortgagee except under an order of court, and it cannot be that that was the intention of Congress. We are of opinion that this is the result of the true construction of the act, for in that way alone can a mortgagee be certain that the foreclosure of his mortgage will not be made in violation of the act. We are of opinion that since this is the result of the true construction of the act, this must be taken to have been the intention of Congress."

This construction of the act of Congress (in the absence of a contrary decision by the Supreme Court of the United States) must be accepted as sound. It does not mean, however, that in all cases it is and must be impossible to satisfy a court of equity beyond a reasonable doubt that no person in the military service of the United States had any interest in the property subject to the mortgage which has been foreclosed. The meaning of the decision in *Hoffman v. Charlestown Five*

War—Soldiers' Civil Relief Act—foreclosure of mortgage.

Cents Sav. Bank is that the safe course for the mortgagee is to foreclose his mortgage under the order of a court of equity. It is only by pursuing that course that he gets a record title not open to successful attack under the said act of Congress, and therefore in that way alone can he be certain that the foreclosure of his mortgage will not be made in violation of that act of Congress. But it is not a proposition unprovable in the nature of things or practically impossible to show beyond doubt in a court of equity that

Real property—
marketable title
—strict foreclosure
of mortgage
—Soldiers' Civil
Relief Act.

no person in the military service of the United States had an interest in the premises described in a mortgage foreclosed without order of court.

A mortgagee who forecloses his mortgage under the power of sale therein contained, without an order of court, during the time specified in said chapter 20 of the act of Congress, known as the Soldiers' and Sailors' Civil Relief Act, assumes a heavy burden of proof when he undertakes to enforce specific performance of his agreement to convey by good title the land so foreclosed. But it is not a burden of proof incapable of being sustained as matter of law. Circumstances attendant upon the history of a particular title and its record owners may be such as to exclude every rational hypoth-

esis compatible with the notion that a person in the military service of the United States has an interest in it likely to be affected by the foreclosure. Evidence may make it clear beyond a reasonable doubt that no such person has any interest in specified real estate. The allegations of the present bill, to the effect that no person in the military service of the United States has an interest in the premises, in the nature of things are or may be susceptible of legal proof.

The question whether, in truth, a person in the military service of the United States had any interest in the premises which are the subject of

Trial—question
for jury—person
in military
service.

the present suit, was one of fact, and not of law. *Shanahan v. Chandler*, 218 Mass. 441, 443, 444, 105 N. E. 1002. Its decision depends upon the hearing and weighing of evidence. No evidence has been presented. The case is reserved merely upon the bill and answer. It follows that the case must stand for hearing. If the plaintiffs succeed in maintaining the burden of proof and demonstrating to the satisfaction of the court that no person in the military service had any interest in the property, according to the principles heretofore stated, then they will be entitled to a decree. Otherwise, the bill must be dismissed.

Case to stand for hearing.

ANNOTATION.

Validity and construction of Soldiers' and Sailors' Civil Relief Act.

This note is confined to a discussion of the Soldiers' and Sailors' Civil Relief Act (Act of Congress March 8, 1918, Comp. Stat. § 30781a, Fed. Stat. Anno. Supp. 1918, p. 810). It does not include the English or Canadian Moratorium Acts, the state laws in aid of soldiers and sailors, or the joint resolution of Congress of May 31, 1918, as to rent profiteering in the District of Columbia. Neither does it review the cases wherein relief by way of continuance or otherwise has been granted

9 A.L.R.—6.

in the absence of a statute, because a party or a witness was absent in the military service of the United States.

The Soldiers' and Sailors' Civil Relief Act provides in brief for a suspension of civil proceedings against persons in the military service of the United States, or against their dependents, during the continuance of the war with Germany. The language of the act throughout is permissive, providing that the court "may" stay proceedings under certain conditions.

The effect of this is to commit the allowance of a stay to the discretion of the court. *State ex rel. Clark v. Klene* (1919) 201 Mo. App. 408, 212 S. W. 55; *Dietz v. Treupel* (1918) 184 App. Div. 448, 170 N. Y. Supp. 108; *Gilluly v. Hawkins* (1919) — Wash. —, 182 Pac. 958.

The act is an exercise of the war power of Congress, and as such it is valid and binding on the courts of every state. *Hoffman v. Charlestown Five Cents Sav. Bank* (1918) 231 Mass. 324, 121 N. E. 15, wherein the court added: For this reason it governs the foreclosure of mortgages on real estate within the territorial limits of the commonwealth."

And in *Kuehn v. Neugebauer* (1919) — Tex. Civ. App. —, 216 S. W. 259, it was held that Congress, under its war and military powers, was invested with full power to pass this statute, at least so far as it related to matters of procedure in state courts.

In *Konkel v. State* (1919) 168 Wis. 335, 170 N. W. 715, it was said that the power to maintain an army and navy necessarily implies the power to prescribe the conditions under which persons in the military service of the United States shall be subject to the process of courts, whether state or Federal.

Being an exercise of a paramount Federal power, the act abrogates all state laws inconsistent therewith. *Konkel v. State* (Wis.) supra. In that case it was held that a state act which provided a more liberal exemption from civil liability than that granted by the Federal act was abrogated, the court saying: "It is argued that, because chapter 409 grants a more generous immunity or greater exemption than that granted by the Soldiers' and Sailors' Civil Relief Act, there is no conflict, within the principles laid down in *Savage v. Jones* (1912) 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715, and in *McDermott v. Wisconsin* (1913) 228 U. S. 115, 57 L. ed. 754, 47 L.R.A.(N.S.) 984, 33 Sup. Ct. Rep. 431, Ann. Cas. 1915A, 39. Viewed from the standpoint of the person in the military service of the United States, there may be some force to this

argument; but he is not the only person concerned. In this case the defendant soldier is the father of a child which he is legally and morally bound to support. The United States prescribes the conditions under which the delinquent father may be proceeded against. Chapter 409 provides that he may not be so proceeded against. Upon what theory can it be said that there is no conflict between the two acts?"

Under the Soldiers' and Sailors' Civil Relief Act, § 205, Comp. Stat. § 3078½, Fed. Stat. Anno. Supp. 1918, p. 816, the time limited by a state statute for payment of costs of an appeal and the taking out of a mandate does not run against one during the period of his military service. *Kuehn v. Neugebauer* (1919) — Tex. Civ. App. —, 216 S. W. 259.

But the act does not supersede or suspend a state statute providing that no suit or action shall be commenced or maintained to foreclose a mortgage during the period of actual service in the Army or Navy of the United States. *Pierrard v. Hoch* (1919) — Or. —, 184 Pac. 494.

The provision of the act authorizing a stay of proceedings to foreclose a mortgage against a person in the military service is not limited to cases where the person in the military service is the owner of record of the property covered by the mortgage, is not confined to property used by a soldier or sailor or his dependents for business or residence purposes, and is not affected by the fact that the mortgagee does not know that a person in the military service has an interest therein. *Hoffman v. Charlestown Five Cents Sav. Bank* (Mass.) supra. In that case it appeared that the property in question was conveyed by a soldier to his mother, subject to an oral agreement to reconvey in case he returned safely from the war. In sustaining a bill for relief from a foreclosure, the court said: "The next contention of the defendant is based upon a finding of the master that the bank had no notice or reason to suppose that the plaintiff was the owner of the property in question. There is nothing in the section here in ques-

tion which limits its provisions to owners of record, or to cases where the mortgagee in fact knew or had reason to know who the owner of the property was. The act in terms includes every case where the mortgaged property is 'owned by a person in the military service at the commencement of the period of military service, and [is] still so owned by him.' If the section is construed to apply in every case where the owner is in the military service of the United States, whether the mortgagee did or did not know who the owner was, it would seem on the face of it to be a drastic statute. The fact of the owner (when he is ascertained) being or not being in the military service of the United States is a fact, which it is at least as hard for the mortgagee to find out as it is for the mortgagee to find out who the owner of the property is. Yet, without question, there is no such limitation as to that fact. . . . The defendant has urged against this construction of the section that if that be the true construction of it, the result is that, until the termination of the time specified in the act, no mortgage can be foreclosed by any mortgagee except under an order of court; and it cannot be that that was the intention of Congress. We are of opinion that this is the result of the true construction of the act, for in that way alone can a mortgagee be certain that the foreclosure of his mortgage will not be made in violation of the act."

In *John Hancock Mut. L. Ins. Co. v. Lester* (1920) — *Mass.* —, 125 N. E. 594, the court said that it is well settled that during the time the Soldiers' and Sailors' Civil Relief Act is in force, a mortgagee forecloses under a power of sale contained in a mortgage at his own peril, unless upon an order of sale previously granted by the court and return thereto made and approved by it; and that, while a sale is not necessarily bad, it is of no validity if made during the "military service" of an owner of land, or within three months thereafter, if consigned without such order and returned (citing *Hoffman v. Charlestown Five Cents Sav.*

Bank (1918) 231 *Mass.* 324, 121 N. E. 15, and the reported case (*MORSE v. STOBER*).

In the *Hoffman Case* it was said, and in *John Hancock Mut. L. Ins. Co. v. Lester* (*Mass.*) *supra*, decided, that "the existence of the Soldiers' and Sailors' Civil Relief Act is a special circumstance which is sufficient to give the equity courts of the commonwealth jurisdiction to foreclose . . . [power of sale] mortgages within the time specified in the act."

In *John Hancock Mut. L. Ins. Co. v. Lester* (*Mass.*) *supra*, it was held that mortgagees of real property owned by a realty trust were entitled to a decree authorizing foreclosure in accordance with clause 3 of § 302 of the act, fourteen months having elapsed since the signing of the armistice, and the only reason advanced for not granting the decree being that shareholders, who were owners under the act, were in the military service, and it not being urged that the mortgagees did not require a foreclosure, or that foreclosure would inequitably affect the interest of those in the military service. In this case, it was also held that the failure to join the shareholders as parties did not prevent the entry of an order of foreclosure, as their interests were fairly and sufficiently represented by the trustees, whose duty it was to act in their interest. The court added that the act does not provide that no order of foreclosure shall be made where owners are in the military service.

In the reported case (*MORSE v. STOBER*, *ante*, 81) the court reiterates the holding of *Hoffman v. Charlestown Five Cents Sav. Bank* (*Mass.*) *supra*, as to the necessity of foreclosure by order of court, and holds that in case of a foreclosure otherwise made, a person seeking to enforce specific performance of an agreement to purchase the land, and who has agreed to give a good title, has the burden of showing that no person in the military service was in any manner interested in the foreclosure.

But in *Dietz v. Treupel* (1918) 184 *App. Div.* 448, 170 N. Y. *Supp.* 108, it was held that where a person in the

military service claims no interest in the land in which a foreclosure is sought, but is secondarily liable for the debt secured by the mortgage, the foreclosure will be allowed to proceed, but the entry of a deficiency judgment will be stayed.

In *Gilluly v. Hawkins* (1919) — Wash. —, 182 Pac. 958, the allowance of a writ of restitution in proceedings to recover the possession of leased premises from the dependent father of a soldier was held not to be an abuse of discretion, it appearing that the court had suspended the writ for more than three months.

In *State ex rel. Clark v. Klene* (1919) 201 Mo. App. 408, 212 S. W. 55, the court held that the trial judge did not abuse his discretion in refusing to stay a proceeding by the wife of a man in the military service to vacate a judgment of divorce previously procured by him.

In *Post v. Thomas* (1918) 183 App. Div. 525, 170 N. Y. Supp. 227, it was held that an appeal by one who was complainant with a person in the military service, from an order denying his motion that the action be discontinued as to him, should be stayed, since the appeal, if successful, would impose a liability for costs on the plaintiff, who was in the service.

Under the Soldiers' and Sailors' Civil Relief Act, § 203, Comp. Stat. § 3078½d, Fed. Stat. Anno. Supp. 1918, p. 815, the court of civil appeals had power to order the issuance of a mandate to a lower court to proceed with a cause in accordance with the judgment rendered by the appellate court, although the costs had not been paid within one year, as required by state statute. *Kuehn v. Neugebauer* (1919) — Tex. Civ. App. —, 216 S. W. 259. The court said that "it is obvious that this is a remedial statute enacted by Congress for highly important national ends, and that its provisions must be liberally interpreted to ascertain the intent of Congress and to give effect to that intention. After a careful consideration of the terms of the statute construed in the light of the 1st section of preamble, we have concluded that the first part of § 3078½d is ap-

plicable to this case, and that by its provisions this court is at least vested with the discretion to stay the execution of its judgment and orders entered against appellee, requiring him to pay the costs of this appeal. The time limited by the act for the exercise of this authority is for the period of military service, and three months thereafter, and appellee has made his application during such time. This court might have and doubtless would have entered an order staying the execution of its judgment at any time during the year following the rendition of the judgment upon application of appellee or someone in his behalf, or indeed upon its own motion, had it known of the situation of appellee during practically all that time. We have given due consideration to the proofs introduced by appellant in resisting the motion, urged as equitable reasons against the exercise of our discretion for appellee's benefit, but we do not think they are sufficient to restrain us from granting the relief sought. The application having been formally made by appellee within three months after his discharge, we think he is in time, and that the facts of his motion present a meritorious case justifying this court in exercising its discretion to stay the execution of its judgment a sufficient length of time to enable him to legally procure his mandate."

The act, in defining what shall constitute "military service," expressly includes the Naval Reserve, and in *Post v. Thomas* (N. Y.) supra, the benefit of the act was granted to a Naval Reservist. But in *Dietz v. Treupel* (N. Y.) supra, it was said: "The facts stated in the moving papers are meager. To say that the appellant is a chief yeoman in the Naval Reserve, formerly in the real estate business, and whose affidavit does not disclose the nature of his present employment, and who merely states 'that he has been obliged to almost entirely relinquish his civil business,' is not enough. Chief yeomen assigned to certain duties in the Naval Reserve are in many cases engaged during ordinary business hours, and are at liberty to return to their homes every

night. They may attend to advertising property, which is the appellant's alleged grievance, as well as otherwise protect themselves, without any added difficulty due to military or naval service. That is the criterion under the act of Congress."

It is provided by the act (§ 200, clause 1) that before the entry of a default judgment there shall be filed an affidavit setting forth facts showing that the defendant is not in the military service. In *Howie Min. Co. v. McGary* (1919) 256 Fed. 38, it was held that a default judgment will not be set aside because no such affidavit was filed, where there is no claim that the defendant was in the service.

To the same effect are *Harrell v. Shealey* (1919) — Ga. App. —, 100 S. E. 890, and *Alzugaray v. Onzures* (1920) — N. M. —, 187 Pac. 549.

In *Bulgin v. American Law Book Co.* (1920) — Okla. —, 186 Pac. 941, and *Wells v. McArthur* (1920) — Okla. —, 188 Pac. 322, it was held that there was no error in entering judgment without the filing of the affidavit, it not appearing that defendant was in fact in the military service at the time the judgment was rendered, but in the former case the defendant appeared in person in open court, and was granted leave to file an answer out of time, which he did not do; and in the latter case an answer was filed by defendant. Both cases cite the *Howie Min. Co. Case*.

It is further provided by the section referred to in the preceding paragraph that, if the defendant is in the service, no default judgment shall be entered except on order of court, and that an attorney shall be appointed to represent the absent defendant and protect his interests. In *Davison v. Lynch* (1918) 103 Misc. 311, 171 N. Y. Supp. 46, it was held that no compensation can be allowed to an attorney thus appointed, the court saying that a member of the bar "should regard it as a patriotic duty to devote his best efforts to the protection of a defendant in the military service, regardless of compensation."

In *Bassham v. Evans* (1919) — Tex. Civ. App. —, 216 S. W. 446, where the

action charged that, while the plaintiff was in the military service, the defendants trespassed upon his rights and ejected him from a house and lot in pursuance of a conspiracy to deprive him of the protection afforded through the Soldiers' and Sailors' Civil Relief Act, it being specifically alleged that one of the defendants, who had previously sold the property under contract, had exercised his option to declare the purchase-money notes due because of a default in an instalment, and brought suit for personal judgment against his vendee and to foreclose the vendor's lien, without joining as a party the present plaintiff, who was a co-owner of the property under a deed from the original vendee, which assumed the payment of the original purchase-money notes, and that the defendants, in furtherance of their conspiracy to eject the plaintiff, had obtained possession of the property by means of a writ of sequestration and a replevin bond,— it was said that, the plaintiff being the owner or part owner of the property, his rights as such fell within § 302 of the act in question; and the facts that the maker of the note was sued, and that the father of the plaintiff, who was his agent and in the house, was a party, and that his brother was his co-owner, did not affect his rights under the law. The court also declared that the provisions of subd. 1 of § 302, to the effect that the provisions of the section should apply only to obligations originating prior to the date of approval of the act, and secured by mortgage, trust deed, or other security in the nature of mortgage upon real or personal property, did not refer to other classes of obligations or rights named in article 3 of the act, such as leases or rental contracts, or contracts for the purchase of property which at the option of the vendor may be rescinded for nonpayment of instalments of the purchase price. It was the view of the court, however, that the plaintiff was only entitled to the value of the use of the house and lot, and any special damages the property might have received (and possibly the value of personal property on the premises at the time

of the seizure), and that, a suit to foreclose a vendor's lien being an affirmation and not a rescission of the contract, the measure of damages was not given by the provision of § 301, which authorizes the court to order the repayment of prior instalments where the vendor or grantor seeks to rescind a contract of sale for nonpay-

ment of instalments. Though the point was apparently not affected by the act in question, it may be added that the courts held that the allowance of damages for mental anguish was erroneous, they having been sought not as exemplary damages, but as actual damages occasioned by the wrongful trespass. W. A. S.

PITTSBURGH & WEST VIRGINIA GAS COMPANY
v.
ELMUS F. RICHARDSON.

West Virginia Supreme Court of Appeals — September 9, 1919.

(— W. Va. —, 100 S. E. 220.)

Mines — oil and gas lease — use by lessor.

1. An owner of real estate who has leased the same for the production of oil or gas therefrom, with a stipulation in such lease that he shall be allowed to use at his residence gas from any well drilled upon the premises for domestic purposes, free of charge, is entitled, in case a producing well is drilled upon such premises, to such quantity of gas produced therefrom as is reasonably necessary for his domestic uses, for the purposes to which such natural gas is ordinarily devoted.

[See note on this question beginning on page 89.]

— installation of meter — rights.

2. A regulation by a lessee in an oil and gas lease for the establishment and maintenance of meters upon lines furnishing free gas to the lessor, under the terms of the lease providing that such lessor is entitled to the use of gas free of charge for domestic purposes, is a reasonable and proper regulation, and a court of equity will enjoin such lessor from interfering with or obstructing such lessee in the installation, maintenance, or reading of such meters.

Public Service Commission—requiring reports of free gas.

3. A regulation by the Public Service Commission of West Virginia, requiring all producers of natural gas who furnish any of their product to persons free of charge to measure such part thereof by a meter, and to report the amount thereof to the Commission at certain intervals, is a reasonable and proper regulation, and any interference or obstruction upon the part of such free user of gas to the carrying out of such regulation will be enjoined by a court of equity.

Headnotes by RITZ, J.

CERTIFICATION by the Circuit Court for Marion County for the opinion of the Supreme Court of Appeals of questions arising upon the sustaining of a demurrer to a bill and dissolving the temporary injunction in a suit to restrain defendant from interfering with plaintiff in the installation of a gas meter upon his supply line, and the maintenance and reading of the same at proper intervals. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. H. H. Rose and Law & McCue, for plaintiff:

The amount of gas to which a lessor is entitled from a well drilled by his lessee, under an ordinary oil and gas lease providing that he shall have "free gas for domestic purposes for one house," is strictly limited, being only so much as is reasonably necessary.

Hall v. Philadelphia Co. 72 W. Va. 573, 78 S. E. 755; Harbart v. Hope Natural Gas Co. 76 W. Va. 207, L.R.A. 1915E, 570, 84 S. E. 770.

A gas meter may be maintained by the lessee at, or back of, the point where lessor's line begins, without showing any cause or reason therefor, and interference with its maintenance there will be restrained by injunction.

Blondell v. Consolidated Gas Co. 89 Md. 732, 46 L.R.A. 187, 43 Atl. 817.

The inherent power of all sovereign states, known as the "police power," gives them power to regulate all public utilities operating within their territory, and extends to the protection of their natural resources, such as natural gas.

22 Am. & Eng. Enc. Law, § 922; *Dorr v. Chesapeake & O. R. Co.* 78 W. Va. 150, L.R.A.1916E, 622, 88 S. E. 566; *Bunch v. Short*, 78 W. Va. 764, 90 S. E. 813; *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 52 L. ed. 828, 28 Sup. Ct. Rep. 529, 14 Ann. Cas. 560; *Townsend v. State*, 147 Ind. 624, 37 L.R.A. 294, 62 Am. St. Rep. 477, 47 N. E. 19; *Com. v. Trent*, 117 Ky. 34, 77 S. W. 390, 4 Ann. Cas. 209; 6 R. C. L. 212.

Such control may be exercised by the state directly by legislative enactments, or indirectly through power granted to subordinate bodies, such as municipal corporations, boards, commissions, etc., and the orders or regulations prescribed by such subordinate bodies, when legally made, have all the effect of law.

Knoxville v. Bird, 12 Lea, 121, 47 Am. Rep. 326; *Yeatman v. Towers*, 126 Md. 513, P.U.R.1915E, 811, 95 Atl. 158; 22 Am. & Eng. Enc. Law, § 920.

The law, or other governmental regulation in force at the time of the making of a contract, is as much a part of such contract as if its provisions were specifically incorporated into it.

Page, Contr. §§ 1117 & 1759; 9 Cyc. 582; 11 C. J. § 523; *Armour Packing Co. v. United States*, 209 U. S. 56, 52

L. ed. 681, 28 Sup. Ct. Rep. 428; *Knoxville v. Bird*, supra.

A contract concerning a subject-matter which the state, by virtue of its "police powers," may control or regulate, is subservient to after-made laws of such state, and the regulations of its duly created subordinate boards or commissions; and such after-made laws or regulations, on going into effect, modify or become a part of such contract as much as if expressly made a part thereof by the parties.

8 Cyc. 997; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Armour Packing Co. v. United States*, supra; *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 52 L. ed. 828, 28 Sup. Ct. Rep. 529, 14 Ann. Cas. 560; *Yeatman v. Towers*, 126 Md. 513, P.U.R.1915E, 811, 95 Atl. 158; *Union Dry Goods Co. v. Georgia Public Service Corp.*, 142 Ga. 841, L.R.A.1916E, 358, 83 S. E. 946; *Smith v. Northern Neck Mut. F. Asso.* 112 Va. 192, 38 L.R.A.(N.S.) 1016, 70 S. E. 482; *Knoxville v. Bird*, supra.

The effect of such after-made laws or regulations in so modifying the rights of the parties under such contracts cannot be evaded upon the theory that they impair the obligation of such contracts.

Dorr v. Chesapeake & O. R. Co. 78 W. Va. 150, L.R.A.1916E, 622, 88 S. E. 666; *Bunch v. Short*, 78 W. Va. 764, 90 S. E. 813; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Chicago, B. & Q. R. Co. v. Nebraska*, 170 U. S. 57, 42 L. ed. 948, 18 Sup. Ct. Rep. 513; *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 52 L. ed. 828, 28 Sup. Ct. Rep. 529, 14 Ann. Cas. 560; *Grand Trunk Western R. Co. v. South Bend*, 227 U. S. 544, 57 L. ed. 633, 44 L.R.A.(N.S.) 405, 33 Sup. Ct. Rep. 303; *Union Dry Goods Co. v. Georgia Public Service Corp.* 142 Ga. 841, L.R.A.1916E, 358, 83 S. E. 946; *Yeatman v. Towers*, 126 Md. 513, P.U.R.1915E, 811, 95 Atl. 158; *State ex rel. Ellis v. Tampa Waterworks Co.* 56 Fla. 858, 19 L.R.A.(N.S.) 183, 47 So. 358; *Tampa Waterworks Co. v. Tampa*, 199 U. S. 241, 50 L. ed. 170, 26 Sup. Ct. Rep. 23.

Equity has jurisdiction to grant the relief sought in this suit at the instance of the lessee furnishing such "free gas," and prevented by the defendant from installing such meter.

Hall v. Philadelphia Co. 72 W. Va. 573, 78 S. E. 755; *Manufacturers' Gas & Oil Co. v. Indiana Natural Gas & Oil Co.* 155 Ind. 461, 50 L.R.A. 768, 57 N. E.

912, 20 Mor. Min. Rep. 672; *Hogg v. McGulfin*, 67 W. Va. 456, 31 L.R.A. (N.S.) 491, 40 S. E. 41; *Carnegie Natural Gas Co. v. South Penn. Oil Co.* 56 W. Va. 402, 49 S. E. 548.

Ritz, J., delivered the opinion of the court:

Plaintiff is the owner of a lease for oil and gas purposes on a certain tract of land owned by the defendant, by the terms of which lease the defendant is entitled to have free gas for domestic purposes for one house, from any gas well drilled or utilized on said premises. A gas well was drilled upon the premises, and in accordance with the terms of said lease defendant was allowed to make connection with plaintiff's gas line in order to secure a supply of gas for his domestic purposes, and the same has been continuously furnished to him under the terms of said lease for many years. In July, 1915, the Public Service Commission of West Virginia adopted a rule providing that all gas furnished without charge within the state should be metered, and that reports should be made to it monthly of the quantities of gas so furnished. The plaintiff's bill alleges that in order to comply with this provision, as well as in order to be in a position to protect itself against the waste of gas by the defendant, it desired to install a meter upon the pipe supplying gas to the defendant's residence. To this the defendant objected, and, the plaintiff having installed said meter, the defendant removed the same. This suit was then brought and an injunction asked to restrain the defendant from interfering with the plaintiff in the installation of a meter upon his supply line, and the maintenance and reading of the same at proper intervals. A temporary injunction was granted, but subsequently, when the defendant appeared and demurred to the bill, the demurrer was sustained, and the temporary injunction dissolved. The question arising upon the sufficiency of said bill is now certified to this court.

The plaintiff insists that it is en-

titled to establish a meter upon the defendant's supply line, entirely at its own expense, as one of the practicable ways of securing information for the proper regulation of its business, and also in order that it may comply with the regulation made by the Public Service Commission of West Virginia. It is a little difficult to understand why the defendant objects to having the quantity of gas used by him ascertained in this manner. It involves no expense to him, nor does it appear how it can in any manner inconvenience him in the exercise of his right. The quantity of gas to which the defendant is entitled under this free gas clause in his lease is not unlimited, but is only such amount as is customary and reasonable for his domestic uses. *Hall v. Philadelphia Co.* 72 W. Va. 573, 78 S. E. 755; *Harbert v. Hope Natural Gas Co.* 76 W. Va. 207, L.R.A.1915E, 570, 84 S. E. 770. It cannot be said that the plaintiff has any arbitrary right to determine such amount. Neither has the defendant the right to say that he may use the gas produced to any extent which he wants, real or capricious, may demand. He is entitled under his contract only to ^{Mines—oil and gas lease—use by lessor.} so much gas free of charge as is ordinarily used, and as is reasonably necessary for such domestic purposes as natural gas is usually devoted to. This being true, it is entirely proper for the plaintiff to adopt such regulatory measures as may be practicable and appropriate for the purpose of determining that its product is not being wasted. Whatever production of gas remains after the free use thereof by the defendant is the property of the plaintiff. If the defendant uses more gas than his reasonable wants require, if gas is wasted by him, either because of defective appliances, or because of excessive use thereof, to the extent that such quantity exceeds his reasonable ordinary requirements, he is taking the property of the plaintiff. It is represented by the plaintiff that this free

gas is in many instances furnished through pipe lines constructed by the users thereof. These lines become out of order, they leak, and much gas is wasted in this way. These leaks can only be determined by a system of continuous inspection, unless meters are allowed to be installed, in which case such meters will give information as to any excessive use and waste, and lead to the repair of any defects or leaks in the supply line, or the correction of any wasteful use of the substance. We are very clearly of the opinion that inasmuch as it appears from the allegations of the bill that the attachment of this meter to the supply line of the defendant is a practicable and appropriate way of detecting any loss of gas by leaks or wasteful consumption of the same, and, further, that it will not in any way hinder or obstruct the defendant in the full and free exercise of his rights, the plaintiff had and has a right to enforce such regulation, and

—installation of
meter—rights.

that the attempt of the defendant to interfere with it in the installation, maintenance, and reading of such meter is an invasion of its right in this regard, which a court of equity will prevent.

Aside from the right of the plaintiff to protect its property by this regulatory measure, it would seem that the authority of the Public

Service Commission to make the regulation which it has made is entirely justified. It is shown by the bill that the amount of gas delivered to free gas consumers, so far as it has been able to be accurately measured, is something like thirty times as much as is delivered to other consumers for similar service. One of the duties devolved upon the Public Service Commission is to regulate the distribution of natural gas, and undoubtedly the purpose of the regulation it has adopted is to prevent the waste or improper use thereof, to the end that as large an amount as possible may be devoted to the beneficial uses of the inhabitants of the state. The regulations adopted by the Public Service Commission are appropriate, to say the least, for the effectuation of this purpose, and it may be said that not only does the plaintiff have the right to install these meters with the view of giving effect to the Public Service Commission's regulation, but it is its duty to do so, and it is entirely competent for a court of equity to restrain anyone who interferes with the discharge of such duty.

We are, therefore, of opinion to reverse the decree of the Circuit Court sustaining the demurrer and dissolving the injunction, overrule the demurrer, reinstate the temporary injunction, and remand the cause for further proceedings.

ANNOTATION.

Construction of provision for free gas in oil and gas lease.

Amount of gas to be furnished.

The rule is laid down in the reported case (*PITTSBURGH & W. V. GAS CO. v. RICHARDSON*, ante, 86), that where the owner of land leases the same for oil and gas purposes, and stipulates in the lease that he shall be entitled to have free gas for domestic purposes, the quantity to which he is entitled under such clause in the lease is not unlimited, but is only such

amount as is customary and reasonable for his domestic uses.

Similarly, in two cases, the use of an open or flambeau light outdoors has been held to be an improper use of gas furnished free to a lessor, and the substitution of a Welsbach or other economical burner has been required. *Hall v. Philadelphia Co.* (1913) 72 W. Va. 573, 78 S. E. 755; *Harbert v. Hope Natural Gas Co.* (1915) 76 W. Va. 207, L.R.A.1915E, 570, 84 S. E. 770.

The use of an outside light has been held to be within a lease giving free gas for domestic purposes in *Hall v. Philadelphia Co.* (W. Va.) *supra*, wherein the lessors sought to enforce their rights under an oil and gas lease which secured to them free gas for domestic use from the wells on the premises, provided they made their own connections. A well was completed on the premises and was connected with the dwelling house. The lessors maintained an open or flambeau light in the yard, about 20 feet from the house. It was contended that the clause allowing free use of gas for "domestic purposes" did not permit gas to be used outside the house. In holding that a light outside the house was a reasonable use for domestic purposes, the court said: "A clearer and more satisfactory index to the meaning of the terms than the definitions in any of the authorities cited is found in the usage or custom shown by the evidence to obtain in oil and gas regions. Oil and gas leases generally provide for free gas for the lessor's dwelling house, or one or more dwelling houses on the premises. Such a provision is usual and customary. It is found in most of the printed forms of lease. The free gas clause either stipulates for an outside light, or is generally construed by the parties as authorizing it. Nearly all lessors of improved lands on which they reside have free gas for heat and light within the dwelling, and also for a light in the yard. Advised of this well-nigh universal practice, the parties may well be supposed to have contracted with reference to it, and it affords a safer guide for interpretation of the clause than the definitions furnished us. A custom or usage is not allowed to control or vary the meaning of words, when they have a definite legal signification. *Bowyer v. Martin* (1828) 6 Rand. (Va.) 525. But if they are uncertain, or have not a fixed legal signification, a particular custom may be proved as having been within the knowledge of the parties at the time and impliedly adopted as a part of the contract."

But under a lease providing that

the lessee shall equip a house for the lessor, and furnish it with gas, free of cost, the right to maintain a light on the grounds has been denied. *Gillespie v. Iseman* (1904) 210 Pa. 1, 59 Atl. 266, wherein the court said: "Manifestly, the plain meaning and intent is that the company shall furnish gas free for that which it was to equip for its use, not that it was to equip one thing, the house, for the use of gas, and then furnish the gas for use in some other place not mentioned, and not so equipped by it. The defendant might as well have contended that the clause would cover the use of gas in his barn, or to light up his driveway from the road to the house. There was no such agreement. It was the house alone which was to be equipped, and evidently, under the language of the agreement, the use of natural gas free was to be supplied to that for which the equipment was to be furnished. No other idea as to the construction of the contract seems to have been entertained by the parties who made it, or by Mr. Fullerton, who succeeded Mr. Meenan in the ownership of the farm. It was not until more than six years had passed after the making of the lease that the present defendant, who was not a party to it when it was made, sought to put a construction upon it differing from that which had until then been accepted and acted upon by the parties to it. 'Courts will, if they can, give to the contracts of parties the exact effect which the parties themselves gave to them, and interpret them just as they interpreted them.'"

While a covenant in an oil and gas lease for furnishing to the lessor free gas for domestic purposes is a covenant running with the land, it need not be performed on the land, and the lessor has the right to carry the gas off the land for his consumption, especially where the lessee has impliedly admitted the covenantee's right to consume the gas elsewhere than on the land, by permitting him to tap one of its lines and to use gas therefrom for a long period of time. *Harbert v. Hope Natural Gas Co.* (1915) 76 W. Va. 207, L.R.A.1915E, 570, 84 S. E.

770, wherein the court said: "The covenant for free gas, although running with the land, is nevertheless a part of the consideration of the lease. Thornton, Oil & Gas, § 226. What right has the lessee to say how the lessor shall use the consideration, so long as his burden is not increased? A covenant running with the land need not, necessarily, be performed on the land itself. 11 Cyc. 1080. 'A covenant is capable of running with the land, although not directly to be performed on it.' Van Rensselaer v. Smith (1858) 27 Barb. (N. Y.) 104. See also Norman v. Wells (1887) 17 Wend. (N. Y.) 136. There is certainly nothing in the public policy which would prohibit the owner of the land and covenantee for free gas, from consuming it off the premises; and we find no reason for so interpreting the lease. If the purpose was to confine the use of gas to a dwelling house on the leased premises, why did not the covenantor so stipulate? The subsequent conduct of the parties, giving practical construction to the covenant, indicates that they did not so intend. Consumption of the gas elsewhere than on the land does not destroy the real character of the covenant. The covenant runs with the land, regardless of where the gas is consumed, because it issues out of the land and is a benefit to it. As before stated, defendant is interested only in the quantity consumed. It is bound, however, to furnish gas for one dwelling house only; and has a right to demand that plaintiff keep his pipe lines and appliances in good repair, and use a closed light on the outside, with a Welsbach, or some other approved burner, in order to prevent needless waste."

The lessee in an oil and gas lease containing a stipulation that the lessor shall be entitled to free gas for domestic purposes is entitled to establish a meter on the lessor's supply line for the purpose of securing information for the proper regulation of its business, and also in order that it may comply with a regulation of the Public Service Commission, requiring all gas furnished without charge with-

in the state to be metered. See the reported case (PITTSBURGH & W. V. GAS CO. v. RICHARDSON, ante, 86).

Effect of failure to sink well or find gas.

Where a lease of land for the sinking of oil or gas wells provides unconditionally that the lessor is to be furnished with free gas, the failure of the lessee to sink wells on the premises, or to find gas thereon, does not relieve him from the stipulation to furnish free gas.

Thus, it appeared in *Boal v. Citizens' Natural Gas Co.* (1903) 23 Pa. Super. Ct. 339, that an oil and gas company took a lease of certain land "for the sole and only purpose of drilling and operating for petroleum oil or gas." It agreed to pay a certain royalty on oil and gas produced, and also to furnish the lessor with natural gas for heat and light for his house, during the term of the lease. One well was drilled, and, after the production of gas ceased, the lessee sought to be discharged from its obligation to furnish the lessor with gas. It was held that failure of production of gas did not discharge the lessee from its agreement to furnish gas, since the lease contained no stipulation that the gas was to be furnished from the leased premises. The court said: "To hold that the facts set up in the affidavit constitute a defense, we must assume that the parties intended to make the obligation to furnish gas contingent upon the production by the lessee of oil or gas from the leased premises. It is not so written in the lease; nor is such condition, either precedent or subsequent, to be implied from the mere fact that the premises were leased 'for the sole and only purpose of drilling and operating for petroleum oil or gas.' For aught we know, the mere demise for such purpose, with the privilege it conferred, may have been deemed by the lessee, and may have been, in fact, an adequate consideration for its covenant to furnish gas from the date mentioned to the end of the term. There is nothing unconscionable in such an agreement, and it would be neither inequitable nor unjust to hold

the lessee to it, even after it became unprofitable for the lessee to continue its operations and accordingly discontinued them. The construction contended for by the appellant is not only unsupported by any affirmative language in the lease, but it is negatived by the fact that the lessee was to begin furnishing gas within fifteen days after the lease was executed. Surely the lessee could not postpone performance of this duty by postponing its operations. Neither could it terminate or suspend its obligations by ceasing or suspending operations, after drilling a single well and operating it to exhaustion."

So, in *Kokomo Natural Gas & Oil Co. v. Albright* (1897) 18 Ind. App. 151, 47 N. E. 682, there was involved a gas and oil lease whereby the lessees were to have exclusive right to the lessor's premises, to operate gas and oil wells, and in consideration the lessees were to furnish gas for four residences free of charge, so long as gas was obtained on the land in paying quantities. It was further agreed that well rentals should be paid at the rate of \$200 for each well, \$100 to be paid in gas; cash payment was to be made annually in advance, "whether a gas well is drilled or not." No wells were dug, but the rental was paid for a period of two years, after which time no gas was furnished. It was held that the providing of gas was not dependent on the drilling of gas wells, the court saying: "The special provision relating to the furnishing of gas free of charge did not limit the delivery of the gas to a period during which it should be obtained in paying quantities on the land of the appellees; and if the appellant would have been relieved of the obligation to continue to furnish gas by reason of its failure to obtain it in paying quantities for piping, according to the judgment of the company, and if such failure would diminish the demand of the appellees in this action, it would seem to devolve upon the appellant to show that gas could not be so obtained, rather than that the appellees should be required to show the contrary. Under the contract as a whole,

the gas was to be furnished in part payment of the \$200 per year, and as an equivalent of \$100 in cash annually, and the sum of \$100, as the balance, was to be paid in cash, whether a gas well were drilled or not. The appellant was not bound to drill a gas well. It had the right to do so. It was enough for the appellees to be ready and willing to agree with the appellant upon a place, and to wait for notice from the appellant that it was ready to locate the well. The time when the furnishing of gas was to commence, and the term during which it was to continue, were specified in the contract, and it was alleged in the complaint that the gas was furnished according to the contract until a certain date, and that the company then and ever since has failed and refused to furnish the gas as provided in the contract, though the appellees often requested it to do so. No other averment of demand was necessary."

The oil and gas lease construed in *Armitage v. Mt. Sterling Oil & Gas Co.* (1904) 25 Ky. L. Rep. 2262, 80 S. W. 177, provided that the lessor should be supplied with free gas, and the lessee agreed to sink a well within three years and commence operations within six months. It appeared that the lessee failed to commence operations within six months, and the lessor sought to cancel the lease. The court held that there was an unconditional provision in the lease to furnish free gas, commencing within a certain time, and that failure to comply therewith was not excused by an offer to pay rent for the premises; but the lessor could cancel for a breach of the agreement to furnish free gas.

To the same effect is *Indiana Natural Gas & Oil Co. v. Hinton* (1902) 159 Ind. 398, 64 N. E. 224, involving an oil and gas lease dated July 25, containing the following terms: "(1) Second party agrees to drill a well upon said premises within twelve months from this date, or thereafter pay to the first party a yearly rental of \$56 until said well is drilled. . . . (2) Should oil be found in paying quantities upon the premises, second

party agrees to deliver to first party, in the pipes with which second party may connect the well or wells, the one-eighth part of all the oil produced and saved from the premises.

(3) Should gas be found, second party agrees to pay first party \$200 yearly, payable quarterly on demand, for each and every well which is transported or used off the premises, so long as the same is transported. (4) First party shall have, free of expenses, gas from the well or wells, to use at his own risk, to light and heat the dwellings now on the premises, with pipe to conduct the same to said dwellings free of cost. . . . (9)

Second party agree to furnish gas to first party for use at his premises on or before the 15th day of November." The court held that the obligation to furnish free gas was independent of the obligation imposed by the first clause of the agreement,—to sink wells, or pay rental on failure so to do.

But in *Evans v. Consumers' Gas Trust Co.* (1891) — Ind. —, 31 L.R.A. 673, 29 N. E. 398, it appeared that, by an oil and gas lease, the lessee contracted to complete a gas well within ninety days, and, in case of failure so to complete it, to pay a yearly sum until it was completed. He also contracted to furnish the lessor free gas for his premises, with pipes and fixtures, etc. The court held that the lessee was bound to furnish gas and piping only if gas was obtained, and that where the lessee failed to sink wells, the lessor was entitled to nominal damages only. The appellant contended that the agreement to furnish gas was absolute and unconditional, but the court construed the terms of the contract, taking all the provisions into consideration, to mean that the lessee agreed to furnish gas only if it obtained gas from the well to be drilled.

In *Indiana Natural Gas & Oil Co. v. Leer* (1904) 34 Ind. App. 61, 72 N. E. 283, it was said, by way of dictum, that an agreement to furnish to a lessor free gas from "the well or wells in use" meant that the gas was "to come from a well or wells on the prem-

ises," giving no right to gas until a well was completed.

The decision in *Weger v. Western Supply & Wrecking Co.* (1916) 199 Ill. App. 34, is abstracted in the official report as follows: "In an action to recover for breach of a lease of land demised for the production of oil and gas, where it appeared that the lease contained a covenant to pay plaintiffs an agreed rental, and to supply them with gas for domestic use without cost, 'while the product of each well in which gas only is found shall be marketed from said premises'; that the lease was assigned, and the assignee drilled a well which produced gas only, which was marketed for general consumption; that the lease was afterwards assigned to defendant; that, the flow of gas becoming insufficient to supply plaintiffs if allowed to go into defendant's commercial line, plaintiffs shut it off from the line, and for some time used the gas without cost; that later an arrangement was made whereby the owner of land on which there were strong gas wells, which were owned by defendant, secured the right to use gas from plaintiffs' well, without cost, for domestic purposes, so as to increase the pressure in defendant's commercial line from the wells on such other person's land, defendant agreeing not to take up the pipe from the well as intended, which would have prevented plaintiffs from using the gas, but to allow it to remain with the well shut off from defendant's commercial line; and plaintiffs claimed that the gas used by such other person was 'marketed' within the meaning of the lease, entitling them to rental,—held, that under the evidence the lease was superseded by the new arrangement, and that plaintiffs could not recover for rental."

Cases involving the cancelation of an oil and gas lease for failure to prosecute the work are not within the scope of this discussion, though a provision for free gas is contained in the lease in question, unless that provision is specifically considered.

M. J. Q.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appt.,

v.

MARIE ROBERTS, by Next Friend.

Kentucky Court of Appeals — February 24, 1920.

(— Ky. —, 218 S. W. 713.)

Carrier — injury by cinder — leaving door open — train in tunnel.

1. A carrier is liable for injury to the eye of a passenger due to a cinder entering the car where a brakeman, contrary to rules, left the door of the car open when the train was passing through a tunnel.

[See note on this question beginning on page 96.]

Evidence — hearsay — statement of physician.

2. In an action against a carrier for injury to a passenger's eye evidence is not admissible that the physician consulted by the passenger said that a cinder which entered the eye was more than likely to cause the trouble.

[See 5 R. C. L. 92.]

Appeal — hearsay testimony — non-prejudicial error.

3. Admission of hearsay testimony

is not reversible error if the same fact was proved by competent testimony.

[See 2 R. C. L. 252, 253.]

Damages — injury to eye — amount.

4. One thousand dollars is not excessive to allow for negligent injury by a carrier to the eye of a passenger which causes a growth in the eye and impairment of vision.

[See 2 R. C. L. 200; 8 R. C. L. 673 et seq.]

APPEAL by defendant from a judgment of the Circuit Court for Breathitt County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by the negligence of defendant's servants. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Messrs. Benjamin D. Warfield, O. H. Pollard, and J. M. Benton, for appellant:

The petition did not state a cause of action, and appellant's demurrer thereto should have been sustained.

Missouri, K. & T. R. Co. v. Orton, 67 Kan. 848, 73 Pac. 63, 14 Am. Neg. Rep. 548; O'Donnell v. Louisville & N. R. Co. 19 Ky. L. Rep. 1005, 42 S. W. 846; Cincinnati, N. O. & T. P. R. Co. v. Baxter, 33 Ky. L. Rep. 305, 18 L.R.A. (N.S.) 241, 110 S. W. 248; 2 White, Personal Injuries on Railroads, 656, p. 995; Gosney v. Louisville & N. R. Co. 169 Ky. 323, L.R.A.1916E, 458, 183 S. W. 538; Covington & C. R. Transfer & Bridge Co. v. Mulvey, 135 Ky. 223, 26 L.R.A.(N.S.) 204, 122 S. W. 129.

Even if the petition had alleged a cause of action, plaintiff failed to prove one, and defendant was entitled to a peremptory instruction both on that ground and because the petition did not state a cause of action.

Louisville & N. R. Co. v. Cox, 145 Ky. 716, 141 S. W. 59; Louisville R. Co.

v. Hibbitt, 139 Ky. 43, 139 Am. St. Rep. 464, 129 S. W. 319; Mast v. Lehman, 100 Ky. 464, 38 S. W. 1056; Gore v. Illinois C. R. Co. 17 Ky. L. Rep. 799, 32 S. W. 754; Hill v. Ragland, 114 Ky. 209, 70 S. W. 634.

If the growth on plaintiff's eye could readily be removed, it was her duty to have this done.

Louisville & N. R. Co. v. Reaume, 128 Ky. 100, 107 S. W. 290; Illinois C. R. Co. v. Gheen, 112 Ky. 695, 66 S. W. 639, 68 S. W. 1087; Louisville & N. R. Co. v. Wilkins, 143 Ky. 572, 136 S. W. 1023, Ann. Cas. 1912D, 518; Western U. Teleg. Co. v. Matthews, 113 Ky. 188, 67 S. W. 849.

The court erred in permitting plaintiff to testify to what she says Dr. Trapp told her as to what was the cause of the growth on her eye.

Louisville & N. R. Co. v. Lynch, 137 Ky. 696, 126 S. W. 362; Louisville & N. R. Co. v. Smith, 27 Ky. L. Rep. 257, 84 S. W. 755.

Messrs. E. C. O'Rear, W. N. Cope, and T. T. Cope for appellee.

Clay, C., filed the following opinion:

Through her father as next friend, Marie Roberts, an infant, brought suit against the Louisville & Nashville Railroad Company to recover damages for personal injuries. From a verdict and judgment in her favor for \$1,000, the railroad company appeals.

It appears from the petition that the defendant owns and operates a railroad between Jackson and McRoberts, and that on March 6, 1916, plaintiff purchased a ticket from Jackson to Haddix, and entered the rear coach of defendant's passenger train and took a seat near the front door. The petition further alleges that, after said train left Jackson, the first stop was made at Dumont, a flag station near the Dumont tunnel; that the defendant, by its agents and employees who had charge of the train, carelessly and negligently left the front door of the rear passenger car open as the train entered Dumont tunnel; that the rear passenger car, in which plaintiff was seated, was filled with fumes, smoke, and cinders that came from the engine of said train and entered the open door of the car, stifling and suffocating the plaintiff; and that a hot cinder entered her right eye, causing her great pain and impairing her vision.

Plaintiff's testimony is in substance as follows: She got on the train at Jackson. She and her mother took a seat near the door. After the conductor took up the tickets, the train stopped at Dumont. As they went into the tunnel, the brakeman came in and left the door open. The car was filled with cinders, and a cinder went into her eye. In about a week she went to Jackson, and Dr. Back removed the cinder. After that a growth appeared in her eye, and she went to Lexington to consult a specialist, who prescribed for her. Dr. Back testified that he removed something from plaintiff's eye about the size of a pin point, but could not say whether it was a cinder or not. Dr. Wickliffe

testified that there was a growth in plaintiff's eye, which he called a "pterygium," but that the growth could be removed by an operation. Dr. Hurst testified that he discovered a little growth in plaintiff's eye, and that this growth could have been caused by a cinder. Dr. Offutt, a specialist, deposed that a cinder, if left in the eye, could have caused the growth. On the other hand, Dr. Trapp, another specialist, testified that a cinder could not have caused the growth.

It is insisted, not only that the demurrer should have been sustained to the petition, but that defendant was entitled to a directed verdict. To support this position the case of *Missouri, K. & T. R. Co. v. Orton*, 67 Kan. 848, 73 Pac. 63, 14 Am. Neg. Rep. 548, is relied on. In that case plaintiff passed through a train looking for a seat, and, finding none, he stopped in the door of the car, and while standing there a cinder struck him in the eye. Though there was a verdict in favor of plaintiff, the jury found that the engine of the train was in good repair and was supplied with the best known appliances to prevent the escape of cinders; that the engineer in charge was both competent and skilful, and so was the fireman; and that the engine was being properly and skilfully managed and operated at the time the injury occurred. After adverting to the fact that the findings of the jury acquitted the company of all negligence as to the construction of the locomotive and its management and operation, the court said: "The only other charge of negligence was in failing to keep closed the door of the coach wherein the plaintiff was riding. The rules of the company, it is true, required that the doors be kept closed; but the opening and closing of the doors and windows of cars are not fully within the control of the company or its employees. Passengers pass from one coach to another, and hence the doors are frequently opened: they are also frequently opened by passengers for purposes

of ventilation. The mere fact that a cinder comes in at a door or window and strikes a passenger is not evidence of negligence. Cinders come into cars and into contact with passengers, whether they are sitting or standing. Orton might have been struck as readily if he had been occupying an end seat as when standing. As the appliances were of the best and the operation and management proper and skilful, the presumption of negligence does not obtain in favor of the passenger as it otherwise might have done. In view of the excellent condition and skilful operation of the locomotive, the company was no more responsible for the accident than if the cinder had come from a steam thresher operated in proximity to the railroad. From the record we cannot say that there was such proof as warranted a finding of culpable negligence with respect to the open door. For that reason we are of the opinion that the motion for a new trial should have been sustained, and therefore the judgment will be reversed and the cause remanded for further proceedings."

In the case under consideration, it is pointed out that plaintiff did not rely upon the defective spark arrester, or the negligent management of the train, but predicated her case on the fact that the door of the car was left open, which, it is insisted, was not negligence. It may be conceded that ordinarily the fact that the window or door of a car is left open is not evidence of negligence, since passengers are in the habit of raising and lowering windows, and going in and out of doors; but that rule cannot be applied to

the facts of this case. Here, it was the rule of the company to close the doors of the cars when going through a tunnel. The brakeman was charged with notice of the location of the tunnel. It is a matter of common knowledge that if the door of a car without a vestibule is left open, cinders will probably enter the car. Hence, if the brakeman himself left the door open, just as the train was about to enter the tunnel, and this caused the cinder to enter plaintiff's eye, it cannot be doubted that he was guilty of negligence for which the company was liable. That being true, a cause of action was both pleaded and proved.

Carrier—injury by cinder—leaving door open—train in tunnel.

Over the objection of defendant, plaintiff was permitted to state that the specialist whom she visited in Lexington, on being told that plaintiff had gotten a cinder in her eye, stated that more than likely that was the cause of her trouble. It may be

Evidence—hearsay—statement of physician.

conceded that this evidence was mere hearsay, and was not admissible. *Louisville & N. R. Co. v. Lynch*, 137 Ky. 696, 126 S. W. 362.

But we do not regard its admission as prejudicial, since the same fact was shown by competent testimony.

Appeal—hearsay testimony—non-prejudicial error.

Ohio & K. R. Co. v. Beuris, 146 Ky. 612, 143 S. W. 16.

Damages—injury to eye—amount.

We do not regard the verdict as excessive.

Judgment affirmed.

ANNOTATION.

Carrier's duty to passenger while train is going through tunnel.

The reported case (*LOUISVILLE & N. R. Co. v. ROBERTS*, ante, 94) holds that if the rules of a railway company require the closing of the car doors in passing through a tunnel, and a brakeman leaves a door open as the train is about to enter the tunnel, and

as a result a cinder enters a passenger's eye, causing injury, negligence is shown for which the railway company is liable.

The proposition that a railway company owes a duty to provide lights and to close the windows and doors

in passing through a long tunnel is supported by *Western Maryland R. Co. v. Stanley* (1883) 61 Md. 266, 48 Am. Rep. 96, where a passenger recovered damages for injury sustained by running his arm through the glass in a door of the car in attempting to close it while the train was passing through a tunnel. The court said: "It appeared in the proof of the defendant that the running time for the passage of the tunnel was from six to seven minutes. . . . There can be no doubt that it is the duty of railroads for the conveyance of passengers to take proper precautions, in the management, appointments, and discipline on their trains, to secure the safety and reasonable comfort of their passengers. . . . The company knew the train had to pass through the tunnels of the Baltimore and Potomac Railroad. Lights were necessary for such a totally dark transit. The necessities of passengers might require light during the passage of them. No argument is needed to prove this. The officers of the train, testifying for the defendant, say there were lights in all the cars; but this is a question of evidence, and the plaintiff and another passenger say there were none. The imperative necessity for closing the windows, doors, and even the ventilators when passing through tunnels, to prevent the otherwise inevitable discomfort from the smoke, cinders, and gas, is notorious. The ordinary practice of the company to do that before entering a tunnel, as proved by the defendant's own witnesses, establishes the importance of such precautions. There were ten passenger coaches, and but two conductors and two brakemen on the train. When the cry was made, to 'shut the door,' there was no officer in the car to comply with the passengers' request, and the plaintiff was impelled by his discomfort to attempt to do it himself. Whilst we do not think, or mean to say, that an officer should have been provided for every car, or that the omission to shut out the gas and smoke would of itself have given a right to passengers to sue for the discomfort and annoyance, yet we

think all the recited facts and circumstances taken together, if found by a jury, would warrant the finding of negligence on the part of the defendant, and justify a verdict for the plaintiff, unless the plaintiff's conduct amounted to contributory negligence." And the court held that contributory negligence was not shown as matter of law by the fact that the plaintiff, who was sitting nearest the door in a crowded car, attempted to close it, even though he knew there were persons both inside and outside the doorway, and their presence may have been the immediate cause of the accident.

In an action for injury to an infant passenger by being struck in the eye by a cinder which entered through an open window when the train was passing through a tunnel, there being evidence that the passenger had requested the conductor before reaching the tunnel to close the window, which she was unable to do, and that he had failed to do so, the court, in *Lexington & E. R. Co. v. Robinson* (1919) — Ky. —, 216 S. W. 86, stated that the plaintiff's evidence, while unsatisfactory, was sufficient to take the case to the jury, yet that the verdict, which was for the plaintiff, was not only against the weight of the evidence, but the amount awarded as damages was so excessive that for both reasons a reversal must be ordered.

The view that it is not necessarily negligence as matter of law for a street railway company to permit a passenger on a crowded street car to stand on the running board of the car when passing through a tunnel is supported by *North Chicago Street R. Co. v. Polkey* (1908) 203 Ill. 225, 67 N. E. 793, 14 Am. Neg. Rep. 275, an action for the death of a passenger who was killed by falling or being knocked from a street car while riding in this position when it passed through a tunnel. The principal contention of the plaintiff was that the conductor negligently attempted to collect fares while passing through the tunnel, and that the passenger, while reaching for his fare, in the exercise of ordinary care, touched the

tunnel walls and lost his hold. A judgment for the plaintiff was reversed largely because of an instruction that, as matter of law, carriers are held to the exercise of the highest degree of care, skill, or diligence for the safety of passengers consistent with the mode of conveyance employed, and a refusal to qualify this instruction, as requested by the defendant, so as to limit the degree of care required to the highest degree consistent with the practical operation of the railway.

Clarke v. Louisville & N. R. Co. (1897) 101 Ky. 34, 36 L.R.A. 123, 39 S. W. 840, 2 Am. Neg. Rep. 360, in which recovery was denied for injury to a passenger by protruding his elbow through an open window when the train was passing through a tunnel, turns on the question of contributory negligence, it being held that a complaint was subject to demurrer which alleged that the passenger, in placing his eyeglasses in his pocket, protruded his elbow through an open window, not more than 1½ inches beyond the outer surface of the car, and was struck by the timbers in the tunnel, which were in such close proximity to the track that the natural and usual oscillations of the cars were sufficient to cause them to strike against the timbers. The court applied the rule

that one who voluntarily, and without qualifying circumstances impelling him to do so, places his arm out of a car window, is negligent, and cannot recover for the resulting injury.

And in *Shelton v. Louisville & N. R. Co.* (1897) 19 Ky. L. Rep. 215, 39 S. W. 842, 2 Am. Neg. Rep. 362, an action for death of a passenger in the same tunnel as in the preceding case, it was held that a cause of action was not stated by a petition alleging that the passenger became suddenly and violently ill, and while in great pain and in a half-fainting condition protruded his head through a car window to vomit, when he was struck by the timbers of the tunnel and instantly killed, it not appearing when the window was opened, nor who opened it, or that those in charge of the train knew of the illness, or the dangerous position assumed by the deceased, or could have known it by reasonable care.

As is indicated in the title, the annotation does not purport to cover the question of contributory negligence, although that is referred to in some of the cases cited, since it does not appear that the question would usually present itself in a form distinctive to the class of cases under consideration.

R. E. H.

STATE OF NORTH DAKOTA EX REL. WILLIAM LANGER, Attorney General, Appt.,

v.

GAMBLE-ROBINSON FRUIT COMPANY et al., Respts.

North Dakota Supreme Court — December 27, 1919.

(— N. D. —, 176 N. W. 103.)

Monopoly — necessity of criminal prosecution.

1. The civil remedy provided by § 8004, Comp. Laws 1913, is not conditioned on a successful criminal prosecution under the penal statutes, and may be brought independently of criminal proceedings.

[See note on this question beginning on page 106.]

Quo warranto — to annul charter — effect of criminal remedy.

2. In a civil action brought by the

attorney general, in which it is sought to procure the cancelation of the corporate charters of the defendants,

Headnotes by BIRDZELL, J.

where the complaint alleges a combination of the defendants to control the price at which they will sell fruits and berries contrary to chapter 65 of the Penal Code, it is held, the civil remedy in the nature of quo warranto to procure the annulment of corporate franchises for abuse of powers, which is provided in § 8004, Comp. Laws 1913, in the Code of Civil Procedure, is the ordinary common-law remedy through which the state might vindicate its sovereign rights, and it is not to be deemed superseded by a criminal remedy, or another civil remedy, in the absence of a clearly expressed legislative intention to that effect.

[See 22 R. C. L. 660, 684.]

Monopoly — remedy — exclusiveness.

3. Neither the absence of provision for a civil remedy in a penal statute prohibiting trusts, pools, and combinations, nor the provision in such penal statute making a judgment of

conviction operate as a forfeiture of corporate franchises, sufficiently evidences a legislative intention to make the criminal remedy exclusive.

Corporation — abuse of powers.

4. Section 8004, Comp. Laws 1913, in the Code of Civil Procedure, authorizes a civil action by the attorney general for the annulment of corporate franchises for abuse of powers, and the alleged acts of the defendants constitute abuse of their corporate powers, within subdivision 2 of the section.

[See 7 R. C. L. 712.]

— misuse of franchise.

5. Misuse of a corporation franchise constitutes abuse of powers, justifying the application of the statutory civil remedy, whenever the acts of misuse involve injury to the public, although the same acts may constitute a violation of a penal statute.

APPEAL by relator from an order of the District Court for Burleigh County (Nuessle, J.) sustaining a demurrer to the complaint in an action brought to secure the cancelation of defendants' corporate charters. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. William Langer, Attorney General, Albert E. Sheets, Jr., Assistant Attorney General, S. L. Nuchols, and Carmody, Loudon, & Mulready for appellant.

Messrs. Fisk & Murphy, for respondent Fruit Company:

A court of equity has no jurisdiction, unless expressly conferred by statute, to decree the dissolution of a corporation or the forfeiture of its franchises, either at the suit of an individual or at the suit of the state.

7 R. C. L. 731, § 740; 5 Fletcher, Cyc. Corp. § 3234; State ex rel. Leese v. Atchison & N. R. Co. 8 Am. St. Rep. 179, and note, 24 Neb. 143, 38 N. W. 43.

Messrs. Murphy & Toner and Butler, Mitchell, & Doherty, for respondent Stacy Bismarck Company:

No action lies for the forfeiture of the defendants' franchises under the allegations of the complaint.

Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; Counselman v. Hitchcock, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195; State ex rel. McClory v. Donovan, 10 N. D. 203, 86 N. W. 709; Re Beer, 17 N. D. 184, 115 N. W. 672, 17 Ann. Cas. 126.

No relief by injunction, or otherwise than by ouster, can be granted in an action begun in the form in which this action was begun.

17 Enc. Pl. & Pr. 386, 390, 482; 32 Cyc. 1412; 22 R. C. L. 656, 719.

Birdzell, J., delivered the opinion of the court:

This is an appeal from an order of the district court of Burleigh county, sustaining a demurrer to a complaint. The action is one by the attorney general to secure the cancelation of the corporate charters of the defendants, and is brought pursuant to leave of court obtained upon an order to show cause why the leave should not be granted.

The complaint alleges the official relation of the plaintiff as attorney general of the state, the corporate existence of each of the defendants, that each defendant is a wholesale fruit dealer, engaged in selling to retailers in territory tributary to the city of Bismarck, and then, in paragraph 4, the allegations upon which the sufficiency of the complaint depends are set forth as follows:

"That in the year 1913 the defendants formed a pool, trust, and combination for the purpose of fixing a standard for the price, and fixing the price, at which fruits and berries should be sold by said defendants to the trade and to the public, and by which defendants agreed between themselves to establish, agree upon, and settle the price each week, or oftener, at which fruits and berries sold by defendants should be sold to retail dealers and to the public, and in pursuance of such combination and agreement, representatives of each of the defendant corporations met together once each week and agreed together to sell fruits and berries to the retail trade and to the public at a certain price during the ensuing week, according to a card or price list agreed upon by said defendants; and said defendants have ever since the summer of 1913 continued to combine and agree together for the purpose of fixing the price at which fruits and berries should be sold by said defendants to the retail trade and the public in the city of Bismarck and the territory tributary thereto, and since said last-mentioned date representatives of said defendants have regularly met together from time to time and agreed upon and fixed the price, and arranged a card and price list according to which said defendants should sell fruits and berries to the retail trade and the public; and said defendants still continue said pool, trust, and combination for the purpose of fixing the price at which fruits and berries shall be sold by defendants to the retail trade and the public, in the city of Bismarck and the territory tributary thereto, and in pursuance of said pool, trust, combination, and agreement for fixing prices neither of said defendants will sell fruit or berries at any other price than the price agreed upon by said defendants, and each of said defendants, pursuant to said agreement, sells fruit and berries at identically the same price in the same territory, and preclude and prevent a free and unrestricted competition

between themselves in the sale of fruits and berries to the retail trade and to the public in the city of Bismarck and the territory tributary thereto, in violation of chapter 65 of the Penal Code, Compiled Laws, State of North Dakota, for the year 1913."

A general demurrer was sustained to the foregoing complaint, and the matter is here upon appeal from the order.

The complaint must be considered in the light of the following provisions of law:

Constitution, § 21: "The provisions of this Constitution are mandatory and prohibitory unless, by express words, they are declared to be otherwise."

Constitution, § 146: "Any combination between individuals, corporations, associations, or either, having for its object or effect the controlling of the price of any product of the soil or any article of manufacture or commerce, or the cost of exchange or transportation, is prohibited and hereby declared unlawful and against public policy; and any and all franchises heretofore granted or extended, or that may hereafter be granted or extended in this state, whenever the owner or owners thereof violate this article, shall be deemed annulled and become void."

Section 8004, Comp. Laws 1913, provides: ". . . An action may be brought by the state, or by any private person in the name of the state, on leave granted therefor by the district court, upon cause shown for the purpose of annulling the existence of any corporation created by, or under the laws of this state, except a municipal corporation, whenever any such corporation shall:

"1. . . .

"2. Violate the provisions of any law by which such corporation shall have forfeited its corporate rights, privileges and franchises by abuse of its powers."

The succeeding section of the same article makes provisions for

the bringing of an action by an individual in case of the refusal of the attorney general, for notice to the corporation for distribution of the corporate property to creditors, claimants, and stockholders following a judgment of dissolution, for the appointment of a receiver, for the payment of costs, for filing a copy of the judgment roll in the office of the secretary of state or the insurance commissioner (depending upon the kind of corporation), etc.

The substance of chapter 65 of the Penal Code requiring consideration may be stated as follows: It provides that those entering into prohibited pools, combinations, etc., shall be guilty of a misdemeanor, defines illegal combinations in such a manner as to bring the alleged acts of the defendants within its penal provisions, and it provides as punishment the fining of the guilty corporation up to the maximum of \$5,000, and fining and imprisonment, or both, of the guilty officers of the corporation. One of the sections (Comp. Laws 1913, § 9954) reads: "Every domestic or foreign corporation authorized to do business in this state, which shall have been found guilty in any court of competent jurisdiction of violating any of the provisions of this chapter, is hereby denied the right of and prohibited from doing business in this state, and the charter, articles of incorporation, or authority granted, authorizing such corporation to do business in this state, shall cease and become void, and it shall become the duty of the secretary of state, upon the filing in his office of a certified copy of such judgment, to immediately cancel the authorization or charter of such corporation and give such corporation written notice of such cancellation."

It contains further sections rendering combinations and contracts made in violation of the chapter void, and not enforceable in law or equity, excusing purchasers from liability to pay for commodities sold in carrying out prohibited combinations, and authorizing the taking of

testimony by the attorney general upon notice. Injunction is also authorized to prevent the corporation from disposing of or removing its property during the pendency of suit unless a bond be given conditioned for the payment of any judgment, fine, and costs that might be adjudged in the action.

The principal contention of the defendants and respondents is that the relief demanded cannot be decreed unless and until the respondents are convicted criminally under the Penal Code. If this contention be correct, the complaint does not state a cause of action. The contention is based primarily upon an interpretation of the statutory provisions hereinbefore referred to in conjunction with a section (Rev. Codes 1905, § 9231), which was passed in 1905 as a part of an act dealing with trusts, pools, and combinations, and which was omitted from the act as amended and re-enacted by chap. 259 of the Session Laws of 1907. The section, which was repealed by and omitted from the 1907 act, provided specifically that it should be the duty of the attorney general, either upon his own motion, or upon complaint of any aggrieved person, to institute a suit or quo warranto proceedings, to obtain the dissolution of the corporate existence of an offending corporation. The argument is that the omission of this section, when considered in connection with the provisions hereinbefore quoted from the 1907 law (Comp. Laws 1913, § 9954), evidences an intention by the legislature to do away with the civil remedy for dissolution and to substitute therefor an automatic cancellation by virtue of a judgment of conviction obtained in criminal proceedings and filed in the office of the secretary of state. Whether or not this is the proper construction of the laws pertaining to the forfeiture of corporate charters for illegal combinations constitutes the sole question for decision upon this appeal; for it is manifest that the complaint states a cause of action, if civil proceedings not founded upon

a criminal prosecution are possible under the law.

The right of the state to inquire civilly into the propriety of the continued exercise of a corporate franchise by those who are alleged to have misused it to the injury of the public has been recognized for centuries as an attribute of sovereignty, and the right of the attorney general to act for the state in such inquiry comes from the common law. *Fletcher, Cyc. Corp.* § 3241. This remedy, whether it be denominated a quo warranto proceeding, an information in the nature of quo warranto, or a civil action under Comp. Laws 1913, § 7969, is now recognized universally as being civil rather than criminal in its nature, and the right to proceed civilly generally exists independently of the right to prosecute criminally. Says *Fletcher, Cyc. Corp.* vol. 5, § 3235: "As has already been noted, quo warranto proceedings are usually considered civil in nature, and there is no merger of the civil liability in the criminal offense. A corporation may be proceeded against by quo warranto for a misuser or perversion of its franchise, although its officers and agents at the same time may be amenable to the criminal law for the offense committed by them in the perversion of such franchises. Neither one of these proceedings is a bar to the other, and the corporation may be held to answer for its wrongful acts before its agents are tried and convicted of their guilty acts. For instance, it has been held that violators of an anti-trust act may be proceeded against by indictment or information, and the remedies by information and in equity also exist."

The text of *Cyc.* is to the same effect. There it is said: "The right reserved by the legislature to repeal a charter which it has granted does not impair the right to proceed by quo warranto in case the legislature does not exercise its power, and it is no bar to quo warranto against a corporation for misusing its franchise that the acts constituting such

misuser have rendered its officers criminally liable."

As to the presumption that the ordinary remedy by quo warranto is not superseded by a special statutory remedy, *Cyc.* further says (32 *Cyc.* p. 1417): "2. In the absence of a constitutional prohibition, the legislature has power to provide other remedies and thereby to supersede that by quo warranto, and an intention so to do, if clearly manifested, will be given effect, and the courts will recognize the statutory remedy as exclusive. Unless, however, the contrary intention clearly appears, the statutory remedy will be considered cumulative."

The text of *Ruling Case Law* supports the same principle (7 *R. C. L.* p. 711): "If a penalty is imposed for an act or omission, and the charter or statute imposing it does not expressly or by necessary implication deprive the state of the right to proceed for a forfeiture, then, on principle; such proceedings should not be cut off."

To turn to specific instances, where courts have held the civil remedy applicable though the acts complained of constituted violations of criminal statutes, see *State ex rel. Atty. Gen. v. Capital City Dairy Co.* 62 Ohio St. 350, 57 L.R.A. 181, 57 N. E. 62; *State v. Nebraska Distilling Co.* 29 Neb. 700, 46 N. W. 155. In the former case the charter of the corporation was forfeited for the violation of a penal statute enacted to prevent fraud and deception in the manufacturing and sale of oleomargarin. The statute contained no provision expressly authorizing the forfeiture of the charter. To the objection that the remedy by criminal prosecution was exclusive, the answer of the court was that the remedy was not adequate, and that the inadequacy of the criminal remedy was attested by practical difficulties in obtaining convictions. In the Nebraska case it was held, without reference to the anti-trust statute expressly authorizing cancelation of the charter, that a corporation entering into a contract

in restraint of trade and commerce which was contrary to the policy of the common law rendered itself liable to the forfeiture of its charter in an original quo warranto proceeding. We deem the proposition to be fully established and well grounded upon principle that the right of the state to proceed civilly to procure the forfeiture of a corporate charter

Quo warranto—
to annul charter
—effect of
criminal
remedy.

for gross abuses of the franchise which are injurious to the public is not dependent upon the result

of criminal prosecutions for the same wrongs, unless there is the clearest expressions of the legislative intention to that effect.

From what is the legislative intention relied upon by the respondents in the case at bar to be deduced? The express direction to the attorney general to proceed by quo warranto, which formed a part of the 1905 statute, was not made a part of the Act of 1907, and § 9954, Comp. Laws 1913, indicates that the filing of a copy of a judgment of conviction with the secretary of state, followed by notice, shall cancel the charter of the corporation. In short, the argument is that the implication resulting from the omission from the penal statute of express authority for a civil action, coupled with an apparent means of making a conviction operate automatically as a cancellation of the charter, evidences an intention

Monopoly—
remedy—
exclusiveness.

to do away with the civil remedy which,

prior thereto, had inhered in the state. We deem this argument untenable for two principal reasons:

1. The penal statute itself, as enacted in 1907, contains provisions, not theretofore existing in the statute, authorizing the taking of testimony and fixing the consequences if the failure of officers, agents, directors, and employees to testify, which consequences could only be visited upon the corporation in a civil action. While it is difficult to see why the legislature would make these sections part of a penal statute

when they relate primarily to civil proceedings, nevertheless, such fact is a significant guide in determining intention where it is contended that the civil action was abolished. One of the added sections, too, provides for the issuance of an injunction to prevent the corporation during the pendency of "any action or suit" under "the provisions of this chapter" from disposing of or removing its assets or property from the jurisdiction. It is clearly intended that this section shall be employed in civil proceedings. Thus there are expressions in the 1907 act itself which are indicative of an intention to continue civil remedies. These, in our opinion, outweigh the negative implication.

2. The Code of Civil Procedure contains ample authority for the bringing of a civil action against a corporation for abuse of its franchise; and it should require something more than a negative implication derived from a penal statute to deprive the state of the civil remedy therein provided for. Section 8004, Code of Civil Procedure, is but the codification of the common-law doctrine according to which the state might vindicate its sovereign right to terminate any franchise granted by it when sufficient cause exists to justify its interference. It would be strange, indeed, if this civil proceeding were suspended entirely where the cause of forfeiture was made a penal offense. Especially where the offense consists of such a public wrong as a combination to control prices, which is expressly inhibited in this state by constitutional provision. N. D. Const. § 146. If such were the situation, the result would be that the legislature has said that for the violation of minor regulatory provisions which are not even made penal, a corporate franchise may be forfeited in a civil action by the state, in which the state would only sustain the burden of proof by a preponderance of evidence; but for an offense so grave as to be made criminal, the franchise may not be forfeited unless the state has estab-

lished guilt beyond a reasonable doubt in a criminal prosecution. Furthermore, by making the forfeiture dependent upon the outcome of a criminal prosecution, it would be impossible to resort to evidence

that might be available in a civil action; such, for instance, as depositions. We would be most reluctant to attach a construction to the statutes that would convict the legislature of intending such an inconsistent and unreasonable consequence.

In addition, the history of the legislation in this state on the subject of pools, trusts, and combinations, shows that, though the Constitution forbids combinations to control prices, and declares that for a violation of the provision corporate franchises "shall be deemed annulled and become void," express authority for civil proceedings was never made a part of any penal statute on the subject until 1905, and in the legislative session immediately following this provision was stricken out as hereinbefore noted. Thus, if the failure to expressly authorize in a criminal statute the forfeiture of the charter by civil proceedings makes the criminal remedy exclusive, the criminal remedy has been exclusive in this state since 1890, with the exception of the years 1905-1907. It is true that in some of these statutes an attempt was made to authorize special inquiry by the secretary of state looking toward the cancelation of corporate charters. But this summary method of cancelation by an executive officer has been held to be unconstitutional and could not take the place of a civil remedy for the same purpose. *State ex rel. Standard Oil Co. v. Blaisdell*, 22 N. D. 86, 132 N. W. 769, Ann. Cas. 1913E, 1089. To us it seems more reasonable that the civil remedy provided in the Code of Civil Procedure has been available during all these years.

But it is argued that the commission of the criminal offense stated in the complaint does not amount to

an abuse of corporate powers under subdivision 2 of § 8004. In the light of the authorities, we can see no merit in this contention.

Corporation—
abuse of
powers.

It will serve no good purpose to attempt a definition of the expression "abuse of its powers" as used in the statute, for there seems to be a general agreement that the commission of acts of the character alleged in the complaint in this case is entirely within any definition that might be attempted. For a case in point under an identical statutory provision, see *People v. North River Sugar Ref. Co.* 121 N. Y. 582, 9 L.R.A. 33, 18 Am. St. Rep. 843, 24 N. E. 834, 54 Hun, 355, note, 2 L.R.A. 33, 3 N. Y. Supp. 401. See also *State v. Central Lumber Co.* 24 S. D. 136-164, 42 L.R.A.(N.S.) 817, 123 N. W. 514; *People v. Buffalo Stone & Cement Co.* 131 N. Y. 140, 15 L.R.A. 240, 29 N. E. 947; *Distilling & Cattle Feeding Co. v. People*, 156 Ill. 448, 47 Am. St. Rep. 200, 41 N. E. 188; *State ex rel. Crow v. Armour Packing Co.* 173 Mo. 356, 61 L.R.A. 464, 96 Am. St. Rep. 515, 73 S. W. 645; *State ex rel. Hadley v. Delmar Jockey Club*, 200 Mo. 34, 92 S. W. 185, 98 S. W. 539; *State ex rel. Hadley v. Standard Oil Co.* 218 Mo. 1, 116 S. W. 902; *State ex rel. Major v. International Harvester Co.* 237 Mo. 369, 141 S. W. 672; *State ex rel. Mason v. Springfield African Social & Improv. Club*, 169 Mo. App. 137, 154 S. W. 458; *State ex rel. Watson v. Standard Oil Co.* 49 Ohio St. 137, 15 L.R.A. 145, 34 Am. St. Rep. 541, 30 N. E. 279; *State ex rel. Snyder v. Portland Natural Gas & Oil Co.* 153 Ind. 483, 53 L.R.A. 413, 74 Am. St. Rep. 314, 53 N. E. 1091.

Morawetz states the rule as follows (2 Morawetz Priv. Corp. § 1024): "A corporation may incur a forfeiture of its franchises by the doing of an illegal act. Any act of a corporation which is forbidden by its charter, or by a general rule of law, and strictly every act which the charter does not expressly or impliedly authorize a corporation to perform, is unlawful; and, if the do-

ing of such act is an injury to the public, it may be sufficient ground for declaring a forfeiture."

See 5 Fletcher, Cyc. Corp. § 32; 2 Cook, Corp. 6th ed. § 633; 5 Thomp. Corp. §§ 6627 and 6628; 7 R. C. L. 726.

The underlying principle of all of the authorities above cited has been well stated in the case of *State ex rel. Hadley v. Delmar Jockey Club*, 200 Mo. 68, 98 S. W. 542, *supra*. It is there said: "When a corporation receives from the state a charter granting certain franchises or rights, there is at least an implied or tacit agreement that it will use the franchises thus granted; that it will use no others, and that it will not misuse those granted. A failure in any substantial particular entitles the state to come in and claim her own, the rights theretofore granted, and this through judgment of forfeiture in a proceeding like the one at bar."

After discussing nonuser as a ground for forfeiture, the court proceeds (200 Mo. 70): "Misuser is likewise a violation of the implied agreement with the state. So is usurpation. Each are but violations

—misuse of franchise.

of the implied contract with the state, and for these viola-

tions we declare forfeitures. . . .

The gist of each in quo warranto is the wilful violation of the rights of the state under the implied contract, and not the violation of some criminal law, for we do not try criminal cases and affix criminal punishments in quo warranto proceedings. The violation of the corporation's contract with the state by misuser or usurpation may be evidenced by the fact of the violation of some statute, criminal in character, but in this kind of proceeding we try the right of the corporation to further hold its franchises, not the question of finding its guilt or innocence under the statute, and fixing punishment permitted by the statute."

But it is argued that the expres-

sion "abuse of its powers," as used in the statute, can only refer to acts that the corporation is enabled to do because it is a corporation, or because of some special power given to it which it has abused. If this argument has not been sufficiently answered above, we need only add that such a construction appeals to us as highly technical and unreasonable. One of the most valuable privileges of the corporation is its right to do business with the public, and this right it enjoys in common with individuals who may do business on like terms. But it is only by virtue of the franchise granted that the corporation secures the right to do business as an artificial entity. So, whatever a corporation does in exercising the franchise to do business, it does by virtue of the power which the state has conferred upon it; whereas the similar right of individuals is not so derived. The provisions of the Constitution and of the statute, as well as the common law of the state, in so far as they affect the manner in which corporations may conduct their business, form the terms of the implied contract upon which the corporate franchise is granted, and therefore enter into the franchise itself. When the corporation breaks this contract in such a way as to work injury to the public, the state has a right to institute an inquiry into the extent of the abuse of the powers granted by it, and, in proper cases, to annul the franchise for the abuse. Even if the view be taken that the acts complained of are *ultra vires*, forfeiture might still be adjudged. *State v. Nebraska Distilling Co.* 29 Neb. 700, 46 N. W. 155.

To the suggestion that the acts alleged in the complaint do not show grave offenses against the public interests or a sufficient turning aside from the purposes for which the defendant corporations were organized to justify action by the state, it need only be replied that the acts alleged have been thought by both the constitutional convention and

the legislature to be sufficiently grave to call for the application of the remedy sought.

For the foregoing reasons, the order appealed from is reversed.

Robinson, J., concurs in the result.

Christianson, Ch. J., Grace, J., and Allen, District Judge, concur.

Bronson, J., disqualified, did not participate; Honorable Frank P. Allen, Presiding Judge of Third Judicial District, sitting in his stead.

ANNOTATION.

Criminal prosecution as a condition of a civil action or proceeding for the cancelation of a corporate charter for violation of law.

It is held in the reported case (STATE EX REL. LANGER v. GAMBLE-ROBINSON FRUIT CO. ante, 98) that a penal statute providing a punishment for certain acts of corporations, and providing further that, upon the filing of a certified copy of a judgment of conviction thereunder against a corporation in the office of the secretary of state, he should cancel its charter, did not make a judgment under the penal statute a condition to the bringing of a statutory civil action by the attorney general for the cancelation of its charter. There is but little other judicial authority on the point.

In State ex rel. Hadley v. Delmar Jockey Club (1906) 200 Mo. 34, 92 S. W. 185, on an information in the nature of a quo warranto a judgment of ouster was rendered against a corporation for unlawful acts committed by its officers and agents, which acts were felonies, although there had been no indictment or trial of such officers and agents for such felonies. The corporation claimed that the information was bad as it "seeks to have this court adjudge specific persons to be guilty of felonies without the aid of a prior indictment or verified information charging such offenses, and without trial by jury, as guaranteed in the Constitution of the state." The court, after stating that a corporation could not be guilty of felony, as it could not

have a felonious intent, said: "The information charges that respondent, 'acting through its officers, agents, employees, and representatives in charge of its business,' engaged in the acts of misuser charged against it in the information. It will thus be seen that the unlawful act charged is not against the officers, agents, employees, and representatives of the corporation, but against the corporation itself. There can be no doubt that a corporation may be proceeded against by quo warranto for a misuse or perversion of the franchise conferred upon it by the state, notwithstanding its officers and agents may at the same time be amenable to the criminal law for offense committed by them in the perversion of such franchise. If a corporation, through its servants and agents, may be guilty of such abuses of its franchises as will subject it to ouster by quo warranto, we can conceive of no reason why such servants and agents, if the acts and abuses committed by them be in violation of the criminal statutes, may not at the same time be prosecuted by indictment or information. The one is not a bar to the other proceeding. Nor are we prepared to give assent to the contention that the defendant corporation could not be held to answer for such wrongful acts until its agents, guilty of the criminal offense, be tried and convicted." B. B. B.

ELIZABETH KOEHLER et al., Appts.,
v.
LOUIS N. ROWLAND et al., Respts.

Missouri Supreme Court (Div. No. 2)—July 16, 1918.

(275 Mo. 573, 205 S. W. 217.)

Covenant — effect of public policy.

1. A condition in a deed against the transfer, lease, or renting of the property to negroes is not void as against public policy.

[See note on this question beginning on page 120.]

Action — form — to determine title.

2. A statutory proceeding to determine title, the petition in which follows substantially the statute in setting forth the claim and defenses, and prays a hearing of all rights, claims, and interests, and that plaintiffs be adjudged owners and entitled to possession, is an action at law.

— effect of answer.

3. When a petition states an action at law, and the answer sets up an equitable defense and asks affirmative relief, it converts the suit at once into one in equity.

[See 21 R. C. L. 534.]

Appeal — effect of findings of fact.

4. Findings of fact in an action at law, if supported by substantial evidence, are binding on appeal.

[See 2 R. C. L. 206-208.]

Covenant — against lease to negroes — construction.

5. Permitting negroes to occupy a flat of an apartment building is a breach of a condition in a deed that the above-described property shall not be sold, leased, or rented to negroes.

— construction against forfeiture.

6. Where a restriction can be construed as a mere restrictive covenant, and not a condition, so as to avoid a forfeiture, it will be so construed.

[See 7 R. C. L. 1086, 1087; 8 R. C. L. 1101.]

— provision construed as condition.

7. A provision in a deed that the above-described property shall not be sold, leased, or rented to negroes, and that in event of such transfer it shall revert to the grantor, is a condition.

[See 8 R. C. L. 1102.]

— validity — restraint on alienation.

8. A provision in a deed that the property shall not be sold, leased, or

rented to negroes is not void as a restriction on alienation.

[See 8 R. C. L. 1114-1116.]

Perpetuity — rule against — condition against leasing for twenty-five years.

9. A condition in a deed against transferring, leasing, or renting the property to negroes for a period of twenty-five years under the penalty of reverter is not void as contravening the rule against perpetuities.

[See 8 R. C. L. 1116.]

Covenant — restrictive — refusal to enforce.

10. Where circumstances are changed, owing to the natural growth of a city or of the present use of the whole neighborhood, so that the purpose of a restriction in a deed no longer can be accomplished, and it would be oppressive to give it effect, the courts will not enforce it.

[See 8 R. C. L. 1106, 1107.]

Pleading — action to determine adverse claim — prayer for possession — effect.

11. The insertion of a prayer for possession in a petition under a statute to determine adverse claims, which makes the petition one in ejectment, will, if not objected to, authorize a judgment awarding possession to plaintiff.

Adverse claim — determination — award of compensation.

12. A judgment awarding defendant compensation for improvements cannot be entered in an action to determine adverse claims, where the statute provides for another action to recover such compensation after adverse judgment.

[See 9 R. C. L. 954.]

Pleading — necessity of asking compensation.

13. Compensation for improve-

ments cannot be awarded defendant in an action to determine adverse claims unless asked for in the pleadings, where the statute provides that if the same be asked for in the plead-

ing of either party, the court may hear and finally determine any and all rights as the court might or could in any other or different action.

[See 9 R. C. L. 955.]

APPEAL by plaintiffs from an order of the Circuit Court for Jackson County (Southern, J.) granting defendants a new trial in an action brought to determine title to certain land. *Reversed.*

The facts are stated in the Commissioner's opinion.

Messrs. Gage, Ladd, & Small, for appellants:

The covenants contained in the deed are perfectly reasonable, lawful, and binding.

Plessy v. Ferguson, 163 U. S. 537, 41 L. ed. 256, 16 Sup. Ct. Rep. 1138; *Buchanan v. Warley*, 165 Ky. 559, 177 S. W. 472, Ann. Cas. 1917B, 149; *Stat. v. Gurry*, 121 Md. 534, 47 L.R.A. (N.S.) 1087, 88 Atl. 546, Ann. Cas. 1915B, 957; *Keltner v. Harris*, — Mo. —, 196 S. W. 1.

The fact that the conditions in the neighborhood may have changed is wholly immaterial and in no way impairs the validity or force of the conditions or restrictions in a deed.

Thompson v. Langan, 172 Mo. App. 83, 154 S. W. 808; *Spahr v. Cape*, 143 Mo. App. 114, 122 S. W. 379; *Noel v. Hill*, 158 Mo. App. 426, 138 S. W. 364.

Upon violation of the conditions in the deed, which are conditions subsequent, the title therefore vested ipso facto in Mrs. Koehler, and the house or improvements, being fixtures and a part of the land, reverted with the land to the plaintiffs.

Ellis v. Kyger, 90 Mo. 600, 3 S. W. 23; *O'Brien v. Wagner*, 94 Mo. 93, 4 Am. St. Rep. 362, 7 S. W. 19; *Brooks v. Gaffin*, 192 Mo. 253, 90 S. W. 808; *St. Louis Southwestern R. Co. v. Curtis*, 113 Ark. 92, 167 S. W. 489.

If re-entry was necessary under the law in this state, the bringing of an action in ejectment is equivalent to and obviates the necessity of re-entry for condition broken.

Ellis v. Kyger, supra; *O'Brien v. Wagner*, 94 Mo. 96, 4 Am. St. Rep. 362, 7 S. W. 19; *Brooks v. Gaffin*, 192 Mo. 253, 90 S. W. 808; *Cowell v. Colorado Springs Co.* 100 U. S. 55, 25 L. ed. 547.

Plaintiff's notification of the conditions contained in the deed, and request to defendants to comply therewith, long before the suit was brought, were equivalent to an actual re-entry at common law.

Carpenter v. Graber, 66 Tex. 465, 1 S. W. 178.

The rights of the plaintiffs being legal rights, and not equitable, this is a suit at law so far as they are concerned.

Lee v. Conrad, 213 Mo. 404, 111 S. W. 1151; *O'Brien v. Wagner*, 94 Mo. 94, 4 Am. St. Rep. 362, 7 S. W. 19; *Ellis v. Kyger*, supra; *Clarke v. Brookfield*, 81 Mo. 503, 51 Am. Rep. 243.

We know of no law which prevents parties, competent to contract, from making such contract; nor of any public policy which it contravenes.

Brooks v. Gaffin, 192 Mo. 253, 90 S. W. 808, s. c. 196 Mo. 351, 95 S. W. 418; *Smith v. Eagle Coal & Mercantile Co.* 170 Mo. App. 27, 155 S. W. 886.

The intention of the parties to a deed, as gathered from its four corners, will prevail over all artificial rules of construction.

Howell v. Sherwood, 242 Mo. 513, 147 S. W. 810; *Mott v. Morris*, 249 Mo. 137, 155 S. W. 434; *Heady v. Hollman*, 251 Mo. 632, 158 S. W. 19; *Sims v. Brown*, 252 Mo. 58, 158 S. W. 624; *Garrett v. Wiltse*, 252 Mo. 699, 161 S. W. 694; *Warne v. Sorge*, 258 Mo. 162, 167 S. W. 967.

And this is true as to conditions subsequent and all other parts of the deed.

St. Louis v. Wiggins Ferry Co. 88 Mo. 620; *Studdard v. Wells*, 120 Mo. 25, 25 S. W. 201; *Roberts v. Crume*, 173 Mo. 581, 73 S. W. 662.

The effect of a condition depends upon the intent as shown by "the deed in its entirety and circumstances attending its execution."

Catron v. Scarritt Collegiate Institute, 264 Mo. 723, 175 S. W. 571; *Brooks v. Gaffin*, 192 Mo. 253, 90 S. W. 808, 196 Mo. 351, 95 S. W. 418; *Smith v. Eagle Coal & Mercantile Co.* supra.

Messrs. S. J. McCulloch, and New, Miller, Camack, & Winger for respondents.

White, C., filed the following opinion:

The plaintiffs brought this suit under § 2535, Rev. Stat. 1909, to determine the title to lot 15, block 2, Wirtman place, an addition to Kansas city. The plaintiff Elizabeth Koehler and her brother, George Wirtman, were at one time owners of all the property in blocks 1 and 2 in Wirtman place. In conveying this property in 1905 to Henry Waters, plaintiffs inserted the following condition in their deed: "This transfer is made subject to the following conditions, to wit: It is agreed between the parties hereto, their assigns and executors, and is made a part of this condition and consideration of this transfer, that above-described property shall not be sold, leased, or rented to any negro or negroes for twenty-five years from date hereof and in event of such transfer, lease, or rental before expiration of said term of twenty-five years, said property shall revert to grantor or sellers without process of law or equity."

The defendants Louis N. Rowland and William N. Rowland acquired the property through mesne conveyances from the plaintiffs' grantee, and their deed stipulates that it is made subject to conditions and restrictions contained in the deed to Waters. Deeds were introduced showing plaintiffs and George Wirtman conveyed other property in the same block and in block 1, with the same restrictions. John B. Groves, trustee for the Groves Brothers Real Estate & Mortgage Company, and the mortgage company, filed a separate answer setting up a deed of trust which the said real estate and mortgage company held on the property, executed by the defendants Rowland. The defendants Rowland filed a separate answer. The defendants Fisher and Thompson were negroes, tenants of the defendants Rowland, and occupied a part of the property in dispute. They filed no answer in the case.

The circuit court rendered a judgment for the plaintiffs, in which it found that the defendants Louis N.

Rowland and William H. Rowland had acquired the property subject to the conditions mentioned, that the said deed of trust was subject to the same conditions, that the conditions had been breached, that the defendants Rowland had been duly notified of the conditions of the said deed and requested to remove their negro tenants from the premises, and failed to do so. The court then adjudged that the plaintiffs were the owners in fee simple, clear of all claims, that the defendants had no right, interest, lien, or claim in said property, and that the plaintiffs were entitled to possession, and ordered a writ of ouster directing the sheriff to deliver possession to the plaintiffs. Separate motions for new trial were filed by the several answering defendants. The court sustained these motions, giving this reason in the order sustaining each motion: "The facts found in the court's decree being true, nevertheless the court erred in its conclusion of the law; defendants are entitled to compensation for improvements on the property."

The plaintiffs thereupon appealed from the order granting a new trial. Other facts will be noticed in considering the points involved.

I. At the outset it is important to settle the character of this action. Respondents, assuming that it is an equitable proceeding, very correctly argue that a court of equity will not enforce a forfeiture while it may relieve against one. It has been settled by this court that the character of an action brought under § 2535 is determined by the issues which the pleadings raise. *Lee v. Conran*, 213 Mo. 404, 111 S. W. 1151; *Hauser v. Murray*, 256 Mo. 58, loc. cit. 84, 85, 165 S. W. 376; *Minor v. Burton*, 228 Mo. 558, 128 S. W. 964. If the pleadings present issues of equitable cognizance, then it becomes a proceeding in equity. But a straight action under this statute, in the terms of the statute, is a suit at law. The petition in this case follows the allegations of the plaintiffs' rights and the defendants' claim, prays the court to

hear and determine all the rights, claims, and interests whatsoever of the parties to the proceeding, to adjudge and decree that the plaintiffs are the owners, and award plaintiffs the right of possession. The petition thus states purely an action at law.

Where the petition states an action at law, if the answer sets up an equitable defense and asks affirmative relief, it converts the suit at once into a suit in equity so that the rules of equity apply. But the setting up of an equitable defense does not convert the case into a proceeding in equity unless affirmative equitable relief is prayed. *Kerstner v. Vorweg*, 130 Mo. 196, loc. cit. 199, 32 S. W. 298; *Carter v. Prior*, 78 Mo. 222, loc. cit. 224; *Brooks v. Gaffin*, 192 Mo. 228, loc. cit. 253, 90 S. W. 808; *Kansas City v. Smith*, 238 Mo. 323, loc. cit. 334, 141 S. W. 1103; *Withers v. Kansas City Suburban Belt R. Co.* 226 Mo. 373, loc. cit. 396, 126 S. W. 432.

The answer of defendants Rowland set up the condition in the deed above mentioned, and alleged facts which they claimed would prevent the occurrence of the forfeiture. They alleged that, since the deed was made, the conditions surrounding the neighborhood had so changed that the reasons for inserting that clause in the deed had ceased to exist, and therefore the consideration for such stipulation had wholly failed, and the plaintiffs were not damaged by the breach of the condition. The answer did not then ask affirmative equitable relief, but followed the language of the statute substantially, and prayed the court to adjudge that the plaintiffs "have no right, title, or interest in or to said property, and that the title to said property be quieted and confirmed in these defendants free from any claim of the plaintiffs, and for such other and further relief as to the court in equity and good conscience may seem meet and proper."

The effect of this pleading was to

pray the court to ascertain the title and enter a decree adjudging it as ascertained; that is, to find out who had the title, and enter such judgment as that finding warranted. If the condition in the deed was broken, plaintiffs had title; otherwise, the title remained in defendants. The title would be affected by the facts and not by any decree of the court.

The case being purely an action at law, the findings of the trial court, if supported by substantial evidence, are binding upon this court.

II. The respondents assert that the evidence failed to show that the conditions of the deed were broken. The argument runs in this way: The condition provides "that the above-described property (lot 15, block 2) shall not be sold, leased or rented to negroes;" whereas the proof shows that negroes occupied only an apartment in a flat building on the site. Therefore it could not be said that "the above-described property," lot 15, block 2, was leased to negroes, because, at most, they leased only a part of it. Much evidence was introduced showing there were negro tenants in the premises, without any definite showing as to how far their occupancy of the premises was restricted, or to what extent the tenants may have controlled the entire lot. Doubtless the intention in inserting the restriction in plaintiffs' deed was to prevent negroes from coming on the premises as tenants. It must be considered with that in view. The narrow and technical construction suggested by respondents, as against such manifest intention, would not accord with the decisions of this court in considering and passing upon the spirit and purpose of instruments of this character. *Sims v. Brown*, 252 Mo. 58, 158 S. W. 624; *Garrett v. Wiltse*, 252 Mo. 699, loc. cit. 707, 161 S. W. 694; *Mott v. Morris*, 249 Mo. 137, 155 S. W. 434. If the grantors fail to express their contract with com-

Covenant—
against lease to
negroes—
construction.

pleteness and precision, but the intention, nevertheless, clearly appears from the instrument, if its spirit and purpose are manifest from a consideration of the instrument as a whole, it will be given an interpretation in accordance with such intention. The answer of defendants alleges "that the original intent, purpose, and object of inserting said provision was to preserve the property described therein, together with other property in the neighborhood, . . . as a district unoccupied by negroes."

The answer then asserts that the conditions have so changed that there ceased to be any consideration for the condition, so that the grantor, plaintiff, was not damaged by the breach. This is a clear admission in the answer that the intention as expressed by its terms was to prevent any occupancy by negroes of the property described. The insertion of the words "or any part thereof" in the instrument would not have made that intention clearer. The trial court found that the premises were occupied by the tenants of the defendants Rowland in violation of the condition in the deed, and the evidence is entirely sufficient to support that finding. Hence we conclude that there was a breach of the condition which would work a forfeiture of the defendants' title if the condition is a valid and enforceable one.

III. We come now to consider the character and effect of the condition in the deed. The plaintiffs, before filing their suit, notified the defendants in writing to comply with the condition and remove the negroes; but the notice was not heeded.

Forfeiture is a harsh remedy, and where a stipulation can be construed as a mere restrictive covenant, and not a condition, so as to avoid a forfeiture, it will be so construed. The question is determined from the language used, the situation of the parties, their relation to the subject of the transaction, and the object in view. Union Stockyards Co. v.

Nashville Packing Co. 72 C. C. A. 195, 140 Fed. 701. But where the language is unmistakable, particularly where there is a provision for re-entry on breach of the condition, or where the right to re-enter is plainly implied, it is a forfeiture. Where the forfeiture is expressly reserved and the right of re-entry is not explicitly stated, but is a necessary incident to the forfeiture, it will be implied; and in all such cases the stipulation is construed to be a forfeiture. Berry, Real Prop. pp. 77, 78; Ruddick v. St. Louis, K. & N. W. R. Co. 116 Mo. loc. cit. 31, 38 Am. St. Rep. 570, 22 S. W. 499; Brooks v. Gaffin, 196 Mo. loc. cit. 357, 95 S. W. 418; id., 192 Mo. loc. cit. 228, 90 S. W. 808; Smith v. Eagle Coal & Mercantile Co. 170 Mo. App. loc. cit. 34, 155 S. W. 886. The language in this case is perfectly clear in providing for a forfeiture on breach of the conditions, and the re-entry for condition broken, if not clearly expressed, is implied in the language used. It is apparent that, in case of sale and conveyance to objectionable parties covered by the restriction, there would be hardly an adequate remedy except by forfeiture.

Respondent asserts that it is an unlawful restraint upon the power of alienation incident to a fee-simple title. All the cases cited by respondent in support of the position are where there is a stipulation directly prohibiting alienation. It is the rule that an absolute restriction in the power of alienation in the conveyance of a fee-simple title is void, but it is entirely within the right and power of the grantor to impose a condition or restraint upon the power of alienation in certain cases to certain persons, or for a certain time, or for certain purposes. Cowell v. Colorado Springs Co. 100 U. S. 55, 25 L. ed. 547; Devlin, Real Estate, § 965.

The condition in the deed under consideration does not come within the rule prohibiting restraints upon alienation.

-construction
against for-
feiture.

strued as a mere
restrictive cove-
nant, and not a con-

-validity-
restraint on
alienation.

consideration does
not come within the
rule prohibiting re-

IV. It is further claimed that the condition is void as against public policy. The courts usually have upheld conditions and restrictions in deeds of property which prohibit the use of the property for certain purposes. The Supreme Court of the United States, in the case of *Cowell v. Colorado Springs Co.* *supra*, uses this language (100 U. S. p. 57): "The reports are full of cases where conditions imposing restrictions upon the uses to which property conveyed in fee may be subjected have been upheld. In this way slaughterhouses, soap factories, distilleries, livery stables, tanneries, and machine shops have, in a multitude of instances, been excluded from particular localities, which, thus freed from unpleasant sights, noxious vapors, or disturbing noises, have become desirable as places for residences of families."

The purpose of the restriction here, as admitted in the defendants' answer, was to preserve the property, together with other property in the neighborhood, as a district unoccupied by negroes; it comes equally within the rule.

The discrimination against negroes has been recognized by the courts in other matters where their presence has been objected to for reasons similar to the reasons advanced here. For instance, the law providing for a segregation of negroes in separate passenger coaches from those occupied by whites has been held lawful and reasonable. *Plessy v. Ferguson*, 163 U. S. 537, 41 L. ed. 256, 16 Sup. Ct. Rep. 1138. In the recent case of *Keltner v. Harris*, — Mo. —, 196 S. W. 1, where an owner of real estate made a contract for the sale of the same to a white man, and after making his deed discovered that the deed was made to a colored man for whom the white man was merely an agent, although he had told the agent that he would not sell the property to a negro because he did not want a negro in that locality, this court held that the conveyance was properly avoided by the judgment of the circuit court on the ground of fraud.

By a necessary inference the contract of sale could not have been transferred by the purchaser to a negro without the consent of the seller. The court said: "If it was distasteful to plaintiff to have a colored man as his adjoining neighbor, he had the legal right to refuse to sell him or his agents the property in controversy"—which is equivalent to saying that the contract could not be enforced in favor of the negro if made in ignorance of his interest in it.

From these authorities it is apparent that the restriction was one which the vendor had a right to make, ^{—effect of public policy.} and was not void on the ground that it was contrary to public policy.

V. It is further urged that it is void because it violates the rule against perpetuities. That rule is that an estate which is granted must necessarily vest within a time limited by the lives of persons then in being, and twenty-one years and ten months thereafter, and if it does not *necessarily* vest within that time it is void for remoteness. *Shepherd v. Fisher*, 206 Mo. 208, 103 S. W. 989. In this case the stipulation runs for twenty-five years, within which time the estate might revert by forfeiture to the grantor. That event might occur after everyone in interest then living was dead and more than twenty-one years and ten months thereafter had elapsed.

The rule applies in all cases where there is a limitation over by which an estate would vest contingently and might vest after the prohibited time. But there is a distinction between a conditional estate and a conditional limitation whereby the estate is determined upon the happening of some event. In the latter case, the estate passes to the person to whom the limitation over is granted upon the happening of the event, without entry or other act. To such limitation over the rule against remoteness applies. But in this country it is generally held that a stipula-

tion whereby the title is to revert to the grantor upon entry for breach of a condition subsequent is not within the rule against perpetuities. First Universalist Soc. v. Boland, 155 Mass. 171, loc. cit. 175, 15 L.R.A. 231, 29 N. E. 524; Hopkins v. Grimshaw, 165 U. S. 342, loc. cit. 356, 41 L. ed. 739, 17 Sup. Ct. Rep. 401; Wakefield v. Van Tassell, 202 Ill. 41, loc. cit. 49, 65 L.R.A. 511, 95 Am. St. Rep. 207, 66 N. E. 830; Gray, Perpetuities, §§ 304-310. In fact, there are many cases in the books, noted expressly in the sections from Gray just cited, where the courts have enforced forfeitures for breach of condition subsequent in which there was no time limit wherein the forfeiture might occur. In those cases the question as to whether it was contrary to the rule against perpetuities was not considered or discussed.

Perpetuity—
rule against—
condition
against leasing
for twenty-five
years.

VI. It is true that where circumstances are changed, owing to the natural growth of a city or of the present use of a whole neighborhood, so that the purpose of a restriction

Covenant—
restrictive—
refusal to
enforce.

in a conveyance no longer can be accomplished, and it would be oppressive and inequitable to give effect to such restriction, the courts will not enforce it, whether it be a restrictive covenant to restrain the violation of which injunction is sought, or whether it is a condition providing for a re-entry in case of breach. Moore v. Curry, 176 Mich. 456, 142 N. W. 839; Kneip v. Schroeder, 255 Ill. 621, 99 N. E. 617, Ann. Cas. 1913D, 426; Devlin, Real Estate, § 991c; Thompson v. Langan, 172 Mo. App. loc. cit. 83, 154 S. W. 808.

If the court upon sufficient inquiry had found, as claimed by defendants in this case, that the conditions had so changed since the conveyance was made, by negroes occupying the surrounding lots, that an enforcement of the restriction no longer could serve the original purpose, then it would have been im-

proper to allow the forfeiture. However, the evidence was conflicting on that point. In fact, there was some evidence to the effect that the defendants themselves were the first ones to introduce colored residents into the block where the lot was situated. The facts were found against the defendants upon that proposition upon sufficient evidence, and that finding is conclusive upon this court.

VII. From what has been said it will be seen that the circuit court correctly determined plaintiffs' rights under the facts. Was it right in awarding possession to plaintiff?

It has been decided that § 2535 did not repeal the ejectment statute and did not authorize recovery of possession in an action brought under it. Bedford v. Sykes, 168 Mo. 8, 67 S. W. 569; Randolph v. Ellis, 240 Mo. 216, loc. cit. 220, 144 S. W. 483. Those cases, however, arose before the amendment of 1909, whereby the legislature added the last half of that section. We do not find that this amendment has enlarged the scope of the statute so as either to repeal the statutes relating to ejectment or to provide for giving possession in an action brought under it. The entire article relating to ejectment remains still in force and can be resorted to for the recovery of possession, and for the recovery of the value of improvements by an unsuccessful defendant. Usually a plaintiff in a case under § 2535, if out of possession, adds a count in ejectment. That was not done in this case; but the petition, in addition to stating a complete cause of action showing plaintiffs' right to recover under § 2535, alleges that the plaintiffs are the owners in fee simple of the property described and are entitled to possession of the same, that the defendants are in possession, and prays the court to adjudge the plaintiffs entitled to possession and to award a writ of possession in favor of the plaintiffs,—a declaration in ejectment. Thus the petition states two causes of action in one count. No objec-

tion was made to this pleading by the defendants, by a motion to elect, or in any other way.

**Pleading—
action to de-
termine adverse
claim—prayer
for possession—
effect.** The circuit court properly gave effect to the cause of action in ejectment

pleaded by awarding possession to the plaintiffs.

VIII. It remains to consider whether the lower court erred in sustaining the motion for a new trial on the ground stated, to wit, that the court failed to allow defendants compensation for improvements on the property.

Both the plaintiffs and the defendants in discussing the matter of improvements assume that § 2401, Rev. Stat. 1909, applies, and that defendants' right to compensation for improvements upon the lot depends upon the application of that statute. Now that section, appearing in the article relating to ejectment, provides for compensation for improvements put upon real estate by an unsuccessful defendant, after a judgment or decree of possession in any real action in favor of a person having a better title. Subsequent sections, immediately following, provide how recovery of such value may

**Adverse claim—
determination
—award of
compensation.**

be had, and the party who would avail himself of it must bring his action and have the matter adjudicated before he is ousted from possession under the judgment against him. If he waits until afterwards, he cannot recover. Section 2401 gives a right conditioned upon immediate action. It is not a recognition of a right which exists independently of the statute, but creates the right.

Manifestly, taking § 2401 alone, compensation for improvements under it could not be assessed in favor of an unsuccessful defendant, *in the same case*, because by its very terms the right to meet compensation accrues only *after* judgment for possession, and can only be enforced in another action.

Respondents claim that the amendment of 1909 to § 2535 per-

mits recovery of such compensation in the same action. That amendment provides that, on a trial under that section, "*if the same be asked for in the pleadings of either party* the court may hear and finally determine any and all rights, etc.," and "may award full and complete relief," etc., "as the court might or could in any other or different action."

It is not necessary to determine whether the defendants would be entitled to compensation for their improvements under the circumstances. Nor is it necessary to determine whether the right created by § 2401 would be available to a defendant by § 2535, as amended, in the same case. It is clear that such compensation, under the latter section, cannot be allowed unless "asked for in the pleadings." That would

**Pleading—
necessity of
asking
compensation.**

be true, whether a defendant's right to such compensation arose by virtue of some equitable claim to the improvements, or by the operation of § 2401. The answer here contains no mention of improvements and no averments beyond the claim of title and all matters affecting the title.

The judgment is reversed, and the cause remanded, with directions to set aside the order granting a new trial, reinstate the judgment originally rendered, and overrule the motion for new trial.

Roy, C., concurs.

Per Curiam:

The foregoing opinion by White, C., is adopted as the opinion of the court.

All the Judges concur.

Petition for rehearing denied July 30, 1918.

NOTE.

The validity and effect of provisions in deeds discriminating against persons on account of race, color, or religion are the subject of the annotation to the case of LOS ANGELES INVEST. CO. v. GARY, post, 210.

LOS ANGELES INVESTMENT COMPANY, Appt.,
v.
ALFRED GARY and Wife, Respts.

California Supreme Court (Dept. No. 1) — December 11, 1919.

(— Cal. —, 186 Pac. 596.)

Covenant — condition against occupation by person of particular race — validity.

1. A condition in a deed in fee that the property shall not be occupied by a person other than of the Caucasian race is valid.

[See note on this question beginning on page 120.]

— condition subsequent — restriction in race of occupant.

2. Provisions in a deed that the property shall not be sold, leased, or rented to any person not of the Caucasian race, and that breach of such condition will cause a reverter, constitute conditions subsequent.

[See 7 R. C. L. 1087.]

— validity.

3. A condition in a grant in fee that the property shall not be sold within a specified time to one other than of the Caucasian race is within the operation of a statute making void con-

ditions restraining alienation, when repugnant to the interest created.

[See 7 R. C. L. 1114-1116; 8 R. C. L. 1116.]

Constitutional law — equal protection — covenant against occupation of property by certain class.

4. The enforcement of a covenant in a deed against the occupation of the property by persons of a particular race does not violate the provision of the Federal Constitution that no state shall deny to any person the equal protection of the laws.

(Angellotti, Ch. J., and Lennon, J., dissent from order denying rehearing.)

APPEAL by plaintiff from a judgment of the Superior Court for Los Angeles County (Houser, J.) in favor of defendants in an action brought to declare forfeiture of title to certain property for alleged breach of condition subsequent in a deed. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Flint & Jutten, H. S. MacKay, E. R. Brainerd, Jr., William R. Flint, and J. H. Schenck, for appellant:

The deed from plaintiff to Renaker was a grant upon condition subsequent, and the provision forbidding that said property should be sold, leased, or rented to any persons other than of the Caucasian race, or that any persons other than of the Caucasian race be permitted to occupy the premises, was not merely a covenant.

Woodruff v. Trenton Water Power Co. 10 N. J. Eq. 489; Underhill v. Saratoga & W. R. Co. 20 Barb. 455; Sharon Iron Co. v. Erie, 41 Pa. 341; Houston

v. Spruance, 4 Harr. (Del.) 117; McCullough v. Cox, 6 Barb. 386; Firth v. Los Angeles Pacific Land Co. 28 Cal. App. 399, 152 Pac. 935; Hawley v. Kafitz, 3 L.R.A. (N.S.) 741, and note, 148 Cal. 393, 113 Am. St. Rep. 282, 83 Pac. 248; Post v. Weil, 115 N. Y. 361, 5 L.R.A. 422, 12 Am. St. Rep. 809, 22 N. E. 145; St. Peter's Church v. Braggaw, 144 N. C. 126, 10 L.R.A. (N.S.) 633, 56 S. E. 688; Ecroyd v. Coggeshall, 21 R. I. 1, 79 Am. St. Rep. 741, 41 Atl. 260; 8 Ballard, Real Prop. § 261; Hawley & McG. Real Prop. p. 230; Zweig v. Sweedler, 140 App. Div. 319, 125 N. Y. Supp. 171; St. Louis v. Wiggins Ferry Co. 88 Mo. 615; Silver

Springs, O. & G. R. Co. v. Van Ness, 45 Fla. 559, 34 So. 884; Parmelee v. Oswego & S. R. Co. 6 N. Y. 80; Davis v. Lyman, 6 Conn. 252; Newcomb v. Presbrey, 8 Met. 406; Myers v. Burns, 33 Barb. 401; Minard v. Delaware, L. & W. R. Co. 139 Fed. 60; Blanchard v. Detroit, L. & L. M. R. Co. 31 Mich. 43, 18 Am. Rep. 142; O'Brien v. Wagner, 94 Mo. 93, 4 Am. St. Rep. 362, 7 S. W. 19; Winn v. State, 55 Ark. 360, 118 S. W. 375; Judd v. Robinson, 41 Colo. 222, 124 Am. St. Rep. 128, 92 Pac. 724, 14 Ann. Cas. 1018.

The breach of a condition subsequent in a deed forfeits the title to the grantor.

Firth v. Marovich, 160 Cal. 257, 116 Pac. 729, Ann. Cas. 1912D, 1190; Los Angeles Terminal Land Co. v. Muir, 136 Cal. 36, 68 Pac. 308; Pabst v. Hamilton, 133 Cal. 631, 66 Pac. 10; Klauber v. San Diego Street-Car Co. 95 Cal. 353, 30 Pac. 555; Liebrand v. Otto, 56 Cal. 242; Parsons v. Smilie, 97 Cal. 647, 32 Pac. 702; Jetter v. Lyon, 70 Neb. 429, 97 N. W. 596.

The alienation of a fee-simple estate may be restrained if for a limited period of time or to a certain number of persons, and the clause in the deed "that said property shall not be sold, leased, or rented to any persons other than of the Caucasian race" is a valid condition.

Cowell v. Colorado Springs Co. 100 U. S. 55, 25 L. ed. 547; M'Williams v. Nisly, 2 Serg. & R. 507, 7 Am. Dec. 654; Dougal v. Fryer, 3 Mo. 40, 22 Am. Dec. 458; Farris v. Rogers, 9 Ky. L. Rep. 912, 7 S. W. 543; Highland Realty Co. v. Groves, 130 Ky. 374, 113 S. W. 420; Rice v. Hall, 19 Ky. L. Rep. 814, 42 S. W. 99; Cropper v. Bowles, 150 Ky. 393, 150 S. W. 380; Harkness v. Lisle, 132 Ky. 767, 117 S. W. 264; Kentucky River Consol. Coal Co. v. Frazier, 161 Ky. 374, 170 S. W. 986; Large's Case, Leon. pt. 2, p. 82, Leon. pt. 3, p. 182, 74 Eng. Reprint, 376, 620; Gray v. Blanchard, 8 Pick. 284; Re Macleay, L. R. 20 Eq. 186, 44 L. J. Ch. N. S. 441, 32 L. T. N. S. 682, 23 Week. Rep. 718; Cornelius v. Den, 26 N. J. L. 376; Camp v. Cleary, 76 Va. 140; Blackstone Bank v. Davis, 21 Pick. 42, 32 Am. Dec. 241; Andrews v. Spurlin, 35 Ind. 262; Munroe v. Hall, 97 N. C. 206, 1 S. E. 651; Jaureche v. Proctor, 48 Pa. 466; 1 Washb. Real Prop. 67-69; Langdon v. Ingram, 28 Ind. 360;

Ex parte Watts, 130 N. C. 237, 41 S. E. 289; Stewart v. Barrow, 7 Bush, 368; Wallace v. Smith, 113 Ky. 263, 68 S. W. 131; Smith v. Isaacs, 25 Ky. L. Rep. 1727, 78 S. W. 434; Collins v. Clamorgan, 5 Mo. 273; Chisholm v. London & W. Trusts Co. 28 Ont. Rep. 347; Re Weller, 16 Ont. Rep. 318; Call v. Shewmaker, 24 Ky. L. Rep. 686, 69 S. W. 749; Queensborough Land Co. v. Cazeaux, 136 La. 724, L.R.A.1916B, 1201, 67 So. 641, Ann. Cas. 1916D, 1248.

The condition, "nor shall any person or persons other than of the Caucasian race be permitted to occupy said lot or lots," is a valid condition.

Firth v. Marovich, 160 Cal. 257, 116 Pac. 729, Ann. Cas. 1912D, 1190; Pabst v. Hamilton, 133 Cal. 631, 66 Pac. 10; Reclamation Dist. v. Van Loben Sels, 145 Cal. 181, 78 Pac. 638; Burdell v. Grandi, 152 Cal. 376, 14 L.R.A.(N.S.) 909, 125 Am. St. Rep. 61, 92 Pac. 1022; Cowell v. Colorado Springs Co. 100 U. S. 55, 25 L. ed. 547.

The condition in the deed forbidding the renting or sale of the land conveyed to persons other than of the Caucasian race, and occupation by persons other than of that race, does not violate the "equal protection of laws" clause of the 14th Amendment to the Federal Constitution.

Home Teleph. & Teleg. Co. v. Los Angeles, 227 U. S. 278, 57 L. ed. 510, 33 Sup. Ct. Rep. 312; James v. Bowman, 190 U. S. 127, 47 L. ed. 979, 23 Sup. Ct. Rep. 678; United States v. Harris, 106 U. S. 629, 641, 27 L. ed. 290, 294, 1 Sup. Ct. Rep. 601; Neal v. Delaware, 103 U. S. 370, 26 L. ed. 567; Virginia v. Rives, 100 U. S. 313, 25 L. ed. 667, 3 Am. Crim. Rep. 524; Slaughterhouse Cases, 16 Wall. 36, 21 L. ed. 394; Civil Rights Cases, 109 U. S. 3, 27 L. ed. 835, 3 Sup. Ct. Rep. 18; Risley v. Utica, 168 Fed. 737; United States v. Adair, 152 Fed. 737; Ex parte Riggins, 134 Fed. 404; Kiernan v. Multnomah County, 95 Fed. 849; United States v. Washington, 20 Fed. 630; Ex parte Wells, 3 Woods, 128, Fed. Cas. No. 17,386; People ex rel. Gaskill v. Forrest Home Cemetery Co. 258 Ill. 36, L.R.A.1917B, 946, 101 N. E. 219, Ann. Cas. 1914B, 277; Chilton v. St. Louis & I. M. R. Co. 114 Mo. 88, 19 L.R.A. 269, 21 S. W. 457; Younger v. Judah, 111 Mo. 303, 16 L.R.A. 558, 33 Am. St. Rep. 527, 19 S. W. 1109; 5 R. C. L. 580; 8 Cyc. 1058; West Chester

(— Cal. —, 186 Pac. 596.)

& P. R. Co. v. Miles, 55 Pa. 209, 93 Am. Dec. 744.

Mr. Arthur Crum, amicus curiæ:

The provision in plaintiff's deed to Benaker, defendants' mesne grantor, forbidding alienation to or occupancy by persons other than of the Caucasian race, is a condition subsequent, the breach of which forfeits the estate granted, and entitles the grantor to a reconveyance thereof.

4 Kent, Com. 132; St. Louis v. Wiggins Ferry Co. 88 Mo. 615; Silver Springs, O. & G. R. Co. v. Van Ness, 45 Fla. 559, 34 So. 884; Blanchard v. Detroit, L. & L. M. R. Co. 31 Mich. 43, 18 Am. Rep. 142; O'Brien v. Wagner, 94 Mo. 93, 4 Am. St. Rep. 362, 7 S. W. 19; Winn v. State, 55 Ark. 360, 18 S. W. 375; Brown v. Tilley, 25 R. I. 579, 57 Atl. 380; Minard v. Delaware, L. & W. R. Co. 139 Fed. 60; Hawley v. Kafitz, 3 L.R.A. (N.S.) 741 and note, 148 Cal. 393, 113 Am. St. Rep. 282, 83 Pac. 248; Post v. Weil, 115 N. Y. 361, 5 L.R.A. 422, 12 Am. St. Rep. 809, 22 N. E. 145; St. Peter's Church v. Bragaw, 144 N. C. 126, 10 L.R.A. (N.S.) 633, 56 S. E. 688; Ecroyd v. Coggeshall, 21 R. I. 1, 79 Am. St. Rep. 741, 41 Atl. 260; 8 Ballard, Real Prop. § 261; Hawley & McG. Real Prop. p. 230.

The breach of a condition subsequent in a deed forfeits the title and entitles the grantor to maintain an action for a reconveyance.

Firth v. Marovich, 160 Cal. 257, 116 Pac. 729, Ann. Cas. 1912D, 1190; Los Angeles Terminal Land Co. v. Muir, 136 Cal. 36, 68 Pac. 308; Pabst v. Hamilton, 133 Cal. 631, 66 Pac. 10; Parsons v. Smilie, 97 Cal. 647, 32 Pac. 702; Klauber v. San Diego Street-Car Co. 95 Cal. 353, 30 Pac. 555; Liebrand v. Otto, 56 Cal. 242.

Conditions restraining alienation of a fee-simple estate, if for a limited period of time only, or to a certain class of persons only, are not invalid for repugnancy.

Cowell v. Colorado Springs Co. 100 U. S. 55, 25 L. ed. 547; Queensborough Land Co. v. Cazeaux, 136 La. 724, L.R.A. 1916B, 1201, 67 So. 641, Ann. Cas. 1916D, 1248; M'Williams v. Nisly, 2 Serg. & R. 507, 7 Am. Dec. 654; Farris v. Rogers, 9 Ky. L. Rep. 912, 7 S. W. 543; Highland Realty Co. v. Groves, 130 Ky. 374, 113 S. W. 420; Rice v. Hall, 19 Ky. L. Rep. 814, 42 S. W. 99; Cropper v. Bowles, 150 Ky. 393, 150 S. W. 380; Harkness v. Lisle, 132 Ky. 767, 117 S. W. 264; Kentucky River

Consol. Coal Co. v. Frazier, 161 Ky. 874, 170 S. W. 986; Gray v. Blanchard, 8 Pick. 284; 1 Washb. Real Prop. 3d ed. p. 69.

Conditions restraining alienation for a particular time are valid.

Ex parte Watts, 130 N. C. 237, 41 S. E. 289; Stewart v. Barrow, 7 Bush, 368; Wallace v. Smith, 113 Ky. 263, 68 S. W. 131; Smith v. Isaacs, 25 Ky. L. Rep. 1727, 78 S. W. 434; Dougal v. Fryer, 3 Mo. 40, 22 Am. Dec. 458; Collins v. Clamorgan, 5 Mo. 273; Chisholm v. London & W. Trusts Co. 28 Ont. Rep. 347; Re Weller, 16 Ont. Rep. 318; Call v. Shewmaker, 24 Ky. L. Rep. 686, 69 S. W. 749; Langdon v. Ingram, 28 Ind. 360.

The condition in question does not suspend the absolute power of alienation, but leaves the grantee free to convey at any time, to persons not of the restricted class.

Hunt v. Wright, 47 N. H. 396, 93 Am. Dec. 451; Mandlebaum v. McDonell, 29 Mich. 97, 18 Am. Rep. 61; Tennant v. John Tennant Memorial Home, 167 Cal. 570, 140 Pac. 242.

The use or enjoyment of a fee-simple estate may be limited or restrained by a condition subsequent in the deed creating the estate.

Papst v. Hamilton, 133 Cal. 632, 66 Pac. 10; Firth v. Marovich, 160 Cal. 257, 116 Pac. 729, Ann. Cas. 1912D, 1190; Cowell v. Colorado Springs Co. 100 U. S. 55, 25 L. ed. 547; Smith v. Barrie, 56 Mich. 314, 56 Am. Rep. 391, 22 N. W. 816; Plumb v. Tubbs, 41 N. Y. 442; Sperry v. Pond, 5 Ohio, 387, 24 Am. Dec. 296.

Mr. Le Roy D. Barnett for respondents.

Olney, J., delivered the opinion of the court:

This is an appeal from a judgment entered upon the plaintiff's failure to amend its complaint after the lower court had sustained a general demurrer thereto interposed by the defendants, and the sole question is as to the sufficiency of the complaint. We have not been favored by either brief or argument on behalf of the respondents, but the correct conclusion in the case seems fairly certain nevertheless.

The complaint seeks in effect to declare a forfeiture of the title to a certain lot in the city of Los Angeles, because of the breach of con-

ditions subsequent subject to which the defendant Alfred Gary held the title. It appears from the complaint that the lot in question is one of 167 which the plaintiff originally owned in a certain tract, and some of which it still retains; that the plaintiff conveyed the lot by way of sale to one Renaker by a deed providing that prior to January 1, 1930, it should not be sold, leased, or rented to, or occupied by, one not of the Caucasian race; that by mesne conveyances the lot passed to the defendant Alfred Gary and is occupied by him and his wife; and, finally, that both Gary and his wife are colored and of African descent.

The provision in the deed by the plaintiff under which the forfeiture is claimed is as follows: "It is hereby covenanted and agreed by and between the parties hereto, and it is a part of the consideration of this indenture, . . . that the said property shall not be sold, leased, or rented to any persons other than of the Caucasian race, nor shall any person or persons other than of Caucasian race be permitted to occupy said lot or lots; provided, further, that a breach of any of the foregoing conditions shall cause said premises to revert to the said grantors, their successors, devisees, or assigns, each of whom respectively shall have the right of immediate re-entry upon said premises in the event of any such breach; provided, further, that all and each of the above restrictions, conditions, and covenants herein contained shall terminate and end and be of no further effect, whether legal or equitable, and shall not be enforceable on and after January 1, A. D. 1930."

There can be no question but that the foregoing provision amounts to a condition, or rather to conditions, subsequent. The express language of reversion and re-entry in case of a breach leaves no room for argument upon this point. It will be noted also that there are two

conditions; one that the property shall not be sold, leased, or rented to one not of Caucasian race, and the other that it shall not be occupied by one not of that race. Inasmuch as a breach of both of these conditions clearly appears from the complaint, the real questions presented by the demurrer, and therefore by this appeal, are as to the validity of such conditions.

The condition that the property be not sold, leased, or rented to one not of Caucasian birth is clearly a restraint on alienation. The deed likewise purports to convey the fee, and an incident of an estate in fee is the right of free disposal or transfer.

—validity.

The condition is, therefore, repugnant to the interest created by the deed except for the condition, and falls within a literal reading of § 711, Civil Code, whose language is: "Conditions restraining alienation, when repugnant to the interest created, are void."

Appellant's counsel, nevertheless, contend that inasmuch as the restraint is but partial, being limited both to persons of a particular class and to a comparatively brief period, that is, prior to January 1, 1930, the condition is good. Many authorities outside of this state do make a distinction between partial and general restraints upon alienation, holding the former in some instances valid, but the Code section would seem to leave no room for such distinction in this state, and since the filing of appellant's brief in this case it was so decided by the district court of appeal, in a scholarly opinion by Judge Finlayson. See Title Guarantee & Trust Co. v. Garrott, — Cal. App. —, 183 Pac. 470. The decision in that case was presented to us for consideration by a petition for rehearing, and the petition was denied because of our conclusion that the decision was correct, a conclusion from which we see no reason for departing. The demurrer was therefore properly

Covenant—
condition
subsequent—
restriction in
race of occupant.

sustained as to the alleged cause of action, based on the fact that the lot in question had been sold to the defendant Gary.

The condition, however, that the property should not be occupied by a person not of Caucasian birth, is in a different category. It is not a restraint upon the alienation, but

upon the use of the property. There is no prohibition by statute of such restraints imposed by

way of condition, nor was there any at common law. 18 C. J. 361; *Cowell v. Colorado Springs*, 100 U. S. 55, 25 L. ed. 547. The instances in which conditions restricting the use of property conveyed have been enforced are exceedingly numerous, and the conditions enforced of almost every conceivable variety. Conditions so extreme as to restrain the use to a single specified purpose are not uncommon, and so far as we are aware have been uniformly enforced, except in certain special cases where, for particular reasons not existing here and not affecting the generally enforceable character of such conditions, the particular condition was held invalid. As an instance of the enforcement of a condition of this extreme character, see *Papst v. Hamilton*, 133 Cal. 631, 66 Pac. 10. In connection with this discussion it may be well to add that what we have said applies only to restraints on use imposed by way of condition, and not to those sought to be imposed by covenant merely. The distinction between conditions and covenants is a decided one, and the principles applicable quite different.

The particular condition in this case being one against the occupation of the property by persons not of the Caucasian race, the question suggests itself as to whether it is an unlawful discrimination against certain classes of citizens, and therefore within the prohibition of the Federal Constitution. This ques-

tion, however, is settled conclusively against the defendants by repeated decisions of the United States Supreme Court.

The provision of the Federal Constitution material is the 14th Amendment. It provides: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

Construing this amendment, the Supreme Court of the United States has held in a number of instances that the inhibition applies exclusively to action by the state and has no reference to action by individuals, such as is involved here: *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588; *Virginia v. Rives*, 100 U. S. 313, 25 L. ed. 667, 3 Am. Crim. Rep. 524; *United States v. Harris*, 106 U. S. 629, 27 L. ed. 290, 1 Sup. Ct. Rep. 601; *Civil Rights Cases*, 109 U. S. 3, 27 L. ed. 835, 3 Sup. Ct. Rep. 18. See also *United States v. Washington (C. C.)* 20 Fed. 630; *Queensborough Land Co. v. Cazeaux*, 136 La. 724, L.R.A.1916B, 1201, 67 So. 641, Ann. Cas. 1916D, 1248; *People ex rel. Gaskill v. Forrest Home Cemetery Co.* 258 Ill. 36, L.R.A.1917B, 946, 101 N. E. 219, Ann. Cas. 1914B, 277; *Chilton v. St. Louis & I. M. R. Co.* 114 Mo. 88, 19 L.R.A. 269, 21 S. W. 457; *West Chester & P. R. Co. v. Miles*, 55 Pa. 209, 93 Am. Dec. 744.

Our conclusion is that the condition against the occupation of the property by anyone not of the Caucasian race is valid, and that, since a breach of this condition is alleged, the complaint states a cause of action.

Judgment reversed.

We concur: Shaw, J.; Lawlor, J.

On Motion for Rehearing.

Per Curiam:

Rehearing denied.

Angellotti, Ch. J., dissenting:

I dissent from the order denying a rehearing. To my mind the department opinion violates the well-settled general rule that conditions

Constitutional law—equal protection—covenant against occupation of property by certain class.

—condition against occupation by person of particular race—validity.

involving a forfeiture must be strictly construed against the grantor, and in favor of the holder of the estate. It seems to me that the portion of the condition which is upheld, viz., "nor shall any person or persons other than of the Caucasian race be permitted to occupy said lot or lots," was not intended by the parties as in any way applicable to occupation by the owner himself. It was apparently designed to prevent the occupancy by others than the owner, under his (the owner's) permission or license. Taken in connection with the preceding part of the sentence, from which it is separated by a comma, my opinion is that it can fairly be given no other construction. The preceding part, viz., "that the said property shall not be sold, leased, or rented to any persons other than of the Caucasian race," was designed by the parties to prevent the property coming into the ownership or control of any person not of the Caucasian race, leaving, in the contemplation of the parties, as the only matter calling for protection in the matter of occupancy, the prohibition of occupancy by third persons not of the Caucasian race under per-

mission or license of the owner. The language used would be apt language to show this intent as to this part of the provision. Fairly construed, it simply said that the owner agreed that he would not permit any person other than one of the Caucasian race to become an occupant of the property, and it is an undue strain of the word "permit," in view of the rule of strict construction, to hold that the owner's own personal occupancy is a violation of the provision. The fact that the first portion of the provision is now held void as an undue restraint on alienation in no way affects the construction to be given to the second portion, for obviously the whole must be considered together in order to arrive at a conclusion as to the meaning intended by the parties to be given to the second portion. I think that by the decision we are attributing to the second portion a meaning neither intended nor expressed by the parties when the deed was executed. In any event, the question of proper construction is so doubtful that the matter should be resolved against the grantor, and in favor of the holder of the estate.

Lennon, J: I concur.

ANNOTATION.

Provision in deed discriminating against persons on account of race, color, or religion.

As an unlawful restraint on the power of alienation.

LOS ANGELES INVEST. CO. v. GARY (reported herewith) ante, 115, in holding that a condition in a grant in fee that the property shall not be sold within a specified time to one other than of the Caucasian race is within the operation of a statute making void conditions restraining alienation when repugnant to the interest created, is in direct conflict with KOEHLER v. ROWLAND (reported herewith) ante, 107, which holds that a condition in a deed that the "property shall not be sold, leased, or rented to any negroes for twenty-five years from the date here-

of" is not void as an unlawful restraint upon the power of alienation incident to a fee-simple title. The court in this case said that "it is the rule that an absolute restriction in the power of alienation in the conveyance of a fee-simple title is void, but it is entirely within the right and power of the grantor to impose a condition or restraint upon the power of alienation in certain cases, to certain persons, or for a certain time, or for certain purposes."

It will be observed that in LOS ANGELES INVEST. CO. v. GARY (reported herewith) the court admitted that many authorities outside of the state

of California did make a distinction between partial and general restraints upon alienation, holding the former in some instances valid, but said that the Code section that "conditions restraining alienation, when repugnant to the interests created, are void," would seem to leave no room for such distinction in the state of California.

Provision as to use of property.

No reported case, aside from *LOS ANGELES INVEST. CO. v. GARY*, has been found which has considered a condition in a deed prohibiting the occupation of property by a person other than of the Caucasian race.

As against public policy.

A covenant in a private deed of real estate, forbidding sale of property to a negro, is not against public policy. *Queensborough Land Co. v. Cazeaux* (1915) 136 La. 724, L.R.A.1916B, 1201, 67 So. 641, Ann. Cas. 1916D, 1248; *KOEHLER v. ROWLAND* (reported herewith) ante, 107.

However, in *Gandolfo v. Hartman* (1892) 16 L.R.A. 277, 49 Fed. 181, a covenant not to rent property to a Chinaman was held to be void as against public policy. In the *Cazeaux Case* the court said that while the public policy of the state opposes the putting of property out of commerce, it at the same time favors the fullest liberty of contract and the widest latitude possible in the right to dispose of one's property as one lists, so long as no disposition is sought to be made contrary to good morals, public order, or express law, and distinguished between total and perpetual inalienability and partial and temporary inalienability. The court in the *KOEHLER CASE* said that the purpose of the restriction was to preserve the property, together with other property in the neighborhood, as a district unoccupied by negroes. And such a restriction was analogous to the conditions and restrictions in deeds of property, which prohibited the use of property for slaughterhouses, soap factories, livery stables, tannery shops, etc., and which have been upheld.

As violation of 14th Amendment.

A covenant in a private deed of real estate, forbidding the sale of the property to a negro, does not violate the 14th Amendment to the Federal Constitution. *LOS ANGELES INVEST. CO. v. GARY* (reported herewith) ante, 115; *Queensborough Land Co. v. Cazeaux* (La.) supra.

Gandolfo v. Hartman (Fed.) supra, takes an opposite view, however, and holds that such a covenant does violate the 14th Amendment.

LOS ANGELES INVEST. CO. v. GARY (reported herewith) ante, 115, and the *Cazeaux Case*, take the view that the 14th Amendment, in so far as prohibiting the discrimination against the negro race, applies only to state legislation, not to the contracts of individuals. In criticizing this view, the court, in the *Gandolfo Case*, said: "It would be a very narrow construction of the constitutional Amendment in question, and of the decisions based upon it, and a very restricted application of the broad principles upon which both the Amendment and the decisions proceed, to hold that, while state and municipal legislatures are forbidden to discriminate against the Chinese in their legislation, a citizen of the state may lawfully do so by contract, which the courts may enforce. Such a view is, I think, entirely inadmissible. Any result inhibited by the Constitution can no more be accomplished by contract of individual citizens than by legislation, and the courts should no more enforce the one than the other. This would seem to be very clear."

The decisions in *LOS ANGELES INVEST. CO. v. GARY* (reported herewith) and the *Cazeaux Case*, it will be observed, merely affirm the right of an individual to discriminate against negroes; they do not assert the right of the state to do so either through its legislature or judiciary. It is true that the decision upholding the covenant becomes in a sense a rule of law, or at least evidence of a rule of law of the state, to the effect that such a covenant is valid. But even regarded as a law of the state, and as such subject to be tested by

the provision of the 14th Amendment that no state shall deny to any person within its jurisdiction the equal protection of the laws, it is not necessarily in violation of that provision, for the reason, as above stated, that it merely tolerates a discrimination by an individual, and in no wise sanctions such a discrimination by the state, either through its legislative or judicial departments. A different question would be presented if the courts, while adhering to the decisions reached in these cases, were subsequently to hold that a similar covenant against Jews, Italians, and Chinamen, or any other class of persons except negroes, would be invalid. Upon that hypothesis the state could, by its judiciary, have established a discrimination against negroes, and incorporated it in a law of the state, a law none the less because established by judicial decisions, and not by an act of the legislature. It seems clear that such law would not be removed entirely from the operation of the 14th Amendment by the fact that the individual decisions by which it was established were rendered in passing upon the contracts of individuals, and that if the discrimination could be upheld at all, as against an objection based on the 14th Amendment, it must be because, even as a discrimination by the law of the state, it was justified by the conditions and circumstances which gave rise to it; and not because of the principle that the Amendment does not apply to the contracts of individuals.

Treaty guaranties to aliens.

But one reported case has been found which has considered the question under annotation as affected by treaty guaranty. Thus, in *Gandolfo v. Hartman* (1892) 16 L.R.A. 277, 49 Fed. 181, it was held that a covenant not to rent property to a Chinaman is void as an infraction of a treaty between the United States and China, of November 17, 1880, which guaranteed

the Chinamen in the United States all the rights, privileges, and immunities accorded to citizens and subjects of the most favored nation. This decision would seem to be open to the criticism that it extends the application of the treaty guaranty too far, and that it should be considered to apply only to legislation affecting their rights, privileges, and immunities.

When breach of condition is shown.

A condition that premises shall not be sold, leased, or rented to negroes is broken by the leasing of a part only of such premises to negroes. *KOEHLER v. ROWLAND* (reported herewith) ante, 107.

But a condition, "the title to this land never to vest in a colored person or persons," is not broken by a conveyance to a corporation, although such corporation is composed entirely of negroes. *People's Pleasure Park Co. v. Rohleder* (1908) 109 Va. 439, 61 S. E. 794, 63 S. E. 981. The decision in this case is based upon the fact that a corporation is an artificial person, having an existence separate from that of its stockholders and directors. It is to be observed that the court stated that had the condition been directed to the use and occupation as well as to the sale, a different question might have been presented.

An interesting case in connection with the question under annotation is *Keltner v. Harris* (1917) — Mo. —, 196 S. W. 1, where an owner of real estate made a contract for the sale of the same to a white man, and after making his deed discovered that the deed was made to a colored man, for whom the white man was merely an agent, although he had told the agent that he would not sell the property to a negro because he did not want a negro in that locality; and the court held that the conveyance was properly avoided on the ground of fraud.

J. H. B.

ANNA MORENCY, Admr., etc., of J. A. Morency,
v.
VITALINE (VACHON) LANDRY, Exrx., etc., of Narcisse Landry.

New Hampshire Supreme Court — December 2, 1919.

(— N. H. —, 108 Atl. 855.)

Bankruptcy — claims of nonresident creditor.

1. The claims of a creditor residing out of the United States, when properly scheduled, are included, so far as proceedings in this country are concerned, in a discharge in proceedings instituted under the Bankruptcy Act of 1898.

[See note on this question beginning on page 127.]

—necessity of notice to assignee.

2. Notice of bankruptcy proceedings need not be given an assignee of a judgment in order to bar his rights by a discharge, until notice of the assignment has reached the bankrupt.

Evidence — burden of proof — notice of change in ownership of claim.

3. To enable a surety who has paid

the debt to avoid a discharge in bankruptcy as a defense to his claim because the notice of the proceeding was given to the original creditor, and not to him, he has the burden of showing that the debtor had notice of the change in the ownership of the claim.

TRANSFER by the Superior Court for Strafford County (Branch, J.) for the opinion of the Supreme Court upon exception by plaintiff to the dismissal of her appeal from a decree of the Probate Court, approving a commissioner's report disallowing her claim against the estate of defendant. *Exception overruled.*

In 1899, Narcisse Landry, a resident of St. Marie in the province of Quebec, gave to plaintiff's intestate, J. A. Morency, a note which was discounted by him at the local bank. In 1900, the note not having been paid at maturity, both parties were sued by the bank, which recovered judgment against them. In 1902 the judgment was paid by Morency, which his administratrix is now attempting to enforce against the estate of Landry.

Landry emigrated to New Hampshire; in 1906 filed a voluntary petition in bankruptcy, received in due course a discharge, and in 1912 died. This claim in the bankruptcy proceedings he included in his schedule of liability, stating F. Morency, F. Morency & Company, and the bank as creditors under the claim.

The court found that notices were duly mailed to these creditors, and that both the bank and J. A. Morency had actual notice of the proceed-

ings, and dismissed the appeal from the report of the commissioner, subject to plaintiff's exception.

Messrs. Snow, Snow, & Cooper, for appellant:

A prima facie case, at least, was established by the plaintiff, not open to examination on its merits, on which she is entitled to recover unless the affirmative defenses are good.

New York, L. E. & W. R. Co. v. McHenry, 21 Blatchf. 400, 17 Fed. 414; Ritchie v. McMullen, 159 U. S. 235, 40 L. ed. 133, 16 Sup. Ct. Rep. 171; Hilton v. Guyot, 159 U. S. 113, 40 L. ed. 95, 16 Sup. Ct. Rep. 139; Mahurin v. Bickford, 8 N. H. 54; Rogers v. Odell, 39 N. H. 452; MacDonald v. Grand Trunk R. Co. 71 N. H. 452, 59 L.R.A. 448, 98 Am. St. Rep. 550, 52 Atl. 982; Tremblay v. Aetna L. Ins. Co. 97 Me. 547, 94 Am. St. Rep. 521, 55 Atl. 509; Tourigny v. Houle, 88 Me. 406, 34 Atl. 158; Fisher v. Fielding, 67 Conn. 91, 32 L.R.A. 236, 52 Am. St. Rep. 270, 34 Atl. 714.

The facts do not give rise to the Statute of Limitations. The appeal is on a judgment obtained in 1902, and

twenty years have not yet elapsed, and the fact that the judgment is foreign rather than domestic is immaterial.

Little v. McVey, — N. J. L. —, 47 Atl. 61; *Jordan v. Robinson*, 15 Me. 167; *Brown v. Bridge*, 106 Mass. 563; *Barber v. International Co.* 74 Conn. 652, 92 Am. St. Rep. 246, 51 Atl. 857.

The facts do not sustain the discharge in bankruptcy. To secure jurisdiction upon which the bankruptcy court could give judgment, it must have had jurisdiction of either the res (the claim) or the person (the creditor).

Re Schwartz, 204 Fed. 326; *Lizardi v. Cohen*, 3 Gill, 430; *Ellis v. M'Henry*, L. R. 6 C. P. 228, 40 L. J. C. P. N. S. 109, 23 L. T. N. S. 861, 19 Week. Rep. 503; *M'Menomy v. Murray*, 3 Johns. Ch. 435; *Phelps v. Borland*, 103 N. Y. 406, 57 Am. Rep. 755, 9 N. E. 307; *McDougall v. Page*, 55 Vt. 187, 45 Am. Rep. 602; *Cook v. Moffat*, 5 How. 309, 12 L. ed. 166; *Ogden v. Saunders*, 12 Wheat. 213, 6 L. ed. 606; *M'Millan v. M'Neill*, 4 Wheat. 209, 4 L. ed. 552; *Van Reimsdyk v. Kane*, 1 Gall. 371, Fed. Cas. No. 16,871; *Tremblay v. Aetna L. Ins. Co.* 97 Me. 547, 94 Am. St. Rep. 521, 55 Atl. 509; 2 Kent, Com. 393, 457, 459; *Freeman*, Judgm. § 605b; 16 Am. & Eng. Enc. Law, 2d ed. 643, 783; 2 Loveland, Bankr. 4th ed. p. 1339; 2 Whart. Confl. L. 3d ed. p. 1242; *Story*, Confl. L. § 342; *Dacey*, Confl. L. 2d ed. p. 435; *Newmarket Bank v. Butler*, 45 N. H. 236; *Baldwin v. Hale*, 3 Am. L. Reg. N. S. 470.

The claim follows the creditor, and unless he submits himself to the jurisdiction of the insolvency court, he is not bound by a discharge which it grants.

Newmarket Bank v. Butler, 45 N. H. 236; *Perley v. Mason*, 64 N. H. 6, 3 Atl. 629; *Carbee v. Mason*, 64 N. H. 10, 4 Atl. 791; *Stien v. McQuade*, 66 N. H. 403, 49 Am. St. Rep. 623, 22 Atl. 451; *Guernsey v. Wood*, 130 Mass. 503; *Bedell v. Scruton*, 54 Vt. 493; *Hammond Beef & Provision Co. v. Best*, 91 Me. 431, 42 L.R.A. 528, 40 Atl. 338; *Swift v. Winchester*, 96 Me. 481, 90 Am. St. Rep. 414, 52 Atl. 1017; *Anderson v. Wheeler*, 25 Conn. 603; *Baldwin v. Hale*, 1 Wall. 223, 17 L. ed. 531.

Neither plaintiff's intestate nor his claim were duly scheduled, and there is no evidence of either notice or actual knowledge. One or the other is a fundamental requirement to the operation of a discharge, and the burden

is upon the bankrupt and those claiming under him to prove their existence.

Weidenfeld v. Tillinghast, 18 Am. Bankr. Rep. 531, 54 Misc. 90, 104 N. Y. Supp. 712; *Bogart v. Cowboy State Bank & T. Co.* — Tex. Civ. App. —, 182 S. W. 678; *Lutz v. Kalmus*, 115 N. Y. Supp. 230; *Collier*, Bankr. 10th ed. p. 400; *Columbia Bank v. Birkett*, 174 N. Y. 112, 102 Am. St. Rep. 478, 66 N. E. 652; *Cohen v. Pinkus*, 126 App. Div. 792, 111 N. Y. Supp. 82; *Collins v. Davidson*, 34 Ohio C. C. 668; *Haack v. Theise*, 16 Am. Bankr. Rep. 699, 51 Misc. 3, 99 N. Y. Supp. 905; *Liesum v. Kraus*, 35 Misc. 376, 71 N. Y. Supp. 1022; *Custard v. Wigderson*, 130 Wis. 412, 110 N. W. 263, 10 Ann. Cas. 740; *Kreitlein v. Ferger*, 28 Am. Bankr. Rep. 908, 52 Ind. App. 199, 97 N. E. 819, 98 N. E. 1005; *Marshall v. English-American Loan & T. Co.* 127 Ga. 376, 56 S. E. 449; *Wright-Dalton-Bell Anchor Store Co. v. St. Louis, I. M. & S. R. Co.* 142 Mo. App. 50, 125 S. W. 517.

The kind of notice or knowledge here required is personal notice or actual knowledge as distinguished from mere imputed or constructive notice or knowledge.

Santa Rosa Bank v. White, 139 Cal. 703, 73 Pac. 577; *Wheeler v. Newton*, 168 App. Div. 782, 154 N. Y. Supp. 431; *Strickland v. Capital City Mills*, 74 S. C. 16, 7 L.R.A. (N.S.) 426, 54 S. E. 220; *Gilmore v. Farmer*, 166 Ill. App. 70; *Hilton v. White*, 171 App. Div. 931, 156 N. Y. Supp. 9; *Custard v. Wigderson*, 130 Wis. 412, 110 N. W. 263, 10 Ann. Cas. 740; *Vaughan v. Boston & M. R. Co.* 78 N. H. 615, 103 Atl. 129.

Messrs. Hughes & Doe and Fred H. Brown, for appellee:

Beyond the limits of the state, bankrupt laws have no force, except such as may be given to them by comity.

Cook v. Moffat, 5 How. 308, 311, 12 L. ed. 165, 166.

A nation can by a discharge in bankruptcy render all claims of foreign creditors as well as domestic thereafter unenforceable within the nation granting the discharge.

Ruiz v. Eickerman, 2 McCrary, 259, 5 Fed. 790; *Dacey*, Confl. L. 2d ed. p. 435, rule 114; *Story*, Confl. L. § 348; *Murray v. De Rottenham*, 6 Johns. Ch. 52.

The Bankruptcy Statute was enacted by practical men for use by practical men, and proceedings under it

are not to be nullified in favor of individual creditors by impractical considerations.

Kreitlein v. Ferger, 238 U. S. 21, 59 L. ed. 1184, 35 Sup. Ct. Rep. 685.

In providing a twenty-year limitation for actions of "debt upon judgments" the legislature did not intend to include foreign judgments. Since that time the status of foreign judgments has been perhaps more clearly defined, but they are not now treated even by the courts on an equality with domestic judgments.

Hilton v. Guyot, 159 U. S. 113, 40 L. ed. 95, 16 Sup. Ct. Rep. 139; MacDonald v. Grand Trunk R. Co. 71 N. H. 448, 59 L.R.A. 448, 73 Am. St. Rep. 550, 52 Atl. 982.

Peaslee, J., delivered the opinion of the court:

The Bankruptcy Act of July 1, 1898, provides that "a discharge in bankruptcy shall release a bankrupt from all of his provable debts," duly scheduled by the bankrupt, with the name of the creditor if known, with certain exceptions not material here. Section 17a (U. S. Comp. Stat. § 9601, 1 Fed. Stat. Anno. 2d ed. p. 708). The act also refers in terms to the claims of those residing outside the United States, as entitled to share in the dividends declared. Section 65d (§ 9649, 1 Fed. Stat. Anno. 2d ed. p. 1106). The plain conclusion from these provisions seems to be that debts due to nonresident creditors, when properly scheduled, are discharged, so far as Congress has the power to enact that such a result shall follow. That Congress has the

Bankruptcy—
claims of non-
resident
creditor.

power to so provide, as far as future proceedings in this country are concerned,

has not been questioned, and is not open to doubt.

But it is argued that, while Congress might enact such a law, it has not done so. The chief contention made in favor of this conclusion is that, prior to the enactment of the present statute, earlier bankruptcy acts containing provisions of similar purport had been construed as not affecting the right of the non-participating foreign creditor to

thereafter maintain a suit in our courts. Hence it is said that Congress intended to express a like purpose here.

The claim that prior to 1898 similar provisions in earlier bankruptcy laws had been authoritatively construed favorably to the plaintiff's contention is not borne out by the cases cited. The question has never been passed upon by the Supreme Court of the United States. The case in that court which is relied upon (Odgen v. Saunders, 12 Wheat. 213, 6 L. ed. 606) raised questions as to the constitutional limitation upon the power of the several states to enact insolvency laws. No question of the meaning of any national bankruptcy law or of the power of Congress to enact the same was involved, and the subject was not considered.

Phelps v. Borland, 103 N. Y. 406, 57 Am. Rep. 755, 9 N. E. 307, deals with the effect to be given here to a discharge of a foreign debtor in his own country. It does not involve the question now under consideration, and the matter is not referred to in the opinion.

In Lizardi v. Cohen, 3 Gill, 430, the question was whether a discharged bankrupt was a competent witness as to a London contract. It was held that the contract was not discharged, and that therefore the witness was interested and incompetent. The decision is put upon the ground stated by Judge Story (Conflict of Laws, § 342) "that a discharge of a contract, by the law of a place where the contract was not made or to be performed, will not be a discharge in any other country." It does not discharge the obligation so as to make the debtor disinterested. He is still liable in the "other country." Whether the debt was discharged locally was a question not necessary to the decision, and not discussed.

The only case cited holding that under the Bankruptcy Law of 1867 (Act Cong. March 2, 1867, chap 176, 14 Stat. at L. 517) a discharge did not bar a subsequent suit here

by a foreign creditor is *McDougall v. Page*, 55 Vt. 187, 45 Am. Rep. 602, decided in 1882. But it was admitted in the opinion that the holding was contrary to the decisions in other states, and that the question had not been passed upon by the Supreme Court of the United States. Add to this the facts that two judges dissented from the Vermont decision, and that in 1884 still another decision opposed to it was announced (*Moore v. Horton*, 32 Hun, 393), and it becomes evident that there was not, in 1898, any authoritative interpretation of the Act of 1867, such as is now claimed. The matter had not been passed upon by the court of last resort, and the views of others were conflicting. So far as the authorities go, their weight is against rather than for the plaintiff upon the issue of how the earlier laws had been understood at the time the present law was enacted.

The argument that a law making the discharge efficient locally as to a foreign creditor gives the domestic creditors undue advantages compels the foreign creditor to pursue his debtor into other lands, and undertakes to make a foreign discharge effective in another country where the creditor resides, is based upon a misconception of the effect of the discharge, so far as it relates to foreign creditors who do not participate in the bankruptcy proceedings. Such creditors are not thereby compelled to pursue their debtor into foreign lands. But if they do so pursue him, they are bound by the limitation of remedy which applies to those resident there. Neither does the law undertake to make the discharge effective against the creditor in proceedings brought at his place of residence in Canada. It merely places him on an equality with our own citizens in proceedings in our courts. It is manifest that such a law is not so devoid of just principle that it is always to be inferred that there was no intent to enact it.

It has recently been declared that

the object of the bankruptcy law is not merely to distribute the debtor's property equitably among the creditors, "but as a main purpose of the act intends to aid the unfortunate debtor by giving him a fresh start in life, free from debts. . . . Our decisions lay great stress upon this feature of the law." *Stellwagen v. Clum*, 245 U. S. 605, 617, 62 L. ed. 507, 512, 38 Sup. Ct. Rep. 218.

The plaintiff's argument is based upon an erroneous assumption as to the state of the law in 1898, and takes a narrow and mistaken view of the purposes intended to be effected by the legislation in question. The statute plainly applies to the case in hand, and the plaintiff's rights here are no greater than they would be if the creditor had resided in the United States. 1 *Loveland, Bankr.* § 743; *Bump, Bankr.* 713; *Black, Bankr.* § 723; *Ruiz v. Eickerman*, 2 *McCrary*, 259, 5 Fed. 790; *Zarega's Case*, 1 N. Y. Legal Obs. 40; note, 4 *Law Rep.* 480, Fed. Cas. No. 18,204.

As the judgment recovered by the bank is a provable debt (§ 65d), the right of the bank to recover on it is barred by the discharge. The plaintiff cannot recover on the note, or for money paid upon the judgment, because such claims are barred by the general six-year limitation. She can recover only through the bank judgment. *Stavrelis v. Zacharias*, 79 N. H. —, 106 Atl. 306.

If it can be found that equitably the judgment belonged to J. A. Morency, and that he had the right to prosecute it in the bank's name, the plaintiff can answer the discharge only upon the ground that the bankrupt failed to name Morency as the creditor under the judgment. In order to impose that duty upon the bankrupt, it must appear that he knew of the change in the equitable title. It is not the bankrupt's duty to notify the assignee, until the assignee has performed his duty of notifying the bankrupt. "Upon an assignment

—necessity of
notice to
assignee.

being made it becomes the duty of the assignee to notify the debtor." *Thompson v. Emery*, 27 N. H. 269, 272; *Hellen v. Boston*, 194 Mass. 579, 80 N. E. 603. While the mere fact of the surety's payment of the debt may be treated as constituting an equitable assignment of the rights incident to the original claim in the hands of the creditor, equity does not relieve the surety from the performance of his equitable duty to inform the debtor of the change in the situation. Until such notice is given, it is the debtor's right to treat the original creditor as the one to whom he owes a debtor's duties. And aside from this general common-law rule, the provision of the bankruptcy act requiring the scheduling of the names of creditors, "if known," plainly implies that one who has become a creditor without the knowledge of the bankrupt cannot complain because the claim is not scheduled as owing to him.

The cases "almost uniformly hold that where the bankrupt is sued on a debt existing at the time of filing the petition, the introduction of the order makes out a prima facie defense, the burden being then cast upon the plaintiff to show that, be-

cause of the nature of the claim, failure to give notice or other statutory reason, the debt sued on was by law excepted from the operation of the discharge." *Kreitlein v. Ferger*, 238 U. S. 21, 26, 59 L. ed. 1184, 1186, 35 Sup. Ct. Rep. 687. The same rule was announced in this state as applicable in proceedings under similar provisions contained in the National Bankruptcy Law of 1841. *Cutter v. Folsom*, 17 N. H. 139; *Wiggins v. Shapleigh*, 20 N. H. 444.

This imposed on the plaintiff the burden of offering evidence tending to show that Landry, when he filed his petition, knew Morency's relation to him as a creditor through the bank judgment. No such evidence was offered, and there was no error in the order dismissing the appeal. This conclusion renders it unnecessary to consider whether the mailing of notices to F. Morency and F. Morency & Company authorized the finding that J. A. Morency had actual knowledge of the proceedings.

Evidence—burden of proof—notice of change in ownership of claim.

Exception overruled.

All concur.

ANNOTATION.

Discharge in bankruptcy as bar to debt due to foreign creditors.

The present annotation is confined to a treatment of the specific question whether a discharge under a national bankruptcy act so operates as to a debt due to a foreign creditor as to prevent his maintaining an action thereon in the courts of the country granting the discharge. This limitation excludes not only all questions as to the effect of a discharge under a foreign bankruptcy law as a bar to an action in the courts of this country by a local creditor, but also any question as to the effect of a discharge in the United States upon the right of a foreign creditor to pursue the remedies afforded by his home country upon contracts of that country. Also

excluded are the decisions involving the effect of an assignment in insolvency under the laws of one state upon a creditor residing in another state or country.

Upon the question thus presented the decided weight of authority is to the effect that a discharge of a bankrupt under a bankruptcy act of the United States operates as a bar to the maintenance of an action in its courts by a foreign creditor. *Zarega's Case* (1842) 1 N. Y. Legal Obs. 40, note, Fed. Cas. No. 18,204; *Ruiz v. Eickerman* (1881) 2 McCrary, 259, 5 Fed. 790; *MORENCY v. LANDRY* (reported herewith) ante, 123; *Murray v. De Rottenham* (1822) 6 Johns. Ch. (N.

Y.) 52; *Ritchie v. Garrison* (1858) 10 Abb. Pr. (N. Y.) 246; *Moore v. Horton* (1884) 32 Hun (N. Y.) 393; *Pattison v. Wilbur* (1873) 10 R. I. 448, 12 Nat. Bankr. Reg. 193.

And this seems to be the law of England. See *Armani v. Castrique* (1844) 13 Mees. & W. 443, 153 Eng. Reprint, 185, 14 L. J. Exch. N. S. 36, 2 Dowl. & L. 432, wherein Pollock, C. B., said that an English certificate of discharge in bankruptcy is "a discharge as against all the world in the English courts." And the following cases contain statements to the same effect: *Gill v. Barron* (1868) L. R. 2 C. P. 157, 37 L. J. C. P. N. S. 33, 5 Moore, P. C. C. N. S. 213, 16 Eng. Reprint, 496; *Ellis v. M'Henry* (1871) L. R. 6 C. P. (Eng.) 228, 40 L. J. C. P. N. S. 109, 23 L. T. N. S. 861, 19 Week. Rep. 503. And see also *Re Bonacina* [1912] 2 Ch. (Eng.) 394, 81 L. J. Ch. N. S. 674, 107 L. T. N. S. 198, 28 Times L. R. 508, 67 Sol. Jo. 504, 19 Manson, 224, and *Odwin v. Forbes* (1817) Buck, Bankr. (Eng.) 57. And in the New Brunswick case of *Ford v. Stewart* (1901) 35 N. B. 568, it was expressly held that a certificate of discharge under the Imperial Bankruptcy Act of 1883 constituted a defense to an action in New Brunswick on a provable debt contracted in that province, but by a subject of a foreign state who had never resided or been domiciled within British dominions.

In *Zarega's Case* (Fed.) *supra*, the foreign creditors raised the objection that Congress has no power to pass a law which would destroy debts contracted abroad, but the court held that such objection did not reach the question, since it was only necessary to determine that the discharge barred the maintaining of an action in this country, regardless of the creditor's right to maintain an action in the foreign country where the contract was to be performed. The court said: "Taking the questions on the broad ground that the law is not competent to discharge debts contracted abroad, I see no ground for the argument urged. If the petitioner had come here with the intention of availing himself of this law to extinguish debts

contracted in another country, that might defeat the proceedings. But if he resides here, and the debts were contracted abroad, I see nothing that should exempt him from the full effects of a discharge given to a bankrupt. Nor is it important to consider how far the discharge here might avail him if set up abroad. His creditors abroad might perhaps proceed against him there if he should come among them; we have nothing to do with that. . . . The law operates as a bar to all creditors here, and may be pleaded as a bar to any suit brought against him here." And again in *Ruiz v. Eickerman* (1881) 2 McCrary, 259, 5 Fed. 790, the court admitted that a Federal bankruptcy law has no extra-territorial force, and that a discharge thereunder might not protect the bankrupt from a suit brought by a foreign creditor in a foreign jurisdiction, but insisted that the discharge was valid, in the absence of fraud, in whatever court in the United States such a creditor should bring suit. As to whether or not the foreign creditor had notice of the bankruptcy proceeding, it does not expressly appear, but the court did say that he could have proved his demand and shared in the divisions, but that "he elected not to do so," and, therefore, that his demand was discharged so far as the United States law operates.

In *Moore v. Horton* (1884) 32 Hun (N. Y.) 393, it was expressly held that a discharge in the United States serves as complete defense in actions prosecuted in the courts of New York state as to all debts existing at the time of the filing of the petition in bankruptcy, including a debt due a resident of Canada, although such foreign creditor did not prove his debt or in any manner appear in or consent to the bankruptcy proceeding, but that the discharge, since it could have no extraterritorial effect, constituted no bar to a recovery in the courts of Canada.

In *Pattison v. Wilbur* (1873) 10 R. I. 448, 12 Nat. Bankr. Reg. 193, the decision was upon the ground that the foreign creditors, by suing in the courts of this country, subjected them-

selves to the *lex fori*, so that they cannot deny here the legal effect of the discharge under our laws. In this case both parties lived in the United States when the contract was made, and here was its place of performance, the real *locus contractus*, but the creditor moved to Scotland and received no notice of the bankruptcy proceeding, but this was held not to constitute an avoidance of the discharge, the debtor having listed the debt and having complied with the provisions of the act (U. S. Bankruptcy Act 1867, § 29) under which the proceeding was brought, and which merely required the bankrupt to mail notice of his application for discharge to all who have proved their debts, and by publication also to appear and oppose the discharge.

In *Murray v. De Rottenham* (1822) 6 Johns. Ch. (N. Y.) 52, it was held that a certificate of discharge under the United States Bankruptcy Law of 1800, which discharged the bankrupt from "all debts which were or might be proved under the commission," was a bar, at least in the United States, to a debt contracted and to be paid in Germany. In this case the foreign creditors suggested that since the Bankruptcy Act did not by express words or by necessary construction extend to extraterritorial or foreign contracts, it was not to be applied to them, but the court said: "I do not apprehend that we are to require an express declaration of the legislature that foreign creditors are included in the operation of a bankrupt law, when the language of the statute is otherwise sufficiently general and comprehensive, and when the evident policy of the law is to embrace all debts that can be proved under the commission, and to give the unfortunate merchant who conducts himself fairly new credit in the commercial world, and new capacity for business." And a similar ruling was made in *Ritchie v. Garrison* (1858) 10 Abb. Pr. (N. Y.) 246, an action brought by residents of Canada upon a judgment obtained in that country upon a debt contracted therein, it having been held that a discharge in bankruptcy under the Fed-

eral Act of 1841, which provided that a discharge granted thereunder should in all courts be deemed a complete discharge of all debts, contracts, and other engagements of the bankrupt "which are provable under this act, and shall be and may be pleaded as a full bar to all suits whatever," applied to a debt contracted in a foreign country with a citizen thereof. However, in this case the writer of the opinion was of a different mind, but regarded himself as bound by earlier decisions.

And in the reported case (*MORENCY v. LANDRY*, ante, 123) it was held not only that Congress might constitutionally enact that a discharge in bankruptcy shall apply to foreign creditors so far as future proceedings within this country are concerned, but that it has in effect done so as to all properly scheduled debts. In arriving at the latter conclusion the court refuted the contention that such a construction discriminated in favor of local creditors, saying that it merely placed him on an equal footing with them in proceedings in our courts.

On the other hand it has been expressly held that a discharge under a Federal bankruptcy act does not bar the local enforcement of a debt owed to a resident of a foreign country under a contract entered into and made payable in the latter country. Thus, in *McDougall v. Page* (1882) 55 Vt. 187, 45 Am. Rep. 602, it was held (two judges dissenting) that a discharge under the United States Bankruptcy Act did not operate in the courts of Vermont to bar the enforcement of a debt provable under the act, but contracted and payable in Canada by a resident of Vermont to a resident of Canada who neither proved his debt in bankruptcy nor in any way became a party to the proceeding, nor had any personal notice thereof. The discharged bankrupt contended that the discharge was a bar in the courts of the United States of all debts and liabilities provable under the law, wherever contracted or to be performed, and that by resorting for the enforcement of his debts to the courts of the country so granting the discharge, the creditor waived his

extraterritorial immunity, and subjected himself to the *lex fori*, so that he could not deny the effectiveness of the discharge against him; and the court admitted that the wording of the Bankruptcy Act was certainly broad enough to cover foreign debts, for it provided the bankrupt's release from "all debts which were or might have been proved against his estate," unless the act should not be construed as intended to include foreign contracts, they not being particularly mentioned therein; but in construing the act the court did adopt as the "true rule" the following: "A statute discharging contracts or denying suits upon them, without the particular mention of foreign contracts, does not include them," and said that it would not "impute to the legislature an intention to include matters beyond its jurisdiction." In argument the court also adopted the theory that a discharge in bankruptcy goes to the debt itself, rather than to the remedy (a theory disputed by many courts), and disposed of the debtor's jurisdictional contention by saying that "the distinction as to the forum in which the party elects to institute his action may be very material in regard to all that is mere remedy," but that "where the question goes to the merits, the *lex loci* should govern, unless the *lex fori* expressly forbids it," and that "there is no express prohibition in the law of this state nor of the United States forbidding the *lex loci* to govern." And Rowell, J., speaking for the majority of the court, summarized as follows: "The court granting the discharge in bankruptcy had jurisdiction neither of the plaintiffs nor of their debts. The obligatory force of said debts therefore is in no wise impaired by said discharge in the country where

they were contracted and payable. There is no express, and we think no implied, enactment, state or national, forbidding the courts of this state to afford the plaintiffs a remedy for the enforcement of their debts here. A discharge under bankrupt or insolvent laws, unlike the bar of statutes of limitations, goes to the merits, and not to the process or remedy. The *jus gentium privatum* is, that contracts valid in the place where they are made and to be performed are to be held valid everywhere, by the tacit or implied assent of the parties . . . a rule founded not only in the convenience, but the necessities of nations. On what principle then shall we refuse these plaintiffs a remedy in our courts?"

Lizardi v. Cohen (1845) 3 Gill (Md.) 430, has also been cited in several instances as supporting the rule that a discharge in bankruptcy does not affect the rights of a foreign creditor, but, as pointed out in the reported case (*MORENCY v. LANDRY*, ante, 123), that case merely decided that a discharge of a debtor under a Federal bankruptcy act, since it has no extraterritorial operation, does not extinguish a debt created under a contract made in England, and did not pass upon the question whether or not the debt was discharged locally. Another case which has been similarly cited is *M'Menomy v. Murray* (1818) 3 Johns. Ch. (N. Y.) 435, wherein it was held that a discharge under the Federal Bankruptcy Act of 1800 did not discharge the debtor from debts contracted and made payable in Germany, but in which the court expressly refrained from passing upon the question whether such creditors were barred from pressing suit in the United States.

G. J. C.

FOWLER, Admr., etc., of W. H. Fowler, Deceased, Plff. in Err.,
v.
CITY OF CLEVELAND.

Ohio Supreme Court—July 8, 1919.

(— Ohio St. —, 126 N. E. 72.)

Municipal corporation — liability for act of fire department.

1. A municipal corporation is liable for injury to a pedestrian by the negligent driving of fire apparatus by a member of its fire department.

[See note on this question beginning on page 143.]

Constitutional law — right to remedy.

2. Section 16, article 1, of the Constitution, guarantees to every person, for injury done him in his lands, goods, person, or reputation, remedy by due course of law.

[See 6 R. C. L. 277.]

State — liability for negligence respecting laws.

3. It is not the policy of government that the state or any of its subdivisions shall, in the absence of special provision, indemnify persons for loss or damage, either from lack of proper laws or administrative provisions, or from inadequate enforcement of laws

or the inefficient operation of such provisions.

[See 7 R. C. L. 954-956; 19 R. C. L. 1083; 25 R. C. L. 407.]

Municipal corporation — liability for ministerial act.

4. But where a wrongful act which has caused injury was done by the servants or agents of a municipality in the performance of a purely ministerial act which was the proximate cause of the injury, without fault on the part of the injured person, respondeat superior applies, and the municipality is liable.

[See 19 R. C. L. 1106; 22 R. C. L. 484.]

Headnotes 2-4 by the COURT.

(Jones, J., dissents.)

ERROR to the Court of Appeals for Cuyahoga County to review a judgment affirming a judgment of the Court of Common Pleas sustaining a demurrer to and dismissing a petition filed to recover damages for injury to and death of plaintiff's decedent, alleged to have been caused by the negligent driving of fire apparatus by a member of defendant's fire department. *Reversed.*

Statement by Johnson, J.:

This was an action by the administratrix to recover damages for injuries wrongfully inflicted upon W. H. Fowler, from which he died.

The deceased was going north-erly on the east side of Ontario street, in the city of Cleveland, and was at the intersection of the street with the southerly side of the public square. While on the easterly cross-walk he was struck and run over by a motor hose truck belonging to the city, which was returning to its station in that neighborhood.

The petition alleged that it was driven in a reckless and negligent manner diagonally from the north-east, cutting the corner sharply at a high rate of speed, without warn-ing, and on the wrong side of the street.

The common pleas court sus-tained a demurrer to the petition on the ground that the city was not liable for the negligent driving of the hose truck operated by a mem-ber of the city fire department while in the performance of his duties. The petition was dismissed, this

judgment was sustained by the court of appeals, and error is prosecuted here.

Messrs. Payer, Winch, Minshall, & Karch for plaintiff in error.

Messrs. W. S. Fitzgerald, Alfred Clum, and James T. Cassidy for defendant in error.

Johnson, J., delivered the opinion of the court:

The petition sets forth with great detail the alleged negligent acts of the defendant in the operation of the motor truck on the public street at the time of the injury. It states an undoubted cause of action if alleged against any defendant corporation liable for the acts of its servants in charge of such a vehicle.

The trial court entertained the view that the case was ruled by *Frederick v. Columbus*, 58 Ohio St. 538, 51 N. E. 35, 4 Am. Neg. Rep. 574, and it is conceded that, if that case is not now reversed or modified, the judgments of the courts below should be affirmed.

The syllabus in that case lays down the following proposition: "A municipal corporation is not, in the absence of any statutory provision, liable in damages to one injured by the negligent acts of its fire department, or any of its members."

The conclusion was arrived at in obedience to a principle long embedded in our jurisprudence, and generally enforced, that no liability attached to the sovereignty or any of its subdivisions, in the exercise of any governmental function. The rule has been followed by the courts of England and this country, with some variations, for a long period of time. It would not be profitable to cite or examine the cases in detail.

In the opinion in the *Frederick Case*, a fair statement is made of the reasons of the rule as applied to fire departments, viz.: "The ground on which the nonliability of municipal corporations is placed in such cases is that the power conferred on them to establish a department for the protection of the property of its citizens from fire is of a public

or governmental nature, and liability for negligence in its performance does not attach to the municipality unless imposed by statute. The nonliability of the city in such cases rests upon the same reasons as does that of the sovereign exercising like powers, and are distinguished from those cases in which powers are conferred on cities for the improvement of their own territory and the property of their citizens."

Recognizing the existence of the distinction referred to, and the liability of cities in the latter class of cases, the court remarked, at page 549 of 58 Ohio St.: "It is not always a simple matter to determine to which class of the duties of a municipal corporation a given case belongs."

We think it may be fairly said that there has been a growing dissatisfaction with any comprehensive rule (and its unsatisfactory and unjust results) which exempts municipalities from liability for all acts which have loosely been classed as governmental.

In England, a distinction was long ago made in the maritime law, and the general rule was denied application in maritime cases; but the reasons and logic upon which the distinction was made are not so satisfying or clear as those upon which the criticism of the rule itself is based.

The distinction, however, was recognized in *Workman v. New York*, 179 U. S. 552, 45 L. ed. 314, 21 Sup. Ct. Rep. 212, where the city was held liable by maritime law for the negligence of its servants in charge of a fire boat while hastening to put out a fire raging at the head of a dock, in consequence of which the fire boat collided with and injured another vessel. The Federal Supreme Court reversed the judgment of the United States court of appeals, which had held the city to be exempt from liability under the general rule to which we have referred. The court, in holding that the rule did not apply, in maritime

law at least, say (at page 573 of 179 U. S.): "Because we conclude that the rule of the local law in the state of New York, conceding it to be as held by the circuit court of appeals, does not control the maritime law, and therefore affords no ground for sustaining the nonliability of the city of New York in the case at bar, we must not be understood as conceding the correctness of the doctrine by which a municipal corporation, as to the discharge of its administrative duties, is treated as having two distinct capacities, the one private or corporate, and the other governmental or sovereign, in which latter it may inflict a direct and positive wrong upon the person or property of a citizen without power in the courts to afford redress for such wrong.

And although this opinion is confined to the controlling effect of the admiralty law, we do not intend to intimate the belief that the common law, which benignly, above all, considers the rights of the individual, yet gives its sanction to a principle which denies the duty of courts to protect the rights of the individual in a case where they have jurisdiction to do so."

The United States court of appeals in *New York v. Workman*, 14 C. C. A. 530, 531, 35 U. S. App. 204, 67 Fed. 348, which was reversed by the United States Supreme Court, *supra*, concisely set forth the general rule and the reasons for it, viz.: "It is familiar law that the officers selected by a municipal corporation to perform a public service for the general welfare of the inhabitants or the community, in which the corporation has no private interest and from which it derives no special benefit or advantage in its corporate capacity, are not to be regarded as the servants or agents of the municipality, and for their negligence or want of skill it cannot be held liable. . . . The duties intrusted to them do not relate to the exercise of corporate powers; and hence they are the agents or servants of the public

at large. . . . The test of corporate liability for the acts of the officers of the municipality depends upon the nature of the duties with which they are charged. If these, being for the general good of the public as individual citizens, are governmental, they act for the state. If they are those which primarily and legitimately devolve upon the municipality itself, they are its agents."

The line of demarcation between acts which are termed governmental and those which are ministerial or proprietary, done in the performance of a corporate function, has not been accurately defined in cases where the liability of a municipality was involved. It is, of course, everywhere recognized that the exercise of the legislative will is governmental. The power to determine whether certain steps shall be taken in the interest of the public welfare is governmental, and the exercise and expression of the discretion as to the kind of steps, and the extent of them, are governmental. But a municipal corporation is a vastly different thing now from what it was in the early days. Then its function was very largely expressed in the exercise, as a political subdivision, of the delegated and limited powers of sovereignty. It was a favorite maxim of the early times in this country that that government is best which governs least, and the authority of the Federal government to make internal improvements was long contested. It was the natural expression of protest against the ancient idea that the sovereign was the active and all-pervading influence, and that the duty of the people was to exalt the sovereignty.

Now, the activities and undertakings of a municipal corporation are manifold. They reach and touch in countless directions. It seems to be utterly unreasonable that all these activities and enterprises which are brought closely home to the lives of all of the people of the municipality must still be

regarded as bound up in the vague and uncertain sphere of what is called a governmental function.

In the early days protection against fire was provided by voluntary fire departments. All of the necessities of the people were supplied and taken care of by private citizens and by companies.

The revolutionary change has been brought about by the advent of new conditions, changes in the means of communication and in the entire method of supplying the wants of the community, so that a municipal corporation has now come to be a dual entity. It is no longer a mere subdivision for the expression of the sovereign will in the particular locality, but it has entered the field and does the things that were formerly done by private persons in the manner referred to.

A modern city may be said to be a great public service corporation, and no reason is apparent why, in the respects in which it intrusts purely ministerial duties to agents and employees, it should not be subject to the liabilities of such persons and companies. When the government acts itself, as, for instance, in the taking of the property of a citizen, the Constitution itself prescribes the proceeding by which the government acts and under which the citizen is safeguarded. No injury is done the citizen, for he held his property always subservient to the public welfare.

Now, in this case, it was stated that the proof would have shown that the motor truck was returning to its station when it was recklessly driven over the decedent, who was without fault. It would, of course, be conceded that if the truck had been owned by, and driven by the servant of, a private corporation, the liability would be fixed; and it is difficult to understand the justice of a rule which denies to a citizen the protection of the law and the remedy guaranteed by the Constitution when injury is thus done him by the servant of a city instead of a servant of a private corporation.

It would seem to be clearly a case in which, the reason of the rule having failed, the rule itself should be set aside as to such injuries.

It would, of course, be admitted the municipality was under no obligation to provide any fire department, and that the matter of deciding whether it should have a fire department, and, if so, what sort, and the extent of the services that the city would render on the general subject, is governmental. No complaint could be made concerning the exercise of that governmental power. But when it has determined all of these matters, and has placed an instrument upon its streets which, when negligently and carelessly operated, is dangerous to the lives of its citizens, then the operation of this dangerous instrument, while governmental as being operated by the government for the public welfare, yet is ministerial and proprietary. It is performed by agents who as such have no part in the decision or determination of the sovereign will. Their relation is precisely the same as the agent of a private person. When the functions of government were negative rather than positive, the results of nonliability for any and every act did not attract close attention or inquiry. To adhere to the ancient rule in the presence of existing relations would seem to involve the obvious contradiction that the state, which is formed to protect society, is under no obligation, when acting itself, to protect an individual member of society. Such conceptions of sovereign prerogative are not only illogical, but they offend the spirit of our institutions. We have successfully striven, under a system of checks and balances, to reconcile liberty with authority. Authority should be reconciled with justice.

In many ways the legislation and the decisions of the courts of the country have recognized these altered conditions. For instance, the duty to keep the streets open, in repair, and free from nuisance has

been made statutory, and the liability of municipalities for failure to comply with this statutory requirement has been generally enforced. Likewise the liability of a city for negligence in the construction of improvements on its own property has been enforced in most jurisdictions.

The general assembly of Ohio has, by statute, created a liability against a county to persons injured by mob violence. In Ohio, it has been provided by statute that each municipality shall be a body politic and corporate. Provision is made for the use of a seal that it may sue and be sued and acquire property by purchase, gift, etc., and by § 4 of article 18 of the Constitution, adopted September, 1912, full power has been conferred upon a municipality to "acquire, construct, own, lease, and operate, within or without its corporate limits, any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants," and likewise power has been conferred upon it to contract with others for any such product or service. So that it is apparent that the municipality has become a body corporate as well as a body politic. The provision that it may sue and be sued does not create any new liability. But the conception of public policy under which the municipality as a subdivision of the sovereign power could not be sued has long been abrogated.

Moreover, § 16, art. 1, of the Constitution, which guarantees to every person for injury done him in his lands, goods, person, or reputation, remedy by due course of law, was amended by the people in 1912 by the addition to that section which provides that suits may be brought against the state in the courts and in the manner to be provided by law; that is to say, the state, by its amendment to the Constitution, made by the people, has surrendered the ancient privilege of exemption from suit.

Constitutional
law—right to
remedy.

The legislature has merely the power and the duty of prescribing the court and the manner in which the suit may be brought. The statutes which had theretofore been enacted, permitting municipal corporations to sue and be sued, are, of course, perfectly consistent with the amendment to the Constitution above referred to, and therefore legally provide the manner and method of bringing suit against municipal corporations.

Of course, we must keep in mind that remedy is not guaranteed by § 16, art. 1, of the Constitution, for every damage or loss.

The Constitution does not define a legal injury or locate liability. These must be determined "by due course of law." For example, if the injury was the result of unavoidable accident or of the concurrent neglect of the injured person and another, there is no remedy. The law must define the duty.

The rule, *respondeat superior*, itself is a creature of the common law, as are also the rules as to fellow servant, assumption of risk, contributory negligence, and the rules as to liability generally for negligence. All were made by legislatures or courts.

There is no property right or guaranteed right in these rules of law, and they may be added to or repealed by the legislature. *Second Employers' Liability Cases* (*Mon-dou v. New York, N. H. & H. R. Co.*) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A. 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; *New York C. R. Co. v. White*, 243 U. S. 188, 61 L. ed. 667, L.R.A. 1917D, 1, 37 Sup. Ct. Rep. 247, Ann. Cas. 1917D, 629, 13 N. C. C. A. 943; and *Arizona Liability Cases* (*Arizona Copper Co. v. Hammer*) 250 U. S. 400, 6 A.L.R. 1537, 64 L. ed. 1058, 39 Sup. Ct. Rep. 553, decided June 9, 1919.

Where such a rule had its origin in the decisions of courts it may be changed by the courts in the light of experience, unless it has become

fixed by constitutional or legislative provision.

The rule of law must be declared. If the old rule is found to be unsuited to present conditions, or unsound, it should be set aside and a rule declared which is in harmony with those conditions and meets the demands of justice.

That the common law has within itself the quality and capacity for growth and adaptation to new conditions has been one of its most admirable features.

Our Constitutions, state and Federal, were made with the full conception that they had the inherent capacity to comprehend and meet the requirements of the new and various experiences which would arise out of the development of the country.

While it is perhaps true that the rule of exemption of the sovereignty, as originally declared in England, had its genesis in the maxim that "the King can do no wrong," and that in a general way that rule was adopted and applied to declare the exemption of the government in this country, yet, as already stated, there was a very early disposition to draw a distinction between governmental and corporate functions and to hold municipalities liable for negligence in the performance of the latter. It must be noted that the courts of this state have repeatedly declared that they will adopt the principles of the common law only so far as those principles are adapted to our circumstances, state of society, and form of government.

We think it may be said that the reason why the courts have been slow to declare and enforce a rule of liability against municipalities in the working of the new relationship which they have assumed is because they have left the difficulty, in the presence of the manifold angles of the situation, of accurately defining a line between what is governmental and what is ministerial or corporate. In fact, much of the difficulty is because of the persistence of antiquated and outworn terminology.

Where a municipality (whether termed a governmental agency or a body corporate), with the sanction of the state, has assumed the performance of a work or industry or enterprise formerly carried on by the citizenship, that of itself, so far as its practical operation is concerned, stamps it as a corporate or ministerial work. So far as this case is concerned the facts sufficiently show the distinction referred to, and it must be remembered that the liability in any case could only arise where there was a duty to exercise care towards the public and towards the injured person under the circumstances of the particular case, and where there was a wrongful violation of that duty by an act which was the proximate cause of the injury to the plaintiff, who must himself have been without fault.

The emergency of fire and the excitement attendant upon it, the necessity for haste, the duty of extra caution on the part of bystanders or those passing in the neighborhood, and similar circumstances, are all elements to be considered in determining whether or not there was actionable negligence in the situation. If, for example, a motor truck was returning from a fire, a very different situation would be presented for the consideration of the trial court and the jury from one in which it was hurrying to a fire.

It is not the policy of government to indemnify persons for loss, either from lack of proper laws or administrative provisions, or from inadequate enforcement of laws or the inefficient administration of provisions which have been made for the protection of persons and property. The unwisdom and impracticability of such a system are easily apparent. But we hold that where a wrongful act which has caused injury was performed by the servants of a municipality, in the performance of a purely ministerial act which was the proximate cause

State—liability
for negligence
respecting laws.

Municipal
corporation—
liability for
ministerial act.

of the injury, without fault on the part of the injured person, the municipality is liable, and the fact that it derives no pecuniary profit from the thing done does not change the rule. The application of the ordinary rules for the determination of liability in similar cases will sufficiently safeguard the public corporation, and the enforcement of the rule we have declared will doubtless induce greater caution for the protection of individuals.

For these reasons the Frederick Case is overruled, and the judgments below will be reversed.

Nichols, Ch. J., and Matthias, Donahue, and Robinson, JJ., concur.

Wanamaker, J., concurring:

I heartily agree with the majority in the soundness of this judgment. I as heartily disagree upon the grounds of the judgment.

Probably no case has been before this court in years that touches as closely as does this case the primary and paramount purpose of the American government.

For centuries there have been three schools of political thought, finding concrete expression, generally in modified form, in some one or more of the nations of the world.

The autocratic form of government, which is one of the oldest and most universal, especially in earlier days, is well personified by the great Louis XIV. of France, who presided over the destinies of that nation in the seventeenth century. The prevailing policy of his administration, as by himself declared, was: "I am the state. . . . Kings are absolute lords; to them belongs naturally the full and free disposal of all property of their subjects, whether they be churchmen or laymen. For subjects to rise against their prince, however wicked and oppressive he may be, is always infinitely criminal. God, who has given kings to men, has willed that they should be revered as his lieutenants, and has reserved to him-

self alone the right to review their conduct. His will is that he who is born a subject should obey without question."

It will be observed from this creed of Louis XIV. that the individual was completely eliminated. His chief duty was to "revere his lord" and "obey without question."

The communistic form of government, or its more modern style,—Bolshevism, or radical Socialism,—makes men in the mass the sovereign power, and eliminates the individual man from all consideration as does autocracy. As effectually The individual man is merely like one of the ants in the hill, merely an atom in the political world. There is neither room, occasion, nor desire for individual initiative, enterprise, or achievement, save the dead level of the mediocre.

In both these forms of government the individual man is the very last consideration, and that only to please the autocrat upon the one hand or the community upon the other.

The third school, typified by the American democracy, is founded upon an entirely different principle. The great Magna Charta of American democracy is, concededly, the Declaration of Independence. The immortal Jefferson wrote these immortal words: "We hold these truths to be self-evident: That all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness; that to secure these rights governments are instituted among men, deriving their just powers from the consent of the governed."

Now, when a truth is "self-evident," it is unnecessary to either argue for it or against it, or attempt further to demonstrate it. At all events these truths have become self-evident in the history of American democracy.

What are these truths as Jefferson enumerates them?

(1) The unalienable rights of

men, among which are "life, liberty, and the pursuit of happiness."

(2) That governments are instituted "to secure these right."

(3) That these rights are best secured by governments "deriving their just powers from the consent of the governed."

Under the American system the individual is the primary and paramount consideration, as conceived and declared by Jefferson and his school, and likewise those who have followed in his footsteps. This was the doctrine of Abraham Lincoln and those who have followed in his footsteps; for in my judgment Lincoln was the greatest interpreter and the greatest follower of Jeffersonian democracy, and it may be observed that Abraham Lincoln quoted Thomas Jefferson more than he quoted all other American statesmen combined.

Under American democracy, as declared by Jefferson and interpreted by Lincoln, the individual's rights were ever to be safeguarded and secured by government, Federal, state, and local.

The Constitution of Ohio, in the Bill of Rights, as adopted in 1851 and still in force (§ 16, art. 1), contained the language: "And every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law."

This is a reaffirmation of the Jeffersonian doctrine of the Declaration of Independence written into the Constitution of Ohio by our early fathers.

It will be observed that there is no qualification or limitation as to these rights, or as to a redress when these rights are violated. When the individual receives the injury comprehended within the above provision of the Bill of Rights, he shall have "remedy" by due process of law. That constitutional grant and guaranty is so plain and persuasive that it does not lie in the power of any state legislature or court to disregard or nullify it.

The judgments below in the case

at bar, which denied the plaintiff the right to recover as a matter of law, were based on the Frederick Case, 58 Ohio St. 538, 51 N. E. 35, 4 Am. Neg. Rep. 574.

The syllabus in that case reads: "A municipal corporation is not, in the absence of any statutory provision, liable in damages to one injured by the negligent acts of its fire department or any of its members," etc.

An examination of the opinion sustaining above syllabus shows an entire absence of any consideration whatever of said § 16 of the Bill of Rights. The opinion further discloses an entire absence of reference to the old statute that has been in force in Ohio for many years, making a municipal corporation "a body corporate" with the right "to sue and be sued."

It is strikingly strange indeed that the opinion should be silent as to both of these important propositions; the one constitutional, the other statutory. If the doctrine of the syllabus is sound, then the existence of such a statute called for an exactly contrary judgment.

The whole doctrine of immunity given to a sovereign state was based upon the assumption of the divine right of kings—a king can do no wrong; he is infallible; or, if he do wrong, no subject has any right to complain. This doctrine has been shot to death on so many different battlefields that it would seem utterly folly now to resurrect it, even by the judgment of a court of last resort.

The Declaration of Independence makes no exception in favor of governmental sovereignty. Indeed, governmental sovereignty denying natural rights was the very basis of that Declaration. The Constitution of Ohio (Bill of Rights, § 16) makes no exception in favor of governmental sovereignty. It is as broad and comprehensive as language can make it, and right and remedy run to the individual who has been injured.

The injury, therefore, is the pri-

mary and paramount consideration, no matter by whom said injury is inflicted. When the injury is inflicted the right to sue ripens, the courts are open, and as to those political subdivisions of the state that have been for a long time recognized as capable of suing and being sued, there can be no reasonable question, longer raised as to their liability for their wrongs committed against the individual's rights as declared and defined by constitutional guaranties.

If the government of the United States, and the government of the states, and the various political subdivisions thereof, are to be perpetuated by well-settled and well-directed public opinion, it will be because the unalienable personal rights of man are protected and promoted in accordance with our constitutional guaranties. It is our only escape from autocracy upon the one hand, and Bolshevism, Communism, or the teachings of radical schools of Socialism upon the other.

I complain, however, of the majority opinion chiefly upon the ground that it is predicated upon the claim that the act of the municipal corporation pleaded as negligence was a "ministerial act." I cannot quite regard the act of a fire department, a waterworks department, a police department, a health department, or any other governmental department, dealing with the very essential purpose of such department, which directly and vitally affects the life, limb, and property of the people of a city, as being a mere "ministerial" act. It is as much a governmental function as the exercise of any other police power is a governmental function.

Government is a growth,—necessarily so,—and every new field of public duty it invades it so does in the exercise of a governmental function, and if in the exercise of such function it invades or violates personal rights granted and guaranteed by the Constitution, then it must in such case respond in damages for the right so violated.

After all, in the case at bar, there is nothing new in principle in holding municipalities liable for their negligence. For many years municipalities have been held liable for their failure to keep their streets and sidewalks open, safe for travel, and free from nuisance. Many cases may be cited in support of this doctrine, and it cannot be denied that the care of the streets is a governmental function, and surely it would not be claimed that the care of the streets, vital and important as it is to municipal life and activity, is a "ministerial" act. It is as much a governmental function as any other municipal act possibly could be.

Indeed, the case at bar belongs to the same family of nuisances in the public streets as those in which municipalities have heretofore been held liable. What could be a greater nuisance than the careless and negligent running of a motor hose truck at a great rate of speed in a public square, where hundreds of people are going about, where they have a lawful right to be, without warning and without opportunity to avoid the danger of collision with a motor truck? It may be the worst kind of a nuisance, the most dangerous to life and limb, as it proved to be in the case at bar.

Reason and righteousness both demand that in such a case, where the proper facts are pleaded and proven, there should be a liability fixed against the municipality.

For many years also, the municipality, in the exercise of its function for the change of grade of streets, has recognized the right of abutting property owners for damages for such change of grade. Yet the change of the grade was the exercise of a governmental function in the improvement and development of the city.

In the exercise of the right of eminent domain, in order to carry out some police power in the municipality, certain specific real property is appropriated by condemnation proceedings. Now if the Constitution

so permitted, the inherent powers of government would, no doubt, permit the taking of such property without compensation, but, realizing the equities of the case in the property owner, the Constitution safeguards that right by providing that compensation shall be made to the owner of the property when taken for public use, and the compensation is raised by taxation over the entire community, all contributing. In principle, why should there be any difference when human life is taken in the exercise of some governmental function? As to the taking of the property there is no negligence, there is no wrong, but compensation nevertheless is made. As to the taking of life there is negligence, there is wrong, and why should satisfaction not be made for such wrong?

Nineteen centuries and more ago the Man of Galilee announced the doctrine that the Sabbath was made for man and not man for the Sabbath. So Jefferson announced in the Declaration of Independence that government was made for man and not man for government, and it is the primary and paramount purpose of our American system of democracy to promote and protect these constitutional policies of the fathers, as defined and guaranteed in our national and state Bill of Rights.

Jones, J., dissenting:

The decision in this case not only overrules the established legal principles heretofore announced by this court, but is at variance with the principles settled by practically every court in this country. The law upon this subject was stated in the syllabus in *Frederick v. Columbus*, 58 Ohio St. 538, 51 N. E. 35, as follows: "A municipal corporation is not, in the absence of any statutory provision, liable in damages to one injured by the negligent acts of its fire department, or any of its members."

The principle there announced, however, was not a new one, for it had already been established in this

state in the reported cases of *Western College v. Cleveland*, 12 Ohio St. 375, and *Wheeler v. Cincinnati*, 19 Ohio St. 19, 2 Am. Rep. 368. As late as 1909, this principle found approval in *Bell v. Cincinnati*, 80 Ohio St. 1, 23 L.R.A.(N.S.) 910, 88 N. E. 128. In the case of *Frederick v. Columbus*, supra, Judge Minshall says, at page 548 of 58 Ohio St.: "The decision in this case is fully supported by the authorities and the decisions in the other states of the Union. There is, in fact, a remarkable unanimity on the subject."

Upon this all the textbooks are in accord in holding that members of a fire department of a municipality are not agents for whose negligent conduct the city may be held liable. It is stated in 5 *McQuillin on Municipal Corporations*, § 2432, that "this rule of nonliability has been followed in many decisions, and is well settled. And the municipality is not liable either for acts of commission or acts of omission, unless liability is expressly imposed by statute," etc.

Mr. Dillon in the 4th volume of his work on *Municipal Corporations*, § 1660, states the same rule of nonliability in the absence of express statute.

Mr. Tiedeman also, in his work on *Municipal Corporations*, § 333a, states that a municipal corporation is not liable to a person who is run over by a horse carriage on its way to a fire.

Mr. Justice Gray, in the admiralty case *Workman v. New York*, 179 U. S. 552, 580, 45 L. ed. 314, 327, 21 Sup. Ct. Rep. 222, there states, as I am content to do, that "the decisions are so uniform, and treat the point as so well settled, that it is enough to cite them, without stating them in detail."

What warrant, therefore, is there for pursuing a course so much at variance with the established legal doctrines of this country, and which overrules the well-settled principles of law in this state? Is it a question of public policy? If so, that

feature should be addressed to the legislative, and not to the judicial, department. Frequently the legislature has prescribed liability against counties and cities, where but for the legislative action none would exist. If it should be desired that the doors of the public treasuries of these municipalities should be flung wide open at the behest of anyone who conceives that he has been injured by some officer or employee of the municipality while exercising public and governmental functions, the legislature can easily provide a remedy.

Counsel for plaintiff in error say in their brief: "The legislature has not caught up with this spirit of the times, and it is submitted that the courts are not entirely precluded from doing so, notwithstanding this neglect of the legislature."

This is an appeal for judicial legislation, entirely unwarranted by the Constitution. Moreover, the policy of the people of this state has been ingrafted upon our Constitution, which now provides that in suits against the sovereign (which in this state constitutes the people, who, by their initiative, may establish constitutions and laws), legislative action must first be obtained. The latter clause of § 16, art. 1, provides: "Suits may be brought against the state, in such courts and in such manner, as may be provided by law."

This provision did not promulgate any new principle in the jurisprudence of this state. Prior to its adoption in our Constitution of 1912, our courts had held that the state and its subdivisions were not suable without legislative consent, and it was under that principle that the *Frederick Case*, supra, was decided. When, therefore, the people adopted the constitutional provision just quoted, they placed in the organic law of the state the judicial principle of exemption from liability which theretofore obtained in favor of the sovereign and its various subdivisions, when acting for it in a governmental capacity.

In the case of *Raudabaugh v. State*, 96 Ohio St. 513, 118 N. E. 102, all the present judges concurring, it was held that this clause was not self-executing, but that "statutory authority is required as a prerequisite to the bringing of suits against the state." This, then, evinces the policy of all the people, that the state and its governmental subdivisions, exercising governmental functions in its behalf, should not be suable unless the legislature had expressly provided therefor. In this class of cases a city must act through its servants. It is required in the interest of public safety that the municipality provide police and fire departments. The servants employed in these departments are not acting under the principle of *respondeat superior* and for the benefit of the city as a corporate entity, but are acting for the entire public. These servants are agents of the entire people,—not only of a person who may be injured, but of every citizen in the municipality. The employee, therefore, if exercising these governmental functions, is the agent of the plaintiff as well as the rest of the community. The corporation in its corporate capacity receives no special benefit; the benefit accrues to the community. It must be conceded that the defendant in this instance, although acting through its fire employee, was exercising a governmental function. That principle is established not only in this state, but elsewhere. Its act was not a ministerial one.

"There is a distinction between those powers of a municipal corporation which are governmental or political in their nature, and those which are to be exercised for the management and improvement of property. As to the first, the municipality represents the state, and its responsibility is governed by the same rules which apply to like delegation of power." *Cincinnati v. Cameron*, 33 Ohio St. 336.

The statutory provision that a

municipal corporation may sue and be sued gives no sanction for imposing liability. It simply means that there may be a suit where there is liability. The statute creates no liability. The county, through its commissioners, may sue and be sued, but no liability accrues from the action of a mob except by legislative authority. Furthermore, that section has long been upon our statute books, and it has not escaped the attention of this court, for it has been expressly held in the syllabus of *Overholser v. National Home*, 68 Ohio St. 236, 62 L.R.A. 936, 96 Am. St. Rep. 658, 67 N. E. 487, that "the grant of power to sue and be sued at law and in equity applies to such matters only as are within the scope of the other corporate powers of the defendant, and it does not authorize such corporation to be sued for a tort."

It was held in *Finch v. Board of Education*, 30 Ohio St. 37, 27 Am. Rep. 414, that the board of education was not liable in its corporate capacity for damages for a tortious act, although the board of education by its charter was declared to be a body politic and corporate in law, with capacity to sue and be sued.

The majority opinion in the case of *Workman v. New York*, 179 U. S. 552, 45 L. ed. 314, 21 Sup. Ct. Rep. 212, has been cited in support of the majority opinion. That was purely an admiralty case in rem, and, as stated by the court, was governed entirely by the admiralty law. Had the question arisen under the local laws of any of the states, it is evident that the decision would have been otherwise, although even under the maritime law its application was denied by four dissenting judges, Justices Gray, Brewer, Shiras, and Peckham. It was con-

ceded in both opinions that the local law was otherwise, but the majority simply applied the admiralty law where it held the city for damages to the extent of the value of the vessel. About the time this case was decided a Federal case under the maritime law arose in the city of Cleveland, in this state, and at a time when the local law of nonliability had been well settled in the *Frederick* and other cases. This was in 1899. There, the Federal judge held in the Ohio case that the rule of the maritime law was not based on the relation of master and servant, but rested upon the fact of ownership alone, and that the principle which held the city exempt from liability for the negligent acts of its firemen had no application to the case of a maritime injury, and that the city could be held responsible in a court of admiralty to the extent of the value of the tug owned by the city. *Henderson v. Cleveland* (D. C.) 93 Fed. 844.

I have not cited the multitudinous cases reported in other jurisdictions supporting this opinion. These may be found in the citations attached to the various textbooks to which I have referred.

The municipalities of the state are merely agents of the sovereign when they exercise governmental functions, and where employees of a fire department, while on their way to a conflagration menacing the city, where the lives of citizens may be imperiled by the loss of a few seconds' time, do commit an act of negligence, whether of omission or commission, such act should not cast upon the municipality, in its attempt to allay the conflagration or rescue the citizens, a civil liability, unless it is expressly imposed upon the municipality by statute.

ANNOTATION.

Fire department as pertaining to the governmental or to the proprietary branch of municipality.**I. Scope and introduction, 143.****II. Majority rule:**

a. In general, 143.

b. Application of rule, 150.

III. Minority rule:

a. In general, 154.

b. Under statute, 156.

IV. Under maritime law, 157.*I. Scope and introduction.*

The present annotation is concerned mainly with the question whether a municipality is relieved of liability for malfeasance or nonfeasance in connection with the maintenance and operation of a fire department, on the theory that such department belongs to the governmental as distinguished from the proprietary branch of the municipality, or, in other words, whether the functions of the department are public so as to relieve from liability, or local and private so as to render the municipality liable for its or its employees' acts or omissions, in connection with the department and the performance of its functions. This limitation is dictated not only by the fact that it is practically impossible to anticipate all of the situations into which the general question might enter, but also by the fact that some courts, at least, have held that a fire department belongs to the legislative or governmental branch of the municipality for some purposes, and to the local or proprietary branch for others. For purposes of comparison with the authorities treated in the present annotation, and as illustrative of the different conclusions reached when the general question whether or not a fire department is a governmental branch of a municipality is approached from different viewpoints, may be mentioned the line of cases which, upon the theory that, in the absence of constitutional provision to the contrary, a state, through its legislature, has no absolute control over matters referable to the private as distinguished from the public or governmental character of the municipality, have held that a state cannot control the administration and property of a municipal fire department. To the

latter effect, see *Evansville v. State* (1889) 118 Ind. 426, 4 L.R.A. 93, 21 N. E. 267; *State ex rel. Holt v. Denny* (1889) 118 Ind. 449, 4 L.R.A. 65, 21 N. E. 274; *State ex rel. Geake v. Fox* (1902) 158 Ind. 126, 56 L.R.A. 893, 63 N. E. 19; *Lexington v. Thompson* (1902) 113 Ky. 540, 57 L.R.A. 775, 101 Am. St. Rep. 361, 68 S. W. 477; and *Davidson v. Hine* (1908) 151 Mich. 294, 15 L.R.A. (N.S.) 575, 123 Am. St. Rep. 267, 115 N. W. 246, 14 Ann. Cas. 352. These decisions, so far at least as concerns the reason assigned for denying the right of control, are seemingly opposed not only to other cases involving the same question (see *State ex rel. Simeral v. Seavey* (1887) 22 Neb. 454, 35 N. W. 228, which was overruled in *State ex rel. Atty. Gen. v. Moores* (1898) 55 Neb. 480, 41 L.R.A. 624, 76 N. W. 175, which was in turn overruled, and the doctrine of *State ex rel. Simeral v. Seavey* restored, in *Redell v. Moores* (1901) 63 Neb. 219, 55 L.R.A. 740, 93 Am. St. Rep. 431, 88 N. W. 243), but also to the decided weight of authority upon the specific question treated in the following subdivisions of this annotation.

*II. Majority rule.**a. In general.*

The overwhelming weight of authority is to the effect that a fire department, maintained by a municipal corporation, belongs to the public or governmental branch of the municipality so as to relieve it, at least in the absence of statutory provision to the contrary, from liability for injuries to person or property resulting from malfeasance or nonfeasance connected with the maintenance and operation thereof.

Alabama.—*Long v. Birmingham*

(1909) 161 Ala. 427, 49 So. 881, 18 Ann. Cas. 507.

California.—Howard v. San Francisco (1875) 51 Cal. 52.

Connecticut.—Jewett v. New Haven (1871) 38 Conn. 368, 9 Am. Rep. 382; Torbush v. Norwich (1871) 38 Conn. 225, 9 Am. Rep. 395; Judson v. Winsted (1908) 80 Conn. 384, 15 L.R.A. (N.S.) 91, 68 Atl. 999.

District of Columbia.—Brown v. District of Columbia (1907) 29 App. D. C. 273, 25 L.R.A. (N.S.) 98.

Georgia.—Wright v. Augusta (1886) 78 Ga. 241, 6 Am. St. Rep. 256; Rogers v. Atlanta (1914) 143 Ga. 153, 84 S. E. 555. And see Simon v. Atlanta (1881) 67 Ga. 618, 44 Am. Rep. 739.

Illinois.—Wilcox v. Chicago (1883) 107 Ill. 334, 47 Am. Rep. 434; Nicastro v. Chicago (1912) 175 Ill. App. 634.

Indiana.—Brinkmeyer v. Evansville (1867) 29 Ind. 187; Robinson v. Evansville (1882) 87 Ind. 334, 44 Am. Rep. 770; Aschoff v. Evansville (1904) 34 Ind. App. 25, 72 N. E. 279.

Iowa.—Van Horn v. Des Moines (1884) 63 Iowa, 447, 50 Am. Rep. 750, 19 N. W. 293; Saunders v. Ft. Madison (1900) 111 Iowa, 102, 82 N. W. 428, 7 Am. Neg. Rep. 532. And see Field v. Des Moines (1874) 39 Iowa, 575, 28 Am. Rep. 46.

Kansas.—Bowden v. Kansas City (1904) 69 Kan. 587, 66 L.R.A. 181, 105 Am. St. Rep. 187, 77 Pac. 573, 1 Ann. Cas. 955, 16 Am. Neg. Rep. 339 (to extent only of determining necessity for department, kind and quantity of apparatus, and matters involving efficiency).

Kentucky.—Greenwood v. Louisville (1877) 13 Bush, 226, 26 Am. Rep. 263; Davis v. Lebanon (1900) 108 Ky. 688, 57 S. W. 471, 8 Am. Neg. Rep. 41; Hazel v. Owensboro (1907) 30 Ky. L. Rep. 627, 9 L.R.A. (N.S.) 235, 99 S. W. 315 (dictum); Terrell v. Louisville Water Co. (1907) 127 Ky. 77, 105 S. W. 100; Park Comrs. v. Prinz (1907) 127 Ky. 460, 105 S. W. 948 (dictum); Louisville v. Bridwell (1912) 150 Ky. 589, 150 S. W. 672; O'Daly v. Louisville (1914) 156 Ky. 815, 49 L.R.A. (N.S.) 1119, 162 S. W. 79.

Louisiana.—Allen & C. Mfg. Co. v.

Shreveport Waterworks Co. (1905) 113 La. 1091, 68 L.R.A. 650, 104 Am. St. Rep. 525, 37 So. 980, 2 Ann. Cas. 471. And see Yule v. New Orleans (1873) 25 La. Ann. 394.

Maine.—Burrill v. Augusta (1886) 78 Me. 118, 57 Am. Rep. 788, 3 Atl. 177.

Massachusetts.—Hafford v. New Bedford (1860) 16 Gray, 297; Fisher v. Boston (1870) 104 Mass. 87, 6 Am. Rep. 196; Tainter v. Worcester (1877) 123 Mass. 311, 25 Am. Rep. 90; Pettin-gell v. Chelsea (1894) 161 Mass. 368, 24 L.R.A. 426, 37 N. E. 380. See also Tindley v. Salem (1884) 137 Mass. 171, 50 Am. Rep. 289.

Michigan.—Brink v. Grand Rapids (1906) 144 Mich. 472, 108 N. W. 430 (cited with approval in Hodgins v. Bay City (1909) 156 Mich. 687, 132 Am. St. Rep. 546, 121 N. W. 274, and distinguished in Davidson v. Hine (1908) 151 Mich. 294, 15 L.R.A. (N.S.) 575, 123 Am. St. Rep. 267, 115 N. W. 246, 14 Ann. Cas. 352, which, as shown supra, I., held that for purposes of state control a fire department was not a general governmental agency).

Minnesota.—Grube v. St. Paul (1886) 34 Minn. 402, 26 N. W. 228; Miller v. Minneapolis (1898) 75 Minn. 131, 77 N. W. 788, 5 Am. Neg. Rep. 183; Hillstrom v. St. Paul (1916) 134 Minn. 451, L.R.A. 1917B, 548, 159 N. W. 1076.

Mississippi.—Alexander v. Vicksburg (1891) 68 Miss. 564, 10 So. 62.

Missouri.—Heller v. Sedalia (1873) 53 Mo. 159, 14 Am. Rep. 444; McKenna v. St. Louis (1878) 6 Mo. App. 320; Hawkins v. Springfield (1916) 194 Mo. App. 151, 186 S. W. 576.

Nebraska.—Gillespie v. Lincoln (1892) 35 Neb. 34, 16 L.R.A. 349, 52 N. W. 811.

New Hampshire.—Edgerly v. Concord (1879) 59 N. H. 78.

New Jersey.—Wild v. Paterson (1885) 47 N. J. L. 406, 1 Atl. 490.

New York.—Smith v. Rochester (1879) 76 N. Y. 506; Gaetjens v. New York (1909) 132 App. Div. 394, 116 N. Y. Supp. 759; Peaty v. New York (1900) 33 Misc. 231, 67 N. Y. Supp. 276; O'Meara v. New York (1865) 1 Daly, 425; Woolbridge v. New York (1875) 49 How. Pr. 67; Thompson v.

New York (1885) 20 Jones & S. 427. And see Springfield F. & M. Ins. Co. v. Keeseville (1895) 148 N. Y. 46, 80 L.R.A. 660, 51 Am. St. Rep. 667, 42 N. E. 405.

North Carolina.—Peterson v. Wilmington (1902) 130 N. C. 76, 56 L.R.A. 959, 40 S. E. 853, 11 Am. Neg. Rep. 332.

Oklahoma.—See Silva v. McAlester (1915) 46 Okla. 150, 148 Pac. 150.

Pennsylvania.—Boyd v. Insurance Patrol (1886) 113 Pa. 269, 6 Atl. 536; Kies v. Erie (1890) 185 Pa. 144, 20 Am. St. Rep. 867, 19 Atl. 942, but see case on subsequent appeal in (1895) 169 Pa. 598, 32 Atl. 621; Freeman v. Philadelphia (1879) 13 Phila. 154; Knight v. Philadelphia (1884) 15 W. N. C. 307; Lilly v. Scranton (1896) 18 Pa. Co. Ct. 438. And see Grant v. Erie (1871) 69 Pa. 420, 8 Am. Rep. 272.

Rhode Island.—Dodge v. Granger (1892) 17 R. I. 664, 15 L.R.A. 781, 33 Am. St. Rep. 901, 24 Atl. 100.

South Carolina.—Black v. Columbia (1883) 19 S. C. 412, 45 Am. Rep. 785.

Tennessee.—Foster v. Lookout Water Co. (1879) 3 Lea, 42; Irvine v. Chattanooga (1898) 101 Tenn. 291, 47 S. W. 419.

Texas.—Shanewerk v. Ft. Worth (1895) 11 Tex. Civ. App. 271, 32 S. W. 918; Blankenship v. Sherman (1903) 33 Tex. Civ. App. 507, 76 S. W. 805.

Utah.—Brown v. Salt Lake City (1908) 33 Utah, 222, 14 L.R.A.(N.S.) 619, 126 Am. St. Rep. 828, 93 Pac. 970, 14 Ann. Cas. 1004 (dictum).

Vermont.—Welsh v. Rutland (1883) 56 Vt. 228, 48 Am. Rep. 762.

Washington.—Lawson v. Seattle (1893) 6 Wash. 184, 33 Pac. 347; Lynch v. North Yakima (1905) 37 Wash. 657, 12 L.R.A.(N.S.) 261, 80 Pac. 79; Cunningham v. Seattle (1905) 40 Wash. 59, 4 L.R.A.(N.S.) 629, 82 Pac. 143, 19 Am. Neg. Rep. 55, on rehearing in (1906) 42 Wash. 134, 4 L.R.A.(N.S.) 633, 84 Pac. 641, 7 Ann. Cas. 805.

West Virginia.—Mendel v. Wheeling (1886) 28 W. Va. 233, 57 Am. Rep. 664.

Wisconsin.—Hayes v. Oshkosh (1873) 33 Wis. 314, 14 Am. Rep. 760; Manske v. Milwaukee (1904) 123 Wis. 172, 101 N. W. 377, 17 Am. Neg. Rep.

9 A.L.R.—10.

388; Higgins v. Superior (1908) 134 Wis. 264, 13 L.R.A.(N.S.) 994, 114 N. W. 490; Engel v. Milwaukee (1914) 158 Wis. 480, 149 N. W. 141.

In Brinkmeyer v. Evansville (1867) 29 Ind. 187, the court pointed out the distinction between governmental and "ministerial" duties of a municipal corporation, and classified fire departments as belonging to the governmental branch, saying: "A municipal corporation is, for the purposes of its creation, a government, possessing to a limited extent sovereign powers which, in their nature, are either legislative or judicial, and may be denominated governmental or public. The extent to which it may be proper to exercise such powers, as well as the mode of their exercise, by the corporation, within the limits prescribed by the law creating them, are, of necessity, intrusted to the judgment, discretion, and will of the properly constituted authorities, to whom they are delegated. And being public and sovereign in their nature, the corporation is not liable to be sued, either for a failure to exercise them, or for errors committed in their exercise. But when duties of a purely ministerial character are expressly enjoined by law on such corporations, or arise by necessary implication, they are responsible for any damages resulting to individuals from a neglect to perform them, or from their performance in an improper manner. These two classes of duties and obligations are sometimes so intimately connected that it is not always very easy to distinguish the one from the other. It is conceded by the counsel for the appellants that the power conferred on the city to organize and regulate a fire department, for the purpose of preventing and guarding against damage by fire, is a legislative or judicial one, and that if the common council had deemed it inexpedient to undertake its execution, and had done nothing in reference to it, the plaintiffs would be without remedy. But the right to recover seems to be based on the idea that, the common council having undertaken to execute the power, or, in other words, to act under it, all

else became mere ministerial duties, and that the city thereby became responsible; that everything within the scope of the power conferred, to render the fire department complete and efficient, should be done; or, in other words, that the power should be exercised to the fullest extent necessary to protect the citizens from loss by fire, and that any failure therein would render the city liable for such losses. We are not aware of any authority to sustain so broad a proposition, and do not think that any such can be found. . . . It is also alleged that the common council purchased sundry fire engines, some of which were worked and operated by men, and others by steam, but that they were not good and efficient ones; that they also failed to supply a sufficiency of good hose, and the proper and necessary means of propelling the engines from place to place. The number and character of the engines purchased for the use of the city, as well as the means of propelling them from place to place, and the quantity of hose proper to be purchased, were all matters resting in the judgment and discretion of the city council; they were in no sense ministerial obligations, and no liability devolves on the city from the manner of their exercise, or errors of judgment committed therein. . . . It could not have been intended by the legislature, in conferring on the common council power to organize a fire department, that they should thereby undertake, absolutely, to prevent loss by fire in all cases, or become responsible as insurers in case of failure. Human skill and ingenuity are not competent always to resist the power of that destructive element, and the most that can be expected from the public authorities is the adoption of such means as may be reasonably within their power, to guard as far as they may against such losses, and aid in extinguishing such fires. These are all legislative or judicial in their nature, depending upon the wisdom and judgment of the common council, and cannot be the subject of legal liability to individuals." And in *Fisher v. Boston* (1870) 104 Mass. 87, 6 Am.

Rep. 196, Gray, J., said: "The prevention of damage to buildings by fire is an object which affects the interest of all the inhabitants and relieves them from a common burden and danger, and is, therefore, within the scope of municipal authority. . . . But the extinguishment of fires is not for the immediate advantage of the town in its corporate capacity. . . . It makes no difference whether the legislature itself prescribes the duties of the officers charged with the repair and management of fire engines, or delegates to the city or town the definition of those duties by ordinance or by-law. However appointed or elected, such persons are public officers, who perform duties imposed by law for the benefit of all the citizens, the performance of which the city or town has no control over, and derives no benefit from in its corporate capacity. The acts of such public officers are their own official acts, and not the acts of the municipal corporation or its agents." And in *Welsh v. Rutland* (1883) 56 Vt. 228, 48 Am. Rep. 762, the court stated the reasons generally assigned by the courts for nonliability of municipal corporations for torts in general, as well as the reasons why a municipal fire department should be classed as a governmental branch of the municipality, as follows: "At common law it has been a settled principle ever since the leading case of *Russell v. Devon County*, 2 T. R. 667, 100 Eng. Reprint, 359, decided by Lord Kenyon in 1788, that an individual cannot sustain an action against a political subdivision of the state, based upon the misconduct or nonfeasance of public officers. The reasons assigned in the earlier cases were that the maxim which declares it better for the individual to suffer than for the public to be inconvenienced is stronger than the other principle that for every injury the law gives a remedy, and that the plaintiff might levy his execution upon the property of any individual inhabitant,—the organization having no fund legally applicable to its payment,—thus giving rise to multiplicity of actions to enforce contribution, and great public annoyance.

But the more modern and broader ground is said to be that these quasi corporations are mere instrumentalities for the administration of public government and the collection and disbursement of public moneys, raised by taxation for public uses, and which cannot lawfully be applied to the liquidation of damages caused by wrongful acts of their officers. . . . This rule of exemption extends, necessarily, to municipal corporations so far as the reason of it applies, and that is so far as the acts done are governmental and political in their character, and solely for the public benefit and protection; or the negligence or nonfeasance are in respect of the same matters. . . . The fire department and its service are of no benefit or profit to the village in its corporate capacity. They are not a source of income or profit to the village, but of expense, which is paid, not out of any special receipts or fund, nor defrayed, even in part, by assessment upon particular persons or classes benefited, as in case of sewers or waterworks, but from the general fund raised by taxation of all the inhabitants. The benefit accrues not in any sense to the corporation, as such, but directly to the public; and the members or employees of the department, whether acting as an independent, though subordinate, organization, or under the direct authority of the general officers of the corporation, are, while acting in the line of duty prescribed for them, not agents of the corporation in the sense which renders it liable for their acts, but are in the discharge of an official duty as public officers. To such it is held in many cases that the doctrine of respondeat superior does not apply, and for their acts no liability can be imposed upon the corporation except by statute. . . . If the defendant were held liable in this case, it would be impossible to avoid a similar conclusion in case of a negligent or careless act in putting the hydrants in order for efficiency, or in the use or repair of any of the fire apparatus, or indeed any negligence or carelessness of firemen while in active service at a fire; and that would be a state of

law which, it must readily be seen, cities and villages could not live under. It would make them virtually insurers of all property within their limits, and of their citizens, not only against damage by fire, but against all injuries to persons or property by reason of the efforts used to stay or extinguish fires, provided any negligence or want of due care and skill could be established to the satisfaction of a jury." So, in *Hawkins v. Springfield* (1916) 194 Mo. App. 151, 186 S. W. 576, the court said: "It is well-settled law that the maintenance and use of the fire department and equipment of a city belong to its governmental functions, and with reference to either the use or abuse of same by the city the doctrine of respondeat superior does not apply. The city cannot be held liable in damages for either a negligent use or failure to use its fire engines and equipment. It is not liable for acts of omission or commission, misfeasance or nonfeasance, with reference thereto." And in *Brown v. District of Columbia* (1907) 29 App. D. C. 273, 25 L.R.A. (N.S.) 98, the court said: "By the great weight of authority, the maintenance of a fire department is in the nature of a general public duty, as contradistinguished from those duties purely municipal and local; and the employees thereof are not mere agents or servants of the municipality, but rather officers charged with a public service." And in *Burrill v. Augusta* (1886) 78 Me. 118, 57 Am. Rep. 788, 3 Atl. 177, in arguing that members of a municipal fire department are public officers performing public duties, and not agents or servants of the municipality, the court said: "The object and purpose of this organization are public and not private. It is not intended to, nor does it, especially advance the corporate interest or immediate emolument of the city or town where it is established. Its advantages may indeed be great, but they are indirect and enjoyed in common with the public. The officers, though chosen directly by or under ordinances or by-laws established by cities and towns, are public officers, performing

public duties, acting upon their own responsibility, controlled by fixed principles and established rules as found in the laws applicable, with no power of control over, or to impose any obligation upon, the corporation, except so far as such authority may be conferred by express statute or act of the corporation. They are a part of the municipal government, and not servants or agents of the municipality. Hence their relation to their respective cities and towns differs in no respect from that of municipal officers generally." And in *Hafford v. New Bedford* (1860) 16 Gray (Mass.) 297, Bigelow, Ch. J., said that the members of a municipal fire department, "when acting in the discharge of their duties, are not servants or agents in the employment of the city, for whose conduct the city can be held liable; but they act rather as officers of the city, charged with the performance of a certain public duty or service; and no action will lie against the city for their negligent or improper conduct while acting in the discharge of their duty." And in *Peterson v. Wilmington* (1902) 130 N. C. 76, 56 L.R.A. 959, 40 S. E. 853, 11 Am. Neg. Rep. 332, in answering the question, Are the powers and duties of a fire department public and governmental, or merely private and municipal? the court said: "If they are of the former character—for the general good—the defendant is not liable for either its own tort or negligence, or the negligence or tort of its officers or agents, unless there is some constitutional or legislative enactment which subjects it to liability therefor; and it is not contended by the plaintiff that there is any such enactment applicable to this case. If, however, the defendant was acting for its own benefit, and purely under its corporate or municipal powers, then, in case of negligence on its part, liability would ensue. . . . The great weight of authority is to the effect that such duties and powers are legislative and governmental. . . . In fact, we found none to the contrary." And in *Lynch v. North Yakima* (1905) 37 Wash. 657, 12 L.R.A. (N.S.) 261, 80 Pac. 79, in classi-

fying a municipal fire department as governmental, the court said: "It is difficult to announce a rule as to just where liability of a municipality commences, or where it ceases. But it may generally be accepted that a city is not liable for an improper discharge by its officers of a purely governmental function. The duties of an officer or employee of a fire department are regarded as for the benefit of the community, and not for the mere advantage of the municipality as a corporate body. The city, possessing, as it does, a portion of the sovereignty of the state, in the exercise thereof provides and maintains a fire department. The services of this department are for the benefit of all persons who may have property in the city limits capable of injury by fire. It would seem, therefore, that in creating, maintaining, and operating the fire department the city was exercising governmental functions. This seems to have been the view entertained by the courts that have considered this subject. In the case at bar the respondent had provided, and was maintaining, a fire department. The horses, engines, and apparatus were under the charge of a fire chief. In view of these facts, and in view of the character of the employment in which appellant was engaged, it impresses us as a case where the circumstances of his injury occasion no liability upon the part of the city." And Dixon, Ch. J., in *Hayes v. Oshkosh* (1873) 33 Wis. 314, 14 Am. Rep. 760, stated the grounds upon which a municipality is exempted from liability for the negligent acts of its firemen, as follows: "The grounds of exemption from liability . . . are that the corporation is engaged in the performance of a public service, in which it has no particular interest, and from which it derives no special benefit or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the general welfare of the inhabitants, or of the community; that the members of the fire department, although appointed by the city corporation, are not, when acting in the discharge of their duties, serv-

ants or agents in the employment of the city, for whose conduct the city can be held liable; but they act rather as public officers, or officers of the city charged with a public service, for whose negligence or misconduct in the discharge of official duty no action will lie against the city, unless expressly given; and hence the maxim 'respondeat superior' has no application." A more concrete illustration of the distinction made between acts in a governmental and acts in a private or corporate capacity, with respect to municipal liability, is afforded by *Aschoff v. Evansville* (1904) 34 Ind. App. 25, 72 N. E. 279. In this case it was held that a municipality was not liable in damages for the flooding of plaintiff's premises by water from a broken pipe during a fire on near-by premises, because of its refusal to shut off the water after the breaking of the pipe, which would have interfered with the purely governmental use being made of the waterworks system at the time, namely, fighting fire; but that it was liable for its negligence in not keeping its water system in condition to withstand reasonably anticipated fire pressure, since in maintaining the water system for general purposes, including fire, it acted in its corporate, and not in its governmental, capacity.

However, it has been held that to excuse the municipality from liability the act complained of must have been incident to its fire service. *Judson v. Winsted* (1908) 80 Conn. 384, 15 L.R.A.(N.S.) 91, 68 Atl. 999 (holding that if the flushing of the hydrant which caused the damage had been for the purpose of improving the general water supply, rather than to test for fire purposes, the fireman would not have been engaged in the performance of a public function); *Martin v. Fire Comrs.* (1913) 132 La. 188, 44 L.R.A.(N.S.) 68, 61 So. 197 (holding that a municipal corporation is not liable for injuries to a pedestrian resulting from the needless driving of a green team, which was being tested with a view of purchasing, where it was known that it could not be accepted because it did not meet the required specifica-

tions); *Neuert v. Boston* (1876) 120 Mass. 338 (holding that a city was liable for damages caused by a suspended telegraph wire belonging to the fire department, where the wire was at the time being moved for purposes not connected with the fire department); *Brink v. Grand Rapids* (1906) 144 Mich. 472, 108 N. W. 430 (holding in effect that the negligent act must have been incident to the fire service). And in *Opocensky v. South Omaha* (1917) 101 Neb. 336, L.R.A.1917E, 1170, 163 N. W. 325, where the common law had been modified by statute by placing a speed limit on motor vehicles except fire vehicles, etc., when "answering emergency calls demanding excessive speed," it was held that, where a fire department motor vehicle was being tested out at a high speed, it was not engaged in the exercise of a governmental function, such, for instance, as answering an emergency call, so that the city was liable for injuries caused by its operation at a speed in excess of that permitted by statute. And see *Lafayette v. Allen* (1881) 81 Ind. 166, wherein a municipality was held not liable for injuries to an engineer resulting from the bursting of the boiler to his fire engine, seemingly on the ground that the engine, at the time it blew up, was not being used for fire purposes, but for pumping water from a cistern into the city's water pipes.

And it has been held that a firmly established exception to the rule that a city is not liable in damages for negligence in the performance of its governmental functions requires it not to negligently permit a dangerous condition to exist in its streets. Applying this exception, it was held in *Hillstrom v. St. Paul* (1916) 134 Minn. 451, L.R.A.1917B, 548, 159 N. W. 1076, that a municipality was liable for the death of a child, caused by the falling of a rotten pole used exclusively to carry the wires of the fire alarm telegraph system. In reaching this conclusion the court said: "While the city is not liable for negligence of the officers of its fire department in performing their official duties, it is liable for negligence in failing to keep its streets safe, and we see little room

for making a distinction between a dangerous condition of the street caused by a third party, for whose acts the city is not responsible, and a dangerous condition caused by a department of the city, for whose negligence the city is not liable. It is the duty of the city to exercise reasonable care to keep its streets free from danger, and it possesses the power to do whatever is necessary to accomplish this purpose. If, through negligence, it fails to perform this duty, and injury results from a dangerous condition in one of its streets, the city cannot avoid liability by showing that negligence in caring for an instrumentality used in the performance of a governmental duty is what brought about the dangerous condition."

And see the cases set out *infra*, III. a.

b. Application of rule.

The general rule that the operation and maintenance of a fire department by a municipal corporation is an exercise of a governmental function so as to accord it exemption from liability to the person or property of a stranger, under the principle that considerations of sound public policy require that it be relieved of the disadvantages and embarrassments of responsibility for those miscarriages which attend the exercise of such functions, has been applied to the following facts and circumstances:

—carelessness of fireman in drawing a hose cart against a person on a public street in answering an alarm of fire, *Hafford v. New Bedford* (1860) 16 Gray (Mass.) 297;

—negligent driving of fire apparatus in going to fire, *Howard v. San Francisco* (1875) 51 Cal. 52; *Wilcox v. Chicago* (1883) 107 Ill. 334, 47 Am. Rep. 434; *Greenwood v. Louisville* (1877) 13 Bush (Ky.) 226, 26 Am. Rep. 263; *Grube v. St. Paul* (1886) 34 Minn. 402, 26 N. W. 228; *Alexander v. Vicksburg* (1891) 68 Miss. 564, 10 So. 62; *McKenna v. St. Louis* (1878) 6 Mo. App. 320; *Freeman v. Philadelphia* (1879) 13 Phila. (Pa.) 154; *Knight v. Philadelphia* (1884) 15 W. N. C. (Pa.) 307;

—negligent driving in going from

fire back to fire house for more hose to use in fighting fire, *Jewett v. New Haven* (1871) 38 Conn. 368, 9 Am. Rep. 382;

—incompetent and reckless driver of fire apparatus, knowingly selected and retained by city officials, negligently running down pedestrian on street, *Higgins v. Superior* (1908) 134 Wis. 264, 13 L.R.A. (N.S.) 994, 114 N. W. 490;

—running of fire engine on sidewalk in violation of ordinance, to the injury of a pedestrian, *O'Meara v. New York* (1865) 1 Daly (N. Y.) 425;

—negligence of firemen while extinguishing a fire, causing hose to burst, thereby injuring plaintiff, *Fisher v. Boston* (1870) 104 Mass. 87, 6 Am. Rep. 196;

—negligence of firemen in cutting hole in floor of building occupied by plaintiff as a tenant, after responding to an alarm of fire sent in by plaintiff's daughter; plaintiff was injured by stepping into the hole, *Rogers v. Atlanta* (1915) 143 Ga. 153, 84 S. E. 555;

—negligent use of plaintiff's house as a place from which to fight fire on adjoining premises, *Torbush v. Norwich* (1871) 38 Conn. 225, 9 Am. Rep. 395;

—stock of goods damaged by water negligently thrown by firemen while fighting fire, *Davis v. Lebanon* (1900) 108 Ky. 688, 57 S. W. 471, 8 Am. Neg. Rep. 41;

—refusal of firemen to shut off water while fighting fire so as to stop flooding of plaintiff's property by water escaping through a break in a water pipe, *Aschoff v. Evansville* (1904) 24 Ind. App. 25, 72 N. E. 279;

—negligence in allowing sparks to escape from fire engine while fighting fire, which sparks set fire to and resulted in the destruction of near-by property, *Hayes v. Oshkosh* (1873) 33 Wis. 314, 14 Am. Rep. 760;

—improper and inefficient apparatus and employees, or defective appliances and negligent firemen, *Brinkmeyer v. Evansville* (1867) 29 Ind. 187; *Louisville v. Bridwell* (1912) 150 Ky. 589, 150 S. W. 672; *Heller v. Sedalia* (1873) 53 Mo. 159, 14 Am. Rep. 444 (property

destroyed because firemen did not sufficiently exert themselves); *Hawkins v. Springfield* (1916) 194 Mo. App. 151, 186 S. W. 576;

—defective fire engine exploded, *Woolbridge v. New York* (1875) 49 How. Pr. (N. Y.) 67;

—negligent driving of automobile used in fire and police alarm system by employee in course of duty, *Engel v. Milwaukee* (1914) 158 Wis. 480, 149 N. W. 141;

—fire department erecting poles and stringing electric wire, but failing to keep same in repair, so that wire fell, *Gaetjens v. New York* (1909) 132 App. Div. 394, 116 N. Y. Supp. 759;

—insufficient and defective hose, balky fire horse, and drunken fireman, resulting in destruction of property by fire, *Robinson v. Evansville* (1882) 87 Ind. 334, 44 Am. Rep. 770;

—negligence in allowing valve on fire cistern to get out of order, and thereby delaying the obtaining of sufficient water to fight fire, *Terrell v. Louisville Water Co.* (1907) 127 Ky. 77, 105 S. W. 100;

—negligence and inefficiency of firemen in connection with fire plug, which they were unable to open with the appliances at hand so as to fight fire without delay, *Wright v. Augusta* (1886) 78 Ga. 241, 6 Am. St. Rep. 256;

—negligence in permitting water mains and hydrants to become and remain choked and clogged with mud, etc., *Miller v. Minneapolis* (1898) 75 Minn. 181, 77 N. W. 788, 5 Am. Neg. Rep. 183; *Mendel v. Wheeling* (1886) 28 W. Va. 233, 57 Am. Rep. 664; and see *Foster v. Lookout Water Co.* (1879) 3 Lea (Tenn.) 42;

—failure to furnish sufficient water for fire purposes, *Allen & C. Mfg. Co. v. Shreveport Waterworks Co.* (1905) 113 La. 1091, 68 L.R.A. 650, 104 Am. St. Rep. 525, 37 So. 980, 2 Ann. Cas. 471; *Tainter v. Worcester* (1877) 123 Mass. 311, 25 Am. Rep. 90; *Black v. Columbia* (1883) 19 S. C. 412, 45 Am. Rep. 785. And see *Grant v. Erie* (1871) 69 Pa. 420, 8 Am. Rep. 272;

—negligent escape of water while thawing out fire hydrant; ice formed and plaintiff, a pedestrian, fell, *Welsh*

v. Rutland (1888) 56 Vt. 228, 48 Am. Rep. 762;

—negligent flushing of borough hydrant to determine its power or condition for fire purposes, or to remove an obstruction which might interfere with its use for such purposes, *Judson v. Winsted* (1908) 80 Conn. 384, 15 L.R.A.(N.S.) 91, 68 Atl. 999; *Brink v. Grand Rapids* (1906) 144 Mich. 472, 108 N. W. 430; *Edgerly v. Concord* (1879) 59 N. H. 78;

—negligent driving while exercising fire team in performance of duty, *Gillespie v. Lincoln* (1892) 35 Neb. 34, 16 L.R.A. 349, 52 N. W. 811; *Lilly v. Scranton* (1896) 18 Pa. Co. Ct. 433;

—negligently causing fall of water tower while fire department officials were testing it with view of purchase, *Thompson v. New York* (1885) 20 Jones & S. (N. Y.) 427;

—horse frightened by negligent and wanton ringing of bell of fire apparatus by firemen, while caring for the same, *Saunders v. Ft. Madison* (1900) 111 Iowa, 102, 82 N. W. 428, 7 Am. Neg. Rep. 532;

—fire horse escaping from custody through negligence of fireman, and cutting up plaintiff's lawn, *Cunningham v. Seattle* (1905) 40 Wash. 59, 4 L.R.A.(N.S.) 629, 82 Pac. 143, 19 Am. Neg. Rep. 55, on rehearing in (1906) 42 Wash. 134, 4 L.R.A.(N.S.) 633, 84 Pac. 641, 7 Ann. Cas. 805;

—firemen unnecessarily leaving fire engine in street and negligently allowing steam to escape therefrom, whereby a horse rightfully being driven on such street is frightened and runs away to plaintiff's, the driver's, damage, *Burrill v. Augusta* (1886) 78 Me. 118, 57 Am. Rep. 788, 3 Atl. 177;

—reckless moving of scales used in weighing coal for fire department, *Manske v. Milwaukee* (1904) 123 Wis. 172, 101 N. W. 377, 17 Am. Neg. Rep. 388.

And upon the theory that a fire department is a governmental branch of a municipality, it has been held that it is not liable for torts in connection with its fire houses. This view was taken in *Brown v. District of Columbia* (1907) 29 App. D. C. 273, 25 L.R.A. (N.S.) 98, wherein it was held that a

child permitted by her father, a fireman, to enter a fire house, could not recover from the municipality for injuries caused by her falling through an unguarded hole in the floor, provided for the purpose of enabling firemen quickly to respond to alarms of fire. And a similar conclusion, based on almost identical facts, was reached in *Nicastro v. Chicago* (1912) 175 Ill. App. 634, wherein the court declared that the maintaining of a fire house by a municipality was a purely governmental function. So in *Kies v. Erie* (1890) 135 Pa. 144, 20 Am. St. Rep. 867, 19 Atl. 942, it was held that a city was not liable for the negligent act of a fireman in allowing a spring door to so open as to injure a passer-by, but on a subsequent appeal (1895) 169 Pa. 598, 32 Atl. 621, a recovery was upheld, and an instruction to the effect that if the operation of the doors with reasonable care would have provided against danger and accidents to passers-by, the city was not liable, but that if the necessary and natural and probable operation thereof was dangerous, even though accompanied by the use of ordinary care on the part of its employees, the city was liable for the result. And in *Dodge v. Granger* (1892) 17 R. I. 664, 15 L.R.A. 781, 33 Am. St. Rep. 901, 24 Atl. 100, in holding that a city was not liable for the negligence of members of its fire department in leaving a ladder truck standing while cleaning the fire house, so that a ladder projected across the sidewalk in front of the fire house, in consequence of which a passer-by was injured, the court said: "The defendant demurs to the declaration on the ground that the members of the fire department are public officers, for whose negligent acts the city is not liable. The plaintiff, while admitting the general doctrine contended for by the defendant in support of its demurrer, yet claims that the case stated in the declaration is not governed by the rule announced, for the reason that the act complained of was not one which was done at a fire, or on the way to or returning from a fire, but was the negligent placing of a truck at said station, and leaving it

there so that the projecting ladders formed an obstruction to the street and sidewalk, for which the city is liable the same as if said obstruction had been placed there by a mere stranger. We do not think that the plaintiff's position is tenable. It is the duty of the fire department to take care of its apparatus, and keep it in proper condition for use, as well as to use it for the extinguishment of fires; and the members of said department are acting in the line of their duty while so taking care of said appliances, as fully as when actually engaged in extinguishing fires. The efficiency and usefulness of such a department must necessarily depend very largely upon the diligence exercised in the management and care of its appliances when not in actual service, so that the same may at all times be in proper condition for instant use. The cleaning of the station house referred to in the declaration was evidently necessary and proper, both on account of the health and comfort of the firemen stationed there, and also for the better protection and preservation of said appliances. It is evidently necessary that the horses belonging to the department should be taken care of and exercised, that hose and hydrants should frequently be tested, and that the entire apparatus should be kept in the best of repair. And we fail to see that the city is any more responsible for the negligence of the members of said department when in the performance of these duties than when in the performance of the more important duty of extinguishing fires." And in *O'Daly v. Louisville* (1914) 156 Ky. 815, 49 L.R.A. (N.S.) 1119, 162 S. W. 79, it was held that the flushing of the street by a fireman in front of the fire house was a governmental function, so that the city was not liable for injuries to a pedestrian caused by the bursting of a hose being used in the flushing. To the contrary, however, see *Bowden v. Kansas City* (1904) 69 Kan. 587, 66 L.R.A. 181, 105 Am. St. Rep. 187, 77 Pac. 573, 1 Ann. Cas. 955, as set out *infra*, III. a.

And it has been held that a municipality may rope off a street in order

to allow a parade of its fire department, and that it is not liable for personal injuries caused by a traveler along the street colliding with the rope. *Simon v. Atlanta* (1881) 67 Ga. 618, 44 Am. Rep. 739. So it has been held that a municipal corporation is not liable for injuries to a pedestrian, caused by the negligent driving of fire apparatus in a parade in which the common council had authorized its fire department to participate. *Blankenship v. Sherman* (1903) 33 Tex. Civ. App. 507, 76 S. W. 805. And it has been held that a municipality is not liable for the negligent running down of a pedestrian by its fire apparatus on its way to a midnight parade, whether the use be regarded as not of a public nature, or it be assumed that the apparatus had been called out for the purpose stated, pursuant to authority. *Smith v. Rochester* (1879) 76 N. Y. 506. Nor can a municipality be held liable for the destruction of property by fire simply because the firemen and their apparatus were, by permission of the common council, attending a fair, and this notwithstanding a tax was levied to support the department. *Yule v. New Orleans* (1873) 25 La. Ann. 394. And a similar conclusion was reached in *Irvine v. Chattanooga* (1898) 101 Tenn. 291, 47 S. W. 419, where at the time of the fire the firemen were on parade duty to attend the funeral of a city official.

And it has been held that an incorporated fire patrol which is a charitable organization, auxiliary to the city government and its fire department, is a public agency, and not liable for the death of a pedestrian on a public street, caused by the negligence of a member in throwing from the window of a building tarpaulins which had been left there after a fire. *Boyd v. Insurance Patrol* (1886) 113 Pa. 269, 6 Atl. 536.

And the rule exempting a municipality from liability in cases of the character under consideration has been held to apply to an employee of the fire department to the same extent that it applies to a stranger. *Long v. Birmingham* (1909) 161 Ala. 427, 49 So. 881, 18 Ann. Cas. 507 (negligence

of municipality in not providing a safe extension ladder and a safe place to work); *Pettingell v. Chelsea* (1894) 161 Mass. 368, 24 L.R.A. 426, 37 N. E. 380 ("negligently constructed, cared for, maintained, and placed pole," used to carry wires of fire alarm system, broke, injuring a fire-signal-system lineman); *Wild v. Paterson* (1885) 47 N. J. L. 406, 1 Atl. 490 (failure to keep apparatus in safe condition; defective brake on fire engine); *Peaty v. New York* (1900) 33 Misc. 231, 67 N. Y. Supp. 276 (decayed pole fell, killing fire-signal lineman who was a member of the fire department); *Peterson v. Wilmington* (1902) 130 N. C. 76, 56 L.R.A. 959, 40 S. E. 853, 11 Am. Neg. Rep. 332 (hose reel on which injured fireman was required to ride collapsed because allowed to get and remain out of repair); *Shanewerk v. Ft. Worth* (1895) 11 Tex. Civ. App. 271, 32 S. W. 918 (city employed incompetent driver for fire engine, to engineer's injury); *Lawson v. Seattle* (1893) 6 Wash. 184, 33 Pac. 347 (defective appliance furnished for use of firemen); *Lynch v. North Yakima* (1905) 37 Wash. 657, 12 L.R.A. (N.S.) 261, 80 Pac. 79 (vicious horses furnished driver of fire engine). In *Peterson v. Wilmington* (N. C.) *supra*, the court said that the fact that the injured person was an employee did not alter the principle, and continued as follows: "If the powers and duties be legislative and governmental, the city governments are neither liable for their own negligence nor for the negligence of their agents or officers to anyone, stranger or employee."

And the general rule of nonliability of a municipality for the negligence of its firemen has been held to apply to the acts of a voluntary association of firemen while engaged in extinguishing a fire. *Torbush v. Norwich* (1871) 38 Conn. 225, 9 Am. Rep. 395. And see *Yule v. New Orleans* (1873) 25 La. Ann. 394.

For cases applying the qualification to the general rule which requires that, to excuse the municipality from liability, the act complained of must have been incident to the fire service, see *Judson v. Winsted* (1908) 80 Conn.

384, 15 L.R.A.(N.S.) 91, 68 Atl. 999; *Lafayette v. Allen* (1881) 81 Ind. 166; *Martin v. Fire Comrs.* (1913) 132 La. 188, 44 L.R.A.(N.S.) 68, 61 So. 197; *Neuert v. Boston* (1876) 120 Mass. 338, and *Opocensky v. South Omaha* (1917) 101 Neb. 336, L.R.A.1917E, 1170, 163 N. W. 325, as set out II. a, *supra*.

III. *Minority rule.*

a. *In general.*

It can with truth no longer be said, as has often been done in laying down the general rule stated *supra*, II. a, that the authorities are unanimous, or that there is no reported decision to the contrary, for the majority of the court in the reported case (*FOWLER v. CLEVELAND*, ante, 131) squarely rejects that rule, at least so far as concerns the acts of the members of a municipal fire department in performing their duties. This conclusion was based upon the premise that, though the decision to have a fire department and the determination of the kind and extent of the services to be rendered were exercises of true public, legislative, or governmental functions, the actual performance of the duties pertaining thereto are corporate, ministerial, or proprietary, so that the rule respondeat superior applies in case of an act such as the one complained of, namely, negligent driving of fire apparatus in returning from a fire to the fire house. The decision of the majority in the *FOWLER CASE* expressly overrules the case of *Frederick v. Columbus* (1898) 58 Ohio St. 538, 51 N. E. 35, 4 Am. Neg. Rep. 574, which affirmed (1895) 3 Ohio N. P. 36, 4 Ohio S. & C. P. Dec. 31, wherein a municipal corporation was held not to be liable for the death of a person caused by the fall of a "fire tower" during a practice drill by the fire department; is in square conflict with *Thomas v. Findlay* (1892) 6 Ohio C. C. 241, 3 Ohio C. D. 435, wherein a municipality was held liable for injuries resulting from negligent driving in practising with fire apparatus in street; and is in conflict with much that is said in the earlier case of *Wheeler v. Cincinnati* (1869) 19 Ohio St. 19, 2 Am. Rep.

368. However, the actual decision in the *Wheeler Case* is possibly not reached, since that case seems to have turned upon a charge of neglect in not making proper provision for the extinguishment of fires, whereby plaintiff's property was destroyed, and in fact the ruling opinion in the *FOWLER CASE*, as above stated, admits that no complaint can be made concerning the exercise by a city of the governmental function of deciding whether it should have a fire department, and, if so, what sort, and "the extent of the service that the city would render." It is also worthy of comment that *Wanamaker, J.*, in concurring in the conclusion reached in the prevailing opinion in the *FOWLER CASE*, expressly objected to the reasoning therein, and maintained that the act complained of (negligent driving of fire apparatus in returning from fire) was not a mere "ministerial act," but rather was a governmental function, and that *Jones, J.*, in contending that both the conclusion and reasoning were wrong, points out that "the decision in this case not only overrules the established legal principles heretofore announced by this court, but is at variance with the principles settled by practically every court in this country."

But seemingly in full accord with the ruling opinion in the reported case (*FOWLER v. CLEVELAND*, ante, 131) is the decision in the earlier Ohio case of *Newark v. Frye*, decided by the supreme court on March 22, 1881, but unreported. That case, as set out in *Robinson v. Greenville* (1885) 42 Ohio St. 625, and *Frederick v. Columbus* (1898) 58 Ohio St. 538, 51 N. E. 35, 4 Am. Neg. Rep. 574, held the defendant municipality liable for personal injuries resulting from the explosion of materials used in making a fire in connection with the testing of an apparatus for the extinguishment of fires. The *Frederick Case* overruled *Newark v. Frye*, but it is in effect restored to good standing by *FOWLER v. CLEVELAND*.

And in Ontario it has been held that a municipality is liable for the acts or negligence of a member of a fire

department voluntarily organized by it. *Hesketh v. Toronto* (1898) 25 Ont. App. Rep. 449. This decision, which held the defendant liable for injuries caused by the running away of a fire team while engaged in fighting a fire, was upon the ground that since the municipality was not required to establish and manage a fire department, but did so voluntarily, the firemen employed by it were mere servants, and not public servants, it being admitted that, if the city had been under a duty to form such a department, its members would have been officials, as distinguished from servants, and that the department would have been governmental in character so as to relieve the city from liability. In this connection, Burton, Ch. J. O., said: "In my opinion, if there was a duty or obligation cast upon the council to form such a department, even though the members might be appointed by the city council and paid by them, and liable also to dismissal by them, they could not be regarded as servants, or agents, for whose negligence or want of skill in the performance of their duties the corporation could be made liable, but in such case they would be acting as officers of the city, charged with the performance of a certain public duty, and no action would lie against the city for their negligence whilst acting in the performance of these duties. In the present case there is no legislation creating separate officials with specified duties as a fire department. The city may, in its discretion, pass by-laws for appointing fire wardens, fire engineers, and firemen, and for promoting, establishing, and regulating fire companies. What it has done is to assume the control of a fire department, appointing the members, paying them, and controlling them by certain regulations, with the right to dismiss them, and furnishing them with the engines and other appliances necessary for the extinguishing of fires." And Oslen, J. A., in reaching a similar conclusion, argued as follows: "The council are not bound to maintain a fire department, or to assume the duty of managing one as part of

the work of the corporation. Neither are they bound to construct and establish sewers, or water or gas works. But if they do, it is clear that the law imposes upon them the obligation to use reasonable care that no unnecessary damage be done. I do not see how they are in a different position in regard to their fire department. They have chosen to create it by by-law, and to provide for the carrying it on by themselves through the medium of a committee of their council and of officers and servants appointed by themselves or the committee. The apparatus which is used and the servants who manage it are theirs, and the negligence of the latter in the course of their employment is, therefore, the negligence of the defendants. The fact that the work is undertaken by them for public convenience, and not for profit, makes, as I have said, no difference. If they volunteer to undertake it they are bound to see that they do not, by the negligent acts of their servants, inflict injury upon those whose situation calls for the exercise of reasonable care."

And it has been held that the care and management of a fire station is a purely ministerial duty so as to render a municipality liable for negligent performance of its duty to provide a safe place for its employees to work. Thus in *Bowden v. Kansas City* (1904) 69 Kan. 587, 66 L.R.A. 181, 105 Am. St. Rep. 187, 77 Pac. 573, 1 Ann. Cas. 955, 16 Am. Neg. Rep. 339, the defendant municipality was held liable to a fireman for injuries occasioned by a horse stepping into a hole in the floor of a fire house, in answering an alarm of fire, which caused it to fall against the plaintiff. In this case the court admitted that a municipality, in determining the necessity for a fire department, the number and location of fire stations, the kind, quality, and number of fire extinguishers, and all matters involving the efficiency of such department, acted in a legislative or governmental capacity, but maintained that the execution of the work and the management of its property were purely ministerial. And see *Kies*

v. Erie (1895) 169 Pa. 598, 32 Atl. 621, as set out supra, II. b.

And in *Wagner v. Portland* (1902) 40 Or. 389, 60 Pac. 785, 67 Pac. 300, it was held that a city, while engaged in the duty of repairing its fire alarm system by means of private and corporate agencies, was performing ministerial acts in its corporate capacity, so that it was not excused from liability for injuries to one performing such work on the theory that such injuries were received while performing a governmental function. However, the court recognized the general rule, but distinguished the case under consideration from those which had applied the same. Justice Wolverton, in delivering the opinion of the court, among other things, said: "Municipal corporations exist in a dual capacity, and their functions are twofold. In one, they exercise the right springing from sovereignty, and while in the performance of the duties pertaining thereto their acts are political and governmental. Their officers and agents, though elected, or appointed, and paid by them, are nevertheless public functionaries, performing a public service in which the corporations, as such, have no particular interest, and from which they derive no special benefit or advantage in their private or corporate capacity. Such officials are not, strictly speaking, the servants and agents of the municipalities through which they derive their authority, but are officers, agents, and servants of the state (that is, the political divisions thereof, or the public at large), and for their acts of omission and commission the municipalities themselves are not liable. In the other, they exercise a private, proprietary, or corporate right, arising from their existence as legal persons, and where the duty is one that rests upon the municipalities in respect of their special or local interests, and not as public agencies, and is absolute and perfect, not discretionary or judicial in its nature, their officers and agents, in the performance of the function or duty, act in behalf of, or as the alter ego of, the municipalities in their corporate capacity, and not for the state

or public at large, and for their acts the municipalities are held to accountability. This has become the settled doctrine in the jurisprudence of this country, about which there is no dissent. . . . Undeniably, municipalities, when acting through their fire departments in the preservation of property from the devastation of fire, are in the exercise of a purely governmental function, and their officers and agents represent the public, as an arm of the state, for whose acts the corporations are not liable. . . . But the case at bar is distinguishable from any of these cases [reference is to cases applying the general rule], or any that we have been able to find applying the doctrine referred to therein. Here the city was acting in the discharge of a legal duty to repair the fire alarm system, and the case is one of common employment for the performance of a special service for and in behalf of the city. The duty was being performed through the instrumentality of private or corporate agencies, and not through the fire department or its officers, or through officers of the city whose duty it was to perform such work; and it might be added that the work of repairing was an act ministerial in its nature."

And for cases in which the city was held liable on the ground that the acts complained of were not incident to the fire service, see *Judson v. Winsted* (1908) 80 Conn. 384, 15 L.R.A. (N.S.) 91, 68 Atl. 999; *Lafayette v. Allen* (1881) 81 Ind. 166; *Martin v. Fire Comrs.* (1913) 132 La. 188, 44 L.R.A. (N.S.) 68, 61 So. 197; *Neuert v. Boston* (1876) 120 Mass. 338; *Brink v. Grand Rapids* (1906) 144 Mich. 472, 108 N. W. 430; and *Opocensky v. South Omaha* (1917) 101 Neb. 336, L.R.A. 1917E, 1170, 163 N. W. 325, all of which are set out supra, II. a.

b. Under statute.

There seems to be no question but that a municipal corporation may by statute be made liable for the wrongful acts of its fire department, even though such department be regarded as a governmental branch of the

municipality. Illustration of a statute of this character is afforded by *Creps v. Columbia* (1916) 104 S. C. 371, 89 S. E. 316, wherein it was held that a pedestrian, who was injured by being struck by a negligently driven team of fire horses, could recover against the city by virtue of Civ. Code 1912, § 3053, which provided that any person injured by the mismanagement of anything under the control of the corporation within the city limits could hold the municipality liable therefor.

IV. Under maritime law.

In *Workman v. New York* (1900) 179 U. S. 552, 45 L. ed. 314, 21 Sup. Ct. Rep. 212, reversing (1895) 14 C. C. A. 530, 35 U. S. App. 201, 67 Fed. 847, which reversed (1894) 63 Fed. 298, it was held that under the maritime law

a municipality was liable for injuries caused by the negligent operation of one of its fire boats, the court maintaining that the public nature of the service upon which a vessel is engaged at the time of the commission of a maritime tort affords no immunity from liability in a court of admiralty. It cannot be said, however, that this case is authority, either for or against the proposition that a fire department is a governmental branch of the municipality supporting it, since that element did not affect the decision of the case.

To the same effect as the *Workman Case* are *Thompson Nav. Co. v. Chicago* (1897) 79 Fed. 984, and *Henderson v. Cleveland* (1899) 93 Fed. 844. G. J. C.

STATE OF WASHINGTON EX REL. SPOKANE & EASTERN TRUST COMPANY et al.

v.

SUPERIOR COURT of the State of Washington for Spokane County et al.

Washington Supreme Court (Dept. No. 1) — January 27, 1920.

(— Wash. —, 187 Pac. 358.)

Witness — excuse for refusing to comply with subpoena duces tecum.

1. A bank cannot refuse to produce its books in court in response to a subpoena duces tecum because it would be inconvenient for it to do so and compliance would entail great expense upon it.

[See note on this question beginning on page 163.]

Appeal — supersedeas — when granted.

2. While the granting of a supersedeas upon appeal from a denial of a writ of prohibition is ordinarily within the discretion of the court, it will ordinarily be granted where, if not granted, the appeal would be futile, depriving the appellant of the fruits of the appeal.

— when denied.

3. A supersedeas, upon appeal from an order denying a writ of prohibition, may be denied if there is no substantial basis for the appeal, although the denial of the supersedeas will make the appeal futile.

Witness — right to refuse to answer subpoena.

4. A witness cannot refuse to an-

swer a subpoena on the ground that he does not believe that his testimony will be of any benefit to the one subpoenaing him, in face of the fact that the testimony is material and necessary.

— refusal to comply with subpoena duces tecum.

5. The production of records under a subpoena duces tecum cannot be refused, if they are material and not shown to be of a confidential or privileged character.

— showing of necessity.

6. The necessity for the production of documents to warrant the issue of a subpoena duces tecum is sufficiently shown by an allegation that they are

necessary to enable the referee to make his findings of fact and report pursuant to the order of reference, and that there is no other source available from which to obtain the necessary information.

Evidence — bank account.

7. Books of a bank containing the deposit account of one from whom an accounting is demanded in court are proper evidence upon the accounting, although they are not his account books or books of original entry.

[See 10 R. C. L. 1185.]

Witness — accounts of strangers — effect.

8. That bank books containing accounts of others than the one whose account is needed in court is no excuse for refusal to produce them in response to a subpoena duces tecum.

— inconvenience of producing records.

9. A bank will not be excused from producing its records in court in response to a subpoena duces tecum, because they weigh half a ton and some of them are constantly used in the bank's business.

PETITION for a writ of mandate directing defendants to fix the amount of a supersedeas bond to be given on appeal to the Supreme Court from the dismissal of a certain action in the Superior Court. *Writ denied.*

The facts are stated in the opinion of the court.

Messrs. Cyrus Happy, O. C. Moore, and Graves, Kizer, & Graves, for relators:

Relators should be allowed to supersede, in order that their appeal shall not be rendered futile.

State ex rel. Nooksack River Boom Co. v. Superior Ct. 2 Wash. 9, 25 Pac. 1007; State ex rel. Prosecuting Atty. v. Union Sav. Bank, 86 Wash. 48, 149 Pac. 327; State ex rel. Barnard v. Board of Education, 19 Wash. 8, 40 L.R.A. 317, 67 Am. St. Rep. 706, 52 Pac. 317; State ex rel. Davis & Co. v. Superior Ct. 95 Wash. 258, 163 Pac. 765; Bier v. Clements, 95 Wash. 505, 164 Pac. 82; Packenham v. Reed, 37 Wash. 260, 79 Pac. 786; State ex rel. German-American Safe Deposit & Sav. Bank v. Superior Ct. 12 Wash. 677, 42 Pac. 123; State ex rel. Byers v. Superior Ct. 28 Wash. 403, 68 Pac. 865; Lund v. Idaho & W. N. R. Co. 48 Wash. 453, 93 Pac. 1071.

In order to justify the issuance of a subpoena duces tecum, requiring the production of books and papers by a witness who is not a party to the action in which they are sought to be used, the court, magistrate, or examiner must require a showing in advance as to the competency, relevancy, and materiality of the books and papers, the production of which is sought.

State ex rel. Ozark Cooperage & Lumber Co. v. Wurdeman, 176 Mo. App. 540, 158 S. W. 436; Vacuum Cleaner Co. v. Platt, 116 C. C. A. 220, 196 Fed. 398; United States v. Terminal R. Asso. 154 Fed. 268; United States v. Hunter, 15 Fed. 712; Perrine v. Hotchkiss, 58 Barb. 77; Bent-

ley v. People, 104 Ill. App. 353, 107 Ill. App. 245; 40 Cyc. 2167-2169; Ex parte Brown, 72 Mo. 83, 37 Am. Rep. 426; Lawson v. Black Diamond Coal Min. Co. 44 Wash. 26, 86 Pac. 1120; State ex rel. Seattle General Contract Co. v. Superior Ct. 56 Wash. 649, 28 L.R.A. (N.S.) 516, 106 Pac. 150.

A refusal on the part of a witness to answer an incompetent or otherwise improper question, likewise the refusal of a witness to produce documents which did not contain competent or relevant evidence, does not constitute a contempt of court.

Hupp v. Superior Ct. 22 Cal. App. 162, 133 Pac. 987; Ex parte Zeehandelaar, 71 Cal. 238, 12 Pac. 259; Re Davis, 38 Kan. 408, 16 Pac. 790; Shorwitz v. Caminez, 152 App. Div. 758, 137 N. Y. Supp. 545; State ex rel. Ozark Cooperage & Lumber Co. v. Wurdeman, 176 Mo. App. 540, 158 S. W. 436; Miller v. Mutual Reserve Fund Life Asso. 139 Fed. 864; Dancel v. Good-year Shoe Machinery Co. 128 Fed. 760.

Since John I. Daniel had nothing whatever to do with the keeping of the books of the bank, the entries therein could in no sense bind or affect his rights in said accounting.

Union Electric Co. v. Seattle Theatre Co. 18 Wash. 213, 51 Pac. 367; Toule Logging Co. v. Hammond Lumber Co. 78 Wash. 568, 139 Pac. 625; McKeen v. Providence County Sav. Bank, 24 R. I. 542, 54 Atl. 49; Perrine v. Hotchkiss, 58 Barb. 77; Brickley v. Walker, 68 Wis. 563, 32 N. W. 773; Davison v. West Oxford Land Co. 126 N. C. 704, 36 S. E. 162; Winter v. Newell, 49 Pa. 507; 17 Cyc. 395; State

Bank v. Brown, 165 N. Y. 216, 53 L.R.A. 518, 59 N. E. 1.

Messrs. George W. Belt and Fred M. Williams for defendants.

Mackintosh, J., delivered the opinion of the court:

In the superior court for Spokane county, before Honorable Bruce Blake, one of the judges thereof, there was pending an action entitled Daniel v. Daniel, in which the plaintiff claimed an undivided interest in certain property located in Spokane, and the right to an accounting for the rents, issues, and profits thereof. In January, 1918, the court entered a decree in favor of the plaintiff, awarding her an undivided interest in the property and an accounting for one twelfth of the rents, profits, and issues for the period beginning December, 1903. In that accounting the amount of taxes and assessments paid out by the defendant were to be ascertained, together with the costs and improvements made by the defendant, and the cost of materials, repairs, and upkeep. There was also to be ascertained the amount of the mortgage which existed in December, 1903, and the amount of the mortgages which now exist, and what use or disposition was made by the defendant of the funds received from the mortgages. An appeal from this decree was taken by the defendant to this court, where it was affirmed, and may be found reported in Daniel v. Daniel, — Wash. —, 181 Pac. 215. Upon the remittitur going down, Judge Blake appointed S. P. Domer as referee to take the accounting in accordance with the terms of the decree. On October 21, 1919, testimony was commenced to be taken before the referee, when the defendant Daniel submitted a written account of the rents, profits, and issues from December, 1903, to date, and testified that no books of accounts, records, deposit books, leases, checks, documents, or memoranda were in his possession from which the account was compiled, and that the same had been made entirely from his recollection. He further

testified that he had deposited the rents derived from the property in certain banks in Spokane, one of which, the Spokane & Eastern Trust Company, is the relator in this action; that his brother during four years of the time was associated with him as part owner of the property, and had collected and received portions of the rents and had deposited the same in this bank. The plaintiff claimed before the referee that the production of the account of the defendant and his brother with the Spokane & Eastern Trust Company, the relator, was necessary in order to enable the referee to take a proper accounting, and that no other source accessible to the plaintiff existed from which to obtain the information that the bank's books would show. The plaintiff asked for a subpoena duces tecum to issue to the proper officers of the bank to produce its books, records, and papers in so far as they related to the account of the defendant and his brother covering the period under examination before the referee. The referee, being satisfied that the material sought by the subpoena was necessary for a full and complete disclosure of the rents, issues, and profits, directed the issuance of the subpoena duces tecum to the bank. (When we use the word "bank," we are, for the sake of brevity, using it as inclusive of the bank itself and its officers, to whom the subpoena was directed.)

The bank refused to produce the evidence called for in the subpoena, whereupon an action entitled the State of Washington on the relation of the Spokane & Eastern Trust Company v. Domer was instituted in the superior court for Spokane county, for the purpose of prohibiting Domer, as referee, from proceeding against the Spokane & Eastern Trust Company for the violation of the subpoena; the referee having threatened to punish the bank for contempt in failing to obey the subpoena. Upon the hearing in the superior court before Honorable Bruce Blake, the writ of prohibition

was quashed and the proceeding dismissed, whereupon the Spokane & Eastern Trust Company appealed and made an application to Judge Blake for an order fixing the amount of the supersedeas bond on appeal to this court from the order denying the petition for a writ of prohibition. This motion for supersedeas bond was denied. The Spokane & Eastern Trust Company then came to this court in this action with a petition for a writ of mandate to issue to the superior court of Spokane county and Bruce Blake, judge thereof, directing them to fix the amount of the supersedeas bond to be given on appeal to this court from the dismissal of the prohibition action in the superior court of Spokane county. The matter is before us on this petition.

The writ of prohibition sought in the superior court was a special proceeding, and from a final judgment in such proceeding § 1033 of Rem. Code provides that an appeal may be taken to the supreme court. State ex rel. Nooksack River Boom Co. v. Superior Ct. 2 Wash. 9, 25 Pac. 1007; State ex rel. Prosecuting Atty. v. Union Sav. Bank, 86 Wash. 48, 149 Pac. 327. And where the court has issued a writ of prohibition, supersedeas is granted on appeal. But where, in the superior court, the writ of prohibition or mandate or injunction has been denied, the granting of supersedeas is a matter of discretion with the court, and in the

Appeal—supersedeas—when granted.

exercise of that discretion this court has said that supersedeas will ordinarily be granted, where, if not granted, the appeal would be made futile, depriving the appellant of the fruits of his appeal; that the status quo will be preserved pending the determination of the appeal upon its merits. State ex rel. German-American Safe Deposit & Sav. Bank v. Superior Ct. 12 Wash. 677, 42 Pac. 123; State ex rel. Barnard v. Board of Education, 19 Wash. 8, 40 L.R.A. 317, 67 Am. St. Rep. 706, 52 Pac. 317; Pakenham v. Reed, 37 Wash.

258, 79 Pac. 786; State ex rel. Davis & Co. v. Superior Ct. 95 Wash. 258, 163 Pac. 765; Bier v. Clements, 95 Wash. 505, 164 Pac. 82. But these cases, while preserving the status quo in order to protect the appellant in the event of his success on the appeal, require that the discretion of the court should be exercised, after an examination into the application for the supersedeas to determine whether the appellant has any substantial right which would be injured by the refusal of the supersedeas. State ex rel. Bringgold v. Burns, 21 Wash. 227, 57 Pac. 804; State ex rel. Cawley v. Bremerton, 32 Wash. 508, 73 Pac. 477; State ex rel. Martin v. Poindexter, 43 Wash. 147, 86 Pac. 176. Although the court should place no obstacles in the way of one appealing as he is permitted by statute, still it is to be remembered that the appeal is a privilege which is accorded; and, although that privilege is looked upon with favor, still, if its exercise interferes with the rights of others, and the appeal itself, upon the record presented in the mandamus action, appears to be without merit, a supersedeas will not be granted, although such denial may virtually dispose of the appeal and destroy any possibility of its efficacy to the appellant. In other words, the fact that though the result sought to be prevented by the appeal may be accomplished by the failure to grant the supersedeas, this court cannot be deprived of its right to exercise its discretion in the refusing or granting of the supersedeas in aid of its appellate powers, and if, in the examination which must necessarily be made of the merits of the appeal to determine the proper way in which that discretion shall be exercised, this court determines there is no substantial basis for the appeal, the proper exercise of its discretion in such cases requires that the supersedeas be denied.

In a case such as this before us, although the appellant is pursuing a remedy accorded it by law, on the

other hand, it is not to be forgotten that it is interfering with the conduct of a trial in a court of justice, and that such interference is not ordinarily to be sanctioned, even though, by withholding the super-sedeas, the fruits of appellant's appeal may be entirely destroyed before the appeal is heard on its merits.

It becomes necessary, therefore, to investigate the merits of this controversy as they are shown in the record presented on this application for a writ of mandate. That record shows that the testimony sought to be secured by the subpoena duces tecum is testimony which is necessary to the plaintiff's case, and the only testimony available to the plaintiff for the purpose of establishing that the account offered by the defendant is inaccurate. Under the peculiar circumstances of this accounting, the sources of information are extremely limited, and it would result in a virtual denial of justice were she prevented from using even such meager information as the books of the Spokane & Eastern Trust Company may reveal. It is, of course, entirely possible that an examination of those books will be of no material assistance; but, according to the record, the plaintiff claims that they will be of assistance, and there is no substantial denial of that contention. A witness cannot refuse to answer a subpoena

Witness—right
to refuse to
answer
subpoena

on the ground that
he does not believe
that his testimony
will be of any benefit

to the party subpoenaing him, in face of the fact that the testimony is material and necessary. The law recognizes the right of a witness subpoenaed duces tecum to refuse to produce documents which are not material, or which, on account of their confidential or privileged character, could not be received in evidence. *Lawson v. Black Diamond Coal Min. Co.* 44 Wash. 26, 86 Pac. 1120; *State ex rel. Seattle General Contr. Co. v. Superior Ct.* 56 Wash. 649, 28 L.R.A.(N.S.) 516, 106 Pac. 9 A.L.R.—11.

150. But where, as here, a showing of materiality has been made, and the books and records are not of that confidential or privileged character which renders them inadmissible, the witness has no right to then refuse production.

—refusal to
comply with
subpoena duces
tecum.

The Spokane & Eastern Trust Company asserts that a subpoena duces tecum need not be complied with if the court from which it is issued is exceeding its jurisdiction. The record in this case does not show that the subpoena is in itself insufficient, nor that the referee was exceeding his power in its issuance.

The Spokane & Eastern Trust Company asserts that, in order to justify the issuance of the subpoena duces tecum, the court issuing it must require a showing in advance of the competency, relevancy, and materiality of the books and papers the production of which is sought. The record here shows that the production of these books "became and was important and necessary in order to enable this defendant, as referee, to make his findings of fact and report pursuant to the order of reference, and that there was no other source accessible to the plaintiff to obtain the information from the said books, papers, and documents, except by the production thereof."

This showing was certainly sufficient to justify the issuance of the subpoena duces tecum, and the subpoena was not, as so issued, void as being without or in excess of jurisdiction.

—showing of
necessity.

The Spokane & Eastern Trust Company asserts that a witness cannot be held for contempt on a refusal to answer incompetent or improper questions, and such witness cannot be held for contempt on a refusal to produce documents which do not contain competent or relevant evidence. As we have already shown, this evidence is material, competent, and relevant.

The Spokane & Eastern Trust Company further asserts that Dan-

iel did not make the entries contained in the books, and that those entries would not even tend to indicate the sources from which deposits were derived, and that therefore the entries could not affect the rights of Daniel in the accounting. Although it may be that they are not the books of the accounts of the defendant, and not

Evidence—bank account.

books of original entry, still they are proper evidence, and will throw some light upon the accuracy of the account submitted by the defendant Daniel, and it is not for the Spokane & Eastern Trust Company to say the amount of weight they will carry nor the conclusiveness of their showing upon the referee. The witness subpoenaed in a case and the witness subpoenaed duces tecum are not in any different position before the court. It is not for either to comply or to refuse to comply with the subpoena by determining for themselves the admissibility of the evidence sought nor the weight thereof.

This observation also applies to the further objection of the Spokane & Eastern Trust Company that it would be a great inconvenience to it to respond to the subpoena. If it

Witness—excuse for refusing to comply with subpoena duces tecum.

were the rule that witnesses might respond or not to the subpoena according to the inconvenience they might suffer by responding, lawsuits would be conducted according to private rather than public convenience. The further objection of the Spokane & Eastern Trust Company that to comply with the subpoena would entail great expense is answered in the same way.

It is also asserted by the Spokane & Eastern Trust Company that the books and records called for contain confidential communications with clients of the bank other than defendant Daniel, and that, by their production in court, these communications might become public property. The answer to this is: First, that the referee has plainly said that

he is not going to divulge any such confidential communications that accidentally might see the light of day; and, second, it is to be presumed, in the absence of evidence to the contrary, that a public official such as the referee, in the performance of his sworn duty, is not going to allow records introduced before him to be used for any but their proper purpose, nor is he going to convert the trial of the cause into material for general gossip.

As a matter of fact the record shows that the Spokane & Eastern Trust Company is not making any very serious objection to answering the subpoena; that the objection is coming from the defendant Daniel, the record showing that the Spokane & Eastern Trust Company, in appearing in response to the subpoena, merely stated, through its attorney, that the records called for would weigh half a ton; that some of them are constantly used in the bank's business; and that it is an invariable rule of the bank never to allow them out of its custody. The argument made in this respect fails to convince us that this court should quash the subpoena on any of these grounds.

The bank's attorney stated that he was advised that the defendant is claiming the subpoena to have been issued without authority, and that, under such circumstances, the bank "has felt constrained to allow the matter to be tested out." To the question, "The bank has no objection to complying with the subpoena; they are simply standing on the objection made by counsel, I understand?" the bank's attorney answered: "That is the situation. There is no objection except the legal objection."

There is also involved in the case the subpoena duces tecum for the books of the Traders' National Bank, now in the custody of the Spokane & Eastern Trust Company. What

—accounts of strangers—effect.

—inconvenience of producing records.

we have said in this opinion applies equally to the books and records of the Traders' National Bank.

This examination into the facts of the case indicates to us clearly that the appeal is without merit, and therefore, in the exercise of our dis-

cretion, the application for a writ of mandate to compel the issuance of supersedeas on appeal is denied.

Holcomb, Ch. J., and Mitchell, Parker, and Main, JJ., concur.

Petition for rehearing denied.

ANNOTATION.

Inconvenience or expense as excuse for disobeying subpoena duces tecum.

Cases relating to orders for the production of books or papers are not included.

It will be seen that it is held in the reported case (*STATE EX REL. SPOKANE & E. TRUST CO. v. SUPERIOR CT.* ante, 157) that a bank cannot refuse to respond to a subpoena duces tecum, requiring the production of books, records, and papers, in a suit to which it is not a party, on the ground of great inconvenience or great expense.

There seems to be little in the books directly on this subject.

In *Wertheim v. Continental R. & Trust Co.* (1883) 21 Blatchf. 246, 15 Fed. 716, it was held that the officers of a corporation which was not a party to a suit could be compelled by subpoena duces tecum to produce books of the corporation which were necessary evidence, regardless of considerations of inconvenience. The court said: "It may be inconvenient, and sometimes embarrassing, to the managers of a corporation to require its books and papers to be taken from its office and exhibited to third persons, but it is also inconvenient and often onerous to individuals to require them to do the same thing. Considerations of inconvenience must give way to the paramount right of litigants to resort to evidence which it may be in the power of witnesses to produce, and without which grave interests might be jeopardized, and the administration of justice thwarted." The court further said: "Why should not the officers of a corporation be required to produce the books of the corporation as witnesses when the books are necessary evidence? A corporation can only act through its officers. The suggestion that the

books are in the legal custody of the corporation, and not of its officers, may be theoretically correct. If technically true, it is not an objection to compelling the officers to produce them."

In *United States v. American Tobacco Co.* (1906) 146 Fed. 557, the court refused to vacate a subpoena duces tecum, requiring a corporation to produce before a Federal grand jury its minute books from the time of its incorporation, a period of three years, and its copy letter books, covering a period of four and one half months.

But in *National Exch. Bank v. Lubrano* (1908) 29 R. L. 64, 68 Atl. 944, it was held that a motion for a writ of subpoena duces tecum, made after the plaintiff bank had closed its case, was properly denied in an action on a note, where the production of the books in question, which were in daily use, would have greatly inconvenienced the plaintiff, and the defendant could, by order of court before trial, have obtained the information desired, so as to have procured copies of entries, and it did not appear that the books, if produced, would have furnished material evidence, and it appeared that the evidence of the president of the bank, who was present in court during the trial, was available.

And in *Dancel v. Goodyear Shoe Machinery Co.* (1904) 128 Fed. 753, it was held that the mere allegation, in a motion for a subpoena duces tecum, that the evidence desired was material and necessary in the suit, without preliminary proof that the documents desired were in the possession of the witness, and were

prima facie competent and were material evidence, was insufficient to warrant the issuance of a subpoena duces tecum for the production of a great number of books and papers belonging to the corporation defendant, as such a procedure would be an oppressive, if not an unconstitutional, use of the power of the court, and an abuse of its process.

In *McDonald v. Ideal Mfg. Co.* (1906) 143 Mich. 17, 106 N. W. 279, it was held that where the books of the defendant, which it was summoned by subpoena duces tecum to produce, were 21 in number, containing about 700 pages each, and were not all necessary in order to enable the plaintiff to make out his case, the defendant would not be required to produce them, but that plaintiff should at least determine which ones he needed by an examination of the books where they were kept.

In *Munroe v. United States* (1914) L.R.A.1915B, 980, 132 C. C. A. 351, 216 Fed. 107, wherein it was held that one is not punishable for contempt in failing to produce, in response to a subpoena duces tecum, papers which are in possession of his partners at the firm's place of business in a foreign country, and which relate to such business, the court laid particular stress on the fact that the papers were not in the possession of the witness himself, and quoted the opinion of Lord Ellenborough in *Amey v. Long* (1808) 9 East, 473, 103 Eng. Reprint, 653, to the effect that no man was obliged, "according to any sense of the effect" of a subpoena duces tecum, "to sue and labor in order to obtain the possession of any instrument from another, for the purpose of its production afterwards by himself in obedience to the subpoena."

The court further said that the witness "could not lawfully be called upon, under a writ of subpoena duces tecum, to sue and labor to the extent of superintending shipment of papers from France to the United States, to have the care and responsibility of them upon arrival, or of being obliged to await the necessities of Atlantic navigation, and to assume all the other incidents of an importation of this character, including the chance of the time of the arrival of the documents, and the travel to and from in connection therewith, merely for the per diem of a witness of perhaps only one day attending court, and the mileage from his place of residence to the place of trial. We make these observations because the amount of responsibility and attention required from the position of the United States, with reference to importing documents from a foreign country, is too great to be lawfully demanded as the result of a subpoena duces tecum upon an ordinary witness; and in doing this we stop short of considering whether, in any event, the service of a subpoena can compel a witness to go outside of the district of his own residence for the purpose of obtaining documents, or for any purpose except traveling to the place of judicial session, for which he is compensated, and especially whether a subpoena duces tecum can compel the holder of documents which, in many cases, may be of very great value, to transport them from a foreign country to a domestic country, and especially across the high seas, with all the perils attaching thereto. No case can be found which justifies a proposition of that character."

B. B. B.

MRS. J. W. MULLICAN et al., Appts.,
v.
MERIDIAN LIGHT & RAILWAY COMPANY et al.

Mississippi Supreme Court (In Banc) — March 8, 1920.

(— Miss. —, 83 So. 816.)

Principal and agent — failure to furnish light — liability to employee.

1. One contracting with a manufacturer to furnish electrical energy for the factory is not liable to an employee in the factory for injury caused by permitting the lights to go out, on the theory that he was the manufacturer's agent to furnish the lights, since he owed no duty to the employee.

[See note on this question beginning on page 174.]

Pleading — effect of filing contract with complaint.

2. The filing with a complaint, by an employee against one who has contracted to furnish electrical power for his employer's factory, to recover for injuries caused by breach of contract, of the contract between the light company and the employer, requires the rights of complainant to be determined by the contract as to whether or not the light company owed him any duty.

[See 21 R. C. L. 476, 477.]

— construction against pleader.

3. A declaration is to be construed must strongly against the pleader.

[See 21 R. C. L. 464.]

Negligence — contract to furnish electrical power — duty to employees.

4. One contracting to furnish electrical energy for power purposes at a manufacturing plant owes no duty to employees in the plant to furnish lights and keep them burning for their safety in the performance of their duties.

Principal and agent — liability of agent for negligent injury to stranger.

5. The relation of agency does not exempt a person from liability for an injury to a third person resulting from his negligence for which he would otherwise be liable.

[See 21 R. C. L. 851.]

— absence of duty to stranger.

6. An agent in the performance of his duty to his principal is not liable for negligent injury to a stranger to whom he owes no duty.

[See 21 R. C. L. 851.]

Trial — motion for judgment — order for stay of proceedings.

7. A motion for final judgment on a plea cannot be sustained while an order for stay of proceedings in the case remains in force.

Pleading — plea in bar — conclusion to the country.

8. Judgment cannot be entered for defendant on a plea in bar which concludes "to the country."

(Cook and Ethridge, JJ., dissent.)

APPEAL by plaintiffs from a judgment of the Circuit Court for Lauderdale County (Heidelberg, J.) in favor of defendants in an action brought to recover damages for the death of plaintiffs' decedent alleged to have been caused by defendants' negligence. *Affirmed in part.*

The facts are stated in the opinion of the court.

Messrs. R. N. Miller, H. B. Miller, Fulton Thompson, R. H. Thompson, and J. H. Thompson, for appellants:

Defendants are liable for their wrongful and negligent acts causing the death of plaintiff's decedent.

Mechem, Agency, §§ 569-572.

There is not even a shadow of merit in the defense of proximate cause.

Alabama & V. R. Co. v. Beard, — Miss. —, 81 So. 14; Yazoo City v. Birchett, 89 Miss. 700, 42 So. 569; Illinois C. R. Co. v. Seaman, 79 Miss. 106, 31 So. 546; Gulf, C. & S. F. R. Co. v.

Sneed, 84 Miss. 252, 36 So. 261; Yazoo & M. Valley R. Co. v. Aden, 77 Miss. 382, 27 So. 385.

Messrs. Baskin & Wilbourn, for appellee Railway:

Where an exhibit is a part of the bill, no characterization of it by the pleader can alter its essential nature, and when it is contradicted by an averment of the bill, the fact will be taken to be in conformity with the exhibit.

House v. Gumble, 78 Miss. 259, 29 So. 71; McNeill v. Lee, 79 Miss. 455, 30 So. 821.

The defendant railway company is not liable as the agent of defendant Crawford for a mere nonfeasance.

Feltus v. Swan, 62 Miss. 415; Story, Agency, 308, 309; Wharton, Agency, 535, 536; Delaney v. Rochereau, 34 La. Ann. 1123, 44 Am. Rep. 456; Drake v. Hagan, 108 Tenn. 265, 67 S. W. 470; Carey v. Rochereau, 16 Fed. 87; Kelly v. Chicago & A. R. Co. 122 Fed. 286; Steinhauser v. Spraul, 127 Mo. 552, 27 L.R.A. 441, 28 S. W. 623, 30 S. W. 102; Trowbridge v. Forepaugh, 14 Minn. 133, Gil. 100; Harriman v. Stowe, 57 Mo. 98; Bryce v. Southern R. Co. 125 Fed. 958.

The Meridian Light & Railway Company is not liable for the death of the deceased, for the reason that the going out of the lights on the occasion in question was not the proximate cause of the injury.

Howell v. Illinois C. R. Co. 75 Miss. 242, 36 L.R.A. 545, 21 So. 746, 2 Am. Neg. Rep. 580; Alabama & V. R. Co. v. Rooks, 78 Miss. 91, 28 So. 821; Vicksburg v. Holmes, 106 Miss. 234, 51 L.R.A. (N.S.) 469, 63 So. 454; Griffin v. Jackson Light & P. Co. 128 Mich. 653, 55 L.R.A. 318, 92 Am. St. Rep. 496, 87 N. W. 888; Central of Georgia R. Co. v. Price, 106 Ga. 176, 43 L.R.A. 402, 71 Am. St. Rep. 246, 32 S. E. 77; Stone v. Boston & A. R. Co. 171 Mass. 536, 41 L.R.A. 794, 51 N. E. 1, 4 Am. Neg. Rep. 490; Winfree v. Jones, — Va. 39, 1 L.R.A. (N.S.) 201, 51 S. E. 153; Coley v. Statesville, 121 N. C. 301, 28 S. E. 482; Murphy v. New York, 89 App. Div. 98, 85 N. Y. Supp. 445.

Messrs. Amis & Dunn, for appellee Crawford:

Where the technical imperfection of the plea is not called to the attention of the trial court, it ought not to be made the basis of a reversal of the judgment of the court.

Queen City Mfg. Co. v. Blalack, — Miss. —, 18 So. 800; Hayes v. Slidell

Liquor Co. 99 Miss. 583, 55 So. 356; Gully v. Dunlap, 24 Miss. 413; Schemerhorn v. Jenkins, 7 Johns. 373; Blood v. Harrington, 8 Pick. 552; Drago v. Moso, 28 S. C. L. (1 Speers) 212, 40 Am. Dec. 592; Young v. Young, 3 N. H. 345.

Holden, J., delivered the opinion of the court:

This suit was instituted by the appellants, Mrs. Mullican and her children, against the appellees, V. L. Crawford and the Meridian Light & Railway Company, for damages for the death of John W. Mullican, husband of the appellant and father of the children, caused by the negligence of the defendants. A demurrer to the declaration interposed by the Meridian Light & Railway Company was sustained by the court as to it, and a plea of discharge in bankruptcy by the appellee Crawford resulted in a judgment discharging him, from which judgments this appeal is prosecuted.

In order to have a clear view of the case presented and of the legal question involved, we consider it necessary to set out the declaration in full so that we may determine whether or not it states a cause of action under the law. It may be here stated, in substance, that the appellee Crawford operated a manufacturing plant at Meridian for the manufacture of cotton linters into absorbent cotton for the purpose of making guncotton and other high explosives. There were located in this plant several vats or boilers containing a boiling solution of chemicals. The deceased, Mullican, was employed to work in and around these vats, and was so employed when he fell into one of them, which caused his death. The declaration reads as follows:

"Plaintiffs charge that the said V. L. Crawford on the — day of —, 1915, established a manufacturing plant in the city of Meridian, Lauderdale county, Mississippi, for the manufacture of cotton linters into absorbent cotton, cotton batting, etc., and the process of manufacturing in said plant was to take the

cotton linters and cotton fiber and remove therefrom all fatty oils and acids, and to bleach it and put it through certain chemical processes and prepare it for making guncotton and other high explosives. In order to prepare this cotton for guncotton and other high explosives, the manufacturing plant of V. L. Crawford, aforesaid, was located in a large building in Meridian, on the north side of which is located a large lot of machinery which is operated and driven by electric power for carding and manipulating the cotton preparatory to bleaching, and on the south side of this building is what is called the 'kier room,' and in this 'kier room' on either side thereof are located a number of vats or boilers into which the cotton is immersed into chemical baths, which vats extend above the floor in the kier room some few feet, large vats or boilers holding many hundred gallons, which extend down into a cellar underneath the floor, and the tops are placed on these vats or boilers loosely by handhold, which are even and on a level with the floor with the kier room, and into these three vats or boilers steam and hot water are let by pipes which enter the bottom of these three vats or boilers, and in these three vats or boilers a boiling solution of chemicals is kept in which is nitric acid, sulphuric acid, lunar caustic, and other dangerous and poisonous chemicals, and in the process of manufacturing cotton it is placed in these vats or boilers. No railing is provided or other guard or protection around the tops of these vats, the tops of which are even with the floor as aforesaid, and these tops are the only means of preventing a person from falling into the same in the darkness or in the absence of light.

"The plaintiffs charge that the defendant V. L. Crawford, on the 3d day of March, 1916, and before and after that time, had a contract with his codefendant, the Meridian Light & Railway Company, who owned and operated an electric power plant in the city of Meridian, which con-

tract was made by the said V. L. Crawford with the said Meridian Light & Railway Company for and on behalf of himself and his employees, who were employed to work in said manufacturing plant, one of whom was the said John W. Mullican, deceased, and to furnish electric lights and power for his [V. L. Crawford's] manufacturing plant, and for the benefit of his employees therein as aforesaid, and to operate the machinery used in said plant, the said manufacturing plant operated by the said V. L. Crawford was operated and driven by the electric power furnished by the said defendant, said Meridian Light & Railway Company, and by the dangerous agency of steam.

"And plaintiffs charge that this kier room with these vats of boiling chemicals as aforesaid was an exceedingly dangerous place to work, and that the tops of these vats were, of course, frequently removed, and had to be in order to immerse the cotton in them, and on account of the poisonous steam coming from them and the danger of falling into them, particularly at nighttime, the kier room was a most dangerous place to work, as both the defendants then and there well knew, and that V. L. Crawford, as employer of J. W. Mullican, deceased, was bound by law to make this kier room a reasonably safe place to work by day and by night, and said Mullican was employed to work there at night, and in order to make this kier room a reasonably safe place to work, Crawford, instead of performing the duty himself of lighting the room, in order to prevent his employees from falling into said vats and being hurt in said kier room, employed the said Meridian Light & Railway Company to perform this duty for him, the duty, as aforesaid, which he owed John W. Mullican, and both the defendants well knew that it was of vast importance, in order to make this room a reasonably safe place to work, that these lights be kept burning constantly in the night.

"Plaintiffs charge that they file

herewith a copy of the contract so made by V. L. Crawford for and on behalf of his employees as aforesaid with the Meridian Light & Railway Company, and make the same a part of this declaration the same as if fully copied herein.

"Plaintiffs further charge that said Meridian Light & Railway Company had for a long time furnished the electric current which lights this kier room where John W. Mullican was required to work for Crawford among these dangerous vats of boiling chemicals, and the conduct of said Mullican there and his work there was based in good faith upon his expectations that said Light & Railway Company would continuously perform its duty under its contract aforesaid with his employer and master on his behalf made as aforesaid, and would not permit their lights to go out during working hours of the night and thus render this kier room an unsafe place to work.

"Plaintiffs further charge that on said 3d day of March, 1916, said John W. Mullican being employed by the said V. L. Crawford in said manufacturing plant aforesaid, and being at the time in the room known as the 'kier room' in the performance of his duty, that is, the room where the tops of these three vats or boilers came up with the level of the floor, and over which vats the tops were placed as aforesaid on a level with the floor, and in the nighttime the electric lights in said plant, by the carelessness and negligence of said Meridian Light & Railway Company, suddenly, on account of their defective machinery, and the carelessness or indifference of its agents and servants, were permitted to go out, and left this room in darkness, and it so happened that just about this time, by the carelessness and negligence of said V. L. Crawford and his servants, the fellow servant of said J. W. Mullican, one of the tops of these three vats was left off and the vat was left open, and this vat was then full of a boiling solution made up of nitric acid,

sulphuric acid, lunar caustic, and other dangerous and poisonous chemicals, and the said John W. Mullican in the discharge of his duty in said kier room went walking across the floor to secure a ladder to make a light in the darkness and fell into this open vat of boiling chemical compound, and there was cooked literally to death. He was soon rescued and pulled out and lingered for about one week, suffering in body and mind all the tortures, agonies, and pains of the lost, and the flesh fell away from his bones, and he died as a result of falling into said vat.

"Plaintiffs charge that the Meridian Light & Railway Company knew that this result was likely to follow, and had reason to anticipate such a result if they failed to comply with their contract, which was to keep lights continuously burning in said kier room during the night, and that they well knew that said lights were furnished for the use and benefit of these employees and to make said kier room a safe place for them to work, as it was employed to do for said Crawford, for him and in his place.

"Plaintiffs further charge that it was then and there the duty of said Crawford to furnish his employees and John W. Mullican a safe place to work, and to keep and maintain said place so furnished him to work in a reasonably safe condition, and he breached this duty and was guilty of gross carelessness and negligence, in that the said three vats were so defectively constructed, as his codefendant well knew, that no safeguard or railing was provided around the top thereof, even with the floor as they were, or other means to prevent people from falling into the same when the tops were off, and also by the carelessness and negligence of his agents and servants by then and there leaving the tops off of said vat into which Mullican fell.

"And plaintiffs further charge that it was then and there the duty of the Meridian Light & Railway Company, which it then and there

owed the said V. L. Crawford and his said employee, John W. Mullican, to keep and maintain lights in said kler room, and to keep them constantly burning, and it breached this duty and was guilty of gross carelessness and negligence in permitting its lights to suddenly go out then and there at the time Mullican fell into said vat, and that its lights went out because of the breaking down of its machinery, which was defective and worn out, and the lights were permitted to go out by the carelessness and gross negligence of its employees in failing to operate its plant so as to keep said lights continuously burning, as it had undertaken to do for the benefit of said Mullican.

"And so the plaintiffs charge that by the combined and joint negligence, which joint negligence was the proximate cause of Mullican's death, and by the joint negligence of said defendants as aforesaid, John W. Mullican was caused to fall into said vat and get burned to death as aforesaid, from which an action has survived to the plaintiffs, and they have been damaged, and also they have the right to demand damages for all pain and suffering endured by said J. W. Mullican as aforesaid, and all losses sustained by him.

"Wherefore they sue and demand judgment for actual and punitive damages in the sum of \$50,000 against the said defendants, together with all costs of this suit."

The written contract between the Meridian Light & Railway Company and Crawford, in which the light company agrees to furnish electrical energy for power purposes at the plant of Crawford, is filed with the declaration as an exhibit, and is pleaded as a part of it. We here set out the contract between the light company and Crawford, which is as follows:

Contract.

This contract and agreement made and entered into this the 1st day of February, 1915, by the Meridian Light & Railway Company herein-

after styled for convenience sake "party of the first part," and Mr. V. L. Crawford, hereinafter styled for convenience sake "party of the second part," both of the city of Meridian, Lauderdale county, state of Mississippi, witnesseth:

That the party of the first part hereby agrees to furnish to the party of the second part electrical energy for power purposes at the premises occupied by the party of the second part known as a "linter washing and drying factory" located on the Alabama Great Southern Railroad in the eastern part of the city of Meridian. Said electrical energy to be furnished for a period of three years from the date of signing of this contract at a rate of 2½ cents per kilowatt hour, the amount of bill to be determined by the readings of an electrical meter or meters which the party of the first part will install in the building or premises owned by the said party of the second part.

In consideration of this it is agreed that the party of the second part shall operate twenty-four hours per day two twenty-horse power motors, and three five-horse power motors during the entire period of this contract. It is further agreed that in the event the party of the second part ceases to operate twenty-four hours per day, that this contract becomes void, and that the party of the second part will be furnished by the party of the first part electrical energy at its regular published rates.

In consideration of the party of the second part paying its bills promptly on or before the tenth day of each month following that in which the service is rendered by the party of the first part, a discount of ½ cent per K. W. H. will be allowed to the party of the second part by the party of the first part.

It is further agreed by and between the two parties that the duly authorized agents of the party of the first part shall have free access to the motors and their connections which will be installed in the premises of the party of the second part at all hours and for any purpose.

It is further agreed and understood that the party of the second part shall assume all risks for damages caused by defective wiring.

It is also agreed that the party of the first part may have the privilege of removing its meters, and discontinuing furnishing service upon the failure of the party of the second part to pay said bills for electrical energy promptly when due.

It is also agreed by and between the two parties that the party of the first part shall not be held liable on account of interruptions to service due to boiler explosions, lightning, cyclones, or other causes beyond its control.

Signed in duplicate this the 1st day of February, 1915. Meridian Light & Railway Company, by [Signed] A. B. Patterson, General Manager. [Signed] V. L. Crawford.

The contract between Crawford and the light company having been

**Pleading—
effect of filing
contract with
complaint.**

filed as a part of the plaintiffs' declaration, the plaintiffs' rights must be determined by it with reference to whether or not the light company owed any duty to the deceased employee of Crawford.

The declaration is to be construed most strongly against the pleader, and the character of the contract set out as a part of the declaration cannot be altered by any allegations or conclusions of the declaration. Therefore, whether, there was such relationship between the deceased and the light company as imposed a duty of reasonable care by the light company toward him must be ascertained from the terms of the contract set out and relied upon by the pleading of the plaintiffs below. In other words, if there be a conflict between the terms of the written contract and the allegations and conclusions of the declaration, the true fact will be taken to be in conformity with the contract pleaded in the declaration.

It is clear to us that the contract obligated the light company to do

no more than to "furnish to the party of the second part electrical energy for power purposes at the premises occupied by the party of the second part, known as a 'linter washing and drying factory.'"

The contract imposed no duty upon the light company to furnish lights and keep them burning in the factory for the use and safety of the employees therein.

**Negligence—
contract to
furnish elec-
trical power—
duty to
employees.**

No such service was promised or contemplated under the contract, therefore it necessarily follows that, since there was no such duty on the part of the light company toward the deceased, there can be no liability against it for damages on account of the unfortunate death alleged to have been caused by the extinguishment of the lights in the plant.

The appellant contends that the light company was the agent of Crawford, and as such agent negligently failed to keep the plant lighted as a duty owed to Crawford and the deceased employee, Mullican. We have reviewed exhaustively the authorities on the question of the liability of agents for negligence in the performance of duties to principals and third persons, and with much interest we have observed the distinctions made between acts of nonfeasance and misfeasance, or acts of omission and commission. We find our own court in *Feltus v. Swan*, 62 Miss. 415, held that a mere agent is not liable for an omission of duty except to his principal. This rule appears to be well established in the textbooks and many decisions in other states. However, the more modern rule, which we think is based upon better reasoning, is that the relation of agency does not exempt a person from liability for an injury to a third person resulting from

**Principal and
agent—liability
of agent for
negligent injury
to stranger.**

his neglect of duty for which he would otherwise be liable. This liability is not based upon the con-

(— *Miss. —*, 83 So. 816.)

tractual relation existing between the principal and agent, but upon the common-law obligation that every person must so use that which he controls as not to injure another. But it must be borne in mind that this rule of liability always rests upon the question of the duty of the agent toward the injured party and

—absence of
duty to
stranger.

his negligent disregard of violation of that duty, and that

where no duty exists there can be no liability. It is the fact that the agent is guilty of a wrongful or negligent act amounting to a breach of duty which he owes to the injured person that makes him liable. It seems, therefore, that the modern rule tends to abolish the distinction between the agent's acts of commission and omission wherever such act involves a breach of duty. 21 R. C. L. 851; Story, Agency, § 309.

It is argued, in substance, by the appellants that the light company as agent of Crawford negligently failed to furnish lights continuously burning for the use and protection of the employees in the factory. This contention cannot be maintained, in our judgment, for the reason that there was no privity or

—failure to
furnish light—
liability to
employee.

other relation between the light company and the deceased which ob-

ligated the light company to furnish continuous lighting, or any lights whatever, in the factory.

Nor was there any common-law duty imposed upon the light company to furnish a safe and continuously lighted plant for the use and safety of the deceased. In truth, the light company here was not an agent of Crawford to furnish lights in the factory. It had no control or supervision over the lighting of the plant, but was a mere contractor to furnish electrical energy for power purposes at a stipulated price per kilowatt hour. Therefore, in view of the facts alleged in the declaration, there is no liability on the part of the light company for the unfortunate death of Mr. Mullican; conse-

quently the judgment of the lower court as to the light company is affirmed.

As to the appellee Crawford, we think the lower court erred in rendering a judgment in his favor on the plea in bar setting up his discharge in bankruptcy. The motion, which was sustained by the court, for final judgment on this plea, should

Trial—motion
for judgment—
order for stay of
proceedings.

not have been granted until the order of a stay of proceedings in the case had been set aside, and, even then, judgment on the plea should not have been allowed, since the plea con-

Pleading—plea
in bar—con-
clusion of the
country.

cluded "to the country." It is true that this was merely a mistake in the form of the pleading, and the plea could have been amended to one of verification, which would have called for a replication, yet this was not done, and since the plea put at issue the fact pleaded by concluding "to the country," we are not willing to say that, while the pleadings were in this shape through no fault of appellants, and without waiver, the motion for a final judgment on the plea was proper. It appears that the plea was insufficient in law and form, and could have been stricken or answered either by demurrer or replication, but its conclusion "to the country" should have been under the circumstances considered as a joinder of issue, if valid at all for any purpose.

The judgment of the lower court as to the appellee Crawford is reversed, and the cause remanded; affirmed as to the appellee light company.

Ethridge, J., dissenting:

I am compelled to dissent from that part of the opinion in this case which holds that the declaration did not state a cause of action against the Meridian Light & Railway Company. The cause having been decided on bill and answer, all the allegations of the bill are to be taken as true, and if they are true I think liability exists. A critical

reading of the declaration set out in the majority opinion shows that the Meridian Light & Power Company had a contract with V. L. Crawford, which contract was made on behalf of himself and his employees who were employed to work in his manufacturing plant, among whom was the deceased, and that said Meridian Light & Railway Company was to furnish electric light and power for Crawford's manufacturing plant and for the benefit of his employees therein. It is further alleged that the kier room was an exceedingly dangerous place to work; that it contained boiling vats, the tops of which had to be frequently removed for the purpose of immersing the cotton, and that both of the defendants, Crawford and the Meridian Light & Railway Company, knew of the dangerous condition; that in order to make the said room safe for his employees it was his duty to have the premises properly lighted, and that, instead of performing the duty himself and preventing his employees from falling into the vats and being hurt in the room, Crawford employed the Meridian Light & Railway Company to light it for him; and that both defendants knew the importance of keeping these lights constantly burning at night. It further alleged that the Meridian Light & Railway Company had for a long time furnished electric current which lighted this kier where the deceased was required to work, and that Mullican acted in good faith upon the expectation that the light company would continuously perform its duty in the premises, and that Mullican was at work in the performance of his duty when the lights went out through the negligence of the Meridian Light & Railway Company on account of their defective machinery and the carelessness and indifference of its agents and servants, leaving the room in darkness. It further charged that the Meridian Light & Railway Company knew that the injuries of the kind complained of were likely to follow, and that it had

reason to anticipate such a result as deceased's injury if it failed to comply with its contract and keep the lights continuously burning during the night, and that both of said defendants knew that the said lights were furnished for the use and benefit of the employees of Crawford and to make the kier room a safe place to work. It was further charged that it was the duty of the Meridian Light & Railway Company to keep and maintain the lights in the said kier room, and to keep them constantly burning, and that it breached this duty and was guilty of gross carelessness and negligence in permitting its lights to go suddenly out, and that the lights went out because of the breaking down of the machinery of the Meridian Light & Railway Company, which was defective and worn out, and the lights were permitted to go out by the carelessness and gross negligence of its employees in failing to operate its plant so as to keep said lights continuously burning as it had undertaken to do for the benefit of Mullican. An analysis of the contract made exhibit to the declaration shows that the manufacturing plant of Crawford was required to operate twenty-four hours per day two twenty-horse power motors, and three five-horse power motors during the entire period of the contract. Under the contract the Meridian Light & Railway Company was to furnish Crawford with electric energy for power purposes at the premises occupied by the lint washing and drying factory in the city of Meridian for a period of three years, at a reduced price per kilowatt. The contract further recites: "It is further agreed by and between the two parties that the duly authorized agents of the party of the first part [Meridian Light & Railway Co.] shall have free access to the motors and their connections which will be installed in the premises of the party of the second part *at all hours and for any purpose.*" (Italics mine.)

In my opinion this contract in

no wise contradicts the allegations of the declaration. It is well known that in cities the lights are generally furnished by electric light companies to business institutions and residences for hire, and it is well known that the same current that furnishes power is used for lighting and heating purposes. The same socket the light bulb is inserted in may be used to supply motion or heat. Electrical energy is adapted equally to all purposes above named, and may be transformed from one purpose to another by the simple expedient of changing the appliance from light to heat or motion, or vice versa.

The declaration alleges specifically that the Meridian Light & Railway Company was engaged in lighting the plant, and had been for a long time. This allegation is not contradicted by the contract at all.

I think this case falls within the principle announced by Chief Justice Gray in *Osborne v. Morgan*, 130 Mass. 102, 39 Am. Rep. 437. In this case Judge Gray, who afterward was a member of the Supreme Court of the United States, states: "If an agent never does anything towards carrying out his contract with his principal, but wholly omits and neglects to do so, the principal is the only person who can maintain any action against him for the nonfeasance. But if the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts; and he cannot, by abandoning its execution midway and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards."

This principle is announced in this decision quoted from in *Mechem on Agency*, 2d ed. §§ 1465-1472, and

this distinction is discussed and the distinction between nonfeasance and misfeasance clarified in 2 C. J. 824-826, and *Lough v. John Davis & Co.* 94 Am. St. Rep. 848, and note (30 Wash. 204-208, 59 L.R.A. 802, 70 Pac. 491, 17 Am. Neg. Rep. 146); *Mayer v. Thompson-Hutchison Bldg. Co.* 28 L.R.A. 433, and note (104 Ala. 611, 53 Am. St. Rep. 88, 16 So. 620); also *Campbell v. Portland Sugar Co.* 62 Me. 552, 16 Am. Rep. 503; *Baird v. Shipman*, 132 Ill. 16, 7 L.R.A. 128, 22 Am. St. Rep. 504, 23 N. E. 384; *Cameron v. Mount*, 86 Wis. 477, 22 L.R.A. 512, 56 N. W. 1094; *Ward v. Pullman Co.* 25 L.R.A.(N.S.) 343, and note (131 Ky. 142, 114 S. W. 754). See also *Ellis v. McNaughton*, 76 Mich. 237, 15 Am. St. Rep. 308, 42 N. W. 1113; *Consolidated Gas Co. v. Connor*, 114 Md. 140, 32 L.R.A.(N.S.) 809, 78 Atl. 725.

If the contract had never been entered upon by the Meridian Light & Railway Company, no one other than Crawford would have a right of action for the failure to perform the contract, but when the Meridian Light & Railway Company entered upon the performance of its contract it became responsible for injuries resulting from its wrong and negligence in the performance of the contract. The declaration shows that this place was highly dangerous, and that the manufacturer was manufacturing ingredients of high explosives, and that common prudence required the place to be kept lighted. It was the duty of the Meridian Light & Railway Company to furnish suitable machinery and appliances for the discharge of its contract; and, if it was using worn-out machinery, which was liable at any time to break down and leave this dangerous place unlighted, it was negligence for which it was liable.

Cook, J., joins in this dissent.

Suggestion of error overruled.

ANNOTATION.

Liability of electric light or power company for injuries to employee of patron.

The decision in the reported case (*MULLICAN V. MERIDIAN LIGHT & R. Co.* ante, 165) seems to be one of first impression on the question of the liability of an electric company for injuries to an employee of one to whom it furnishes current for light or power purposes, resulting from its breach of duty in wrongfully failing to furnish current according to its contract. In this case the contract merely obligated the light and power company to furnish "electrical energy for power purposes" at the employer's manufacturing plant; and the plaintiff's intestate died as the result of falling into a vat of boiling acid when, as it was alleged, the lights were extinguished by a wrongful break in the supply of electric current. The conclusion in the majority opinion is based squarely upon the point that the defendant power company under its contract was under no duty to furnish lights and keep them burning for the safety of its customer's employees because no such service was either promised or contemplated. The conclusion was reached in the face of the contention that since the master owed a duty to his servants, including the deceased, to furnish a safe place to work, and that since lights were essential to such safety, and the master had contracted with the defendant power company for the current therefor, the master had delegated such duty to the power company, and the latter became the agent of the master and was liable for the breach of such duty by permitting the break in the supply of current which extinguished the lights. It is interesting in this connection to note the position of the dissenter, and especially his quotation from *Osborne v. Morgan* (1881) 130 Mass. 102, 39 Am. Rep. 437, which draws a distinction between the failure of the agent to enter upon the performance of the contract, and his failure after entering upon its per-

formance, to exercise due care to prevent injury to third persons.

In a number of cases in which it was not necessary, as it was in the reported case (*MULLICAN V. MERIDIAN LIGHT & R. Co.*), to predicate the claim of negligence upon a breach of duty created by the contract between the employer and the electric company, but there was a duty arising at common law or under statute and owing directly to all persons rightly upon the premises, e. g., the duty to keep wires properly insulated, the courts have passed upon the degree of care required of one furnishing electricity toward an employee of a patron. Thus, it has been held that "ordinary" (*Ennis v. Gray* (1895) 87 Hun, 355, 34 N. Y. Supp. 379; *Denson v. Georgia R. & Electric Co.* (1910) 135 Ga. 132, 68 S. E. 1113), "reasonable" (*Anderson v. Jersey City Electric Light Co.* (1899) 63 N. J. L. 387, 43 Atl. 654, 6 Am. Neg. Rep. 314; *Brooks v. Consolidated Gas Co.* (1904) 70 N. J. L. 211, 57 Atl. 396, 16 Am. Neg. Rep. 127; *Fish v. Waverly Electric Light & P. Co.* (1907) 189 N. Y. 336, 13 L.R.A.(N.S.) 226, 82 N. E. 150), and "proper" (*Adams v. United Light, Heat & P. Co.* (1918) 69 Pa. Super. Ct. 478) care is required to protect the employees of a patron; and that not only a very "high" degree of care is necessary (*Bourke v. Butte Electric & Power Co.* (1905) 33 Mont. 267, 83 Pac. 470), but also that the "highest" (*Schweitzer v. Citizens General Electric Co.* (1899) 21 Ky. L. Rep. 608, 52 S. W. 830; *Shaw v. North Carolina Pub. Serv. Corp.* (1915) 168 N. C. 611, 84 S. E. 1010; *Smith v. Lexington* (1918) 176 N. C. 466, 97 S. E. 378; *Rice v. Wheeling Electrical Co.* (1907) 62 W. Va. 685, 59 S. E. 626) as well as the "utmost" degree of care (*Giraudi v. Electric Improv. Co.* (1895) 107 Cal. 120, 28 L.R.A. 596, 48 Am. St. Rep. 114, 40 Pac. 108; *McLaughlin v. Louisville Electric Light Co.* (1896)

100 Ky. 173, 34 L.R.A. 812, 37 S. W. 851; *Mangan v. Louisville Electric Light Co.* (*Phelan v. Louisville Electric Light Co.*) (1906) 122 Ky. 476, 6 L.R.A.(N.S.) 459, 91 S. W. 703, holding that by "utmost care and skill" as here used is meant "the highest degree of care and skill known which may be used under the same or similar circumstances (*Clayton v. Enterprise Electric Co.* (1916) 82 Or. 149, 161 Pac. 411) must be exercised to protect the customer's employees. It has also been said that electricity is a dangerous agent, and the degree of care devolving upon a purveyor thereof toward a servant of a consumer is in proportion to the dangers which it is its duty to avoid. *Economy Light & P. Co. v. Stephen* (1900) 87 Ill. App. 220, affirmed in (1900) 187 Ill. 137, 58 N. E. 359. And see *Anderson v. Jersey City Electric Light Co.* (1899) 63 N. J. L. 387, 43 Atl. 654, 6 Am. Neg. Rep. 314, wherein the court said that "the elemental rule is that whoever uses a highly destructive agency is held to a corresponding high degree of care," and that "care, in this sense, means more than mere mechanical skill; it includes circumspection and foresight with regard to reasonably probable contingencies." And see also *Clayton v. Enterprise Electric Co.* (Or.) *supra*. In *Shaw v. North Carolina Pub. Serv. Corp.* (1915) 168 N. C. 611, 84 S. E. 1010, *supra*, the court discussed the degree of care required as follows: "Those who use and control so dangerous and subtle an agency as electricity in their commercial pursuits must not be permitted to theorize in regard to its probable effects or speculate upon chances as to results, when the danger to human life is so great and may be so disastrous. It is not too much to require of them the highest practicable degree of care and vigilance in the management of their appliances which carry and conduct this deadly current, for no ordinarily prudent man would bestow less in such circumstances. If it raises expenses to be more watchful and cautious than in ordinary cases where there is no such dangerous agency

employed, and thereby profits are reduced, it is far better that it be so than that the toll of human life be alarmingly increased. While the dealer in electricity may not be an insurer of safety in its use by customers and other persons coming in contact with it, the care exacted by the law is raised to the highest degree in order to be commensurate with the great danger involved and to safeguard the public. All authorities agree that there must be frequent, if not constant, inspection and unremitting vigilance."

In *Fish v. Waverly Electric Light & P. Co.* (1907) 189 N. Y. 336, 13 L.R.A.(N.S.) 226, 82 N. E. 150, where an electric light company placed arc lights in a store under a contract with the tenant, reserving the absolute property in, and the exclusive care, management, and control of, the same, it was held that the company owed to an employee of its patron the duty of using reasonable care as to the manner of attaching such lights to the ceiling, so that it was liable for personal injuries to such an employee from a fall of a light in consequence of a failure to exercise that degree of care.

And where a company supplying electric current to a customer does owe a duty to him, as, for instance, to exercise a proper degree of care to prevent a dangerous current of electricity from entering the building supplied, it has been held that this duty extends to the patron's servants rightfully upon the premises, and that a failure to exercise the necessary care renders the company directly liable to a servant injured as a result of such failure, as for negligence. *Union Light, Heat & P. Co. v. Arntson* (1907) 87 C. C. A. 81, 157 Fed. 540 (defective transformer); *Denson v. Georgia R. & Electric Co.* (1910) 135 Ga. 132, 68 S. E. 1113 (question whether or not proper appliances to reduce the current were used); *Augusta R. & Electric Co. v. Beagles* (1913) 12 Ga. App. 849, 78 S. E. 949 (defective wiring or transformer); *Economy Light & P. Co. v. Stephen* (1900) 87 Ill. App. 220, af-

firmed in (1900) 187 Ill. 137, 58 N. E. 359 (defective transformer); Princeton Light & P. Co. v. Ballard (1915) 59 Ind. App. 345, 109 N. E. 405 (improperly insulated wires under the control of the company furnishing the electric current); McLaughlin v. Louisville Electric Light Co. (1896) 100 Ky. 173, 34 L.R.A. 812, 37 S. W. 851 (improperly insulated wires); Schweitzer v. Citizens General Electric Co. (1899) 21 Ky. L. Rep. 608, 52 S. W. 830 (same as preceding case); Baries v. Louisville Electric Light Co. (1904) 118 Ky. 830, 80 S. W. 814, 85 S. W. 1186 (same as preceding case); Mangan v. Louisville Electric Light Co. (Phelan v. Louisville Electric Light Co.) (1906) 122 Ky. 476, 6 L.R.A.(N.S.) 459, 91 S. W. 703 (defective transformer); Cosgrove v. Kennebec Light & Heat Co. (1904) 98 Me. 473, 57 Atl. 841 (burning out of transformer if due to negligence or want of care upon part of company); Vessels v. Kansas City Light & P. Co. (1920) — Mo. —, 219 S. W. 80 (primary wire charged with dangerous current negligently allowed to sag and come in contact with secondary wire, which supplied light to laundry where plaintiff worked); Anderson v. Jersey City Electric Light Co. (1899) 63 N. J. L. 387, 43 Atl. 654, 6 Am. Neg. Rep. 314 (defectively insulated wires carrying dangerous current); Brooks v. Consolidated Gas Co. (1904) 70 N. J. L. 211, 57 Atl. 396, 16 Am. Neg. Rep. 127 (improperly protected wires); Ennis v. Gray (1895) 87 Hun, 355, 34 N. Y. Supp. 379 (improperly placed and defectively insulated primary wires of a converter); Houston v. Durham Traction Co. (1911) 155 N. C. 4, 71 S. E. 21 (cause for dangerous current on secondary wire not shown, but attributed to defendant's negligence); Shaw v. North Carolina Pub. Serv. Corp. (1915) 168 N. C. 611, 84 S. E. 1010 (defective transformer); Wheeler v. Northern Ohio Traction Co. (1905) 27 Ohio C. C. 517 (defective transformer or wiring); Clayton v. Enterprise Electric Co. (1916) 82 Or. 149, 161 Pac. 411 (defectively insulated switch or lack of transform-

er); Adams v. United Light, Heat & P. Co. (1918) 69 Pa. Super. Ct. 478 (defective transformer); Bice v. Wheeling Electrical Co. (1907) 62 W. Va. 685, 59 S. E. 628 (defective condition of transformer). And the same has been held where the duty was to so raise dangerous wires above the roof of the building supplied, that servants having occasion to go there would not come in contact with them. Giraudi v. Electric Improv. Co. (1895) 107 Cal. 120, 28 L.R.A. 596, 48 Am. St. Rep. 114, 40 Pac. 108. And this duty is a continuing one, constant oversight and repair being required. Houston v. Durham Traction Co. (1911) 155 N. C. 4, 71 S. E. 21; Smith v. Lexington (1918) 176 N. C. 466, 97 S. E. 378.

But the rule announced in the next preceding paragraph has been held to apply only in case the defective wiring or appliances were under the control of the company furnishing the power. Thus, in Princeton Light & P. Co. v. Ballard (1915) 59 Ind. App. 345, 109 N. E. 405, it was held that the company was not liable where the defect was in the customer's wires, over which it had no supervision or control. And to the same effect, see Shaw v. North Carolina Pub. Serv. Corp. (1915) 168 N. C. 611, 84 S. E. 1010; Smith v. Lexington (1918) 176 N. C. 466, 97 S. E. 378; and Adams v. United Light, Heat & P. Co. (1918) 69 Pa. Super. Ct. 478.

And, of course, the decisions, in order to favor an injured servant of a patron, must be based upon negligence or the failure to exercise the required degree of care upon the part of the defendant company. See, for example, Cosgrove v. Kennebec Light & Heat Co. (1904) 98 Me. 473, 57 Atl. 841; Vessels v. Kansas City Light & P. Co. (1920) — Mo. —, 219 S. W. 80; Fish v. Waverly Electric Light & P. Co. (1907) 189 N. Y. 336, 13 L.R.A.(N.S.) 226, 82 N. E. 150; Ennis v. Gray (1895) 87 Hun, 355, 34 N. Y. Supp. 379; McMullan v. Edison Electric Illuminating Co. (1895) 13 Misc. 392, 34 N. Y. Supp. 248; and Smith v. East End Electric Light Co. (1901) 198 Pa. 19, 47 Atl. 1123. In McMullan

v. Edison Electric Illuminating Co. (1895) 13 Misc. 392, 34 N. Y. Supp. 243, supra, where the defendant light company had disconnected the service wires in a house so that the owner might make repairs, and it appeared that such wires entered the cellar 8 feet above the floor, and that the current did not exceed 230 volts, it was held, even assuming that the defendant did not tape the ends of the service wires, that it was not liable to one engaged in making repairs for the owner, who was injured as a result of either intentionally or accidentally

shortcircuiting the exposed ends of the wires. The court maintained not only that there was no privity of contract between the defendant and the injured servant, but also that there the company was under no duty to him, since it could not under the circumstances reasonably anticipate that anybody would go to the cellar, climb up so as to reach the wires, and after seeing take hold of at least two of them at the same time in such a manner as to make an injurious short circuit. G. J. C.

BANK OF CALIFORNIA, Respt.,
v.
HENRY W. STARRETT, Appt.

Washington Supreme Court (Dept. No. 2) — March 17, 1920.

(— Wash. —, 188 Pac. 410.)

Bills and notes — failure to apply deposit account upon note — effect on accommodation maker.

1. Failure of a bank holding a demand note signed by an accommodation maker to apply the deposit account of the maker primarily liable, upon the note, does not release the accommodation maker.

[See note on this question beginning on page 181.]

— place of signature — effect on character of signer.

2. Placing one's name upon the left side of the bottom of a note, instead of the right, does not render him an indorser rather than a maker, under a statutory provision that where a signature is so placed upon an instrument that it is not clear in what capacity the one making the same in-

tended to sign, he is to be deemed an indorser.

[See 3 R. C. L. 922.]

— breach of promise to collect from maker primarily liable — effect.

3. An accommodation maker of a promissory note cannot prove, in defense of his liability thereon, a breach by the holder of his agreement to collect the note from the one for whose accommodation he signed the note.

APPEAL by defendant from a judgment of the Superior Court for King County (Edwards, J., pro tem.) in favor of plaintiff in an action brought to recover the amount alleged to be due on a promissory note. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Poe & Falknor, for appellant:

Defendant signed the note in question as indorser.

Culbertson v. Wilcox, 11 Wash. 522, 39 Pac. 954; Bank of British Columbia v. Jeffs, 15 Wash. 230, 46 Pac. 247; Baldwin v. Daly, 41 Wash. 416, 83 Pac. 9 A.L.R.—12.

724; Colona v. Parksley Nat. Bank, 120 Va. 812, 92 S. E. 979; Howard v. Kincaid, 54 Okla. 271, 156 Pac. 628; Germania Nat. Bank v. Mariner, 129 Wis. 544, 109 N. W. 574; Krinner v. Lincoln, 54 Ill. App. 675, 66 Ill. App. 533; Steininger v. Hoch, 39 Pa. 263, 80 Am. Dec. 521; Aultman & T. Co. v. Gunder-

son, 6 S. D. 226, 55 Am. St. Rep. 837, 60 N. W. 859.

Failure of a bank to apply a depositor's funds to the payment of a note operates to discharge an indorser.

Morse, Banks & Bkg. 5th ed. § 562; 5 Cyc. 554; 32 Cyc. 171; Bank of Taylorsville v. Hardesty, 28 Ky. L. Rep. 1285, 91 S. W. 729; Brown v. First Nat. Bank, 56 L.R.A. 870, 50 C. C. A. 602, 112 Fed. 901; Southern Nat. Life Realty Corp. v. People's Bank, 178 Ky. 80, 198 S. W. 543; Eppinger v. Kendrick, 114 Cal. 620, 46 Pac. 614; Winfield Bank & T. Co. v. Roberts, — Ala. —, 76 So. 79; Commercial Nat. Bank v. Henninger, 105 Pa. 496; First Nat. Bank v. Peltz, 176 Pa. 513, 36 L.R.A. 832, 53 Am. St. Rep. 686, 35 Atl. 218; Mechanics & T. Bank v. Seitz Bros. 150 Pa. 632, 30 Am. St. Rep. 853, 24 Atl. 356; Central Bank v. Thein, 76 Hun, 571, 28 N. Y. Supp. 232; Eades v. Muhlenberg County Sav. Bank, 157 Ky. 416, 163 S. W. 494; Lowe v. Reddan, 123 Wis. 90, 100 N. W. 1038, 3 Ann. Cas. 431; Dawson v. Real Estate Bank, 5 Ark. 283; McDowell v. Bank of Wilmington & Brandywine, 1 Harr. (Del.) 369; Faulkner v. Cumberland Valley Bank, 14 Ky. L. Rep. 923; Pursifull v. Pineville Bkg. Co. 97 Ky. 154, 53 Am. St. Rep. 409, 30 S. W. 203; Tatum v. Commercial Bank & T. Co. 193 Ala. 120, L.R.A.1916C, 767, 69 So. 508; German Nat. Bank v. Foreman, 138 Pa. 474, 21 Am. St. Rep. 908, 21 Atl. 20; Commercial Nat. Bank v. Henninger, 105 Pa. 496.

Where, as here, actual payment has been made in accordance with the contract, the parol-evidence rule has absolutely no application.

Continental Gin Co. v. Stocker, 235 Fed. 1006; 3 Jones, Ev. § 495; Farley v. Letterman, 87 Wash. 644, 152 Pac. 515; Ober & Sons Co. v. Drane, 106 Ga. 406, 32 S. E. 371; Saffer v. Lambert, 111 Ill. App. 410; Roe v. Bank of Versailles, 167 Mo. 406, 67 S. W. 303; New York L. Ins. Co. v. Smucker, 106 Mo. App. 304, 80 S. W. 278.

Messrs. Kerr & McCord, for respondent:

Defendant signed the note as principal, and was primarily liable.

Wingate v. Blalock, 15 Wash. 44, 45 Pac. 663; Hibernia Bank & T. Co. v. Dresser, 132 La. 532, 61 So. 561; Derry Bank v. Baldwin, 41 N. H. 434; Stephenson v. Joplin State Bank, 160 Mo. App. 47, 141 S. W. 691; Bradley

Engineering & Mfg. Co. v. Heyburn, 56 Wash. 628, 134 Am. St. Rep. 1127, 106 Pac. 170; Handsaker v. Pedersen, 71 Wash. 218, 128 Pac. 230; Tacoma Mill Co. v. Sherwood, 11 Wash. 492, 39 Pac. 977; Skagit State Bank v. Moody, 86 Wash. 286, L.R.A.1916A, 1215, 150 Pac. 425.

If a bank holds a demand note payable at its offices, the note is not discharged by a deposit to his general account of sufficient funds by one of the makers.

Marengo Sav. Bank v. Kent, 135 Iowa, 386, 112 N. W. 767; Richards v. Jefferson, 20 Wash. 166, 54 Pac. 1123; Voss v. German-American Bank, 83 Ill. 599, 25 Am. Rep. 415; First Nat. Bank v. Peltz, 176 Pa. 513, 36 L.R.A. 832, 53 Am. St. Rep. 686, 35 Atl. 218; Patterson v. State Bank, 55 Ind. App. 331, 102 N. E. 880; Bank of Alexandria v. Turney, — Tenn. —, 52 S. W. 762; Camp v. First Nat. Bank, 44 Fla. 497, 103 Am. St. Rep. 173, 33 So. 241; Dawson v. Real Estate Bank, 5 Ark. 283.

The bank is not obliged to charge the depositor's account if the deposits are made subsequent to the maturity of the note.

Shuman v. Citizens' State Bank, 27 N. D. 599, L.R.A.1915A, 728, 147 N. W. 388; Third Nat. Bank v. Harrison, 3 McCrary, 316, 10 Fed. 243; 23 Cyc. 1210; Thomas v. Matthiessen, 232 U. S. 221, 58 L. ed. 577, 34 Sup. Ct. Rep. 312.

Fullerton, J., delivered the opinion of the court:

This is an action upon a promissory note, of which the following is a copy:

\$4,000.

Seattle, Washington,
Mar. 15, 1917.

On demand after date, we jointly and severally as principals promise to pay to the order of the Bank of California, National Association, four thousand dollars, for value received, with interest from date at the rate of 6 per cent per annum payable monthly until paid. Principal and interest payable in United States gold coin, at the Bank of California, National Association, in this city.

In case default is made in the payment of this note, and the same is placed in the hands of an attorney for collection, we jointly and severally agree to pay 5 per cent of the

amount then due as attorneys' fees, if paid without suit; but if suit be commenced to collect this note, or any part thereof, we jointly and severally agree to pay 10 per cent upon the amount due at the time suit is brought, and in case such suit is prosecuted to judgment, said attorneys' fees, equal to 10 per cent of the amount then due, shall be included in said judgment, and such judgment shall bear interest at the rate of 10 per cent per annum.

All parties to this note, including guarantors, sureties, and indorsers, hereby severally waive presentment, protest, notice of nonpayment, and any release or discharge arising from any extension of time of payment or other cause.

[Seal] Teller Packing Company,
Henry Teller. By Henry Teller, Pres.
H. W. Starrett. W. T. Hall.

Of the parties to the note, Hall and Starrett alone were served with process. Hall defaulted. Starrett answered, putting in issue by denials the traversable allegations of the complaint, and pleading affirmatively the following:

"Further answering said complaint, and as a first affirmative defense thereto, this defendant alleges:

"That at the time of the execution of the said note, described in paragraph 3 of said complaint, this defendant signed the same as an indorser, without consideration, upon the understanding that the plaintiff would collect the amount thereof, with interest, from the defendant Teller Packing Company, a corporation, as and when said corporation, which was then engaged in the salmon-packing business, should receive money from the sale of its pack.

"VI. That the said note is a demand note, and at diverse and different times since the making thereof, the said Teller Packing Company has had on general deposit in an open account with the said plaintiff, from the sale of its pack, large

sums in excess of the amount then or at any time due upon the said note, and that this defendant on several occasions notified the plaintiff that the said deposit was on hand, and requested it to make demand upon the said Teller Packing Company, which was primarily liable thereupon, for payment of the said note, and to apply so much of said deposit as was necessary to the payment thereof.

"VII. That this defendant further informed the said plaintiff that said Teller Packing Company was in a precarious financial condition, and that defendant might be injured, but that, notwithstanding the defendant's request, the said plaintiff refused and neglected to make application of said deposit towards the payment of said note or any part thereof, or to do anything proper to protect this defendant in the premises."

"IX. That since the said request was made by this defendant, the said Teller Packing Company has been adjudged bankrupt."

The plaintiff denied generally the affirmative allegations of the answer. On the issues as thus formed a trial was entered upon before the court, sitting without a jury, in the course of which the plaintiff put in proof tending to substantiate the allegations of its complaint. The defendant Starrett thereupon offered evidence tending to substantiate the averments in his answer. To this evidence an objection was interposed, which the court sustained, holding in effect that the defendant had signed the note as maker, and could not interpose such a defense, as it was applicable only to a party secondarily liable. Judgment was entered accordingly, from which Starrett appeals.

The first question presented by the record is: In what capacity did the appellant sign the instrument? That is to say, is he a maker or an indorser? It is the appellant's contention that he signed as an in-

dorser. This is founded upon § 17, subd. 6, of the Negotiable Instruments Act (Rem. Code, § 3408), which provides that, where a signature is so placed upon an instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser. The only thing unusual in the placing of the signature upon this instrument is that it was placed on the left side of the bottom of the body of the instrument, instead of upon

**Bills and notes—
place of signature—effect on
character of
signer.**

on the right, the more usual place for the signatures of makers. But there can be no hard-and-fast rules in such cases. The exigency of modern business conditions requires that houses using commercial paper keep on hand blank forms of such paper as they most commonly use. These forms must be more or less general, if they are to serve their purposes, and the result of this practice is that such paper is often found containing matter which is surplusage when applied to the particular transaction. Such forms must also be limited as to size, and only a limited number of spaces can be provided for signatures. When the instrument is a note, and there are more makers than there are spaces for signatures, it is not an uncommon practice for some of them to sign in the blank space to the left of the place prepared for signatures. The original note, which is in evidence, bears evidence that such was the case here. The names of the corporation maker, together with the name and title of the authenticating officer, with that of another maker, took up all of the available space provided for the signatures, and the appellant, with the other person charged as maker, if they signed upon the note at all, had to sign elsewhere than in the more usual place.

The appellant argues that the place upon which he placed his name on the note is the place usually re-

served for witnesses to the signatures of the persons bound by the instrument, and that for this reason it is not clear as to the capacity in which he signed. In a case where the law required the instrument to be authenticated by witnesses, undoubtedly this argument would have force whether the capacity in which they actually signed was indicated or not; but we think it has little weight where the instrument is a promissory note. The law of this state has never required the signatures of a promissory note to be authenticated by witnesses, and we are not aware that such was ever the rule of the law merchant. There can therefore be no presumption that persons so placing their names signed as witnesses, and hence nothing upon which the rule of the statute can seize to charge them as indorsers.

We have been cited to no case, and our own researches have discovered none, where the precise question has been presented. In the case of *Germania Nat. Bank v. Mariner*, 129 Wis. 544, 109 N. W. 574, it was discussed somewhat; but the real question there presented and determined was whether the defendant was bound upon the note at all; not whether he should be bound as a maker or as an indorser. Our own case of *Handsaker v. Pedersen*, 71 Wash. 218, 128 Pac. 230, also touches the question. In that case certain parties to the note claimed they were not makers, but only indorsers, and the fact that they signed the note in the lower left-hand corner was relied upon as a circumstance indicating their purpose. We there said that this circumstance, "if worthy of consideration at all," was overcome by certain parol evidence introduced at the trial. This case, it is true, is not conclusive of the question; but it is clear that, in so far as it has bearing, it sustains the conclusion we here reach; namely, that a person so placing his signature upon a note signs

(— Wash. —, 188 Pac. 410.)

as a maker rather than as an indorser.

Since the appellant signed the note as maker, and not as an indorser, can he show in defense of an action against him upon the note the matter alleged in his affirmative answer? By the terms of the Negotiable Instruments Act an accommodation party to a note is primarily liable thereon. His engagement is to pay the note according to its tenor, and is so holden to the payee, even if, at the time of taking it, the payee knew he was but an accommodation party. Rem. Code, §§ 3420, 3551, 3582. While the rule is not uniform, even in those states which have adopted the Negotiable Instruments Act, it is generally held that a contemporaneous parol agreement limiting the liability of such a maker, or fixing a collateral source of payment, is not available as a defense. Such was our holding in *Van Tassel v. McGrail*, 93 Wash. 380, 160 Pac. 1053, where a number of our cases to the same effect will be found collected. See also *Bradley Engineering & Mfg. Co. v. Heyburn*, 56 Wash. 628, 134 Am. St. Rep. 1127,

106 Pac. 170. To permit the agreement pleaded to be shown would therefore be a violation of the parol-evidence rule as we have heretofore announced it.

—breach of promise to collect from maker primarily liable —effect

The appellant argues further that where a banker holding a promissory note due on demand receives on deposit from a maker of the note funds sufficient to satisfy it, it is obligated to apply the funds in satisfaction of the note. There are cases which maintain this principle as to one secondarily liable on the note; but it is not the rule as to a maker of the note, or as to one otherwise primarily liable thereon. A bank is entitled undoubtedly to set off against a deposit account the amount of a due note held by it against the depositor; but it is not obligated so to do under the penalty of having the note considered as paid.

—failure to apply deposit account upon note—effect on accommodation maker.

The judgment is affirmed.

Holcomb, Ch. J., and Mount, Mackintosh, and Bridges, JJ., concur.

ANNOTATION.

Duty of bank to one primarily liable to apply his deposit to an indebtedness owing from him to the bank.

It is a well-established rule that a bank may apply to the payment of a matured claim held by it against a depositor, so much of the maker's deposit as may be necessary for that purpose, provided there is no contrary agreement and the deposit is not specifically applicable to some other particular purpose. 3 R. C. L. § 217. This is a privilege which the bank has; no case has gone so far as to hold it to be a duty owing by the bank to one primarily liable on the note to so apply the deposit. On the contrary, it has been expressly held that the bank is under no duty to the primary debtor to make the application. *BANK OF CALIFORNIA v. STARRETT*

(reported herewith) ante, 177; *Marsh v. Oneida Cent. Bank* (1861) 34 Barb. (N. Y.) 298; *Mechanics & T. Bank v. Seitz Bros.* (1892) 150 Pa. 632, 30 Am. St. Rep. 853, 24 Atl. 356 (obiter); *Bank of Alexandria v. Turney* (1898) — Tenn. —, 52 S. W. 762 (complaining party was apparently primarily liable as to the bank, although only a guarantor as to the other party to the note, whose account it was urged should have been applied); *Docter v. Riedel* (1897) 96 Wis. 158, 37 L.R.A. 580, 65 Am. St. Rep. 40, 71 N. W. 119.

At least it is under no obligation to make the application in the absence of a demand by the customer.

Boothe v. Farmers & T. Nat. Bank (1908) 53 Or. 576, 98 Pac. 509, 101 Pac. 390; Guernsey v. Marks (1910) 55 Or. 323, 106 Pac. 334.

Nor is the bank under obligation to apply deposits made subsequent to the maturity of the note, where, at the time of the maturity, the primary debtor's account was not sufficient to meet the note. Guernsey v. Marks (Or.) supra.

In Thomas v. Matthiessen (1914) 232 U. S. 221, 58 L. ed. 577, 34 Sup. Ct. Rep. 312, an action against a stockholder in a corporation to recover a corporate debt evidenced by notes, in which the defendant was held to be a principal debtor, it was held that the fact that the corporation had deposits in the bank that held the notes did not discharge the notes pro tanto.

It is stated generally in First Nat. Bank v. Peltz (1896) 176 Pa. 513, 36 L.R.A. 832, 53 Am. St. Rep. 686, 35 Atl. 218, that "while a bank which is the holder of a note and has on deposit at the time of maturity a sum to the credit of any party liable to it on the note, sufficient to pay it, and not previously appropriated by the depositor to be held for a different purpose, may apply the deposit to the payment of the note, yet it is not, in general, bound to do so;" and it is further stated that the cases where this right of the bank becomes a duty on its part rest on the special equity of some party, usually an indorser, to have the payment enforced against the depositor as the one primarily liable.

There being no duty owing by the bank to one primarily liable on a note held by the bank, to apply his deposit to the payment of the note, the note is not discharged. Accordingly, a surety on the note may pay it and sue the primary debtor. Guernsey v. Marks

(Or.) supra. An assignee of the bank may sue on the note. Thomas v. Matthiessen (U. S.) supra. The bank may sue on the note without being guilty of an abuse of process. Docter v. Riedel (Wis.) supra.

That the bank is under no duty to make such an application has been stated generally in some cases in which the party complaining of the failure was a surety or other party secondarily liable, but in which no point is made of the character of the complainant. Patterson v. State Bank (1913) 55 Ind. App. 331, 102 N. E. 880. And in Citizens' Bank v. Carson (1862) 32 Mo. 191, in which the party complaining of the failure was the acceptor of a bill of exchange, it was held that a bank is not bound to apply the deposit account of the drawer of a bill of exchange to the extinguishment thereof. It seems, however, that, according to the weight of authority, the bank is bound to exercise its right to apply a depositor's account to the payment of a claim held against him where the rights of parties secondarily liable are involved. 3 R. C. L. p. 596, § 224. That question, that is, the duty to one secondarily liable, is beyond the scope of this note.

Under a Code provision it was held in Bank of Louisiana v. Fowler (1845) 10 Rob. (La.) 196, that as soon as a note held by the bank against a depositor fell due, the depositor's account to the amount of the note became extinct. A rule of the bank also provided that all notes discounted should be charged to the account of the payer when due, provided there were funds in the bank to the credit of such person or persons, and he or they neglected to have the notes taken up before the shutting of the bank on the last day of grace.
W. A. E.

PEOPLE OF THE STATE OF ILLINOIS EX REL. E. E. BLACK, State's
Attorney of Tazewell County, et al.,

v.

ORVILLE A. SMITH.

Illinois Supreme Court — October 27, 1919.

(290 Ill. 241, 124 N. E. 807.)

Attorney and client — disbarment — visiting disorderly houses.

1. That an attorney visits disorderly houses and is fined for so doing is not of itself sufficient to warrant his disbarment.

[See note on this question beginning on page 189.]

— **necessity of conviction.**

2. Conviction of an attorney for a crime committed by him is not necessary as a basis for disbarment for committing the acts constituting the crime.

[See 2 R. C. L. 1101.]

— **retention of money from client.**

3. It is the duty of an attorney to notify his client forthwith of the collection of money on his account, and remit it to the client, less proper charges, as soon as he can reasonably do so.

— **power of commissioner to permit amendment of counts.**

4. A commissioner appointed to take and report proofs in a proceeding to disbar an attorney has no authority to permit the filing of amended counts in the information to make them correspond with the proof.

— **conversion of property — disbarment.**

5. The conversion by an attorney to his own use of property which he was employed to secure for his client is ground for disbarment.

[See 2 R. C. L. 1095, 1096.]

EXCEPTIONS by both parties to the report of the Commissioner in a proceeding for the disbarment of respondent as a practising attorney and to strike his name from the roll of attorneys; respondent excepting to so much of the report as found him guilty, and relators excepting to the finding as to count 19, and to the ruling denying to them the right to amend said count to make it correspond to the evidence. *Rule made absolute and respondent's name stricken from the roll.*

The facts are stated in the opinion of the court.

Messrs. George B. Sucher and O. A. Smith for respondent.

Messrs. E. E. Black, Franklin L. Velde, and Ralph Dempsey, for relators:

As a good character is an essential qualification for admission to practise, an attorney may be removed whenever he ceases to possess such a character.

People ex rel. Chicago Bar Asso. v. Meyerovitz, 278 Ill. 356, 116 N. E. 189; People ex rel. Chicago Bar Asso. v. Carnecki, 268 Ill. 278, 109 N. E. 14.

All the counts in the information should be considered together in determining whether or not respondent

is a fit person to practise law; and also in determining whether his testimony—especially where contradicted—is worthy of belief.

People ex rel. Hamlin v. Payson, 215 Ill. 476, 74 N. E. 383; People ex rel. Healy v. Hooper, 218 Ill. 313, 75 N. E. 896; People ex rel. Deneen v. Pickler, 186 Ill. 64, 57 N. E. 893; People ex rel. Deneed v. Hahn, 197 Ill. 137, 64 N. E. 342.

The conduct of the respondent complained of in the eleventh to the fifteenth counts not only constitutes unprofessional conduct on his part in representing at the same time two

corporations in transactions which resulted in the loss of all the assets of one of the corporations, but his actions constitute embezzlement.

People v. Lay, 193 Mich. 476, 160 N. W. 467.

The conduct of the respondent in this transaction with Mrs. Berger, as set forth in the eighteenth and nineteenth counts, clearly constitutes unprofessional conduct on his part.

Re Ball, 184 App. Div. 18, 171 N. Y. Supp. 489.

It is within the power and discretion of the court to permit the amendment of the nineteenth count so as to make the same conform to the evidence introduced in reference to said count.

Koch v. Roth, 150 Ill. 212, 37 N. E. 317; *Booth v. Wiley*, 102 Ill. 84.

Thompson, J., delivered the opinion of the court:

An information on the relation of the state's attorney of Tazewell county and certain members of the bar of that county was filed in this court at the October, 1916, term, for the disbarment of Orville A. Smith, respondent, as a practising attorney, and to strike his name from the roll of attorneys. The information consisted of twenty counts, but counts one, two, and three were stricken, and counts nine and ten have been abandoned by relators. Respondent answered the information, denying in general all the allegations. The matter was referred to a commissioner to take and report the proofs, together with his conclusions and recommendations. The commissioner found respondent guilty of the charges set forth in counts four to six, inclusive, and eleven to eighteen, inclusive, but that counts seven, eight, and twenty were not sustained by the evidence and that as to count nineteen the evidence did not correspond fully to the charge. Respondent filed exceptions to the report of the commissioner as to all his findings, except as to counts seven, eight, and nineteen, and relators filed exceptions to the commissioner's finding as to count nineteen, and also as to his ruling denying

to relators the right to amend that count to make it correspond to the evidence.

The fourth count charges that November 11, 1909, respondent was fined for carrying concealed weapons and for creating a disturbance in a disorderly house in the city of Pekin, and that respondent for a year prior to that date had frequented disorderly houses in that city, and on such occasions carried and displayed a revolver and created disturbances. The evidence as to this charge shows that respondent did frequent such disorderly houses as often as three times a week, and that he remained in such houses as late as 3 o'clock in the morning. On behalf of the relators, evidence was adduced to the effect that respondent visited these houses as a patron, while he insisted that some of his visits were pursuant to a commission by the mayor of Pekin as a secret service agent, to check up certain police officers, in order to ascertain what their habits were with reference to visiting such houses, and some of his visits were professional calls, pursuant to employment as an attorney by the keepers. We think the evidence shows that, irrespective of whether respondent was, in fact, an officer under appointment by the mayor, as testified to by him, and irrespective of his employment as an attorney by the keepers, he did visit such houses as a patron. We do not feel that the fact of a fine having been assessed against respondent, or the evidence of his having visited disorderly houses in Pekin, as disclosed by the record, in and of itself would warrant us in disbarring him; but such evidence may be considered, in connection with the other evidence in the case, in determining whether respondent is a fit and proper person to hold a license to practise law in this state.

Attorney and client—disbarment—visiting disorderly houses.

The fifth count charges that respondent committed perjury in an

affidavit filed by him November 21, 1911, with the clerk of the appellate court for the third district; that said affidavit was attached to a motion to reinstate in said court the case of Jibben v. National Cash Register Co.; that the case was originally tried in the circuit court of Tazewell county, and judgment entered against Jibben, who was a constable; that respondent, as attorney for Jibben, prayed for and was allowed an appeal to the appellate court; that an appeal bond was filed, but no transcript; that at the May term, 1911, of said appellate court the attorney for the company filed a certificate in accordance with the statute, and the court affirmed the judgment. The affidavit stated that shortly after the trial was concluded in the circuit court, respondent requested the clerk of that court to prepare a complete transcript of the record, and that the clerk advised him that the record had not then been written up, and that it would require considerable time for him to write up the record and prepare the transcript; that later, on May 20, 1911, respondent again went to the office of the circuit clerk for the purpose of securing the transcript, and that, relying on the conversation had with the clerk, he believed the transcript would be ready at that time. The count further charges that respondent did not request the circuit clerk to prepare a transcript, but, on the contrary, notified the clerk that he (respondent) would prepare the transcript and present the same to the clerk for comparison and signature. The affidavit further stated that respondent was not aware that a certificate had been issued until July, 1911, about the time the clerk of the circuit court had written respondent that the company had asked for a procedendo, and that the respondent had no knowledge relative to the existence of such certificate until a considerable space of time after the appellate court had adjourned. The count further charges that respondent had personal knowledge of

the affirmance of such judgment by the appellate court about the 20th of June, 1911. The evidence clearly sustains this count. The only conclusion to be drawn from this evidence is that respondent made the affidavit in question wilfully and corruptly, with the intention of wrongfully inducing the appellate court to reinstate the case.

The sixth count charges that the respondent committed perjury about March 9, 1914, in the case of Lucas v. C. O. Smith, in the circuit court of Tazewell county; that one of the issues involved in that case was whether the name "C. O. Smith," appearing in the entry book of the recorder of that county, was the genuine signature of said C. O. Smith; that respondent testified falsely before the master in chancery to the effect that the said signature was the genuine signature of C. O. Smith, whereas, in fact, the signature was in the handwriting of respondent. C. O. Smith is a brother of respondent, but was not called as a witness. The testimony of respondent before the master was produced, wherein he testified that the signature on the entry book was that of C. O. Smith. Various notes and checks, showing the genuine signature of C. O. Smith, were produced, and witnesses with a knowledge of handwriting testified, after an examination of such purported signature in the entry book and the genuine signatures of C. O. Smith on the checks and notes, that in their opinion the signature in the entry book was not the genuine signature of C. O. Smith. The commissioner was justified in finding that the evidence supported this count.

Counts eleven to fourteen, inclusive, relate to respondent's dealings with the American General Agency Company and the Pioneer Life Insurance Company. These counts charge that respondent, together with Milton W. Sutton and George L. Colburn, under cover of their connections with these two companies, obtained \$4,317.49 from said companies by the confidence game;

that they were indicted by the grand jury of Tazewell county, Illinois, but because the record did not show that the indictment was returned into open court the case was dismissed; and that the Statute of Limitations had then run. The evidence shows that respondent was general counsel for the two companies in May, 1911; that he was also director of the agency company and trustee of the insurance company; that at the time he became connected with these two companies they were both insolvent; that the insurance company was in disfavor with the insurance department of the state; that these parties caused the entire assets of the insurance company to be turned over to the agency company while the two companies were insolvent; that after such transfer all the assets so turned over were used by said parties in liquidating certain prior advances which they claimed they had made, and in paying large fees to themselves. Respondent was the moving spirit in these transactions, and acted as general counsel for the two companies at a time when their interests were conflicting. Count fifteen is closely related to counts eleven and fourteen, supra, and charges respondent with the embezzlement of \$2,000 of the funds of the agency company, for which he was indicted, but that case was also dismissed on the same technicality. The evidence as to the transactions involved in counts eleven to fifteen, inclusive, is voluminous, and, after giving it careful attention, no other rational conclusion can be drawn than that the charges contained in these counts are fully sustained. It is not essential that

a conviction of an attorney for a crime committed by him be had as a basis of disbarment on account of the acts constituting the crime. *People ex rel. Chicago Bar Asso. v. Meyerovitz*, 278 Ill. 356, 116 N. E. 189.

Count sixteen charges respondent with obtaining a deed to certain land in Tazewell county from Rebecca

Kepcha, in favor of said Colburn, referred to in counts eleven to fourteen, supra; that an appeal was taken by Mrs. Kepcha from a decree of the circuit court of Tazewell county in a partition proceeding, and the deed to Colburn was avowedly given as security for Colburn's signing the appeal bond; that the appeal was dismissed by reason of the failure of respondent to properly perform his duty as attorney for Mrs. Kepcha, and that thereafter a writ of error was sued out in the supreme court to review the decree of the lower court, and a decision was rendered reversing the decree of the lower court, by means of which decision Mrs. Kepcha became entitled to a larger portion of the estate. The count further charges that pending the appeal respondent received from the master in chancery the share of Mrs. Kepcha, as decreed by the circuit court, which share amounted to \$762.91; that after the decision by the supreme court respondent demanded that the purchaser at the partition sale pay to Colburn the difference which would be coming to Mrs. Kepcha, and, upon refusal by said purchaser to pay, caused an execution to issue in the name of Colburn, and a sale to be had, respondent becoming the purchaser at the sheriff's sale; that he assigned the certificate of purchase, and afterwards received from the assignee on account thereof the sum of \$1,510.55; that respondent never notified Mrs. Kepcha, his client, of the receipt by him of her share from the master in chancery; that neither did he notify her of the receipt of the money from the assignee of the certificate of purchase; and that Mrs. Kepcha did not receive any money from respondent until 1914, when he made a settlement with her for the sum of \$250. Respondent admits that he was the attorney for Mrs. Kepcha until after the decision by the circuit court, but that thereafter he ceased to be her attorney, and was the attorney for Colburn. He admits receiving

Mrs. Kepcha's share from the master in chancery, but contends that he was authorized to use that money to pay him for certain moneys laid out, together with his fee. With reference to the money which he received from the assignee of the certificate of purchase, he contends that \$814 of that money was paid to Colburn for money advanced by the latter and \$1,000 was paid to Colburn as his remuneration for assuming the risk in becoming surety on the appeal bond.

The evidence does not bear out respondent's contentions. It is apparent that he, while purporting to appear as attorney for Mrs. Kepcha, was, in fact, furthering his own interests by using Colburn's name. Respondent's conduct in this case was highly reprehensible—in fact, nothing less than criminal. Here he

—retention of
money from
client.

received the share
of his client, and re-
tained the same for

the space of two years, and then paid her only a portion of what was justly due her. It is the absolute duty of a solicitor or attorney to forthwith notify his client of a collection made on his account, and to make remittance to him, less his proper charges, as soon as he reasonably can do so after the receipt of his client's money. The practice indulged in by some solicitors and attorneys of retaining money collected for clients for an indefinite period deserves the severest reprobation. The respondent not only retained the money for the space of two years, but it became necessary for Mrs. Kepcha to institute suit, and then finally to accept a lesser amount than was justly due her, rather than chance losing it all.

Count seventeen charges that in 1908 respondent was indebted to Eugenia Bequeath, his stenographer, in the sum of \$700, and gave her notes covering the same; that after September 20, 1909, when she left his employ, she removed these notes to her home; that about two weeks later, when she looked

for the notes in question, they were missing; that respondent endeavored to induce the servant at the home of Eugenia Bequeath to leave the door unlocked so that he could get into the house; that the servant refused to comply with his request; that shortly thereafter the servant saw respondent in the upper part of the Bequeath home while Eugenia Bequeath was in the cellar, and that it was shortly after this occasion that the notes were missing; that there were other valuable papers and valuables in the same place as the notes, but such other valuable papers and valuables were not molested. While respondent denies the allegations of this count, and while the evidence is not of that satisfactory character which we would demand if this count were the only charge against respondent, still we cannot say that the commissioner was not justified in his finding that the count was sustained by the proof.

Counts eighteen and nineteen relate to certain dealings of respondent as attorney for Martha O. Berger. Mrs. Berger was administratrix of the estate of her brother, John W. Neville, of Hopedale, Tazewell county. The eighteenth count charges that in 1903 respondent attended a sale of personal property in the estate of John W. Neville, deceased, and received the purchase price of the articles sold, amounting in all to \$186; that he advised Mrs. Berger that the money should be deposited in a Pekin bank, rather than in the Hopedale bank; that Mrs. Berger acquiesced, and that he told her he would take the money with him to Pekin and deposit it in the bank to her credit; that instead of so doing he deposited the money to his own credit and used the same; that one of the creditors of Mrs. Berger caused her to be cited before the county judge of Tazewell county to show cause why the funeral expenses of John W. Neville had not been paid; that she advised the county judge that the funds were in the possession of re-

spondent; that respondent was summoned to appear before the county judge, and that he admitted to the judge that he had not deposited any part of the funds to the credit of the administratrix, but had appropriated them to his own use; that respondent was then advised by the judge to restore said funds, and that respondent then induced Mrs. Berger to sign his note as surety at a Pekin bank, so that he could obtain the money to replace the amount so appropriated by him. The evidence fully sustains the count in every particular, and in addition thereto shows that Mrs. Berger, after becoming surety on the note in question, was compelled to pay the note.

The nineteenth count charges that at a partition sale of the Neville real estate Mrs. Berger became the purchaser, and it became necessary that she secure a loan of \$5,000; that, in addition to the execution of a trust deed securing this loan, respondent induced Mrs. Berger and her husband to deliver to him a deed to the property so purchased by her, at an expressed consideration of \$10,000, no money passing hands; that respondent represented to Mrs. Berger that the person from whom he would secure the loan of \$5,000 required this deed to be made; that the trustee knew nothing of the transaction, except that as a matter of convenience respondent had used his name as trustee in the trust deed. The count further charges that, when respondent filed the deed for record, he caused to be noted upon the entry record, in pencil, the words, "Please do not publish," and that respondent refused to reconvey these premises to Mrs. Berger until the county judge of Tazewell county again summoned respondent before him, and advised him that unless he immediately reconveyed to Mrs. Berger suit would be instituted. Respondent admits the making of the deed, but denies that it was secured by him wrongfully and without consideration. Mrs. Berger was an

elderly woman of but limited education, and apparently did not understand the effect of the conveyance made by her husband and her to respondent. The evidence shows that after this conveyance had been made Mrs. Berger went to the Hopedale bank and desired a small loan, but was advised by the banker that there was a recorded deed conveying her premises to respondent, and it was then that Mrs. Berger came to Pekin to ascertain the facts with reference to the recorded deed.

The commissioner found that the evidence did not correspond fully with the charge as laid in the nineteenth count, and then relators asked the commissioner's leave to file an amended nineteenth count, which was denied on the ground that he did not have such authority. The commissioner ruled properly in denying relators leave to file an amended nineteenth count. Such leave, if obtained, must be had from this court.

The commissioner found that as to the seventh, eighth, and twentieth counts the evidence did not sustain the charges. The evidence on the seventh count showed that respondent represented to a justice of the peace of Tazewell county that he (respondent) had made an examination of the records of the office of the county clerk, and that the justice's name did not appear of record in such office, and that by reason thereof the justice had no power to act, and that it was his duty to dismiss the case; that the justice, relying upon such representations, entered a dismissal. The evidence on the eighth count shows that respondent agreed with certain creditors of Frank Evans that he would pay the court costs in case the creditors were unsuccessful in the case of *Jibben v. National Cash Register Co.*, Jibben being only the nominal plaintiff. The evidence as to the twentieth count shows that respondent made misrepresentations to the sheriff of Tazewell county with ref-

-power of commissioner to permit amendment of counts.

erence to subpoenaing a witness in a case then pending in the courts of that county; that, while respondent pretended that he wished to have the witness in question subpoenaed, still he was endeavoring to prevent the service of the subpoena; that when the subpoena was returned, to the effect that the witness could not be found, respondent induced his client to make affidavit in support of a motion for continuance based upon the inability to produce such witness.

The evidence on counts four, seven, eight, nineteen, and twenty may properly be considered by the court, with the evidence on the other counts, in determining whether respondent is a proper person to hold a license to practise law; but, even though such evidence be not considered by us, the evidence as to the other charges clearly shows that his license should be revoked.

No office offers greater opportunity for honorable service than that of attorney at law. To the great privilege conferred on a man given leave to practise this high calling there is added the equally great responsibility of upholding the ideals of the learned lawyers of earlier days. Into the hands of the lawyer are intrusted the property of the citizen, the savings of the widow,

the inheritance of the helpless orphan, and the life of the unfortunate man. The only guaranty that this trust will be honorably executed is the character of the lawyer. Character can only be judged by reputation and conduct. When a lawyer so conducts himself that confidence can no longer be placed in him with safety, his usefulness to the court and state has ceased. Here the respondent has committed the one offense that cannot, under any circumstances be tolerated: He has betrayed helpless clients, and deprived them of property which he was employed to secure for them. Other offenses might be excused, but conversion to his own use of the property of his client is an offense that cannot in any degree be countenanced. Respondent has been guilty of not one, but several, such offenses. His conduct has been such that it would be a grave injustice to other members of the profession to permit such as he to continue to hold the license of this court.

The rule is made absolute, and respondent's name is stricken from the roll of attorneys.

Rule made absolute.

Petition for rehearing denied, December 5, 1919.

ANNOTATION.

Moral delinquency or other conduct not affecting court or client as ground for disbarment or suspension of attorney.

- I. Introductory, 189.
- II. Fraudulent transactions generally, 190.
- III. Misconduct as trustee, or the like, 193.
- IV. Misconduct as judicial officer, 195.
- V. Misconduct as notary public or commissioner of deeds, 196.
- VI. Misconduct as prosecuting attorney, 197.
- VII. Commission of perjury, 200.

1. Introductory.

In discussing moral delinquency of an attorney, as ground for his disbar-

- VIII. Participation in unlawful assembly, 201.

- IX. Act of disloyalty in time of war, 201.

- X. Personal vice, 202.

- XI. Miscellaneous offenses:

- a. Conduct warranting disbarment or suspension, 204.
- b. Conduct not warranting disbarment or suspension, 205.

ment or suspension, this note excludes from consideration all acts which involve a breach of the professional

duty of an attorney to his client, or of his professional obligation of respect and good faith toward the courts. It is confined to those delinquencies in the personal life or non-professional dealings of an attorney, which may be urged as a ground for professional discipline because they show the attorney to be wanting in integrity and unfit to be trusted with professional responsibilities.

Cases involving libel on or contempt of the courts, while on the border line, are regarded as affected by the professional status of the attorney, and are excluded. Disbarment by reason of a conviction of crime is also excluded, as is disbarment for advertising and the like.

II. Fraudulent transactions generally.

Fraudulent conduct or unfair dealing by an attorney, in a transaction not directly connected with any professional employment, and not operating to defraud a client or to deceive the court, is nevertheless ground for suspension or disbarment where it involves such moral delinquency as to show the attorney to be wanting in integrity.

Illinois.—*People ex rel. Healy v. Macauley* (1907) 230 Ill. 208, 120 Am. St. Rep. 287, 82 N. E. 612.

Kansas.—*Re Wilson* (1909) 79 Kan. 450, 100 Pac. 75.

Missouri.—*Re Z*— (1901) 89 Mo. App. 426.

New Hampshire.—*Moore's Case* (1911) 76 N. H. 227, 81 Atl. 703.

New Jersey.—*Re Young* (1907) 75 N. J. L. 83, 67 Atl. 717.

New York.—*Re Kalisky* (1915) 169 App. Div. 531, 155 N. Y. Supp. 550; *Re Isaacs* (1916) 172 App. Div. 181, 158 N. Y. Supp. 403; *Re Berkeley* (1916) 174 App. Div. 205, 160 N. Y. Supp. 1093; *Re Brandmarker* (1917) 177 App. Div. 656, 164 N. Y. Supp. 369, appeal dismissed for want of jurisdiction in (1917) 222 N. Y. 522, 118 N. E. 1052.

Rhode Island.—*Re Holton* (1914) 36 R. I. 114, 89 Atl. 242.

Washington.—*Re Turner* (1918) 104 Wash. 276, 176 Pac. 332.

England.—*Re Blake* (1860) 6 Jur. N. S. 1242, 3 El. & El. 34, 121 Eng.

Reprint, 357, 80 L. J. Q. B. N. S. 32, 2 L. T. N. S. 429.

Thus, an attempt by an attorney to extort money from a foreign corporation which had not complied with the statutes of the state, by forming corporations with similar names, but without any intention of engaging in business, was held in *People ex rel. Healy v. Macauley* (1907) 230 Ill. 208, 120 Am. St. Rep. 287, 82 N. E. 612, to be such misconduct as would warrant disbarment, the court saying: "The standard of personal and professional integrity which should be applied to persons admitted to practise law in the courts is not satisfied by such conduct as merely enables them to escape the penalties of the criminal law. The statute and the rules of this court require a good moral character as a condition precedent to a license as an attorney. This includes, at least, common honesty, and is not consistent with an effort to obtain a part of the wealth of another by any means not denounced by the criminal statutes."

In the case of *Re Wilson* (Kan.) supra, wherein it appeared that the defendant attorneys, among other things, had been carrying on a scheme to defraud under the guise of a real estate business, the court affirmed a judgment of disbarment, saying: "It is said that the courts are not the curators of the morals of the bar, and it is probably true that courts should not take cognizance of a solitary immoral act of a member of the bar, not amounting to a crime, and unconnected with his duties in court. It is, however, one of the requisites for admission to the practice that the candidate should present evidence to the court that he is a person of good moral character, and it would be a great stigma upon an honorable profession if the members of it were powerless to purge it of any who may have been improvidently received into its fold, and whose after life is offensively corrupt, or whose business transactions, even outside of the courts, are characterized by dishonesty; in short, that the profession is compelled to harbor all per-

sons, of whatever character, who have gained admission to it and are fortunate enough to keep out of jail or the penitentiary. This court, at least, is not prepared to say that persons of such character have a legal right to officiate as advocates of right in our courts, which ought to be and generally are temples of justice. This ground of disbarment may not be included in any of the causes therefor specified by the statute, but the court has the inherent power to require of its officers at least common honesty and decency."

And where, in a proceeding for the disbarment of an attorney, it appeared that he had secured a sum of money from the son of a client, with the understanding that he would use it to settle a judgment against the client, but instead had appropriated it to his own use, the court held that such misconduct and deceit warranted his suspension from practice for a period of six months. *Re Z—* (Mo.) *supra*.

So, where an attorney secured a loan from another on false representations, by assigning his salary as county attorney, which salary he had previously hypothecated to another, and on a second occasion secured a sum of money from a fellow attorney by representing that a mortgage assigned as security was valid and enforceable, when the fact was that he had secured it from a client under fraudulent circumstances, rendering it unenforceable in equity, the court held that these acts, coupled with his failure to make any return of the moneys advanced, warranted his disbarment. *Re Young* (N. J.) *supra*.

In *Re Kalisky* (1915) 169 App. Div. 531, 155 N. Y. Supp. 550, it was held that an attorney who had stopped payment on a check given by him to other attorneys in payment for their services in searching title to certain property, which check was drawn primarily to influence a bank to advance a loan to his client, was guilty of misconduct which reflected on the honor of the profession, and the court expressed its disapproval by suspending the attorney from practice for a year.

In *Re Isaacs* (1916) 172 App. Div. 181, 158 N. Y. Supp. 403, wherein it appeared that an attorney had knowingly made fraudulent representations to induce the sale of property at a price in excess of its value, the court, holding that the misconduct of the attorney warranted his disbarment, said: "An attorney engaged in the practice of law should primarily reserve himself for his profession only. In this profession he is held to the highest standard of ethical and moral uprightness and fair dealing. There seems to be no good reason why a lawyer should be allowed to be honest as a lawyer and dishonest as a business man. If he desires to go into business he must take the risk, if any is involved, and must see that his dealings as a business man are as upright as should be his dealings in his professional capacity." And quoting from its opinion in *Re Alexander* (1910) 137 App. Div. 770, 122 N. Y. Supp. 479, the court said: "Attorneys who are guilty of fraud and deceit in their relations with others, even in their private transactions, should not be allowed to escape discipline, where the utmost good faith and highest degree of honesty are required from the members of the profession."

Evidence that an attorney had reopened a bank account in his own name as administrator of an estate two years after his discharge from such office, for the purpose of placing funds beyond the reach of creditors, coupled with his false testimony in an action to set aside conveyances made by him in fraud of creditors, was held in *Re Berkeley* (1916) 174 App. Div. 205, 160 N. Y. Supp. 1098, to warrant his disbarment, the court affirming the conclusion of the referee that "the acts shown to have been committed by the respondent not only involve offenses against the penal law, but also portray a lack of character and common honesty which should not be tolerated in an attorney and counselor at law, whose most essential requisite is probity."

In *Moore's Case* (1911) 76 N. H. 227, 81 Atl. 703, it was held that an

attorney who obtained a note for \$505 from a man in an intoxicated condition, in settlement of an action brought by another person against a friend of the intoxicated person, and who thereafter negotiated the note and acted in a discreditable manner, was morally or mentally wanting in the elements of common honesty and fair dealing, and should be disbarred.

In *Re Holton* (1914) 36 R. L. 114, 89 Atl. 242, wherein it appeared that an attorney had induced the complainant to place funds in his hands for investment, which funds he had appropriated to his own use and squandered in games of chance, the court said that these transactions, "so far as they demonstrate a moral condition inconsistent with a proper appreciation and discharge of professional duties and obligations," might properly be considered as ground for disbarment.

It was shown in the case of *Re Turner* (1918) 104 Wash. 276, 176 Pac. 332, that an attorney induced a woman to advance \$300 on his promise to invest it for her, used the money for his own purposes, but eventually returned it. The court held that although the money was advanced without knowledge that the accused was an attorney, still, since the act involved moral turpitude, a suspension from practice for one year was warranted, to preserve the integrity of the profession.

Similarly in *Re Blake* (1860) 6 Jur. N. S. 1242, 3 El. & El. 34, 121 Eng. Reprint, 357, 30 L. J. Q. B. N. S. 32, 2 L. T. N. S. 429, it appeared that an attorney, who had secured a loan from another person on the assignment of a mortgage as security, subsequently borrowed the evidence of the assignment, ostensibly for use in court, but in reality for the purpose of proving his right to the amount thereof, which he collected without the knowledge of his creditor. He thereafter returned the assignment deed, but, owing to his insolvency, the creditor could not collect the amount of the loan. The court held that this act of the attorney amounted to gross

misconduct, warranting his suspension from practice for two years.

In the case of *Re Brandmarker* (1917) 177 App. Div. 656, 164 N. Y. Supp. 369, an attorney was disbarred on proof that he procured a person to give bail for his client by agreeing personally to reimburse the surety, and thereafter defeated a claim for reimbursement on the ground that the agreement was without consideration.

But acts of an attorney which, though unethical, are not committed in his professional capacity and do not evidence such moral turpitude as to unfit him for the practice of law, are not ground for disbarment.

Thus, in *Re Somerville* (1918) 183 App. Div. 445, 170 N. Y. Supp. 879, it was said: "The court undoubtedly has the necessary authority to discipline or disbar an attorney whose actions indicate disregard for honesty and decency in his dealings with his fellow men." But in that case, it was charged that an attorney, while acting as president of a real estate corporation, had executed a deed warranting the property conveyed to be free from mortgage encumbrance, whereas in fact the property was subject to a mortgage, which was afterwards foreclosed. A release of the mortgage had been obtained, but was never delivered, the failure to secure a delivery and to record the release being in part chargeable to the purchaser. The court refused to disbar the attorney.

Likewise, in a case wherein it appeared that an attorney dealt with another in a business transaction, and the relation of attorney and client did not exist, it was said in a proceeding for disbarment, that he was under no greater restraint with regard to the character of his conduct than any other individual. *Re Renahan* (1914) 19 N. M. 640, 145 Pac. 111.

So, evidence that an attorney conspired with another person to defraud the creditors of the latter, and pursuant to such conspiracy received from the other person a deed to certain real estate, which was executed without any valuable consideration,

has been held to be insufficient to justify the disbarment of the attorney where no corrupt motive was shown. *Zachary v. State* (1907) 58 Fla. 94, 43 So. 925.

In the case of *Re Weed* (1901) 26 Mont. 241, 67 Pac. 308, disbarment proceedings were brought charging that the defendant, an attorney, had sold lands to the petitioner and agreed to convey on payment of the purchase price, which was to be made in instalments, but that after the receipt of part of the purchase price he had conveyed to another party, and refused to keep his agreement with the petitioner. There was, however, no allegation of intent to defraud, and the court held that the acts complained of were not within a statute (Code Civ. Proc. § 402), authorizing the disbarment or suspension of an attorney, "who is guilty of any deceit, malpractice, crime, or misdemeanor."

So, in *Ex parte Gadsden* (1911) 89 S. C. 352, 71 S. E. 952, it was held that the procurement by an attorney for an administration, of an assignment of the interest of a woman not versed in business, which assignment, by reason of his superior knowledge of the value of the interest and his strong influence, had worked to the extreme disadvantage of the woman and her representatives, and similarly to the great benefit of his client, was a reprehensible act, but, in the absence of clear proof of a moral fraud, the court held that suspension or disbarment would be too severe a disciplinary measure, and confined the attorney's punishment to a censure.

An attorney who agreed to procure an apprentice certificate belonging to his client, from the possession of the state board of pharmacy, and also to settle certain differences between his client and his employer, or return a fee paid him, was held subject to disbarment for failure to return the fee upon his failure to obtain the certificate or settle the differences, although his client may have been guilty of forgery in obtaining the certificate in the first instance, and of embezzlement from the employer, in *People ex*

rel. Chicago Bar Asso. v. Loeff (1920) — Ill. —, 126 N. E. 577.

III. *Misconduct as trustee, or the like.*

The courts are quick to disbar an attorney for moral delinquency while fulfilling a position of trust, since such misconduct reflects most strongly on the integrity of the legal profession.

Delaware.—*Re Hoffecker* (1905) — Del. —, 60 Atl. 981.

Illinois.—*People ex rel. Chicago Bar Asso. v. Meyerovitz* (1917) 278 Ill. 356, 116 N. E. 189; *People ex rel. Chicago Bar Asso. v. Tilton* (1918) 284 Ill. 385, 120 N. E. 252.

Kansas.—*Re Wilson* (1909) 79 Kan. 674, 21 L.R.A.(N.S.) 517, 100 Pac. 635, 17 Ann. Cas. 690; *Re Washington* (1910) 82 Kan. 829, 109 Pac. 700.

Michigan.—*Re Radford* (1912) 168 Mich. 474, 134 N. W. 472.

New York.—*Association of Bar v. Chappell* (1909) 131 App. Div. 69, 115 N. Y. Supp. 868; *Re Lichtenberg* (1915) 169 App. Div. 505, 155 N. Y. Supp. 482.

Ohio.—*Re Swadener* (1895) 5 Ohio S. & C. P. Dec. 598, 7 Ohio N. P. 446.

Washington.—*Re Ward* (1919) — Wash. —, 179 Pac. 76.

England.—*Re Chandler* (1856) 2 Jur. N. S. 366, 22 Beav. 253, 52 Eng. Reprint, 1105, 25 L. J. Ch. N. S. 396; *Re Hall* (1856) 2 Jur. N. S. 638, 4 Week. Rep. 636; *Thorndike v. Hunt* (1859) 5 Jur. N. S. 879, 3 De G. & J. 563, 44 Eng. Reprint, 1386, 28 L. J. Ch. N. S. 417, 7 Week. Rep. 246; *Re Hill* (1868) L. R. 3 Q. B. 543, 9 Best & S. 481, 37 L. J. Q. B. N. S. 295, 18 L. T. N. S. 564, 16 Week. Rep. 1061.

Canada.—*Re O'Reilly* (1861) 2 Ont. Pr. Rep. 198, 1 U. C. Q. B. 392; *Hands v. Law Soc. of Upper Canada* (1889) 16 Ont. Rep. 625.

The action of an attorney who had been appointed trustee, in improperly disposing of good securities constituting the trust fund, and investing the proceeds in a corporation of which he was a promoter, for his own advantage, with the consequent loss of a large part of the trust estate, has been held to be sufficient justification

for disbaring him from practice in the courts of chancery. *Re Hoffecker* (Del.) *supra*.

In *People ex rel. Chicago Bar Asso. v. Meyerovitz* (Ill.) *supra*, it was held that the act of an attorney in wrongfully applying to his own use money intrusted to him in his individual capacity would warrant his disbarment. The court said: "This court has, we think, indicated a departure from the rule announced in the Allison and Appleton Cases." In the Allison Case (*People ex rel. Noyes v. Allison* (1873) 68 Ill. 151), the court ruled that charges of misconduct by an attorney in his private character would not be considered in a proceeding for disbarment. And in the Appleton Case (*People ex rel. Hughes v. Appleton* (1882) 105 Ill. 474, 44 Am. Rep. 812), wherein it appeared that an attorney, while acting as trustee, had disposed of the trust property and appropriated the proceeds, the court held that no matter how censurable his conduct, the acts of the defendant in his individual capacity as trustee would not warrant his disbarment.

In *People ex rel. Chicago Bar Asso. v. Tilton* (Ill.) *supra*, the court stated that the inability of an attorney to account for the balance of an estate held by him in the capacity of administrator, when ordered by the court so to do, resulting in a judgment against the sureties and himself, warranted the conclusion that the attorney lacked good moral character, and justified his disbarment.

It has been held that, where an attorney accepts employment from another in a nonprofessional capacity, his appropriation of funds belonging to his employer warrants his disbarment. *Re Wilson* (1909) 79 Kan. 674, 21 L.R.A.(N.S.) 517, 100 Pac. 635, 17 Ann. Cas. 690.

Where an attorney refused to pay over funds placed in his hands as trustee for two persons, according to the terms of the trust agreement, unless a sum of money claimed by his son against the person so entitled should be paid, and, while acting as real estate agent to purchase certain property for another, caused the con-

veyance to be made to his son, and refused to convey to the client unless a larger sum than the amount agreed on should be paid for his services, the court held that this misconduct, accompanied by various other fraudulent acts, authorized a revocation of the attorney's license to practise. *Re Washington* (1910) 82 Kan. 829, 109 Pac. 700.

And where it appeared that an attorney, while acting in the capacity of executor, had invested money of the estate in his own name, refused to obey directions of the court, and schemed to defraud the interested parties, it was held that such conduct was so immoral and unprofessional as to render him unworthy of the trust reposed in the profession, and justify his removal from the bar. *Re Radford* (1912) 168 Mich. 474, 134 N. W. 472.

In *Association of Bar v. Chappell* (1909) 131 App. Div. 69, 115 N. Y. Supp. 868, wherein it appeared that an attorney had appropriated to his own use the proceeds of two checks intrusted to him to cash, the court said that this mere statement of the facts was sufficient to show that the attorney was no longer fit to remain a member of the profession.

In *Re Lichtenberg* (1915) 169 App. Div. 505, 155 N. Y. Supp. 482, the court disbarred an attorney who had appropriated to his own use funds in his hands as a receiver in bankruptcy, characterizing him as "an unfit person to remain a member of a profession in which scrupulous honesty is of prime importance."

So, in the case of *Re Swadener* (1895) 5 Ohio S. & C. P. Dec. 598, 7 Ohio N. P. 446, the court directed the disbarment of an attorney who had appropriated to his own use sums of money received in his capacity as guardian of certain minors, saying: "Good moral character being a prerequisite to admission, it follows as a necessary sequence that the courts, whose officer he is,—he holding under a life tenure,—have the power of removal when such character is wholly lost. Especially is this true where there are charges of dishon-

esty, breach of trust, and want of integrity."

Where an attorney after his appointment as administrator, but before he had qualified as such, received money belonging to the estate and appropriated it to his own use, the court held that, despite his intention to repay the sums so used, his misconduct merited disciplinary action. But the court added that, since the motive as well as the charge in disbarment proceedings must be considered, the punishment should be limited to suspension from practice for one year. *Re Ward* (1919) — Wash. —, 179 Pac. 76.

Where a solicitor, who had been appointed trustee, sold the trust estate and appropriated the proceeds to his own use, the court held that, in spite of the fact that the solicitor had an interest in the trust fund, his misconduct warranted no less punishment than disbarment, that others might not place confidence in him to their injury. *Re Chandler* (1856) 2 Jur. N. S. 366, 22 Beav. 253, 52 Eng. Reprint, 1105, 25 L. J. Ch. N. S. 396.

Similarly, in the case of *Re Hall* (1856) 2 Jur. N. S. (Eng.) 638, 4 Week. Rep. 686, wherein it appeared that a solicitor, who had been appointed trustee, had appropriated to his own use funds received on behalf of the estate, and subsequently had delivered a statement reciting that the sum had been received and invested, the court held that such misconduct required that the solicitor's name should be struck from the roll.

And in *Thorndike v. Hunt* (1859) 5 Jur. N. S. 879, 3 De G. & J. 563, 44 Eng. Reprint, 1386, 28 L. J. Ch. N. S. 417, 7 Week. Rep. 246, the court directed that the name of a solicitor should be stricken off the roll where it appeared that he had appropriated one fund of which he was trustee, to fulfil an order of the court directing him to pay over the funds of another estate, which he had previously appropriated.

The misappropriation by an attorney of money received by him while acting as clerk for a firm of attorneys has been held to be mis-

conduct warranting his suspension from practice for at least one year, in view of extenuating circumstances. *Re Hill* (1868) L. R. 3 Q. B. (Eng.) 543, 9 Best & S. 481, 37 L. J. Q. B. N. S. 235, 18 L. T. N. S. 564, 16 Week. Rep. 1061.

In *Hand v. Law Soc. of Upper Canada* (1889) 16 Ont. Rep. 625, wherein it appeared that a solicitor, who had been intrusted with a power of attorney to dispose of stock owned by a young woman, had misappropriated the proceeds thereof, the court held that he was properly stricken from the rolls. And, as to the circumstance that he had made reparation to the injured person, the court said: "The fact that the solicitor guilty of misconduct has made reparation to the client may satisfy that particular individual, but it does not deprive the general public of its claim for protection against an unsafe member of a privileged class, nor the law society of its claim to expel an unworthy member. The professional man who does what is right because he is in jeopardy of degradation has ceased to act uprightly."

And see *Re O'Reilly* (1861) 2 Ont. Pr. Rep. 198, 1 U. C. Q. B. 392, wherein the court stated, by way of dictum, that where it appeared that an attorney was not trustworthy, because he had retained money received by him in the capacity of agent, it might, on application, strike his name from the rolls.

The failure of an attorney for a receiver to account for money belonging to a trust turned over to him by his client was held ground for disbarment in *People ex rel. Chicago Bar Asso. v. Loeff* (1920) — Ill. —, 126 N. E. 577, although the attorney made some claim to the money retained as fees. The court said that no one could read the record in the case without being convinced that the attorney had not acted honestly and in good faith, but had appropriated his client's money.

IV. Misconduct as judicial officer.

Conduct of an attorney in the exercise of a judicial office, if clearly revealing moral delinquency, justifies his

removal from the roll of attorneys. *State v. Peck* (1914) 88 Conn. 447, L.R.A.1915A, 663, 91 Atl. 274, Ann. Cas. 1917B, 227; *People ex rel. Stead v. Phipps* (1914) 261 Ill. 576, 104 N. E. 144; *Hobbs's Case* (1909) 75 N. H. 285, 73 Atl. 303; *Re Dellenbaugh* (1899) 17 Ohio C. C. 106, 9 Ohio C. D. 325.

The action of the judge of a court of probate in falsely pretending that he had rendered services to an estate which was in process of settlement in his court, and in coercing the consent of the persons interested in the estate to the allowance to him of a sum in payment of the alleged services, has been held to constitute such misconduct as justifies his disbarment. *State v. Peck* (Conn.) *supra*.

So, in *People ex rel. Stead v. Phipps* (1914) 261 Ill. 576, 104 N. E. 144, the court stated that the action of an attorney in using for his personal purposes funds which came into his hands as a master in chancery was such disreputable conduct as would certainly have resulted in disbarment, had it been brought to the attention of the court at the time, and such conduct, the court remarked, would not be overlooked in case subsequent acts were proved.

In *Hobbs's Case* (N. H.) *supra*, the court held that the wilful disregard of procedure on the part of a justice of the peace, and his failure to account for moneys received in his official capacity, in the absence of proof that he had deliberately converted the moneys to his own purposes, warranted a reprimand and suspension from the office of attorney for six months.

And see *Re Dellenbaugh* (Ohio) *supra*, wherein it was stated that proof of the collusion of a judge with an attorney in procuring money from a woman by threatening her with exposure in subsequent proceedings, and in granting a divorce without sufficient evidence, would justify his disbarment.

But in *Baird v. Justice's Ct.* (1909) 11 Cal. App. 489, 105 Pac. 259, the court said that if a police judge had violated the law by engaging in the

practice of his profession, his offense was that of a judicial officer, and not that of an attorney, and could not be punished by disbarment or suspension. And a similar holding was made in *Re Silkman* (1903) 88 App. Div. 102, 84 N. Y. Supp. 1025, to the effect that judicial transgressions must be punished by means other than suspension or disbarment from the practice of the law.

V. Misconduct as notary public or commissioner of deeds.

The making of a false jurat or acknowledgment by an attorney, while acting as a notary public or commissioner of deeds, is a moral delinquency, justifying his suspension or disbarment. *Re Mills* (1906) 17 Haw. 564; *People ex rel. Deneed v. Hahn* (1902) 197 Ill. 137, 64 N. E. 342; *Re Arctander* (1879) 26 Minn. 25, 1 N. W. 43; *Re Barnard* (1912) 151 App. Div. 580, 136 N. Y. Supp. 185; *Re Gotthein* (1912) 153 App. Div. 779, 138 N. Y. Supp. 636; *Re Napolis* (1915) 169 App. Div. 469, 155 N. Y. Supp. 416; *Ex parte Finn* (1898) 32 Or. 519, 67 Am. St. Rep. 550, 52 Pac. 756; *Re Hopkins* (1909) 54 Wash. 569, 103 Pac. 805.

Thus, where it appeared that an attorney had wrongfully altered a document and annexed thereto a false certificate of acknowledgment in his capacity as a notary public, the court said: "This conduct shows such a want of integrity on the part of the respondent, and such a lack of appreciation and disregard of the obligations of his official duty, as render him unfit to be allowed to practise in the courts of the territory, or to be held out to the confidence of the public as an attorney at law." *Re Mills* (Haw.) *supra*.

So, in *People ex rel. Deneed v. Hahn* (1902) 197 Ill. 137, 64 N. E. 342, the court held that the acts of an attorney in swearing to false affidavits before himself as notary public, but under a false name, together with other misconduct, would justify an order striking his name from the roll of attorneys.

Where an attorney, as notary public, antedated the jurats and acknowl-

edgments on the bond of a justice of the peace, the court held that he should be suspended from practice for six months, no argument being required to show that the act was a wrongful one. *Re Arctander* (1879) 26 Minn. 25, 1 N. W. 43.

In *Re Gotthein* (1912) 153 App. Div. 779, 138 N. Y. Supp. 636, an attorney who had made false acknowledgments to deeds in his capacity as commissioner of deeds, and had subsequently testified falsely that such deeds had been properly acknowledged, was held guilty of misconduct warranting his disbarment.

In *Re Napolis* (1915) 169 App. Div. 469, 155 N. Y. Supp. 416, wherein it appeared that an attorney, acting in his capacity as notary public, had signed a jurat to the affidavit of one who had not appeared before him, but who had sworn to the affidavit over the telephone, the court took occasion to express its condemnation of such action, holding it to be serious professional misconduct, but because of the absence of bad motive its discipline was confined to a severe censure.

In *Re Barnard* (1912) 151 App. Div. 580, 136 N. Y. Supp. 185, wherein it appeared that an attorney, in his capacity as notary public, had certified to the acknowledgment of certain papers within the state, when in fact such papers were signed by persons without the state, the court stated that since the certifications were made solely for convenience, and not with the intent to defraud, the attorney would not be punished beyond a reprimand.

In *Ex parte Finn* (1898) 32 Or. 519, 67 Am. St. Rep. 550, 52 Pac. 756, the court directed the suspension of an attorney from practice for one year, on proof that he had affixed his official jurat as notary public to papers which had not been sworn to before him, saying: "It is not the purpose of proceedings of this character to punish the accused attorney as in matters of criminal cognizance, but they are inaugurated and entertained as necessary for the protection of the court, the proper administration of justice, and the dignity and purity of

the profession, and for the public good and the protection of clients.' . . . We have determined that a suspension will accomplish the purpose of correcting the evil in the present case."

In the case of *Re Hopkins* (1909) 54 Wash. 569, 103 Pac. 805, the court stated that an attorney who, while acting as notary public, falsely certified that certain affiants had personally appeared before him, when such was not the fact, was guilty of an act of moral turpitude which would justify his disbarment. As to the immorality of the act, apart from its illegality, the court said: "Certainly a false statement, made with full knowledge of its falsity, concerning a matter of serious moment, the purpose of which is to influence those in authority in determining their official acts, involves a question of morals, whether such statement be made under the sanctity of an oath to speak the truth or under the sanctity of official obligation to speak the truth. This presents a question of right conduct from a purely moral standpoint, independent of the fact that the law prescribes a punishment for the making of such false statements. 'Thou shalt not bear false witness,' was not only one of the Ten Commandments of the Mosaic law, but finds sanction in the teachings of Jesus as a standard of right under the new dispensation. Indeed, this standard of right seems to be a part of the moral consciousness of the race, and to be recognized by all peoples with any appreciation of moral ideals."

VI. *Misconduct as prosecuting attorney.*

Acts of a prosecuting attorney in violation of his oath of office and against good morals are sufficient to justify his disbarment or suspension from practice.

California.—*Re McCowan* (1917) 175 Cal. 51, 170 Pac. 1100.

Colorado.—*People ex rel. Colorado Bar Asso. v. Anglim* (1904) 33 Colo. 40, 78 Pac. 687.

Illinois.—*People ex rel. Stead v. Phipps* (1914) 261 Ill. 576, 104 N. E. 144.

Kansas.—*Re Norris* (1899) 60 Kan. 649, 57 Pac. 528.

Missouri.—*Re Lyons* (1912) 162 Mo. App. 688, 145 S. W. 844.

North Dakota.—*Re Simpson* (1900) 9 N. D. 379, 83 N. W. 541; *Re Voss* (1902) 11 N. D. 540, 90 N. W. 15.

Oklahoma.—*Re Sitton* (1918) — Okla. — 177 Pac. 555.

Vermont.—*Re Jones* (1897) 70 Vt. 71, 39 Atl. 1087.

West Virginia. — *State v. Hays* (1908) 64 W. Va. 45, 61 S. E. 355.

Thus, where a district attorney, while addressing the grand jury, made unwarranted references to the judge of the superior court, in harsh and extreme language, it was held that this conduct, while not sufficient to justify disbarment, at least called for a suspension of the attorney. *Re McCowan* (Cal.) *supra*.

The acceptance by a district attorney of sums of money from saloon keepers and gamblers, on his agreement to refrain from proceeding against them, and his refusal to prosecute a case unless the prosecuting witness paid him a sum of money, have been held to be sufficient causes for his disbarment. *People ex rel. Colorado Bar Asso. v. Anglim* (Colo.) *supra*.

In *People ex rel. Stead v. Phipps* (Ill.) *supra*, it appeared that an attorney, while acting as state's attorney, had induced two young boys to plead guilty and to waive their right to a jury trial, although they had urged their innocence and did not know what they were about to do. It was held that such conduct was most reprehensible, and, it appearing that there had been other unprofessional misconduct, the court declared that the evidence justified the suspension of the attorney from practice for a year.

Where an attorney, while acting in his official capacity as county and state attorney, demanded and received fees for dismissing certain prosecutions, as well as for commencing other prosecutions, the court held that these acts justified his disbarment. *Re Norris* (Kan.) *supra*.

In *Re Lyons* (Mo.) *supra*, the court

declared that if a United States district attorney had a secret partner who was regularly defending persons in the United States district court and dividing fees with the district attorney, it would justify his disbarment from practice, on common principles of honesty and morality. The court quoted the following passage from *Re Henderson* (1890) 88 Tenn. 539, 13 S. W. 413: "Too much is staked upon the honesty and good conduct of lawyers for courts to wink at flagrant misconduct. They are trusted by the community with the care of their lives, liberty, and property, with no other security than personal honor and integrity." The court also quoted from *Dickens's Case* (1870) 67 Pa. 177, 5 Am. Rep. 420, as follows: "Integrity, as well as skill and learning, is essential to the character of the profession, and it becomes the duty of the bench, as well as of the bar itself, to preserve that character in its highest state, as a means of usefulness, and of answering the true end of a profession so honorable, and at the same time so needful."

In the case of *Re Simpson* (N. D.) *supra*, wherein it appeared that the defendant, while acting as state's attorney, had wilfully failed to prosecute violations of the liquor law, and had lost or destroyed the files and records in regard thereto, the court held that such misconduct involved moral turpitude, and was a statutory ground for disbarment under the statute. Rev. Code, § 433, subd. 1.

Similarly, where a state's attorney, who had patronized a gambling house on several occasions, wilfully refrained from prosecuting the proprietor of the house and other persons who were violating the Prohibition Law, it was held that his misconduct was an offense involving moral turpitude, and the court ordered his suspension from practice for nine months. *Re Voss* (1902) 11 N. D. 540, 90 N. W. 15.

But where his reputation for moral character and integrity was testified to by private citizens, judges, and the electorate at the polls, the court held

that a county attorney who had retained money collected by him on forfeited criminal bonds, on a claim that the county was indebted to him, should be reprimanded, but not disbarred or suspended, saying: "Disbarment means professional excommunication and death. It means to loose the moorings and turn a life adrift, and should be resorted to only when it is apparent that the interest of the community, the integrity of the courts, or the honor of the profession imperatively demands it." *Re Sitton* (1918) — Okla. —, 177 Pac. 555.

An intentional misrepresentation of fact by a state's attorney for the purpose of securing a certificate of fidelity in office, which was a prerequisite to the payment of his salary, has been held to be sufficient cause for his disbarment, and in answer to his contention that, because the misconduct related to his duties as state's attorney, the court had no jurisdiction over him in regard thereto, the court said: "While acting in the county court in the prosecution of cases in which the state was a party, and in all his relations to parties, counsel, and court, in such prosecutions, he was also acting in his official capacity as an attorney of this court, and under the obligations assumed by him when he became such attorney. Notwithstanding he might be liable to impeachment, or might be rejected by the voters, if a candidate for re-election, his conduct, when acting in a private or other capacity, was open to investigation by this court, and if found to be such that the court, to protect itself and the public, and to keep the administration of justice pure, ought to withdraw the protection and credit under the law which it accorded him by admitting him to the office of an attorney at law and solicitor in chancery, it is, beyond question, the right and duty of this court to deal with him as justice demands." It may suspend or disbar him." *Re Jones* (1897) 70 Vt. 71, 39 Atl. 1087.

In *State v. Hays* (1908) 64 W. Va. 45, 61 S. E. 355, it was held that a county attorney, who had received several sums of money in return for

his agreement not to prosecute the proprietor of a "speak-easy," was guilty of gross infidelity which justified his disbarment, the court saying: "No one will deny the power and duty of a court to strike from the roll the name of one who fails to maintain fidelity to the personal trust of a single client's interest. How much more important is the duty to exercise this power when the infidelity or misconduct relates to an attorney charged not only by the honor and oath of an attorney at the bar, but also by the dignity and oath of a public official, in an office calling for the exercise of highest qualities as an attorney!"

And see *Re Cowdery* (1886) 69 Cal. 32, 58 Am. Rep. 545, 10 Pac. 47, wherein the court held that the fidelity which a city attorney owed to the city and county existed after the expiration of his term of office, so that his acceptance of money from persons interested, in consideration of his agreement not to represent the city in pending appeals inaugurated during his term of office, was misconduct warranting his suspension for six months.

The bringing of an action by a city attorney on behalf of a relative against the city is not ground for disbarment where before bringing the action he appeared before the village board in regular session and stated the facts in regard to the action, and asked to be relieved of his duties as city attorney, a request that was granted, although this action of the board in relieving him of his duties was beyond their power. *Re Baum* (1920) — Idaho, —, 186 Pac. 927. The court states that, while this action by the city attorney was improper, it appears that he acted in ignorance of his duties rather than in bad faith.

The fact that the attorney for a highway district also acted as attorney for the county in the prosecution of a claim by the highway district against the county is not ground for disbarment, where it appears that the accused acted in good faith, without improper or corrupt motives, and it is not shown that any injury resulted to

his client. *Ibid.* See this case further, *infra*, XI. b.

VII. Commission of perjury.

The commission of perjury is an act involving moral turpitude which justifies the disbarment of an attorney. *Re Ulmer* (1913) 208 Fed. 461; *Perry v. State* (1852) 3 G. Greene (Iowa) 550; *Re Smith* (1906) 73 Kan. 743, 85 Pac. 584; *Re Percy* (1867) 36 N. Y. 651; *Re Thorn* (1914) 164 App. Div. 151, 149 N. Y. Supp. 507; *Re Nichols* (1914) 165 App. Div. 901, 149 N. Y. Supp. 1099.

Thus, under a Federal court rule, authorizing disbarment for any sufficient cause, it has been held that perjury, regardless of the materiality of the false testimony, is sufficient ground therefor, since it involves moral turpitude, and that a conviction therefor need not have been returned. *Re Ulmer* (Fed.) *supra*.

So, in *Perry v. State* (1852) 3 Greene (Iowa) 550, the court, passing on one of the grounds of a demurrer to an accusation against an attorney, said that if the attorney had sworn falsely, as charged, a conviction of perjury was not necessary to justify the court in rejecting him from the bar.

In the case of *Re Smith* (1906) 73 Kan. 743, 85 Pac. 584, the court held that the conduct of an attorney in agreeing to give false testimony in court, and thereafter in refusing to comply with a judgment directing him to return property received in consideration of this corrupt agreement, betrayed a moral obliquity which warranted his disbarment, saying: "The testimony showing both moral and professional delinquency was such that the duty of the trial court was clear, and no other course was open than the revocation of the abused license. An attorney is admitted upon a satisfactory showing of his good character and fitness to be an officer of the court. He is afterward required to maintain the same ethical standard, and is only entitled to hold the high office of 'minister of the law' during good behavior."

In *Re Percy* (1867) 36 N. Y. 651, the court affirmed an order of the

general term, striking the appellant's name from the roll of attorneys, where it appeared that he had destroyed his credibility on various occasions by committing perjury, and that his character was bad. And in reply to the appellant's insistence that only deceit, malpractice, or a misdemeanor in the exercise of his profession, and not general bad character or conduct, would justify his removal, the court said: "The right of admission to practice is made, both by the Constitution and statute, to depend upon the possession of a good moral character, joined with the requisite learning and ability. It is equally as important that this character should be preserved, after admission, while in the practice of the profession, as that it should exist at the time. It would be an anomaly in the law to make good moral character a prerequisite to admission to an office of a life tenure, while no provision for removal is made in case such character is wholly lost."

Where it appeared that an attorney, in a proceeding before a referee, had committed perjury in an attempt to avoid the consequences of his former deceit, the court held that he was not a proper person to remain a member of the profession, and he was accordingly disbarred. *Re Thorn* (1914) 164 App. Div. 151, 149 N. Y. Supp. 507.

Similarly, in *Re Nichols* (1914) 165 App. Div. 901, 149 N. Y. Supp. 1099, wherein it appeared that an attorney, during an investigation of charges of misconduct against him, had deliberately testified falsely, the court directed that he be disbarred.

But see *Beckner v. Com.* (1907) 126 Ky. 318, 128 Am. St. Rep. 287, 103 S. W. 378, wherein the court held that the making of a false affidavit in the capacity of a witness, and in a proceeding in which he was not acting as an attorney, would not justify the disbarment of the defendant, since "it is the policy of the law that a witness should go upon the witness stand untrammelled by the fear of prosecution by those who may be offended by or disappointed in his testimony."

VIII. Participation in unlawful assembly.

Active participation in unlawful assemblages has been held to be sufficient evidence of moral delinquency to justify the disbarment or suspension of an attorney. *Ex parte Wall* (1882) 107 U. S. 265, 27 L. ed. 552, 2 Sup. Ct. Rep. 569; *Dormenon's Case* (1810) 1 Mart. (La.) 129; *State ex rel. McLaughlin v. Graves* (1914) 73 Or. 331, L.R.A.1915C, 259, 144 Pac. 484; *Jones's Case* (1893) 2 Pa. Dist. R. 538, 12 Pa. Co. Ct. 229.

In *State ex rel. McLaughlin v. Graves* (1914) 73 Or. 331, L.R.A.1915C, 259, 144 Pac. 484, the court held that the participation of an attorney in an unlawful assemblage of persons who forcibly took certain prisoners from a jail, compelled them to kiss the American flag, and then forced them to leave the county, was ground for disciplining him, but since he had hitherto been an honorable member of society, and was prompted in his act only by patriotic zeal, the court limited its punishment to three months' suspension from practice.

In *Dormenon's Case* (1810) 1 Mart. (La.) 129, it was held that an attorney who had aided the negroes of St. Domingo in their massacres and outrages against the whites was not a fit person to hold office, however fair his conduct may have been in the meanwhile, and his name was accordingly stricken off the rolls as an attorney and counselor at law.

In *Ex parte Wall* (U. S.) *supra*, wherein it appeared that an attorney had encouraged and taken part in the lynching of a prisoner confined in a county jail, the court held that such conduct warranted his disbarment, saying: "Of all classes and professions, the lawyer is most sacredly bound to uphold the laws. He is their sworn servant; and for him, of all men in the world, to repudiate and override the laws, to trample them underfoot, and to ignore the very bands of society, argues recreancy to his position and office, and sets a pernicious example to the insubordinate and dangerous elements of the body politic. It manifests a want of fidel-

ity to the system of lawful government which he has sworn to uphold and preserve. Whatever excuse may ever exist for the execution of lynch law in savage or sparsely settled districts, in order to oppose the ruffian elements which the ordinary administration of law is powerless to control, it certainly has no excuse in a community where the laws are duly and regularly administered."

In *Jones's Case* (Pa.) *supra*, an attorney was charged with having deliberately made a false statement as to what the law was, in a public place and before an assemblage of lawless persons, who were thereby encouraged to act in further contravention of the law. The court held that proof of this charge would justify the disbarment of the attorney, but in the absence of such proof he was absolved from the charge.

IX. Act of disloyalty in time of war.

It has been held that it was not "dishonorable conduct," within a statute authorizing disbarment for such conduct, for an attorney to say, after the United States entered the World War, that he hoped that Germany would win the war. *Lotto v. State* (1919) — Tex. Civ. App. —, 208 S. W. 563.

But in the case of *Re Arcander* (1920) — Wash. —, 188 Pac. 380, an attorney was disbarred for aiding and advising persons seeking exemption from military service, and for charging fees for filling out questionnaires. The court said: "When other men were freely giving all their time, their money, to the cause, and when the youth of the land were gladly turning aside from the paths of peace to fight, and, if need be, to die for their country, this respondent only saw in it an opportunity to make money. He resented the President's call to the lawyers to serve the nation and its registrants voluntarily, freely, and without charge. He did just what the regulations asked the lawyers not to do. He became the advocate for the man who was seeking to escape military service. He refused to make out questionnaires for registrants who had no claim for exemption. He re-

fused to perform services whereby the War Department could obtain the information which it needed for the classification of registrants for military and industrial service. He became the advocate, and not the disinterested adviser, of the slacker and of men who were even willing to renounce their intentions to become American citizens—men whom he himself called sneaks. . . . From the respondent's own admissions and actions, we are regretfully forced to the conclusion that his conduct in performing services for registrants under the Selective Service Law was disloyal, mercenary, unethical, and unprofessional. Had the bar of the United States assumed the same attitude in response to the President's call to duty that respondent did, it would have called down upon itself the reprobation of the nation. It would have been disgraced to eternity. It is the duty of the lawyer, above all others, to serve his country, and his services should always be at his country's call in times of need. We feel that the respondent should not be allowed to practise law before the courts of this state, and we therefore respectfully recommend his permanent disbarment."

An attorney who solicited the employment of claiming exemptions for persons subject to the operation of the Selective Service Act, and suggested, encouraged, and assisted in the preparation of false affidavits looking to the improper exemption of his clients, was disbarred in *Re Wiltsie* (1920) — Wash. —, 186 Pac. 848. It was also alleged as one of the grounds for disbarment in this case that the attorney made excessive charges for his services in this connection, but the court held this not to be a ground for disbarment, saying that the propriety of the amount of a fee is a debatable question, and largely a matter of individual opinion, and in this case, so far as the record disclosed, the fees were voluntarily paid.

So, in the case of *Re O'Reilly* (1919) 188 App. Div. 970, 176 N. Y. Supp. 781, an attorney was suspended

for four months for receiving fees as a member of an advisory board of lawyers, assisting in the preparation of questionnaires, though he returned the fees when proceedings to disbar were commenced.

See also *Re Hofstede* (1918) 31 Idaho, 448, 173 Pac. 1087, a case outside the strict scope of this note, wherein it was held that aiding or counseling persons seeking to evade military service was a crime involving moral turpitude, so that conviction thereof warranted disbarment.

Personal vice.

Sexual immorality is generally held to be insufficient as a ground for the suspension or disbarment of an attorney. *PEOPLE EX REL. BLACK v. SMITH* (reported herewith) ante, 183; *State v. Byrnett* (1895) 4 Ohio S. & C. P. Dec. 89; *Re H— T—* (1882) 2 Pennyp. (Pa.) 84.

In the reported case (*PEOPLE EX REL. BLACK v. SMITH*) it is held that evidence that the defendant visited various disorderly houses was not of itself sufficient to warrant disbarment.

In *State v. Byrnett* (Ohio) supra, it was said that unless the misconduct of an attorney in his private capacity involved moral turpitude, or evinced a lack of honesty, integrity, and veracity, it would not justify his disbarment, and so, it appearing that an attorney had seduced his stenographer, the court, holding that such misconduct did not justify the disbarment of the attorney, said: "Grave as is the offense charged, much as the court may sympathize with the ruined girl, however great might be the hatred on the part of the court of such practices under such circumstances, still, sitting as a court, bound to lay down the law as I understand it, I am forced to the conclusion that the facts charged do not constitute unprofessional conduct, involving moral turpitude."

So, in *Re H— T—* (Pa.) supra, the court said, by way of dictum, that fornication was not an offense warranting the disbarment of an attorney.

But where, in a proceeding for disbarment, it appeared that an attorney

had been recently sued for alienating the affections of another's wife, in which suit the evidence showed adultery on his part, the court held that misconduct of such enormity, coupled with other minor acts of misconduct, warranted his disbarment. *Re Titus* (1892) 66 Hun, 632, 21 N. Y. Supp. 724.

So, it has been held that an attorney who kept a house of ill fame, at which white girls and negroes consorted, and in which opium was smoked, was morally unfit to practise. *Re Marsh* (1913) 42 Utah, 186, 129 Pac. 411.

Generally speaking, bad language or bad manners is not ground for the suspension or disbarment of an attorney, and the same has been held as to gambling. *People v. Palmer* (1871) 61 Ill. 255; *Re Washington* (1910) 82 Kan. 829, 109 Pac. 700; *Re Mills* (1850) 1 Mich. 392; *Ex parte Stratford* (1843) 7 Jur. (Eng.) 512, 12 L. J. Q. B. N. S. 331.

In *People v. Palmer* (Ill.) supra, the court stated that no matter how ungentelemanly the conduct and language of an attorney towards other members of the profession might be, it would not consider such actions in a proceeding for disbarment, saying: "This court is not constituted a censor of morals, so as to require it to pronounce upon the style of manners and conversation which becomes an honorable member of the legal profession."

In a proceeding for disbarment, one of the charges was that "the accused is a man of quick temper, which he sometimes fails to control; . . . that at times, and probably when under the influence of intoxicating liquor, he was very abusive and threatening in conduct and language; . . . that he had a quarrel with the city marshal over a dog fight, during which he displayed a pocket knife and the marshal a revolver, and that a crowd was attracted, and much excitement ensued." It was further alleged that the accused, "on two or three occasions, made threats against the relator, and has used language concerning him which for vileness and indecency is beyond the imagination

of the ordinary individual, and wholly unjustifiable, and when under the influence of drink has also used very improper language regarding others with whom he was having trouble." The court said: "Upon the charge of offensive language and quarrelsome conduct, the following quotation from an opinion of this court seems pertinent: 'True it is that a man is required to show, upon his admission to the bar, that he is of good moral character. His license to practise after he is admitted, however, will not be revoked on account of objectionable personal habits, until it is shown that such habits have rendered him unable to attend properly to his duties as a lawyer, or have rendered him unworthy of the great trust and confidence generally accorded to the members of the profession, or that such habits have become so bad as to scandalize his profession or the courts in which he practises.' *Re Elliott* (1906) 73 Kan. 157, 84 Pac. 750." *Re Washington* (1910) 82 Kan. 829, 109 Pac. 700.

In *Re Mills* (1850) 1 Mich. 392, wherein a charge was made that an attorney's reputation for veracity was so bad that he would not be believed under oath, the court said: "I do not wish to be understood as affirming that for every moral delinquency the court would be authorized to revoke the license of an attorney. In the exercise of a sound discretion, the court should only entertain such as are in their nature gross, and unfit a person for an honest discharge of the trust reposed in him." But, continuing, the court said: "I am of opinion that, if the charge I have been considering is made out by proof, that the respondent has forfeited his office; that, if fully established, it necessarily implies a baseness of character which disqualifies him for discharging the duties of his office with that faithfulness and integrity so necessary to preserve the honor of the profession from reproach, the public from imposition, and the administration of justice from impurity."

In *Ex parte Stratford* (Eng.) supra, the court refused to disbar an at-

torney on the ground that he had won money from an erstwhile client by unfair play in gambling.

XI. Miscellaneous offenses.

a. Conduct warranting disbarment or suspension.

The proposal of an attorney that he would visit the family of a judge, and, while occupying the honored position of guest, would avail himself of the freedom of conversation to commit the judge to the expression of opinions favorable to his client, has been held to constitute such flagrant turpitude as to justify his disbarment. *Ex parte Cole* (1879) 1 McCrary, 405, Fed. Cas. No. 2,973.

Where an attorney, acting with others who had secured the arrest of a weak-minded person in the hope of securing a reward, on finding that he was innocent, prepared false papers and secured his release on receipt of a large sum of money from relatives of the prisoner, which money was divided between the attorney and his associates, the court held that his conduct warranted disbarment. *Re Snyder* (1885) 24 Fed. 910.

The bribing of a legislator by an attorney, acting in his private character, has been held to be sufficient to warrant disbarment. *Re Wellcome* (1899) 23 Mont. 213, 58 Pac. 47.

In *Re Boland* (1908) 127 App. Div. 746, 111 N. Y. Supp. 932, an attorney who paid an assistant clerk of a court to secure the release, without trial, of a person charged with crime, and to release certain of his clients from liability as bail, was held to be an undesirable member of the profession, and was disbarred.

An attorney has been held to be guilty of misconduct warranting disbarment where the evidence showed that he had converted to his own use a diamond ring loaned to him for the purpose of showing it to a customer, and, further, that he had drawn a check on a bank in which he never had an account. *Re Kammerlohr* (1916) 171 App. Div. 781, 157 N. Y. Supp. 933.

So, it has been held that an attorney, who converted to his own use

money received by him in his capacity as town collector of taxes, should be disbarred, it being indispensable that an attorney should be trustworthy. *Delano's Case* (1876) 58 N. H. 5, 42 Am. Rep. 555.

In *Re Rothschild* (1910) 140 App. Div. 583, 125 N. Y. Supp. 629, an attorney was suspended from practice for one year for allowing others, for a consideration, to sign his name to letters threatening legal proceedings.

In *Re Pascal* (1911) 146 App. Div. 836, 131 N. Y. Supp. 823, the court held that the fact that an attorney had appropriated to his own use a check belonging to a third person, together with the act of the attorney in advising a client who was under indictment, to forfeit his bail, conclusively sustained a conclusion that he was an entirely unfit person to be a member of the profession, and an order of disbarment was accordingly entered.

The acts of an attorney who, being retained to advise a woman in relation to matters arising out of the alleged illicit relations between her husband and another woman, threatened the latter with exposure in the subsequent proceedings unless she paid money to him, and his further collusion with a judge in obtaining a divorce for the client without sufficient evidence, have been held to constitute professional misconduct involving moral turpitude and warranting disbarment proceedings. *Re Burke* (1899) 17 Ohio C. C. 315, 9 Ohio C. D. 850. And in proceedings for the disbarment of the judge who was in collusion with the attorney in the foregoing case, the court held that, if the specifications were made good by proof, they would justify disbarment. *Re Dellenbaugh* (1899) 17 Ohio C. C. 106, 9 Ohio C. D. 325.

An attempt to gain an advantage over an opposing attorney, by making him drunk, has been held to be sufficient ground for removing an attorney from practice, with leave to apply for readmission after six years. *Dickens's Case* (1870) 67 Pa. 169, 5 Am. Rep. 420.

The act of an attorney in accepting the challenge of another to fight a duel, in which duel the challenger was slain, has been held to be good cause for striking his name from the roll. *Smith v. State* (1829) 1 Yerg. (Tenn.) 228.

An attorney who knowingly assisted in an attempt to force another to purchase hotel stock owned by the employer of the attorney, by threatening an exposé of certain events, was held to be guilty of acts involving moral turpitude and justifying his disbarment. *Re Mills* (1918) 104 Wash. 278, 176 Pac. 556.

Where an attorney had been disbarred in another state for want of private and professional character, it was said by the court that, in the absence of some sufficient reason inconsistent with principles of right and justice, the finding of the other state court so operated against the character of the attorney as to constrain the court to exclude him from its bar in turn. *Selling v. Radford* (1916) 243 U. S. 46, 61 L. ed. 585, 37 Sup. Ct. Rep. 377, Ann. Cas. 1917D, 569.

The maintenance of a common nuisance in violation of law, by conducting a place where intoxicating liquors are sold, bartered, and given away in violation of law, and where persons are permitted to resort for the purpose of drinking intoxicating liquors as a beverage in violation of law, is a ground for disbarment. *Re Callicotte* (1920) — Mont. —, 187 Pac. 1019. The attorney had been convicted before a justice of maintaining a nuisance, but this conviction was regarded merely as proof of the charge against him.

b. Conduct not warranting disbarment or suspension.

In *People ex rel. Johnson v. Goddard* (1888) 11 Colo. 259, 18 Pac. 338, it appeared that an attorney, who was a candidate for the office of district judge, executed a written promise to an influential politician to make a certain appointment in case of his election. On the delivery of the promise by a friend, money was accepted against the wishes of the attorney, which amount was, however,

returned after the election. The court held that while the transaction was reprehensible, it would not warrant the disbarment of the attorney.

The refusal by an attorney, called as a witness, to answer questions relating to his personal transactions where he claimed that his answers might lead to disbarment proceedings, has been held not to be a sufficient cause for his disbarment. *Re Kaffenburgh* (1907) 188 N. Y. 49, 80 N. E. 570.

The chartering of a boat by an attorney to take his client out of the state, after he had been released on bail pending extradition proceedings, has been held not to be unprofessional conduct warranting disbarment, where there was no evidence that the intent of the client in leaving the jurisdiction was unlawful. *Ibid.*

Where an attorney wrote a letter to a friend who had been accused of crime, in which he made false statements designed to protect his friend and apparently intended for later publication, the court stated that such falsehood gave occasion for censure, but no further disciplinary action was taken because the attorney believed his friend to be a sincere and well-meaning man, and no motive other than that of protecting his friend prompted the falsehood. *Re Napolis* (1915) 169 App. Div. 469, 155 N. Y. Supp. 416.

To warrant disbarment it has been held that there must be misconduct, influenced by bad motive. So, where an attorney was charged with procuring a person to swear to an affidavit charging another with crime, when he was aware that the person so swearing did not know the person charged with the offense, and knew little, if anything, about the alleged offense, the court held that this would not justify disbarment. *State v. Bentley* (1878) 4 Ohio Dec. Reprint, 362.

And see *Re Cooksey* (1909) 79 Kan. 550, 100 Pac. 62, wherein it appeared that an attorney, actuated chiefly by malicious motives, had assisted in the prosecution of certain false charges against another attorney in a disbarment proceeding, the court held that

the action of the attorney merited strong disapproval, but that, since the duty and dignity of the honorable office of attorney were by this time fully realized by the defendant, it would not proceed further in the case.

The fact that an attorney had made usurious loans, in the absence of proof that his business was conducted in an oppressive or fraudulent manner, has been held to be insufficient to warrant disbarment. *People ex rel. Chicago Bar Asso. v. Wheeler* (1913) 259 Ill. 99, 45 L.R.A.(N.S.) 1202, 102 N. E. 188, Ann. Cas. 1914C, 286, wherein the court said: "A candidate for admission to the bar must show that he is possessed of a good moral character, and one who has been admitted may be disbarred if he has lost that character. Usury is not an offense against the law in Illinois. Of itself, it is not immoral. It would be contrary to common experience to say that a man who lends money at usurious rates is, for that reason alone, not a man of good moral character."

The courts are inclined to be lenient where the alleged moral delinquencies occur several years before the disbarment proceeding. Thus, in *Re Sherin* (1911) 27 S. D. 232, 40 L.R.A.(N.S.) 801, 130 N. W. 761, Ann. Cas. 1913D, 446, wherein, among other charges in a proceeding for disbarment, were some relating to immoral conduct many years before, the court said: "While the charges . . . were, if true, sufficient to show that respondent, was, at the time referred to, not only unfitted to be a member of an honorable profession, but absolutely unfitted for the society of respectable people, yet it is and should be the policy of the law to forgive one his errors long since past, and not to allow the same to be resurrected, where there is nothing to show but that for several years after such wrongdoing the party may have lived an exemplary life."

For an attorney to send out notices which might readily be taken as legal writs or processes, to mail summonses in the hope that the recipients would take their receipt as the equivalent of

personal service, to resort to a second garnishment in a suit against a woman, in which her wages, garnished at first, were claimed and allowed as exempt, and to attempt to blackmail debtors by means of implied threats contained in posters listing judgments for sale, the posters being mailed to the judgment debtors, discloses the attorney as an unfit person to be entrusted with a license to practise law. *Re Swihart* (1920) — S. D. —, 177 N. W. 364. But it was held in this case, in which the attorney made no attempt to conceal his wrongdoing but, on the other hand, was exceedingly frank in his admissions, and expressed a most earnest desire to conform his future conduct with the best ideals of his profession, that a judgment of disbarment should not be entered, but that he should stand suspended from practice for the period of six months.

The making of a false affidavit in an attachment proceeding, charging that the defendant was indebted to the plaintiff, when as a matter of fact it appeared that, to make up the total amount of the claim, claims by third parties had been assigned to the plaintiff without his knowledge and consent, is not ground for disbarment. *Re Baum* (1920) — Idaho, —, 186 Pac. 927.

A letter written by a prosecuting attorney in his efforts to obtain the release of a mortgage on his property, to the holder of the mortgage, stating that unless the holder desired to release the mortgage it would be necessary to have a warrant issued for him for obtaining money under false pretenses, was held not ground for disbarment in *Re Baum* (Idaho) *supra*, on the theory that the letter was sent by the prosecuting attorney in his private capacity, and not as prosecuting attorney; in fact, the sending was held to be in no way connected with the prosecution of his profession as attorney. The court states that, where the charge of a criminal offense is not connected in any way with the office of the accused as an attorney, it is generally held that courts should not enter a judgment of dis-

barment except upon conviction of a felony or misdemeanor involving moral turpitude. The court refers to the holding of some courts that an attorney may be disbarred for criminal misconduct not committed in connection

with his office as attorney, and states that in such cases the criminal misconduct should be such as to involve inherent dishonesty and of itself show one to be unworthy to hold the office of attorney.
R. E. B.

JIM BARROW, Appt.,
v.
STATE OF OKLAHOMA.

Oklahoma Criminal Court of Appeals — March 20, 1920.

(— Okla. Crim. Rep. —, 188 Pac. 351.)

Physician — necessity of knowledge of remedies — liability for homicide.

1. A person assuming to treat disease is bound to know the nature of the remedies he prescribes and the treatment he adopts, and he is responsible criminally for a death resulting to the patient from gross ignorance and culpable negligence in the selection of remedies and the application of the treatment.

[See note on this question beginning on page 211.]

Indictment — duplicity — different forms of negligence.

2. Information for manslaughter in the second degree, alleged to have been committed by the culpable negligence of the defendant, is not duplicious, although it alleges and charges in one count more than one way in which the defendant was culpably negligent, through gross ignorance, in the treatment of disease resulting in death.

— sufficiency.

3. For information held sufficient to support a conviction of manslaughter in the second degree by gross ignorance and culpable negligence in the treatment of disease resulting in death, see body of opinion.

Witness — showing bias — cross-examination.

4. It is competent, on cross-examination of a witness for the defendant, to elicit facts which tend to show the

bias, prejudice, or friendship of the witness for the defendant.

— scope of cross-examination — discretion.

5. A large discretion is lodged in the trial court as to the scope of cross-examination of witnesses on matters affecting their credibility, and before a judgment of conviction will be reversed because improper cross-examination along this line was permitted, a clear abuse of discretion must be shown.

Appeal — evidence of guilt — sufficiency.

6. Where the information charges an offense, and there is evidence in the record from which the jury was authorized reasonably to conclude that the defendant is guilty of the crime in the manner charged, the judgment will not be set aside because of insufficient evidence.

[See 8 R. C. L. 225; 10 R. C. L. 1014.]

Headnotes by MATSON, J.

APPEAL by defendant from a judgment of the District Court for Pittsburg County (Higgins, J.) convicting him of manslaughter in the second degree. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Harris & Lackey for appellant.

Mr. S. P. Freeling, Attorney General, for the State:

When death is caused by gross neglect in the selection or application of remedies by one grossly ignorant of the art he assumes to practise, he is criminally liable.

Ann v. State, 11 Humph. 159; Com. v. Pierce, 138 Mass. 165, 52 Am. Rep. 264, 5 Am. Crim. Rep. 391.

Matson, J., delivered the opinion of the court:

This is an appeal from the district court of Pittsburg county, wherein the defendant, Jim Barrow, was convicted of the crime of manslaughter in the second degree, and sentenced to serve a term of two years' imprisonment in the state penitentiary. An appeal in due time was taken from said judgment to this court, and the errors relied upon for reversal will be considered in the order presented by counsel for defendant.

The prosecution is based on § 2325, Revised Laws 1910, defining manslaughter in the second degree, which is as follows: "Any killing of one human being by the act, procurement or culpable negligence of another, which, under the provisions of this chapter, is not murder, nor manslaughter in the first degree, nor excusable nor justifiable homicide, is manslaughter in the second degree."

The information, in substance, charges that the defendant, being grossly incompetent to act as a physician and grossly ignorant of the science of medicine, and not being a licensed physician under the laws of the state of Oklahoma, held himself out as such to the deceased, Tom Lankford, who was then and there sick and suffering from disease and sickness, a further and more fit description of which was to the county attorney unknown, and to the family and relatives of said deceased, and did wilfully, wrongfully, unlawfully, and feloniously, without due caution and circumspection, and by malpractice in the use of remedies, and by unskilful acts and pro-

curements and culpable negligence, and by exercising gross ignorance and lack of ordinary knowledge and skill in medicine, and through inattention and wanton indifference to the safety of the deceased, and with utter disregard for either the safety or life of the deceased, grossly neglected to use ordinary precaution in ministering to the sickness and feebleness of the deceased, and wantonly failed and refused to give deceased ordinary remedies to cure and heal him, but, being wholly indifferent to the health, safety, and life of the deceased, administered to him as a medicine a brew made by burning hog feet that had long theretofore been thrown out as waste and refuse, pretending to the deceased and the members of his family that the said brew and concoction possessed curative qualities and would alleviate and cure the said Tom Lankford; and also by malpractice, through culpable negligence and gross ignorance, the defendant rubbed the limbs and body of the deceased, accompanied with some incantation, claiming thereby that he was causing the pain to be transferred out of the person of the deceased and to be lodged in him, the said Jim Barrow; and that said brew and said form of rubbing were wholly without nature or cause to tend to cure and heal the deceased and to alleviate his suffering, and were wholly worthless and without remedial value, all of which was known to the defendant; and that said acts as aforesaid, and the culpable negligence, gross ignorance, and wanton inattention and malpractice upon the said Tom Lankford, caused a mortal sickness and feebleness of body, from which the said Tom Lankford died, and by reason of all of which the said defendant did kill and slay the said Tom Lankford.

The defendant interposed a demurrer to the information, which was overruled and excepted to, and it is here urged that the court erred in overruling the demurrer, upon the grounds that the information is

duplicitous and does not state facts sufficient to constitute a crime under the laws of the state.

Counsel present no authorities in support of this contention. We are of the opinion that the information is not duplicitous, although it

Indictment—
duplicitous—dif-
ferent forms of
negligence.

charges more than one way in which the defendant, through gross ig-

norance and culpable negligence, attempted to treat and heal the sickness or disease from which the deceased is alleged to have been suffering, and which is alleged to have contributed to and resulted in the death of the deceased. This the pleader was authorized to do in one count under § 5741, Revised Laws 1910. The information is sufficiently definite and certain as to the various means employed which are alleged to have resulted in the death of Tom Lankford, by malpractice, gross ignorance, and culpable negligence on the part of the defendant.

It is the opinion of the court also that the information states an of-

fense which, if proven to be true, would justify a con-

viction of manslaughter in the second degree, as defined by § 2325, supra. Com. v. Pierce, 138 Mass. 165, 52 Am. Rep. 264, 5 Am. Crim. Rep. 391; State v. Hardister, 38 Ark. 605, 42 Am. Rep. 5.

Objection is also made to the manner in which the county attorney was permitted to cross-examine the wife of the deceased, who was introduced and testified in behalf of the defendant. A large discretion is lodged in the trial court as to the scope of the examination of witnesses, especially as to matters affecting the credibility of the witness on cross-examination. The questions complained of relate to the witness's

feeling of friendship for the defendant, and under the circumstances of

this case, in view of the fact that the witness was largely responsible for calling the defendant to treat

9 A.L.R.—14.

her deceased husband, we find no abuse of discretion upon the part of the trial court in overruling the objection of defendant's counsel to the questions asked.

—scope of
cross-examina-
tion—discretion.

Harrold v. Territory, 18 Okla. 395, 10 L.R.A.(N.S.) 604, 89 Pac. 202, 11 Ann. Cas. 818; Gilbert v. State, 8 Okla. Crim. Rep. 543, 128 Pac. 1100, 129 Pac. 671.

Objection is made to certain of the court's instructions, but an examination of the instructions convinces us that the law of the case was fully covered in a manner as favorable to the defendant as the evidence warranted. The defendant requested no other instructions on any proposition of law involved in the case.

It is also contended that the evidence adduced in the cause utterly fails and is wholly insufficient to establish that Tom Lankford's death was caused by the culpable negligence of the defendant in the treatment of the disease of which deceased was suffering, and is wholly insufficient upon which to base the conviction.

There is evidence in the record to the effect that at the time the defendant undertook to treat and administer to the deceased the deceased was suffering from an attack of la grippe which was bordering on incipient pneumonia, and the evidence of credible physicians is to the effect that in such cases, even with the most careful and skilful treatment, from 10 to 40 per cent of the patients die. The evidence also shows that deceased's condition at the time the defendant commenced to administer to him demanded the very best of medical attention and nursing; that defendant was aware of deceased's condition, and at first protested against treating him, but thereafter, being prevailed upon by the relatives of the deceased to treat deceased, the defendant undertook the treatment of the deceased, and administered to him by laying on of the hands and offering a prayer or incantation that the pain be trans-

mitted from the body of the deceased to that of the defendant, and also by administering to the deceased a brew or concoction made by parching and boiling hog hoofs, and also by giving deceased shortly before death a headache or fever powder containing $8\frac{1}{2}$ grains of acetanilide.

The undisputed evidence is to the effect that such treatment was without curative powers or indicated for treatment of the disease from which the deceased was then suffering, but was wholly without nature to tend to alleviate in any degree the disease from which deceased was suffering, and that the headache or fever powder had a very depressing effect on the heart's action, and that the administration of such treatment under the circumstances was through gross ignorance of the art the defendant assumed to practise.

The main contention urged here appears to be that, in view of the fact that from 10 to 40 per cent of patients suffering from the disease the deceased had at the time the defendant commenced treating him probably die, despite the very best of medical attention and nursing, it can only be surmised that the treatment administered by the defendant possibly may have contributed to the death of the deceased, and that the evidence of guilt only amounts to a suspicion, and the crime is not proved with that degree of certainty which authorizes a conviction in a criminal cause.

The treatment given the deceased by the defendant was not indicated for the disease from which the deceased was suffering; it in no way tended to alleviate the suffering or had any curative properties whatever. On the contrary, the treatment administered, considering the time it was given, was evidently detrimental to the patient's health. Defendant possessed no knowledge of the curative properties of medicine, was not licensed to practise medicine in the state, and was grossly ignorant of the manner in which the disease from which the deceased was suffering should be treated.

The application of hands, accompanied with an incantation or prayer that the pain be transmitted from the body of the deceased to that of the defendant, the administering of hog-hoof tea and of the headache or fever powder at the time it was given, evidenced gross ignorance and culpable negligence on the part of the defendant in the treatment of the disease. Prior to the time the defendant commenced his treatment of the deceased, the deceased's condition, under the treatment of a skilful physician, had slowly improved. The evidence is to the effect that on the morning the defendant commenced the treatment of the deceased the deceased's temperature was 100, his pulse about 85, and his respiration 24. Prior to that time the temperature of the deceased had been as high as 104, his pulse from 90 to 100, and his respiration above 30. The deceased died within two days after the defendant commenced treating him. No one knows to an absolute certainty whether the deceased would or would not have lived had the treatment of a skilful physician been continued.

The question here is not whether the deceased would have lived had he received treatment according to the care and skill usual among good practitioners of any recognized and authorized school, but did the treatment given and applied by the defendant contribute to and result in the death of the deceased, and was the defendant grossly ignorant of the manner in which such disease should be treated and culpably negligent of the patient in giving the treatment? There is evidence in this record from which the jury was authorized reasonably to conclude that death resulted in the manner charged in the information. Under these circumstances, the trial court having properly submitted the law of the case, this court should not set the judgment aside because of insufficient evidence. Appeal—evidence of guilt—sufficiency. Crilley v. State, 15 Okla. Crim. Rep.

44, 181 Pac. 316; Cope v. State, 15 Okla. Crim. Rep. 437, 177 Pac. 920. The crime here did not consist in the omission to perform some duty specifically imposed by law. Defendant owed deceased no duty; but, having assumed to treat him for disease, defendant was bound to know the nature of the remedies he prescribed and the treatment he adopted, and he is responsible criminally for a death resulting from gross ignorance and culpable negligence in such relation. The burden, of course, rests on the prosecution to prove to the satisfac-

Physician—
necessity of
knowledge of
remedies—
liability for
homicide.

tion of the jury beyond a reasonable doubt that death resulted from defendant's gross ignorance and culpable negligence, but controverted questions of fact are solely for the jury's determination.

As we view the evidence in this case, it cannot, with propriety and due respect for the law, be held that there is an absence of competent evidence on which to base the conviction.

No prejudicial error having been urged as ground for reversal, the judgment is affirmed.

Doyle, P. J., and Armstrong, J., concur.

ANNOTATION.

Homicide: improper treatment of disease.

- I. In general, 211.
- II. Physician, 214.
- III. Surgeon, 219.
- IV. Osteopath, 219.
- V. Herbalist, 220.
- VI. Practitioner of particular cure, 221.
- VII. Midwife, 222.
- VIII. Christian Scientist, 223.

Scope.

This note is confined, as its title indicates, to cases where the homicide results from the improper treatment of a sick person, and does not include those cases where the homicide results from the neglect or failure to procure or furnish medical aid.

I. In general.

The crime usually charged in an indictment growing out of the death of a person resulting from the improper treatment of a disease with which he is afflicted is manslaughter, though in the following cases the indictment charged murder: State v. Schulz (1881) 55 Iowa, 628, 39 Am. Rep. 187, 8 N. W. 469; Com. v. Thompson (1809) 6 Mass. 134; Rex v. Williamson (1829) 3 Car. & P. (Eng.) 635.

There was, however, in these cases, apparently no attempt to convict the accused of any crime greater than manslaughter.

The general rule upon the subject under discussion is well stated in the following words of the court, in the case of Hampton v. State (1905) 50 Fla. 55, 39 So. 421: "The law seems to be fairly well settled, both in England and America, that where the death of a person results from the criminal negligence of the medical practitioner in the treatment of the case, the latter is guilty of manslaughter, and that this criminal liability is not dependent on whether or not the party undertaking the treatment of the case is a duly licensed practitioner, or merely assumes to act as such, acted with good intent in administering the treatment, and did so with the expectation that the result would prove beneficial. And that the real question upon which the criminal liability depends in such cases is whether there was criminal negligence. That criminal negligence is largely a matter of degree, incapable of precise definition, and whether or not it exists to such a degree as to involve criminal liability is to be determined by the jury. That criminal negligence exists where the physician or surgeon, or person assuming to act as such, exhibits gross lack of competency, or gross inattention, or criminal indifference to the patient's safety, and that this may arise from

his gross ignorance of the science of medicine or surgery, and of the effect of the remedies employed, through his gross negligence in the application and selection of remedies, his lack of proper skill in the use of instruments, or through his failure to give proper instructions to the patient as to the use of the medicines; that where the person treating the case does nothing that a skilled person might not do, and death results merely from an error of judgment on his part, or an inadvertent mistake, he is not criminally liable."

The proposition that one, who through criminal negligence in the treatment of a patient causes his death, is guilty of manslaughter, is supported by practically all the cases.

Arkansas.—*State v. Hardister* (1882) 38 Ark. 605, 42 Am. Rep. 5; *Feige v. State* (1917) 128 Ark. 465, 194 S. W. 865.

California.—*People v. Hunt* (1915) 26 Cal. App. 514, 147 Pac. 476.

Florida.—*Hampton v. State*, supra.

Illinois.—*Honnard v. People* (1875) 77 Ill. 481.

Massachusetts.—*Com. v. Pierce* (1884) 138 Mass. 165, 52 Am. Rep. 264, 5 Am. Crim. Rep. 391.

Minnesota.—*State v. Lester* (1914) 127 Minn. 282, L.R.A.1915E, 302, 149 N. W. 300.

Missouri.—*State v. Wagner* (1883) 78 Mo. 644, 47 Am. Rep. 131.

Oklahoma.—*BARROW v. STATE* (reported herewith) ante, 207.

Texas.—*Gorden v. State* (1904) — Tex. Crim. Rep. —, 90 S. W. 636.

Washington.—*State v. Gile* (1894) 8 Wash. 12, 35 Pac. 417; *State v. McFadden* (1908) 48 Wash. 259, 14 L.R.A.(N.S.) 1140, 93 Pac. 414.

England.—*Rex v. Williamson* (1829) 3 Car. & P. 635; *Rex v. Simpson* (1829) 1 Lewin, C. C. 172; *Rex v. Long* (1830) 4 Car. & P. 398; *Rex v. Ferguson* (1830) 1 Lewin, C. C. 181; *Rex v. Long* (1831) 4 Car. & P. 423; *Rex v. Senior* (1832) 1 Moody, C. C. 346, 1 Lewin, C. C. 183, note; *Rex v. Spiller* (1832) 5 Car. & P. 333; *Rex v. Webb* (1834) 1 Moody & R. 405, 2 Lewin, C. C. 196; *Reg. v. Spilling* (1838) 2 Moody & R. 107; *Reg. v.*

Whitehead (1848) 3 Car. & K. 202; *Reg. v. Crook* (1859) 1 Fost. & F. 521; *Reg. v. Crick* (1859) 1 Fost. & F. 519; *Reg. v. Bull* (1850) 2 Fost. & F. 201; *Reg. v. Markuss* (1864) 4 Fost. & F. 356; *Reg. v. Chamberlain* (1867) 10 Cox, C. C. 486; *Reg. v. Macleod* (1874) 12 Cox, C. C. 534; *Rex v. Burdee* (1916) 86 L. J. K. B. N. S. 871, 115 L. T. N. S. 904, 141 L. T. Jo. 427.

That this criminal liability is not dependent on whether or not the party undertaking the treatment of the case is a duly licensed practitioner, or merely assumes to act as such, is held by the following cases: *People v. Hunt* (Cal.) supra; *Hampton v. State* (1905) 50 Fla. 55, 39 So. 421; *Rex v. Van Butchell* (1829) 3 Car. & P. (Eng.) 629; *Rex v. Long* (1830) 4 Car. & P. (Eng.) 398; *Rex v. Long* (1831) 4 Car. & P. (Eng.) 423; *Rex v. Spiller* (1832) 5 Car. & P. (Eng.) 333; *Rex v. Webb* (1834) 1 Moody & R. (Eng.) 405, 2 Lewin, C. C. 196; *Reg. v. Whitehead* (1848) 3 Car. & K. (Eng.) 202; *Reg. v. Crick* (1859) 1 Fost. & F. (Eng.) 519.

But while liability for manslaughter is not dependent on whether the accused is a physician or not, that fact apparently has some bearing upon his liability, since in *Reg. v. Crick* (1859) 1 Fost. & F. (Eng.) 519, the prosecution of a quack herb doctor for the death of a child from overdoses of a poison, the court said, in charging the jury: "If the prisoner had been a medical man I should have recommended you to take the most favorable view of his conduct, for it would be most fatal to the efficiency of the medical profession if no one could administer medicine without a halter around his neck; and although I cannot speak of a person in the prisoner's position in language as strong, still he ought not to be responsible unless it has been proved with reasonable certainty that he caused the death by the careless administration of the drug."

And in *Rex v. Burdee* (1916) 86 L. J. Ch. K. B. N. S. (Eng.) 871, the court in connection with the quotation of the rule that any person, whether he be a regular or licensed medical man or not, who professes to deal with the

life or health of others, is bound to have competent skill to perform the tasks that he holds himself out to perform, said that "where the man indicted is a qualified medical man it might be difficult to prove that he had not the requisite skill, as if he had not some skill he would not have passed his examination; but such a person might conceivably not apply his skill in a proper manner. In the present case we are dealing with a person having no medical knowledge; his answers given in evidence show that he is ignorant over and above most people. He imagined that he could cure a difficult disease by fantastic means, but he knows nothing about disease of the heart, and did not examine the patient's heart before prescribing treatment. He adopted a stereotyped practice of prescribing cold water and fasting, with the result, according to the evidence, that she died prematurely. The verdict was therefore justified by law and by the facts adduced in evidence."

And the following cases hold that such liability is not dependent on whether the accused acted with good intent in administering the treatment, with the expectation that the result would prove beneficial: *Hampton v. State* (1905) 50 Fla. 55, 39 So. 421; *Com. v. Pierce* (1884) 138 Mass. 165, 52 Am. Rep. 264, 5 Am. Crim. Rep. 391; *Rex v. Simpson* (1829) 1 Lewin, C. C. (Eng.) 172; *Rex v. Webb* (1834) 1 Moody & R. (Eng.) 405, 2 Lewin, C. C. 196; *Reg. v. Crook* (1859) 1 Fost. & F. (Eng.) 521.

There are, however, some cases holding the contrary of this proposition.

Thus, it was held in *State v. Schulz* (1881) 55 Iowa, 628, 39 Am. Rep. 187, 8 N. W. 469, in *Rice v. State* (1844) 8 Mo. 561, and in *Com. v. Thompson* (1809) 6 Mass. 134, that if a person assume to act as a physician, however ignorant of medical science, and prescribe with an honest intention of curing the patient, but through ignorance of the quality of the medicine prescribed, or the nature of the disease, or both, the patient die in consequence of the treatment, contrary to

the expectation of the person prescribing, he is not guilty of murder or manslaughter; but if the party prescribing have so much knowledge of the fatal tendency of the prescription that it may be reasonably presumed that he administered the medicine from an obstinate, wilful rashness, and not with an honest intention and expectation of effecting a cure, he is guilty of manslaughter at least, though he might not have intended any bodily harm to the patient.

And it was held in *Caywood v. Com.* (1885) 7 Ky. L. Rep. 224, that an instruction that the jury could find defendant guilty of manslaughter if he was ignorant of the poisonous character of the drug which he was administering was error, and the court said that, while one who has caused the death of another by administering poison may be guilty of manslaughter, although he was ignorant of the poisonous character of the drug he was administering, yet, in order to authorize a conviction in such a case, it must appear that he was giving the drug with a wicked or evil purpose.

The following cases recognize the principle that criminal negligence is largely a matter of degree, incapable of precise definition, and whether or not it exists to such a degree as to involve criminal liability is to be determined by the jury:

Arkansas.—*Feige v. State* (1917) 128 Ark. 465, 194 S. W. 865.

California.—*People v. Hunt* (1915) 26 Cal. App. 514, 147 Pac. 476.

Florida.—*Hampton v. State* (1905) 50 Fla. 55, 39 So. 421.

Kentucky.—*Caywood v. Com.* (1885) 7 Ky. L. Rep. 224.

Minnesota.—*State v. Lester* (1914) 127 Minn. 282, L.R.A.1915D, 201, 149 N. W. 297.

Missouri.—*State v. Wagner* (1883) 78 Mo. 644, 47 Am. Rep. 131.

Oklahoma.—*BARROW v. STATE* (reported herewith) ante, 207.

England.—*Rex v. Williamson* (1829) 3 Car. & P. 635; *Rex v. Long* (1830) 4 Car. & P. 398; *Rex v. Ferguson* (1830) 1 Lewin, C. C. 181; *Rex v. Long* (1831) 4 Car. & P. 423; *Rex v. Spiller* (1832) 5 Car. & P. 333; *Rex*

v. Webb (1834) 1 Moody & R. 405, 2 Lewin, C. C. 196; Reg. v. Spilling (1838) 2 Moody & R. 107; Reg. v. Whitehead (1848) 3 Car. & K. 202; Reg. v. Crook (1859) 1 Fost. & F. 521; Reg. v. Crick (1859) 1 Fost. & F. 519; Reg. v. Bull (1860) 2 Fost. & F. 201; Reg. v. Markuss (1864) 4 Fost. & F. 356; Reg. v. Chamberlain (1867) 10 Cox, C. C. 486; Reg. v. Macleod (1874) 12 Cox, C. C. 534; Rex v. Burdee (1916) 86 L. J. K. B. N. S. 871, 115 L. T. N. S. 904, 141 L. T. Jo. 427.

That criminal negligence exists where the physician, or surgeon, or person assuming to act as such, exhibits gross lack of competency, or gross inattention, or criminal indifference to the patient's safety, and that this may arise from his gross ignorance of the science of medicine or surgery, and of the effect of the remedies employed, or through his gross negligence in the application and selection of remedies, is supported by the following cases:

Arkansas.—State v. Hardister (1882) 38 Ark. 605, 42 Am. Rep. 5; Feige v. State (1917) 128 Ark. 465, 194 S. W. 865.

California.—People v. Hunt (1915) 26 Cal. App. 514, 147 Pac. 476.

Florida.—Hampton v. State (1905) 50 Fla. 55, 39 So. 421.

Illinois.—Honnard v. People (1875) 77 Ill. 481.

Massachusetts.—Com. v. Pierce (1884) 138 Mass. 165, 52 Am. Rep. 264, 5 Am. Crim. Rep. 391.

Minnesota.—State v. Lester (1914) 127 Minn. 282, L.R.A.1915D, 201, 149 N. W. 297.

Missouri.—State v. Wagner (1883) 78 Mo. 644, 47 Am. Rep. 131.

Oklahoma.—BARROW v. STATE (reported herewith) ante, 207.

Texas.—Gorden v. State (1904) — Tex. Crim. Rep. —, 90 S. W. 636.

Washington.—State v. Gile (1894) 8 Wash. 12, 38 Pac. 417.

England.—Rex v. Williamson (1829) 3 Car. & P. 635; Rex v. Simpson (1829) 1 Lewin, C. C. 172; Rex v. Long (1830) 4 Car. & P. 398; Rex v. Ferguson (1830) 1 Lewin, C. C. 181; Rex v. Long (1831) 4 Car. & P. 423; Rex v. Spiller (1832) 5 Car. & P. 338;

Rex v. Webb (1834) 1 Moody & R. 405, 2 Lewin, C. C. 196; Reg. v. Whitehead (1848) 3 Car. & K. 202; Reg. v. Crook (1859) 1 Fost. & F. 521; Reg. v. Crick (1859) 1 Fost. & F. 519; Reg. v. Bull (1860) 2 Fost. & F. 201; Reg. v. Markuss (1864) 4 Fost. & F. 356; Reg. v. Chamberlain (1867) 10 Cox, C. C. 486; Reg. v. Macleod (1874) 12 Cox, C. C. 534; Rex v. Burdee (1919) 86 L. J. K. B. N. S. 871, 115 L. T. N. S. 904, 141 L. T. Jo. 427.

That criminal negligence may arise from lack of proper skill in the use of instruments is recognized by the following cases: State v. Hardister (1882) 38 Ark. 605, 42 Am. Rep. 5; Hampton v. State (1905) 50 Fla. 55, 39 So. 421; State v. Lester (1914) 127 Minn. 282, L.R.A.1915D, 201, 149 N. W. 297; Gorden v. State (1904) — Tex. Crim. Rep. —, 90 S. W. 636; Rex v. Senior (1832) 1 Moody, C. C. (Eng.) 346, 1 Lewin, C. C. 183, note; Reg. v. Spilling (1838) 2 Moody & R. (Eng.) 107.

And that criminal negligence may arise from failure to give proper instructions to the patient as to the use of the medicines is held in Reg. v. Chamberlain (1867) 10 Cox, C. C. (Eng.) 486.

The principle that where the person treating the case does nothing that a skilled person might not do, and death results merely from an error of judgment on his part, or an inadvertent mistake, he is not criminally liable, is supported by the following cases: State v. Hardister (1882) 38 Ark. 605, 42 Am. Rep. 5; Feige v. State (1917) 128 Ark. 465, 194 S. W. 865; Hampton v. State (1905) 50 Fla. 55, 39 So. 421; State v. Lester (1914) 127 Minn. 282, L.R.A.1915D, 201, 149 N. W. 297; Reg. v. Macleod (1874) 12 Cox, C. C. (Eng.) 534.

II. Physician.

Since it appears from the general rule hereinbefore set out that criminal liability is not dependent on whether or not the party undertaking the treatment of the case is a duly licensed practitioner, or merely assumes to act as such, and as it does not appear in some of the cases whether the accused was a regular physician or merely as-

sumed to act as such, cases involving both regular physicians and those assuming to be such are treated in this subdivision.

The point under discussion frequently comes up in the form of the question of the sufficiency of the indictment.

Thus, the crime of manslaughter, under a statute reading, "If the killing be done in the commission of an unlawful act, without malice, and the means calculated to produce death, or in the prosecution of a lawful act, done without due caution and circumspection, it shall be manslaughter," which statute is, in substance, the common-law definition of involuntary manslaughter, is held to be set out in an indictment charging, in substance, that the accused, holding themselves out as physicians, were called to attend a pregnant woman, and that they feloniously, and without due caution and circumspection, and by malpractice, in the use of the remedies and appliances prescribed, and finally, by abandonment, caused her death. The improper treatment alleged in the indictment consisted in administering to a woman while in the pains of childbirth a large and excessive quantity of morphine, whereby the labor pains were interfered with and the woman made nervous, delirious, and prostrate with fever, the administering of large and excessive quantities of fluid extract of ergot, causing the patient to have convulsions, in unnecessarily bleeding the patient in the arm, in producing inflammation by the unauthorized use of forceps to deliver the child, in administering to the patient large and excessive quantities of chloroform, in cutting with a pocket knife the child, thus killing it before its delivery, in tying a rope around the neck of the child and by pulling on it, completing the delivery, and finally in abandoning the patient without delivering the afterbirth. *State v. Hardister* (1882) 38 Ark. 605, 42 Am. Rep. 5.

The criminal liability of a physician for the death of his patient, brought about by his gross negligence, carelessness, or ignorance, may be established upon an indictment or information

predicated upon a general statute defining manslaughter, which reads as follows: "The killing of a human being by the act, procurement or culpable negligence of another, in cases where such killing shall not be justifiable or excusable homicide nor murder, according to the provisions of this article, shall be deemed manslaughter." It was unsuccessfully contended that the indictment in this case was fatally defective because of the omission of an allegation that the defendant was intoxicated at the time of the performance of the acts which resulted in the death of his patient, on the ground that another state statute, which provided that if any physician, while in a state of intoxication, shall, without a design to effect death, administer any poison, drug, or medicine, or do any other act to another person which shall produce the death of such other, he shall be deemed guilty of manslaughter, furnished exclusively the status of facts under which alone a physician could be convicted of the crime of manslaughter, consequent upon acts that produced the unintended death of his patient. *Hampton v. State* (1905) 50 Fla. 55, 39 So. 421. In this case a physician was charged with manslaughter because of his culpable negligence, gross ignorance, and lack of ordinary knowledge and skill of surgery, and utter disregard for the health, safety, and life of his patient in the performance of a surgical operation upon her, in which he made large rents in her womb and through them pulled out her intestines, thereby causing her death, and a request to charge that if the defendant performed the operation in good faith and honestly exercised his best skill to cure the disease, the jury must find him not guilty, was held properly refused upon the ground that it was faulty because of its failure to repeat the idea that though a party holding himself out to the public as being a physician may use his best skill and judgment in an honest effort to cure, instead of to kill, the patient, yet that he may be so grossly ignorant of the science of medicine and surgery as to render him crimi-

nally responsible for the results of such ignorance, and that a physician in the treatment of his patient must not only use his best skill and judgment, but must exercise due care in such treatment.

When considered as the basis of a charge of manslaughter against a medical man, or person presuming to act as such, "culpable negligence," within the meaning of a statute defining manslaughter in the second degree as homicide committed without design to effect death by any act, procurement, or culpable negligence, exists, where he exhibits gross lack of competency, or inattention, or wanton indifference to the patient's safety, which may arise from his gross ignorance of the science, or through gross negligence, either in its application or lack of proper skill in the use of instruments. "Gross," as here used, is intended to convey the idea of recklessness with regard to the safety of others, or foolhardy presumption. The court upheld an indictment to the effect that defendant used an X-ray machine, dangerous unless skilfully handled, and presumptively known by the defendant to be such, to take an X-ray picture of the hip of a patient; that he placed the tube of the X-ray too close to her body, and negligently and carelessly failed to give her, during the time of such exposure to such X-ray, such proper and necessary attention as was requisite and proper to prevent burning her, and did operate such X-ray in an unskilful manner, and did keep her body so exposed for an unreasonable length of time, thereby inflicting upon her a mortal burn and injury known as an "X-ray burn," from which she died. An indictment under such statute need not allege knowledge on defendant's part of probability of consequences from the acts or omissions charged, nor is it necessary to charge defendant's duty in the premises, nor set up a specific standard of duty, nor to allege "culpable" or any other degree of negligence *eo nomine*, nor set out defendant's acts in any other than general terms and ultimate facts. *State v. Lester* (1914)

127 Minn. 282, L.R.A.1915D, 201, 149 N. W. 297.

A physician may be charged with manslaughter by causing the death of a sick child, by advising a diet which results in its starvation, under a statute which treats all persons concerned in the commission of an offense as principals, although it was the mother of the child who actually withheld the food from it, in the absence of the accused. *State v. McFadden* (1908) 48 Wash. 259, 14 L.R.A. (N.S.) 1140, 93 Pac. 414.

But an information in such case, under a Code requiring a statement of the acts constituting the offense in such a manner as to enable a person of common understanding to know what is intended, which charges a physician with manslaughter by causing the death of a sick child by starvation, by advising its mother to withhold from it all food or nourishment save water and the juices of fruit and such other nourishment as he might direct; and which alleges that the mother followed his directions, and that the food given was not enough to sustain life,—is insufficient, where there is no allegation as to what other nourishment he directed to be given; since the starvation must be shown to be a necessary and certain result of the directions. *Ibid*.

And in *Roughlin v. State* (1917) 17 Ga. App. 205, 86 S. E. 452, an indictment, under a statute providing that involuntary manslaughter shall consist in the killing of a human being without any intention to do so, but in the commission of an unlawful act, or a lawful act which probably might produce such a consequence, in an unlawful manner, which charges such offense in the commission of a lawful act by negligently permitting the administration of chloroform by an assistant who was neither a physician nor a trained nurse, was held to be demurrable, because it did not show the unlawful manner of the commission of the lawful act, nor state the name of the assistant, so as to enable the defendant to prepare properly for trial.

In the following cases the evidence

was held sufficient to sustain the guilt of the accused:

Thus, in the reported case (*BARROW v. STATE*, ante, 207) the evidence was held sufficient to support a conviction of manslaughter of one who attempted to cure a patient by administering to him as a medicine a brew made by burning hog feet that had long theretofore been thrown out as waste and refuse, and by rubbing his limbs and body, accompanying the same with some incantation, with the purpose of causing the pain to be transferred out of the person of the patient, and to be lodged in the accused.

One publicly practising as a physician, who, on being called to attend a sick woman, caused her, with her consent, to be kept in flannels saturated with kerosene for three or more days, by reason of which she died, is guilty of manslaughter under the rule that one who prescribes with foolhardy presumption and gross recklessness a course of treatment which causes the death of his patient is guilty of manslaughter, although he acts with the consent of the patient and with no evil intent. *Com. v. Pierce* (1884) 138 Mass. 165, 52 Am. Rep. 264, 5 Am. Crim. Rep. 391.

And in *Rex v. Long* (1830) 4 Car. & P. (Eng.) 398, one acting as a medical man was found guilty of manslaughter, where death resulted to a patient from the application to her back of inflammatory and dangerous lotions to prevent her from having consumption, where the court charged that a person acting as a medical man, whether licensed or unlicensed, is not criminally responsible for the death of a patient, occasioned by his treatment, unless his conduct is characterized either by gross ignorance of his art or gross inattention to his patient's safety.

In *Reg. v. Crook* (1859) 1 Fost. & F. (Eng.) 521, the jury found guilty of manslaughter a blacksmith who, by the application of a corrosive sublimate to a cancer, caused the death of his patient. The court directed the jury to find the prisoner guilty if they considered that he took upon himself

the responsibility of attending to a patient suffering under cancer, when he was not qualified for the purpose.

In *Rex v. Webb* (1834) 1 Moody & R. (Eng.) 405, 2 Lewin, C. C. 196, a victualer or publican was convicted of manslaughter, for having caused the death of one afflicted with small-pox by administering to him a large quantity of a certain kind of pills, of which he was the agent.

In *Rex v. Simpson* (1829) 1 Lewin, C. C. (Eng.) 172, where one was indicted for manslaughter in having caused the death of a man by administering white vitriol as a medicine, the court said that if a person not having a medical education, and in a place where persons of a medical education might be obtained, takes on himself to administer medicine which may have a dangerous effect, and such medicine destroys the life of the person to whom it is administered, it is manslaughter; that although the party may not mean to cause death, but, on the contrary, to produce beneficial effects, he has no right to give a medicine of a dangerous tendency, where medical assistance can be obtained, and that if he does so, he does it at his peril.

In *State v. Wagner* (1883) 78 Mo. 644, 47 Am. Rep. 181, sustaining a conviction of murder in the second degree of one indicted for murder in the first degree for poisoning one, with intent only to stupefy so as to obtain possession of his property, where there was also testimony tending to show that the deceased was afflicted with diarrhoea, and that the laudanum was administered to him by the defendant for the purpose of checking the disease, the court charged the jury as follows: "If you find from the evidence that defendant brought about the death of deceased by giving him laudanum, and yet not in such a manner and with such effect as to render him guilty of murder in the first or second degree under the foregoing instructions, yet if you find that defendant was attempting to treat deceased for some disease with which deceased was afflicted, and in such treatment carelessly and recklessly

so administered laudanum to deceased that he was guilty of culpable negligence in producing the death of deceased thereby, then you will find defendant guilty of manslaughter in the fourth degree."

But in the following cases the evidence was held insufficient to support a conviction:

Thus, in *Rex v. Long* (1831) 4 Car. & P. (Eng.) 423, one acting as a physician, who, to cure an infection of the throat, applied a dangerous liquid to the breast and chest of a patient, causing her death, was found not guilty of manslaughter. The court, in stating the law to the jury, said that whether a man has received a medical education or not, his guilt in such a case depends upon whether he has acted with a due degree of caution, or, on the contrary, has acted with gross and improper rashness and want of caution, that if he was guilty of gross negligence in attending to his patient after he had applied a remedy, or of gross rashness in the application of it, and death ensued in consequence, he was liable to a conviction for manslaughter.

And in *Rex v. Spiller* (1832) 5 Car. & P. (Eng.) 333, where one caused the death of a young child afflicted with scald head, which regular physicians had been unable to cure, by placing upon the child's head a plaster of certain corrosive and dangerous ingredients, the jury brought in a verdict of not guilty, several witnesses having testified that they had applied to the prisoner to cure them, or some members of their families, of diseases of which regular practitioners had not been able to cure them, and that the prisoner had cured them, and that they were perfectly satisfied with her skill, attention, and humanity of treatment. The court laid down the law to the jury as follows: "If any person, whether he be a regular licensed medical man or not, professes to deal with the life or health of his Majesty's subjects, he is bound to have competent skill to perform the task that he holds himself out to perform, and he is bound to treat his patients with care, attention, and assiduity," and if

the patient dies for want of either, such person is guilty of manslaughter.

It was held in *Honnard v. People* (1875) 77 Ill. 481, that the evidence was insufficient to support a conviction of manslaughter where it appeared that, while a physician was attending a woman sick with fever, who was five months advanced in pregnancy, she commenced to have a miscarriage, for which he was not in any respect responsible, that her labor was ineffectual, and he undertook to aid in the removal of the fetus by force, shown by medical testimony to be proper practice in such cases, and but partially succeeded; that, becoming sick, he then left, and sent another doctor, who completed the removal, and that four or five days after her miscarriage puerperal fever set in, from which she shortly thereafter died, and the evidence wholly failed to show that such fever was caused by anything done or omitted to be done by the accused.

And in *Gorden v. State* (1904) — Tex. Crim. Rep. —, 90 S. W. 636, where a physician, in making a physical examination of the cancerous womb of a patient, broke the partition wall of the womb, and an intestine protruded through the opening and caused the death of the patient, the court reversed, upon the ground that the evidence failed to show a want of proper care and caution in the operation, a conviction of negligent homicide under the statute providing that if any person, in the performance of a lawful act, shall, by negligence and carelessness, cause the death of another, he is guilty of negligent homicide in the first degree, that to constitute this offense there must be an apparent danger of causing the death of the person killed, or some other, and that want of proper care and caution distinguishes this offense from excusable homicide, and that the degree of care and caution is such as a man of ordinary prudence would use under like circumstances. The court said in this case that a surgeon would not be criminally liable in every case where death resulted from the performance of an operation, in which there was appar-

ent danger of causing death, but that a surgeon would be liable in such case only where there was a want of proper care and caution in performing the operation.

In *Reg. v. Bull* (1860) 2 Fost. & F. (Eng.) 201, the jury found not guilty a medical man indicted for manslaughter on the ground of his having administered prussic acid to his sick mother, with culpable negligence, where the evidence did not clearly show how much of the acid he gave her, and how much would be likely to cause a fatal result. The court in charging the jury said: "If a person takes upon himself to administer a dangerous medicine, it is his duty to administer it with proper care, and if he does it with negligence, he is guilty of manslaughter."

And in *Reg. v. Macleod* (1874) 12 Cox, C. C. (Eng.) 534, a medical man, who in treating his wife gave her an overdose of muriate of morphia, causing her death, was found not guilty of manslaughter. The court said, in summing up the case to the jury, that whether a man be a medical man or not, if he dealt with dangerous medicines he was bound to use them with proper skill, and was bound to bring proper care and employ proper caution so that persons should not be endangered by want of skill on his part, for want of caution or care in dealing with those deadly ingredients, and that it made no difference whether a medical man was dealing with a patient, or, as a volunteer, dealing with a friend or with his wife, but that if the drug was administered without want of skill, intending to do for the best,—doing nothing, in fact, a skilful man might not do—then, if the jury thought it was merely some error of judgment which anybody might have committed, the prisoner should be acquitted.

III. Surgeon.

See also *Hampton v. State* (1905) 50 Fla. 55, 39 So. 421, and *Gorden v. State* (1904) — Tex. Crim. Rep. —, 90 S. W. 636, *supra*, II.

If a person, whether a regular surgeon or not, bona fide and honestly exercising his best skill to cure a pa-

tient, performs an operation which causes the patient's death, he is not guilty of manslaughter. In this case a regular surgeon who performed an operation, resulting fatally, upon a man laboring under a disease of the rectum, was held not liable for manslaughter upon the ground that, there being no evidence of the mode in which the operation was performed, the mere failure of the operation was insufficient to show liability. *Rex v. Van Butchell* (1829) 3 Car. & P. (Eng.) 629.

But in *State v. Gile* (1894) 8 Wash. 12, 35 Pac. 417, the court upheld a conviction for manslaughter of a surgeon who, after failing to set the hip joint of his patient by pulling his leg, unnecessarily made a long and deep incision in the patient's hip and with saw and forceps removed a portion of the bone, causing the patient's death. It was held in this case that consent to a surgical operation in a dangerous case is only a good defense where the operation is performed with due care and skill, and is no excuse for recklessness or even want of usual skill.

And in *Reg. v. Whitehead* (1848) 3 Car. & K. (Eng.) 202, one who had formerly been a butcher, but had practised as a surgeon without any legal qualifications for a number of years, was found guilty of the manslaughter of a man on whom he had performed an operation for a disease in the bone, the court, in summing up to the jury, saying that if a medical or any other man caused the death of another intentionally, that would be murder, but where a person, not intending to kill a man, by his gross negligence, unskilfulness, and ignorance, caused the death of another, he was guilty of culpable homicide, and the questions for the jury were whether the deceased had died from the effects of the operation performed by the prisoner, and whether the treatment pursued by the prisoner in the case of the deceased was marked by negligence, unskilfulness, and ignorance.

IV. Osteopath.

An osteopath is guilty of manslaughter, who, to save the life of a

pregnant woman who has sustained personal injuries, performs an operation upon her to effect a miscarriage, with a shocking degree of unskillfulness, evincing an almost incredible ignorance of surgery and anatomy, and without any caution or circumspection, and resulting in her death shortly thereafter. *People v. Hunt* (1915) 26 Cal. App. 514, 147 Pac. 476. It was held in this case that there was an error in the instructions therein, consisting in a charge, which was held to be harmless, in view of the evidence, that the defendant was not, as an osteopathic practitioner, licensed to perform major operations, and that if he did attempt to perform such an operation upon the deceased, as the result of which her death occurred, he would be guilty of manslaughter, and, in this connection, the court said: "The right of persons to perform or attempt to perform surgical operations upon others, in the honest and reasonable belief that such operations are necessary in order to save the life of those needing such ministrations, is not confined to those who are licensed by the state to perform surgical operations of the nature of that attempted in this case. Any person actuated by the reasonable belief, based upon the circumstances, that such an operation is necessary to save life, and who acts with due caution and circumspection in the performance of such operation, cannot be held guilty of manslaughter."

V. Herbalist.

One professing to cure by the use of drugs composed or made up of herbs, who, with an honest intention and expectation of effecting a cure, treats a man confined to his house with a cold, by persistently and continually dosing him with emetic powders, producing in the patient great debility, and finally resulting in convulsions, fits, loss of reason, and death, is not guilty of manslaughter. *Com. v. Thompson* (1809) 6 Mass. 134.

And in *Reg. v. Crick* (1859) 1 Fost. & F. (Eng.) 519, where an herb doctor gave a bottle of infusion of lobelia inflata to a woman to be given to a child, two teaspoonfuls three times a

day, and the child died from overdoses of the lobelia, which is an acronarcotic poison, the jury returned a verdict of not guilty of manslaughter. The court, in summing up, said in substance: It is no crime for anyone to administer medicine, but it is a crime to administer it so rashly and carelessly as to produce death, and in this respect there is no difference between the most regular practitioner and the plaintiff quack. The woman's account is that she took the child to the prisoner, and that after she had followed his advice for a while, the child got so much better that she left off giving the medicine which she had received from him, and did not consult the prisoner again before the child died. All that the prisoner ought to be held responsible for was what took place in the first week after he saw the child. The prisoner had not seen the child for three weeks before its death. The charge against the prisoner is not that he carelessly allowed the woman to be in the possession of a dangerous medicine, but that he caused the death of the child by administering these medicines; but on the evidence it appeared that the child got better while the medicine was being given to it. The prisoner ought not to be found responsible, unless it has been proved with reasonable certainty that he caused the death by the careless administration of the drug.

And in *Reg. v. Markuss* (1864) 4 Fost. & F. (Eng.) 356, the jury found not guilty of manslaughter a herb doctor or herbalist who gave a patient, afflicted with a cold, an overdose of colchicum seeds. The court, in directing the jury as to the law, said: "A person who, with ignorance, rashness, and without skill in his profession, used such a dangerous medicine, acted with gross negligence. It was not, however, every slip that a man might make that rendered him liable to a criminal investigation. It must be a substantial thing. If a man knew that he was using medicines beyond his knowledge, and was meddling with things above his reach, that was culpable rashness. Negligence might

consist in using medicines in the use of which care was required, and of the properties of which the person using them was ignorant. A person who so took a leap in the dark in the administration of medicines was guilty of gross negligence."

In *Reg. v. Chamberlain* (1867) 10 Cox, C. C. (Eng.) 486, where a herbalist gave arsenical ointment to a woman having a tumor, without giving any particular directions beyond telling her to rub some of the ointment in, and she kept rubbing until she had absorbed so much of the poison that she died, the jury returned a verdict of not guilty of manslaughter. The court, in instructing the jury, said that the most serious part of the case was the apparent absence of caution or direction to the woman as to the use of the arsenical ointment, and that if the prisoner, knowing its effect, gave it to the patient to be used, without giving her any directions as to its use, he would be guilty of culpable negligence, and ought to be convicted.

But in *Rex v. Burdee* (1916) 86 L. J. K. B. N. S. [Eng.] 871, 115 L. T. N. S. 904, 141 L. T. Jo. 427, a conviction of the defendant for manslaughter was upheld, where it appeared that he was a violinist and teacher of music, and had for some years been interested in herbalism and fasting as a cure for rheumatism, and treated people for such disease, that he treated a confirmed invalid suffering from rheumatism and numerous other ills, by directing her to abstain from food for three days, taking nothing but cold water, which was followed by her death, although it further appeared from the medical testimony that she died of heart disease, accelerated by lack of food, the court saying that the evidence showed that his treatment shortened her life, and that no person has a right to shorten by an hour the life of another, except by lawful authority.

VI. Practitioner of particular cure.

One professing to practise medicine according to the books of Baunscheidt, who treats a patient, according to such system, with instruments and

oleum Baunscheidtii, with honest intention and expectation of effecting a cure, though ignorant of the composition of such oleum, is not guilty of manslaughter in the event of the death of the patient. *State v. Schulz* (1881) 55 Iowa, 628, 39 Am. Rep. 187, 8 N. W. 469.

And a practitioner under the botanic system, who attempted to cure a pregnant woman of sciatica by vapor baths and emetics, resulting in the premature birth of the child, and the patient's death shortly thereafter, was held not criminally liable, because he acted with good intentions and without any knowledge or information of the fatal tendency of his prescription. *Rice v. State* (1844) 8 Mo. 561.

And in *Feige v. State* (1917) 128 Ark. 465, 194 S. W. 865, a conviction, under the state manslaughter statute, of a practitioner of the fasting and water cure, for the death of one stricken with paralysis whom he was employed to treat according to such cure, was reversed upon the ground that the case was submitted to the jury on the theory that one who practised medicine for a remuneration was guilty of involuntary manslaughter if death resulted to the patient on account of gross ignorance or lack of skill in selecting and administering the remedy, which, while a correct statement of the law, left the jury in a position to confuse a mistake of judgment with gross ignorance or lack of skill, and that the accused was entitled, upon the whole record, to an instruction asked by him, but refused upon this theory, to the effect that the remedy chosen was rational, reasonable, and scientific, and had been administered in a skilful manner and in good faith, and when administered by him in the same way to other patients had cured them, and that if it was a proximate cause of the patient's death it was a mistake of judgment. Such requested instruction, which was held to present correctly the law applicable to the theory advanced by the accused, was as follows: "Involuntary manslaughter is the involuntary killing done without design, intention, or purpose of kill-

ing, but in the commission of some unlawful act, or in the improper performance of some lawful act. For a mere mistake of judgment in the selection and application of remedies resulting in the death of his patient, a physician is not criminally liable; and whether one who assumes to practise medicine is grossly ignorant of the art of the selection of remedies or their application, or inapplicable or rashly applied, are all questions to be determined by the evidence."

VII. *Midwife.*

A practitioner of midwifery, who, being grossly ignorant of the art which he professed, and unable to deliver the woman whom he was called in to attend, with safety to herself and child, as might have been done by a person of ordinary skill, broke and compressed the skull of the infant when its head had become visible and thereby occasioned its death immediately after it was born, is guilty of manslaughter. The indictment charged the prisoner with the manslaughter of the infant child by mortally wounding it upon the head with a knife, and the court overruled the objection that the indictment was misconceived in that, the child being *en ventre sa mère* at the time the wound was given, the prisoner could not be guilty of manslaughter. *Rex v. Senior* (1832) 1 Moody, C. C. (Eng.) 346, 1 Lewin, C. C. 183, note.

And in *Reg. v. Spilling* (1838) 2 Moody & R. (Eng.) 107, one who had carried on the business of an apothecary and man midwife for a number of years, and was qualified by law to carry on that profession, was found guilty of manslaughter for causing the death of a patient in using an instrument to accomplish the delivery of a child, where the medical evidence showed that the instrument used was a dangerous one, and that at the period of the labor when it was used it was very improper to use at all, and that it must have been used in a very improper way. The court told the jury that no man, was justified in making use of an instrument, in itself a dangerous one, unless he did so with a proper degree of skill and

caution, and that if the prisoner had used the instrument with gross want of skill or a gross want of caution, and the deceased had thereby lost her life, it would be their duty to find him guilty.

And in *Rex v. Ferguson* (1830) 1 Lewin, C. C. (Eng.) 181, a surgeon and man midwife was convicted of causing the death of a woman, by neglecting to take proper care of her during the period of her labor after the delivery of the child, and by leaving and deserting her without a proper person to take care of her. The court said, in summing up, that the jury were to say whether, in the execution of the duty which the prisoner had undertaken to perform, he was proved to have shown such a gross want of care or such a gross and culpable want of skill as any person undertaking such a charge ought not to be guilty of.

But in *Rex v. Williamson* (1829) 3 Car. & P. (Eng.) 635, where an old man, not a regularly educated accoucheur, but in the habit of acting as a man midwife, mistaking a prolapsed uterus for a remaining part of the placenta which had not been brought away at the time of the delivery, attempted to bring it away by force, and thus caused the death of the plaintiff, the court, in summing up, said: "There has not been a particle of evidence adduced which goes to convict the prisoner of the crime of murder; but still it is for you to consider whether the evidence goes so far as to make out a case of manslaughter. To substantiate that charge, the prisoner must have been guilty of criminal misconduct, arising either from the grossest ignorance or the most criminal inattention. One or other of these is necessary to make him guilty of that criminal negligence and misconduct which are essential to make out a case of manslaughter. It does not appear that in this case there was any want of attention on his part; and, from the evidence of the witnesses on his behalf, it appears that he had delivered many women at different times, and from this he must have had some degree of skill. It would seem that, having placed him-

self in a dangerous situation, he became shocked and confounded. I think that he could not possibly have committed such mistakes in the exercise of his unclouded faculties; and I own that it appears to me that, if you find the prisoner guilty of manslaughter, it will tend to encompass a most important and anxious profession with such dangers as would deter reflecting men from entering into it." The jury brought in a verdict of not guilty.

VIII. Christian Scientist.

There seems to be but one reported case involving a prosecution for homicide against a Christian Scientist, based merely upon his undertaking or assumption to treat the patient, apart from any antecedent or independent duty to the latter. Most of the Christian Science cases have involved the prosecution of parents, or others who owed a duty in the premises, for failure to furnish medical aid. As already stated, such cases are not within the scope of the annotation.

In *Reg. v. Beer* (1895) 32 Can. L. J. 416, it was held that a practitioner of the doctrines and practices of Christian Science, called in by the parents of a child suffering from a

mild form of diphtheria, which could probably be cured or helped by the usual medical remedies, cannot be convicted of manslaughter under a statute providing that everyone who undertakes, except in case of necessity, to administer surgical or medical treatments, or to do any other lawful act the doing of which is or may be dangerous to life, is under a legal duty to have and to use reasonable knowledge, skill, and care in doing any such act, and is criminally responsible for omitting, without lawful excuse, to discharge that duty, if death is caused by such omission. The reason given for this decision was that the defendant was not retained, nor was she expected to, nor did she, come in as a medical attendant, that the failure to examine the child in the manner in which a doctor would do, and which was the negligence relied upon by the prosecution, was just what was expected of her, and that she was called in to treat as a Christian Scientist, and her practice consisted simply of sitting silent in the presence of the patient, and she administered no medical treatment, nor did she undertake to do some lawful act the doing of which would endanger life.

G. V. I.

MISSOURI, KANSAS, & TEXAS RAILWAY COMPANY, Plff. in Err.,
v.

HUGH HUDSON.

Oklahoma Supreme Court — September 3, 1918.

(— Okla. —, 175 Pac. 743.)

Receiver — agent — railroad employee.

1. Record examined, and held that, under the order of the Federal court appointing a receiver, the interests of the receiver and of the railway company are not so adverse as to preclude the same person from acting as the station agent of the company, for the purpose of serving summons upon it, pursuant to the laws of the state, while so acting for the receiver in another sense.

[See note on this question beginning on page 228.]

Headnotes by KANE, J.

Principal and agent — creation of relation.

2. The relation of principal and agent is created by contract, and the mere appointment of a receiver for the principal does not ipso facto revoke the agency.

Master and servant — assumption of risk.

3. The rule is well settled that the servant assumes risks of his employment, caused by the master's negligence, which are obvious or fully

known and appreciated by him, but whether such negligence and risk are so patent and obvious that an ordinarily prudent person would see the one and appreciate the other are generally questions of fact to be submitted to the jury under proper instructions.

Appeal — questions for jury.

4. Record examined, and held that the trial court did not err in submitting these questions to the jury under proper instructions.

ERROR to the District Court for Seminole County (Crump, J.) to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Clifford L. Jackson, W. R. Allen, and M. D. Green, for plaintiff in error:

The trial court erred in overruling defendant's motion to quash the alias summons, the service thereof, and the return of service thereon.

Chilletti v. Missouri, K. & T. R. Co. 102 Kan. 297, L.R.A.1918C, 1147, 171 Pac. 14; *Cain v. Seaboard Air-Line R. Co.* 7 Ga. App. 461, 67 S. E. 127; *St. Louis & S. F. R. Co. v. Reed*, — Okla. —, 158 Pac. 399; *Ozark Marble Co. v. Still*, 24 Okla. 559, 103 Pac. 586; *St. Louis & S. F. R. Co. v. Clark*, 17 Okla. 562, 87 Pac. 430; *Chicago Bldg. & Mfg. Co. v. Pewthers*, 10 Okla. 724, 63 Pac. 964.

There was no actionable negligence of the defendant shown, the plaintiff assumed the risks of his employment, and the trial court should have sustained defendant's demurrer to plaintiff's evidence, and should have granted defendant's request for an instructed verdict.

Second Employers' Liability Cases (*Mondou v. New York, N. H. & H. R. Co.*) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176; *Seaboard Air Line R. Co. v. Horton*, 233 U. S. 492, 58 L. ed. 1062, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 884; *Southern R. Co. v. Crockett*, 234 U. S. 725, 58 L. ed. 1564, 34 Sup. Ct. Rep. 897; *New York C. R. Co. v. Winfield*, 244 U. S. 147, 61 L. ed. 1045, L.R.A.1918C, 439, 37 Sup. Ct. Rep. 546,

Ann. Cas. 1917D, 1139, 14 N. C. C. A. 680; *St. Louis & S. F. R. Co. v. Snowden*, 48 Okla. 115, 149 Pac. 1083; *Chicago, R. I. & P. R. Co. v. Jackson*, — Okla. —, 160 Pac. 736; *Chicago, R. I. & P. R. Co. v. Hessenflow*, — Okla. —, 170 Pac. 1161; *Chicago, R. I. & P. R. Co. v. Hughes*, — Okla. —, 166 Pac. 411; *Kansas City, M. & O. R. Co. v. Costa*, — Okla. —, 170 Pac. 892; *Omaha Packing Co. v. Sanduski*, 19 L.R.A.(N.S.) 355, 84 C. C. A. 89, 155 Fed. 897; *Snipes v. Bomar Cotton Oil Co.* 106 Tex. 181, 161 S. W. 1; *Brown v. Hitritz*, 113 C. C. A. 84, 192 Fed. 528; *Murphy v. American Rubber Co.* 159 Mass. 266, 34 N. E. 268; *Cordele v. Hampton Cotton Mills Co.* 104 S. C. 451, 89 S. E. 498; *Card v. Stowers Pork Packing & Provision Co.* 253 Pa. 575, 98 Atl. 728; *Duluz v. Alaska Packers' Asso.* 177 Cal. 465, 170 Pac. 1133; *Butler v. Frazee*, 211 U. S. 459, 53 L. ed. 281, 29 Sup. Ct. Rep. 136; *Harvey v. Wilton Woolen Co.* 115 Me. 566, 100 Atl. 12.

Mr. Grant Stanley for defendant in error.

Kane, J., delivered the opinion of the court:

This was an action for damages for personal injuries, commenced by the defendant in error, plaintiff below, against the plaintiff in error, defendant below. Hereafter, for convenience, the parties will be designated "plaintiff" and "defendant," respectively, as they appeared in the trial court.

The plaintiff was employed by the

defendant as a pumper at its pump-house at Maud, in Pottawatomie county, at the time the injuries complained of occurred. He alleges that during the course of his employment he found that a pinion of the engine had slipped from its proper position at the bull wheel, and that, while in the act of turning around to get a hammer to drive the same into position, his foot slipped on the oily floor, and in falling his hand was caught in the unguarded cogs between the pinion and the bull wheel. The specific acts of negligence alleged are that the defendant did not use ordinary care to furnish the plaintiff a reasonably safe place to work, nor furnish reasonably safe appliances with which to work, in that it neglected to place a guard over said pinion and bull wheel, and failed to furnish sufficient space in the engine room to enable the plaintiff to keep the floor from becoming slippery with water, oil, and grease, thus rendering it dangerous in passing through the narrow space between the said machinery and the walls of said engine room; that the said defendant knew of, and had its attention called to, the absence of guards over the exposed parts of the machinery in March, 1914, and promised to remedy the same, but had negligently failed to do so.

After the service of summons the defendant appeared specially, and moved the court to quash the alias summons served upon it for the following reasons, to wit: "(1) Because said summons was not issued, served, or return of service made, in accordance with the provisions of the statutes in such cases made and provided. (2) Because George Twiss, the person upon whom pretended service of summons was had, was not at the date of the pretended service of said summons, nor has he been since that time, an agent of the Missouri, Kansas, & Texas Railway Company, or a representative or employee in any capacity of said railway company in any manner whatever, or otherwise connected with said railway company in any manner

whatever, all of which will more fully appear from his affidavit hereto attached, marked 'exhibit A' and made a part hereof."

Upon this motion being overruled, the defendant filed its answer, containing a general denial, and allegations to the effect that the injuries complained of were the result of the risk of plaintiff's employment, which he assumed; and that, even if said defendant was injured at the time and place and in the manner alleged in his petition, he was guilty of negligence and carelessness which contributed to his said injuries.

Plaintiff's reply was a general denial. Upon trial to a jury there was a verdict for the plaintiff, upon which judgment was duly rendered, to reverse which this proceeding in error was commenced.

The grounds for reversal of this judgment are summarized by counsel for defendant in their brief under two subheads, as follows: (1) The trial court erred in overruling defendant's motion to quash the alias summons, the service thereof, and return of service thereon. (2) There was no actionable negligence of the defendant shown, the plaintiff assumed the risks of his employment, and the trial court should have sustained defendant's demurrer to plaintiff's evidence, and should have granted defendant's request for an instructed verdict.

From the briefs and argument of counsel upon the first question presented for review, the following facts seem to be conceded: The injury occurred before, and the action was commenced after, the appointment of the receiver. The railway company had not designated an agent in the county upon whom process could be served, as required by § 4717, Revised Laws 1910, and it therefore became necessary to serve the summons pursuant to § 4719, Revised Laws 1910, which provides for service upon any freight agent, agent to sell tickets, or station keeper of the company, in case it failed to designate an agent pursuant to § 4717, supra. Mr.

Twiss, to whom the summons was delivered, was the agent to sell tickets and station keeper of said defendant immediately prior to the order appointing the receiver for the company; that after the order of appointment Mr. Twiss continued to act for the receiver in a like capacity, and was so employed at the time the summons herein was delivered to him.

The contention of counsel for the defendant is that, in view of all this, it appears that the summons herein was not served upon the freight agent, agent to sell tickets, or station keeper of the company, but that it was served upon the agent of the receiver, and is, therefore, insufficient to confer jurisdiction upon the court over the person of the defendant. We are unable to agree with this contention, although there seem to be some respectable authorities sustaining it. *Chillett v. Missouri, K. & T. R. Co.* 102 Kan. 297, L.R.A. 1918C, 1147, 171 Pac. 14, relied upon by counsel for defendant, is directly in point to this effect.

Whilst we have no doubt of the soundness of the part of the opinion which holds that "the railway corporation was not dissolved by the appointment of a receiver," we are unable to agree with the supreme court of Kansas that the discharge of the former employees and agents of the company automatically resulted immediately on the making of the order. The relation of principal and agent is created by contract,

Principal and agent—creation of relation.

and it can only be severed by the action of the parties to the agreement themselves or by operation of law. The weight of authority, it seems to us, sustains the view that the mere appointment of a receiver for the principal does not ipso facto revoke the agency. 2 C. J. 546; *Leupold v. Weeks*, 96 Md. 280, 53 Atl. 937; *Simpson v. East Tennessee, V. & G. R. Co.* 89 Tenn. 304, 15 S. W. 735; *Grady v. Richmond & D. R. Co.* 116 N. C. 952, 21 S. E. 304; *Farris v. Richmond & D. R. Co.* 115 N. C. 600, 20 S. E. 167; *Central Trust*

v. St. Louis, A. & T. R. Co. (C. C.) 40 Fed. 426. Whilst all of these authorities may not be precisely in point, they are sufficiently so by analogy to justify their citation in support of the principle announced.

The order appointing the receiver in the case at bar does not in terms purport to discharge any of the agents of the company. On the contrary, it assumes the continuance of the relationship after the appointment, as it merely enjoins the company, its officers, directors, agents, attorneys, and employees, from interfering in any manner to prevent the receiver from discharging his duties in the premises under the order of the court. The order also requires the receiver to "manage and operate said railroad and property according to the laws of the United States and the valid laws of the various states in which the same are situated, and in the same manner that the defendant railway company would be bound to do if in possession thereof." In these circumstances, the interest of the company and of the receiver being in no sense adverse, we are unable to perceive why Mr. Twiss may not still represent the company as station

Receiver—agent—railroad employee.

keeper, for the purpose of service of summons upon the corporation in accordance with the laws of the state, while acting for the receiver in a like capacity for all other purposes.

This was the identical question passed upon in *Simpson v. East Tennessee, V. & G. R. Co.* 89 Tenn. 308, 15 S. W. 735, wherein the court said: "It will be remembered that this is no effort on the part of the receiver to abate suits by reason of a right to intervene and compel a discontinuance of actions, except in court where the receivership, with litigation involving it, is pending, but an effort by the company to deny its agent because its road had been placed in the hands of a receiver. In such case, no reason appears to us why he does not still, in a proper sense, represent the company, which,

in another, is represented by the receiver."

In the case at bar there is no evidence directly tending to show that it was ever the intention of either the railway company or Mr. Twiss to sever the relation of principal and agent existing between them. It is true that the affidavit of Mr. Twiss states that he is the station agent of the receiver, and not the station agent of the railway company. This, however, is but a mere conclusion of the affiant, which was probably influenced by the erroneous view of counsel for the railway company that the order appointing the receiver *ipso facto* terminated the agency between Twiss and the railway company as a matter of law. We do not deem this affidavit sufficient to overcome the return of the sheriff to the effect that the summons was served upon the station agent of the company, or to conclusively prove a severance of the relation of principal and agent which admittedly formerly existed.

Moreover, in view of the failure of the company to designate a person in the county upon whom service could be had, as required by the state statutes, it will not be presumed, in the absence of clear evidence to the contrary, that it intended to discharge its only remaining agents upon whom service could be made, after the appointment of the receiver, thus rendering it impossible for persons having claims against it to have them adjudicated in the local forums in accordance with the laws of the state.

In presenting the next ground for reversal, counsel for the defendant concede that there was sufficient evidence adduced at the trial to take the case to the jury on the question as to whether or not the defendant exercised ordinary care and prudence to provide the plaintiff with reasonably safe machinery, tools, and appliances with which to do his work, and a reasonably safe place in which to work. They insist, however, that, even if primary negligence in these respects was shown

on the part of the master in the performance or nonperformance of these nondelegable duties, still the defects in the machinery and place of employment which rendered them unsafe were so patent and obvious that the plaintiff must be held to have assumed the risk arising from them as a matter of law. It is true that the rule is well settled that the servant assumes the risks of his employment, caused by the master's negligence, which are obvious or fully known and appreciated by him. Chicago, R. I. & P. R. Co. v. Hughes, — Okla. —, 166 Pac. 411; Boldt v. Pennsylvania R. Co. 245 U. S. 441, 62 L. ed. 385, 38 Sup. Ct. Rep. 139. But it is also well settled that whether such negligence and risk are so patent and obvious that an ordinarily careful person would see the one and appreciate the other is a question of fact to be submitted to the jury under proper instructions. Chicago, R. I. & P. R. Co. v. Ward, — Okla. —, 173 Pac. 212.

Master and servant—
assumption of risk.

In the case at bar the evidence shows that, when the engine was set up by the manufacturer, the cogs between the pinion and bull wheel were protected by a covering which was afterwards removed by the company. The contention of the company on this point is that after the engine was thus altered it operated in such a safe manner that the necessity for protecting the cogs no longer existed. Whether this change justified the removal of the guards over the cogs was also a question of fact for the jury.

The evidence further shows that the plaintiff was not an experienced mechanic or stationary engineer, and that he was placed in charge of this pumping station by a superior officer, with practically no preliminary training except as to the mere matter of starting and stopping the engine. The plaintiff had been working a little less than six months at the time the accident occurred, and it does not appear that in the meantime he had acquired more than the

most elementary knowledge of the machinery he was hired to operate. In these circumstances we are not prepared to say, as a matter of law, that the defects complained of were so patent and obvious that the plaintiff must have seen them or that he appreciated the danger arising therefrom.

As counsel for defendant finds no fault with the instructions given by the trial court, we will assume that

these, as well as all other questions of fact, were submitted to the jury under proper instructions. As the evidence reasonably tends to support the verdict, the judgment of the court below, rendered thereon, will not be disturbed.

For the reason stated, the judgment of the trial court is affirmed.

All the justices concur.

Petition for rehearing denied, November 14, 1918.

ANNOTATION.

Appointment of receiver for railroad as affecting service of process on agent or employee in action against company.

View that service is good.

The view obtaining in some jurisdictions is that the appointment of a receiver to operate and control a railroad, with authority to defend suits against the road, does not prevent process in an action against the railroad company, from being served on the agents or employees whom the receiver continues in service, the effect of such service being the same as if there were no receivership.

United States.—*State v. Port Royal & A. R. Co.* (1897) 84 Fed. 67.

Indiana.—*Louisville, N. A. & C. R. Co. v. Cauble* (1874) 46 Ind. 277.

Michigan.—*Ennest v. Pere Marquette R. Co.* (1913) 176 Mich. 398, 47 L.R.A.(N.S.) 179, 142 N. W. 567, Ann. Cas. 1915B, 594; *Barnhart v. Michigan C. R. Co.* (1913) 176 Mich. 40, 142 N. W. 570.

New York.—*Faltiska v. New York, L. E. & W. R. Co.* (1895) 12 Misc. 478, 33 N. Y. Supp. 679, affirmed in (1896) 151 N. Y. 650, 46 N. E. 1146.

North Carolina.—*Grady v. Richmond & D. R. Co.* (1895) 116 N. C. 952, 21 S. E. 304.

Oklahoma.—See the reported case (*MISSOURI, K. & T. R. Co. v. HUDSON*, ante, 223).

Pennsylvania.—*Hill v. Baltimore & O. R. Co.* (1897) 7 Pa. Dist. R. 473. Compare *Anderson v. Buffalo, N. Y. & P. R. Co.* (1886) 2 Pa. Co. Ct. 402.

Tennessee.—*Simpson v. East Ten-*

nessee, V. & G. R. Co. (1890) 89 Tenn. 304, 15 S. W. 735.

Thus, in *Ennest v. Pere Marquette R. Co.* (1913) 176 Mich. 398, 47 L.R.A.(N.S.) 179, 142 N. W. 567, Ann. Cas. 1915B, 594, the plaintiff brought suit against a railroad to recover for personal injuries sustained by him. After the accident, but before the commencement of the action, the railroad passed into the control of a Federal receiver. It was held that process served on a ticket agent who had been in the employ of the company immediately prior to the order appointing a receiver, and who had been permitted to retain his position after the appointment, was sufficient to bind the railroad company, and was a valid commencement of the action. The court said: "Mr. Coryell might continue the agent of the company, for any purpose not inconsistent with his duty to the receivers. Such double agency is not rare. By the order appointing them, the receivers were authorized and empowered to appear and defend any suits which might be commenced against the company, the defense of which would, in their judgment, be necessary for the proper protection of the property and business placed in their charge. Any suit against the company to recover damages might well be said to be a suit affecting the property which they had in charge, and service of process on

the station or ticket agent at any station on the line of the road might be to the advantage of such receivers. There would be nothing incompatible in Coryell maintaining his relation to the corporation and to the receivers, at the same time. It is very evident that there is nothing found in this record justifying us in holding that he has ever been discharged from his position by either the company or the court." See to the same effect, *Barnhart v. Michigan C. R. Co.* (1913) 176 Mich. 406, 142 N. W. 570, wherein the court said: "This case involves substantially the same state of facts and the same legal question as the case of *Ennest v. Pere Marquette R. Co.* (Mich.) *supra*, and the disposition of this case is necessarily controlled by the decision rendered therein. We are therefore of the opinion that the plea in abatement was properly overruled."

So, in *Faltiska v. New York, L. E. & W. R. Co.* (1895) 12 Misc. 478, 33 N. Y. Supp. 679, affirmed in (1896) 151 N. Y. 650, 46 N. E. 1146, an action for personal injuries brought against a railroad after it had passed into the hands of receivers, the court held that process served on the division superintendent of the company was sufficient to bind the company, it appearing that, after the appointment of the receivers, the superintendent acted in the same capacity, and was regarded as the managing agent of the company for the purpose of service of process.

Similarly, in *Simpson v. East Tennessee, V. & G. R. Co.* (1890) 89 Tenn. 304, 15 S. W. 735, an action against a railroad, after it had passed into the hands of receivers, to recover damages for injuries to property, the court held that it was error to abate the action on the plea of the company that the process was improperly served on the agent of the receiver, where it appeared that the agent referred to had been the station agent originally employed by the company, and still held the same position under the receivership. The court said: "It will be remembered that this is no effort on the part of the receiver to abate suits by reason of a right to intervene and compel a discontinuance of ac-

tions, except in court where the receivership, with litigation involving it, is pending, but an effort by the company to deny its agent because its road had been placed in the hands of a receiver. In such case, no reason appears to us why he does not still, in a proper sense, represent the company, which, in another, is represented by the receiver."

So, in *Grady v. Richmond & D. R. Co.* (1895) 116 N. C. 952, 21 S. E. 304, an action against a railroad company and the receivers thereof jointly, the court held that process served on a local agent in charge of the freight office at one of the stations was sufficient to bind the company, though the agent, at the time of the summons, was the agent of the receivers who were then operating the railroad. It was said: "Service upon the receivers is service upon the corporation, as fully as if made upon the president and superintendent whose duties they are temporarily discharging, as they come within the term, 'other head of the corporation' (Code, § 217), and a service upon their local agent is merely a substitute for, and has the same legal effect as, service upon them personally."

Likewise, in *State v. Port Royal & A. R. Co.* (1897) 84 Fed. 67, the court held that property in the hands of a receiver was bound by a judgment obtained in an action brought against the railroad company, wherein process was served on the agent of the receiver, who was not made a party.

The plaintiff, in *Louisville, N. A. & C. R. Co. v. Cauble* (1874) 46 Ind. 277, brought suit against a railroad which was operated and controlled by receivers appointed by the Federal court, to recover damages for the killing of live stock. It was held that process served on a conductor of a train passing into or through the county where the animal was killed was sufficient to bind the company, though the conductor was employed by and under the control of the receiver. The court said: "The question remains to be considered whether the summons was properly served. It was served upon a conductor on a

train which passed into and through the county where the cow was killed. The 2d section of the Act of March 4, 1863, provides that 'the owner thereof may go before some justice of the peace of the county in which such killing or injuring occurred, and file his complaint in writing, and such justice shall fix a day to hear said complaint, and shall cause at least ten days' notice to be served on the railroad company, by the service of a summons by copy on any conductor of any train passing into or through said county.' The service of process in this case was in strict conformity to the statute. The action is against the railroad company, and not the receiver. If the action were against a lessee, assignee, receiver, or other person named in the 1st section of the act, a very different and grave question would be presented for our decision."

In *Hill v. Baltimore & O. R. Co.* (1897) 7 Pa. Dist. R. 473, an action against a foreign corporation for personal injuries sustained by the plaintiff as a result of the negligence of the defendant's employees in operating the railroad while it was in the hands of receivers, the court held that process served on an agent of the company, by leaving a certified copy in the office attached to the depot, was sufficient to bind the company.

But in *Anderson v. Buffalo, N. Y. & P. R. Co.* (1886) 2 Pa. Co. Ct. 402, it was held that process served on a resident agent of a foreign corporation, designated by the laws of Pennsylvania as the proper agent on whom process might be served, should be set aside, although the court was not informed as to where the cause of action arose, where it appeared that the corporation had been placed in the hands of a receiver by order of the Federal court. It was said: "No declaration has been filed in the case, and we are not informed whether the cause of action upon which the plaintiff sues originated before or subsequent to the appointment of the receiver; but we assume that the cause of action arose subsequent to the appointment of the receiver. That being

the fact, we do not think that the suit is properly brought against the railroad company. The receiver was appointed by compulsory process by an adverse proceeding in the United States court. While the road and its property are in the hands of the receiver, the powers of the corporation are in abeyance. The corporation cannot control the business of the road. The property of the road is in custodia legis. The possession of the receiver is but the possession of the court that appointed him. If an action could be maintained against the railroad company, and a recovery had against it under such circumstances, then the whole property might, perhaps, be swept away, without the knowledge of the receiver himself, or of the court whose agent he is. We think this action cannot be maintained, and it follows that the service of the summons upon Hamlin, the agent, was but a nullity."

View that service is not good.

In other jurisdictions it is held that where the property of a railroad company has passed into the hands of a receiver, and its road is being operated by him under an order of the court, service of process on an employee or agent continuing in the service of the receiver will give no jurisdiction over the company, the railroad employees being considered no longer to be agents of the company. *Cherry v. North & S. R. Co.* (1877) 59 Ga. 446; *Cain v. Seaboard Air-Line R. Co.* (1910) 7 Ga. App. 461, 67 S. E. 127; *Chilletti v. Missouri, K. & T. R. Co.* (1918) 102 Kan. 297, L.R.A.1918C, 1147, 171 Pac. 14; *Vann v. Schaff* (1918) 103 Kan. 857, 176 Pac. 652; *Heath v. Missouri, K. & T. R. Co.* (1884) 83 Mo. 617; *Collins v. Baltimore & O. R. Co.* (1898) 7 Ohio S. & C. P. Dec. 445; *Cleveland & M. R. Co. v. Orme* (1885) 1 Ohio C. C. 511, 1 Ohio C. D. 285; *Webster v. International & G. N. R. Co.* (1916) — Tex. Civ. App. —, 184 S. W. 295; *International & G. N. R. Co. v. Moore* (1895) — Tex. Civ. App. —, 32 S. W. 379. Compare *Proctor v. Missouri, K. & T. R. Co.* (1890) 42 Mo. App. 124.

Thus, in *Chilletti v. Missouri, K. &*

T. R. Co. (1918) 102 Kan. 297, 14 L.R.A.1918C, 1147, 171 Pac. 14, the plaintiff brought an action against a railroad company, after it had passed into the hands of a receiver, to recover damages for personal injuries sustained by him several years prior thereto. It was held that, where the entire management and control of a railroad pass into the hands of receivers, the employees then become the employees of the receiver, and hence process served on a station agent in the employ of the receiver, who formerly occupied the same position for the company, is insufficient to bind the corporation. The court said: "Whatever duties the station agent performed after the appointment of the receiver, he performed as agent of the receiver. Under the terms of the order appointing the receiver, the station agent was not in a position where, in the conduct of the same business, he could serve two masters. All the property and assets of the defendant company were taken out of its control and placed in the hands of the receiver to control and operate. If all the former employees of the railway company continued to be the agents of the company until they could be individually notified of their discharge and re-employment by the receiver, an intolerable situation would arise, not contemplated by the order of the court, and one which would benefit neither the public nor the property. No formal discharge by the railway company of its former employee was required in order to sever the relation of employer and employee. That resulted immediately on the making of the order appointing the receiver. The railway corporation was not dissolved by the appointment; it still exists as a legal entity, and it may have agents for certain purposes; but no person in the employ of the receiver in operating the railway, or in handling any of the assets or property of the railway company, can be regarded as the agent of the company, merely because of the duties performed by him. Whatever any servant, agent, or employee does in connection with the operation or control

of any of the assets or property of the railway company is performed as agent of the receiver, and not of the company." See to the same effect, *Vann v. Schaff* (1918) 103 Kan. 857, 176 Pac. 652.

So, in *Cherry v. North & S. R. Co.* (1877) 59 Ga. 446, it appeared that the state had seized all the property of a railroad company, and a receiver was appointed. Under the receivership a station agent was retained in his same position, but was required to give a bond to the state for the faithful performance of his duties. The court held that, in an action against the railroad for breach of a contract made by it before its seizure by the state, process served on the station agent was insufficient to bind the company, saying: "The corporation was out of possession and out of business, and had nothing for a station agent to do. This agent had ceased to act for the company, and had become the agent of the state. His relation to the company was the same as if he had never been its agent. When the public authority, by a receiver, is in possession of a railroad, and conducting its operation, the agents and employees are no longer those of the company."

Likewise, in *Cain v. Seaboard Air-Line R. Co.* (1910) 7 Ga. App. 461, 67 S. E. 127, an action against a railroad in the hands of a receiver, the court held that service on an agent of the receiver, holding the same position that he held for the company before it passed into a receivership, was insufficient to bind the company.

In *Collins v. Baltimore & O. R. Co.* (1898) 7 Ohio S. & C. P. Dec. 445, 7 Ohio N. P. 270, an action for death by wrongful act, commenced after the railroad had passed into the hands of a receiver, process was served on one of the ticket agents employed by the receiver. It was held that this service was insufficient to bind the company, under a statute providing that process could be served against a railroad company, or any "regular ticket or freight agent thereof," as the ticket agent was the agent of the receiver and not the agent of the company.

The court said: "According to this section, unless the ticket agent of the receivers is the ticket agent of the company, it would not be a good service to serve this summons upon the ticket agent of the receivers in this county. Now, the question is, Are they ticket agents of the company? The court thinks not. The company has no sort of control over them, and although the company, notwithstanding the receivership, has an interest in this property which would authorize a suit to be brought in this county, yet the service must be upon a ticket agent of the company, and, as I say, the company has no control over these agents at all."

So, in *Cleveland & M. R. Co. v. Orme* (1885) 1 Ohio C. C. 511, 1 Ohio C. D. 285, the plaintiff commenced an action against a railroad company, and served process on a ticket agent who had been newly appointed to this position by the receiver immediately after the road passed into his hands. The court held that under a statute drawing a distinction between the ticket and freight agent of the corporation, and the ticket and freight agent of the receiver, process served on this agent was ineffective to bind the railroad company, saying: "To constitute a good service against a corporation, the ticket agent must be an agent thereof. . . . Now, it should be remembered that § 5044 refers to the ticket or freight agent of the corporation, and that § 3416 refers to the ticket agent of a receiver, and shows, as we think conclusively, the policy of the legislature of our state to recognize both the ticket agent and freight agent of the corporation, and the ticket and freight agent of the receiver. . . . It will not do to say that because that is a place that would have been filled by a ticket agent of the company or corporation if it had not been in the hands of a receiver, that service upon him is good. It should be borne in mind that the authority conferred upon its freight or ticket agent is a statutory authority, and it must be served only upon the agent thereof, and not served upon the agent of the receiver."

Similarly, the plaintiff in *Webster v. International & G. N. R. Co.* (1916) — Tex. Civ. App. —, 184 S. W. 295, brought an action against the railroad, after it had passed into the hands of receivers, to recover title and possession of a certain tract of land. Process was served on a local agent holding the same position under the receiver that he had formerly held under the railroad company. The court, in holding that the agent was the agent of the receiver, and hence service of process on him was ineffectual to bind the corporation, said: "Whatever may be the ruling in other jurisdictions, it has been held in this state that the agent of the receivers of a railway corporation, under appointment of a court of competent jurisdiction, is not the agent of the corporation, although before the appointment of the receivers he had been the agent of the corporation, and at the time of the service of citation upon him was serving the receivers as agent in the same capacity in which he had served the corporation."

In *International & G. N. R. Co. v. Moore* (1895) — Tex. Civ. App. —, 32 S. W. 379, the plaintiff, having recovered a judgment against a railroad, on which no execution was issued, filed a suit to recover the amount of the judgment. The defendant contended that the judgment was a nullity, being made after the railroad passed into the hands of receivers, and on service of process on a station agent of the company, who was, at the time of service, in the employ of the receivers, and not in the employ of the company. The court said that while the judgment carried with it the presumption that service on the agent was service on the company, yet this presumption could be overcome by a showing that the appointment of the receivers was regular.

So, in *Heath v. Missouri, K. & T. R. Co.* (1884) 83 Mo. 617, wherein the action was against a railroad to recover damages for injuries to live stock inflicted while the railroad was under the management of a receiver, the court held that service of process on a former agent of the company,

working for the receiver, was insufficient to bind the company. Compare *Proctor v. Missouri, K. & T. R. Co.* (1890) 42 Mo. App. 124, an action against a railroad company and the receivers thereof jointly, wherein the court "conceded" that the process served was good as against the corporation, though the point was not in issue, the controversy being as to whether process served, after receivership, on a station agent in the employ of the receivers, was sufficient to bind the receivers.

However, since a receiver has no authority outside of his own jurisdiction, it has been held that the appointment of a receiver by a foreign court for a foreign corporation, which has a resident agent in the state of suit, and has property and is doing business therein, does not affect the service of process on such agent, and service on him will give the court jurisdiction over the foreign corporation. Thus, in *Georgia Southern R. Co. v. Bigelow* (1881) 68 Ga. 219, the plaintiff brought an action against a domestic railroad to recover for his

forcible ejection from a train. The court held that process served on an agent of the defendant was sufficient to bind it, though it appeared that the agent was in the employ of the receivers of a foreign railroad, and made remittances to them as a result of a contract made between the receivers and the local road, whereby the receivers agreed to operate the road, and to share and divide the expenses or profits, incurred or earned respectively. So, in *Howard v. Chesapeake & O. R. Co.* (1897) 11 App. D. C. 300, where the plaintiff sued for injuries received in a wreck on the defendant's line in Kentucky, the court held that the appointment of receivers for the road in Virginia and West Virginia did not operate to transfer to them property situated in the District of Columbia, and hence that process served on the resident agent of the company in the District of Columbia was sufficient to bind the company, where the agency remained unchanged after the appointment of the receivers.

M. J. McC.

IRA E. CORNELIUS, Plff. in Err.,

v.

J. T. SMITH.

Oklahoma Supreme Court—October 22, 1918.

(— Okla. —, 175 Pac. 754.)

Attorney and client — contingent fee — amount — basis.

1. Two thousand dollars is not an unreasonable fee to allow an attorney under an oral contract for a contingent fee for protecting a client's interest in an oral lease, for which he paid \$100, and from which he realized \$47,500 as the result of litigation extending over about a year in time.

[See note on this question beginning on page 237.]

— contingent fee — skill.

2. Where, in an action to recover attorneys' fees under an oral contract of employment stipulating that the amount of such fee should be contingent upon the success of the litigation, one ground of defense was based upon the contention that there was no consideration for such contract, inas-

much as the services claimed to have been rendered did not require skill, diligence, or legal knowledge, held, that the skill, diligence, and legal knowledge of counsel, exercised in a lawsuit, should be measured in a large degree by the result of the litigation, and not by the number of pleadings filed, or their length, or the number of

Headnotes 2-4 by GALBRAITH, C.

times counsel appeared in court, or the number of hours consumed in oral argument.

[See 2 R. C. L. 1059.]

Appeal — excessive verdict — vacating.

3. A verdict rendered in such action should not be vacated on the ground that it is excessive, unless it clearly appears that the same is so excessive as per se to indicate passion or prejudice on the part of the jury.

[See 2 R. C. L. 199.]

Damages — attorney's contract — contingent fee.

4. A consideration of the entire record in this case does not support the contention that the judgment appealed from is so excessive as to require this

court to vacate the same and to order a new trial.

Evidence — value of services of attorney.

5. Upon the question of character of services rendered in an action by an attorney for fees, evidence is admissible that he prepared and presented a petition for revivor upon death of a party to the action, although he did not represent such person.

— value of lease.

6. In an action by an attorney for fees in defending a title under a lease, evidence is admissible of the amount which third persons received out of a sale of the lease under the client's title, as bearing upon what the client received for his interest therein.

ERROR to the District Court for Creek County to review a judgment in favor of plaintiff in an action brought to recover an attorney's fee under an alleged oral contract of employment. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Messrs. McDougal, Lytle, Allen, & Hodges and Smith & Walker for plaintiff in error.

Mr. J. T. Smith, in propria persona:

Where the verdict of the jury is based upon the testimony of four reputable men, and there is not a line of testimony to contradict them, such a verdict is clearly sustained by weight of the evidence, and should not be disturbed on appeal.

Mullen v. Robison, 30 Okla. 527, 120 Pac. 1099; Brown v. Baird, 5 Okla. 133, 48 Pac. 180; Weller v. Western State Bank, 18 Okla. 478, 90 Pac. 877; Choctaw, O. & G. R. Co. v. Burgess, 21 Okla. 653, 97 Pac. 271; Independent Cotton Oil Co. v. Beacham, 31 Okla. 384, 120 Pac. 969; Fitch v. Green, 39 Okla. 18, 134 Pac. 34; St. Louis & S. F. R. Co. v. Hart, 45 Okla. 659, 146 Pac. 436; Missouri, O. & G. R. Co. v. Parker, 50 Okla. 491, 151 Pac. 325; St. Louis & S. F. R. Co. v. Hodge, 53 Okla. 427, 157 Pac. 60; Ft. Smith & W. R. Co. v. Chandler Cotton Oil Co. 25 Okla. 82, 106 Pac. 10; Ellison v. Bank of Meeker, 27 Okla. 782, 117 Pac. 199; Weller v. Western State Bank, 18 Okla. 478, 90 Pac. 877; Rison v. Harris, 50 Okla. 764, 151 Pac. 584.

Galbraith, C., filed the following opinion:

This is an appeal from the judgment of the trial court, rendered

upon the verdict of a jury returned in an action to recover an attorney's fee based on an oral contract of employment. Smith, as plaintiff in the lower court, alleged that in September, 1913, the plaintiff in error, Cornelius, was made defendant in a suit pending in the district court of Creek county, involving the title and oil and gas lease covering the allotment of Susie Crow, a deceased Creek Indian, whose allotment was located in the north end of the Cushing oil fields. This allotment embraced two tracts of 80 acres each. Cornelius held an oil and gas lease on the allotment that had been executed to him by Molly Tiger and Baby Cumsey, who claimed to be the sole heirs of the deceased allottee. The legality of this lease was one of the issues involved in that suit.

Smith, in his petition, alleged that he was a regularly admitted attorney at law, practising at Sapulpa, engaged in the active practice of his profession, and that after Cornelius was made a party to said suit he came and employed Smith to represent him therein, and agreed orally to pay him a nominal fee in the event that the litigation, or other litiga-

tions involving the lease which might be brought, was lost, or in the event that the premises were condemned in the meantime for oil and gas mining purposes, and in the event that his interest in the premises was established, or, if the matter was compromised, he was to pay Smith a liberal fee, based on the amount Cornelius should obtain thereby; that under said agreement of employment he appeared in said case as Cornelius's attorney, and filed an answer for him, and appeared for him, and looked after his interest in the litigation for a period extending over something like a year; that in September, 1914, Cornelius disposed of his lease on 80 acres of said land for the sum of \$20,000; that later he disposed of his interest in the other 80 acres for the sum of \$37,500; that a reasonable fee for the services rendered in said litigation under the terms of said contract would be \$10,000, for which amount judgment was prayed.

Cornelius answered, denying specifically that he entered into the contract as set out in the petition, but admitted that he employed Smith to file an answer for him, but alleged that he had other attorneys regularly employed to represent him, but that these attorneys were personally interested in this suit, and for that reason did not care to appear for him, but agreed to prepare the pleadings and advise as to his interests, but suggested that Smith be employed to appear in court for him; that his regular counsel prepared the answer, and he delivered it to Smith, and asked him how much he was going to charge to appear for him and represent him under the directions of his general counsel, and that Smith said he would only charge a small fee, and in no event to exceed \$250; that with this understanding he delivered the answer to Smith and directed him to file it; that Smith rendered very little service in the case, and that \$100 would be ample compensation for the services rendered, and tendered

that amount in the court in satisfaction of his claim.

The case was tried to the court and a jury, and a verdict returned against Cornelius and in favor of Smith for \$2,145. On the hearing of the motion for a new trial the court found the verdict to be excessive in the sum of \$145, and required the plaintiff to remit that amount, and on his doing so a new trial was denied, and the verdict approved for \$2,000, and judgment entered for that sum. To review this judgment, Cornelius has appealed to this court.

It is contended (1) that the judgment for \$2,000 is excessive, and is so excessive that it is apparent that the same was the result of passion and prejudice on the part of the jury, and therefore should be set aside. This proposition is argued at length in the brief. The character of the services rendered by Smith in the action is belittled, and it is contended that, viewed in any light, with calm deliberation, they could not possibly be found to be worth the amount of the judgment; that the trial court, who saw the witnesses and heard them testify, found that the verdict was excessive in the sum of \$145, and that such finding necessarily involved the finding that the same was the result of prejudice and passion on the part of the jury, and that, if it was, the vice extended to the entire verdict, and could not be cured by a remittitur, but the verdict should have been vacated and a new trial ordered. It is not clear on what ground the court found the verdict to be excessive, and just how he determined the amount that should be remitted. This court has adopted the rule relative to excessive verdicts that they should be vacated on this ground "only when it appears that the verdict is so excessive as per se to indicate passion or prejudice." *St. Louis & S. F. R. Co. v. Hodge*, 53 Okla. 427, 157 Pac. 60. In the instant case the employment was admitted. What were the terms

of the contract of employment was the leading issue in the case. If the terms were as Smith contended, then the value of the services rendered was another issue to be determined by the jury. These were issues of fact that were submitted to the jury fully and fairly by the court in a series of instructions which were not excepted to by either party. The jury by its verdict found that the terms of the contract of employment were as alleged by Smith, and the verdict also fixed the reasonable value of the services rendered. There is nothing upon the face of the verdict or upon the record to justify the conclusion that the verdict was the result of passion or prejudice on the part of the jury. On the contrary, the evidence abundantly supported the verdict and judgment.

Again, it is argued that the court erred in the admission of certain evidence. (1) In admitting an order of revivor made in the case upon the death of Wallace Jack, one of the parties to the suit. It appears that this order was prepared by Smith, and was entered upon his request to the court, and that in doing this he was acting in the interest of his client, Cornelius, although Smith did not appear for Wallace Jack, he being represented by another attorney in the case. This evidence was

**Evidence—
value of services
of attorney.**

competent upon the issue as to the character of the service rendered by Smith, which was one of the material issues in the case. (2) It is complained that testimony was admitted showing the interest of McDougal & Lytle in the suit, and that they received a portion of the \$20,000 paid to Cornelius for the lease on the land. This testimony was admitted for the purpose of showing how much Cornelius realized out of the lease, and for that purpose it was competent.

Again, it is complained that the court erred in admitting testimony that Mr. Ransom, another attorney,

received \$10,000 of the \$37,500 paid Cornelius for the lease on the second 80 acres. This testimony, it seems, was competent for the same reason as the other testimony set out above.

Lastly, it is contended that the judgment is erroneous, and that a new trial should have been granted, for the reason that there was no consideration necessary to entitle the plaintiff to recover, on the basis of a contingent-fee contract, for the reason that the nature of the services which he claims to have rendered in the case were minor acts, and required on the part of the counsel rendering them no skill or diligence or legal knowledge. In answer to this contention we are constrained to say that whatever skill or legal knowledge Smith may or may not have possessed, or whatever diligence he may or may not have exercised in this case, should be determined by the results obtained by the lawsuit. Measured by this stand-

**Attorney and
client—con-
tingent fee—
skill.**

ard, Cornelius's attorney must have been possessed of a fine degree of skill, and exercised considerable diligence, and displayed a high degree of legal knowledge in this litigation, since the evidence shows that Cornelius invested \$100 in the lease, and as a result of a compromise and settlement of the action realized the sum of \$47,500 in money. From this result we are forced to the conclusion that he had competent and skilful legal advice and was well served by his counsel in the litigation. Smith was his only attorney of record, and from the evidence we cannot say that he did not show skill, diligence, and legal knowledge of a high character.

**—contingent fee
—amount—basis.**

On the whole record, we conclude that the judgment appealed from should be affirmed.

**Damages—
attorney's
contract—
contingent fee.**

Per Curiam:

Adopted in whole.

ANNOTATION.

What constitutes reasonable attorney's fee in absence of provision in contract or statute fixing amount.

- I. Introductory, 237.
- II. Reasonable fees, 239.
- III. Unreasonable fees, 246.

I. Introductory.

This annotation is intended as a compilation of the cases wherein the courts have declared certain specific amounts to be reasonable or unreasonable as compensation for legal services in the absence of a contract or statutory provision expressly fixing the amount. Cases involving the inadequacy of a definite amount awarded by court or jury are not included.

In all of the cases dealing with the question what is a reasonable attorney's fee, whether that question has been presented to the court or to the jury, the inquiry has been turned to the circumstances of the particular case, and the fee has been fixed according to those circumstances. Thus it has been said: "There is no standard by which the compensation of counsel can be properly and definitely determined as to amount. The question, when presented at this time, must be decided upon considerations as vague and indefinite as when it was said in the *Mirror* (chap. 2, § 5) that 'four things are to be regarded: (1) The greatness of the cause; (2) the pains of the sergeant; (3) his worth, as his learning, eloquence, and gift; (4) the usage of the court.'" *Frink v. McComb* (1894) 60 Fed. 486.

"The learning and ability of the counsel, the means of the client, the magnitude of the interests involved, the hazards of the litigation, and the final result, whether successful or otherwise, as well as the actual time and labor expended for the client, all are or may be elements to be considered in determining what is reasonable compensation in a given case." *Halaska v. Cotzhausen* (1881) 52 Wis. 624, 9 N. W. 401.

So, in *Leitensdorfer v. King* (1884) 7 Colo. 436, 4 Pac. 37, it was said: "In estimating the value of an attor-

ney's services, where no special contract exists fixing the same, they are to consider a variety of facts and circumstances, such as the character of the litigation in which the services were rendered; the novelty, difficulty, and importance of the questions involved; the value of the rights or property in controversy; the attorney's position in the case, as leading or assistant counsel, and the degree of responsibility resting upon him; the length of time necessarily consumed by the trial and other court proceedings; the fact, if it be a fact, that compensation is wholly contingent upon success; the manner in which his duties are performed, etc."

In *Randall v. Packard* (1894) 142 N. Y. 47, 36 N. E. 823, the court said: "The general rule is that an attorney, in the absence of an agreement, deserves compensation according to the reasonable worth of his services. Of that the jury are the sole judges; and, to arrive at their value, they may consider the nature of the services rendered, the standing of the attorney in his profession for learning, skill, and proficiency, the amount involved, and the importance to his client of the result. The reason why the result is one of the important factors in the consideration must be obvious. It not only is some evidence of the usefulness of the services, but, for its effects upon the situation of the client, relatively to what it had been, it must be conceded a degree of influence in fixing the amount of the attorney's compensation, proportioned to the nature and incidents of the result, in connection with the other considerations adverted to."

In *Kirchoff v. Bernstein* (1919) 92 Or. 378, 181 Pac. 746, it was said: "It must be remembered, however, that the value of services performed by an attorney cannot always be measured with the same degree of exactitude as can a bushel of wheat or a ton of coal. Education, experience,

skill, judgment, and knowledge are important factors. Nor can a just appraisal be placed upon the worth of professional services, if the time actually employed in the rendition of those services is taken as the sole gauge. An experienced and trained attorney might accomplish in a very short time what another could not do in a much longer time, or perchance might not be able to do at all. The responsibility involved is always a considerable item, and ordinarily the greater the amount involved, the greater the responsibility."

Similarly, in *Clark v. Ellsworth* (1898) 104 Iowa, 442, 73 N. W. 1023, the court said: "It is a well-settled rule that the importance of the litigation, the success attained, and the benefit which it secured may be considered in estimating the compensation to which the attorney who conducted it is entitled for the services he rendered. The responsibility of an attorney may be, and usually is, much greater where large interests are involved than it is where the interests are of but little importance."

In *Gilmore v. McBride* (1907) 84 C. C. A. 274, 156 Fed. 464, it was said: "In determining the reasonable value of services rendered by an attorney, it is certainly proper to consider the value of the property in litigation, and the consequent pecuniary benefit realized by the client as the result of the attorney's skill and labor. We do not agree with the plaintiff in error that such evidence should be confined to the date of the rendition of the judgment in which the property was recovered, but the inquiry may take a wider range, and include its value at the time of the trial, if still owned by the defendant. In other words, in such a case, the present value of the property recovered is not too remote for the consideration of the jury. It tends to show the benefit which the defendant has actually received as the result of the attorney's services,—an inquiry which we think is always open, so long as the amount of the fee remains to be settled."

And in *Smith v. Chicago & N. W. R. Co.* (1883) 60 Iowa, 515, 15 N. W.

291, the court said: "While the labor of an attorney in conducting a case wherein great values are involved may be no greater than would be required in a case of trifling importance, yet the responsibility would be greater. This ought to be considered in determining his compensation. Lawyers ought not to be deprived of the benefit of rules regarded as just in other business transactions. . . . In cases of great magnitude, not only is the responsibility greater, but the resistance is always more formidable than in cases where less is involved. The world knows that in a case of this kind, where a tract of land worth less than \$500 is involved, the contest would not be so vigorous on either side as in a case wherein the contest is for land in Chicago, worth one or two millions of dollars. We are authorized to say that under the general custom of the profession, values in controversy always control charges for professional services."

With respect to the situation where the fee of the attorney is contingent, but the amount or proportion thereof is not fixed, it has been said: "Where an attorney undertakes a case upon the understanding that unless he succeeds and accomplishes for his client what he has agreed to do, he is not to have any compensation for his services, the value of the magnitude of the result achieved ought to be considered in estimating the value of such services." *Smith v. Couch* (1906) 117 Mo. App. 267, 92 S. W. 1143. So, in *Davis v. Webber* (1899) 66 Ark. 190, 45 L.R.A. 196, 74 Am. St. Rep. 81, 49 S. W. 822, wherein it appeared that there had been no contingency as to obtaining judgment, but only uncertainty as to the amount that would be allowed, the court discussed the element of contingency as follows: "It will not do to liken a case of this kind to a suit for damages for personal injury, or any other kind of a suit, where both the question of obtaining judgment and the amount thereof, if obtained, are trembling in the balance. This, in fact, is a suit upon a liquidated demand, where there was no issue as to the amount of the judgment,

and no doubt about obtaining it. The proof shows that the lawyer's fee, based upon the contingency of final recovery, would be much less in the latter case than in the former. Necessarily so, because of the diminished labor in its prosecution, and the anxiety as to the result."

II. Reasonable fees.

The following amounts have been held to be reasonable as fees for legal services:

\$100,000—*Brown v. Pennsylvania R. Co.* (1918) 162 C. C. A. 529, 250 Fed. 513 (attorneys recovered from railroad company for benefit of bondholders of another corporation the sum of \$1,900,000; allowance of \$200,000 from fund recovered reduced to \$100,000);

\$83,293.64—*Mecartney v. Guardian Trust Co.* (1918) 274 Mo. 224, 202 S. W. 1131 (attorney successfully represented trust company in important protracted litigation involving several millions of dollars);

\$66,600—*Whitney v. New Orleans* (1893) 4 C. C. A. 521, 13 U. S. App. 229, 54 Fed. 614 (attorney was employed in litigation concerning property that resulted in recovery of over \$500,000; attorney and client had agreed that certain judge should fix fee; amount fixed held not to be excessive);

\$50,000—*McMannomy v. Chicago, D. & V. R. Co.* (1897) 167 Ill. 497, 47 N. E. 712 (attorney defended railroad in protracted foreclosure litigation, involving large amount and requiring much time and labor, but attorney did not devote whole of his time to case; fee reduced from \$85,000 to \$50,000);
Forrester v. Boston & M. Consol. Copper & S. Min. Co. (1904) 29 Mont. 397, 74 Pac. 1088, 76 Pac. 211 (attorney was employed by minority stockholders in suit to restrain transfer of property of corporation, to secure appointment of receiver, and for other relief; determination of amount of fee by trial court was supported by evidence and was not disturbed on appeal);

\$30,810—*Pons's Succession* (1918) 142 La. 721, 77 So. 515, Ann. Cas. 1918D, 939 (successful defense of suit

for interdiction brought to obtain control of estate valued at nearly \$350,000);

\$30,473—*Frink v. McComb* (1894) 60 Fed. 486 (attorneys prosecuted doubtful claim on promise of "liberal" fee if successful, and recovered \$91,420);

\$30,000—*Re Kings County Trust Co.* (1916) 129 N. Y. 590, 114 N. E. 1070, affirming (1915) 169 App. Div. 966, 153 N. Y. Supp. 1122, which modified (1914) 86 Misc. 176, 149 N. Y. Supp. 124 (attorneys for executor recovered \$346,900 from trustees under will, services being rendered with understanding that compensation was to be contingent on success; fee of \$47,600 reduced to \$30,000);

\$25,000—*Myers's Estate* (1916) 253 Pa. 537, 98 Atl. 694 (attorney rendered services in settling estate valued at over \$2,500,000; expert opinion was that fee of \$36,000 would be reasonable);

\$22,646—*People v. Bond Street Sav. Bank* (1881) 10 Abb. N. C. (N. Y.) 15 (counsel for bank receiver prosecuted eleven actions against trustees of bank for losses caused by their misfeasance or malfeasance in office, and after difficult litigation recovered over \$115,000);

\$20,000—*Glidden v. Cowen* (1903) 59 C. C. A. 172, 123 Fed. 48 (attorney assisted in litigation, including two arguments in United States Supreme Court, resulting in recovery of \$186,000 under doubtful claim);
Kelley v. Richardson (1888) 69 Mich. 430, 37 N. W. 514 (attorney employed by executrix in settling estate worth \$1,000,000; will contest was compromised; estate was quickly and satisfactorily settled);

\$15,000—*Nelson v. Blaisdell* (1893) 23 Or. 507, 32 Pac. 391 (attorney was employed by mining company in water-right litigation and other legal matters);

\$13,735.60—*Percival's Succession* (1915) 138 La. 543, 70 So. 505 (services rendered in administration of estate amounting to \$264,000, and defending will against attack of heirs; fee reduced from \$20,735.60 to \$13,735.60);

\$13,000—*Tuttle v. Clafin* (1898) 86 Fed. 964 (attorneys successfully prosecuted suit for patent infringement, working during substantial portions of 322 days); *Louisville Gas Co. v. Hargis* (1896) 17 Ky. L. Rep. 1190, 33 S. W. 946 (attorneys were successful in fight against rival gas company, though they did not come within time limit of contract providing for fee of \$25,000);

\$12,000—*Hays v. Johnson* (1907) 30 Ky. L. Rep. 614, 99 S. W. 322 (attorneys recovered \$35,000 from insurance company on compromise after prolonged litigation; fee was dependent on recovery; services performed were difficult and valuable);

\$10,000—*Leitensdorfer v. King* (1884) 7 Colo. 436, 4 Pac. 37 (lawyer employed as local attorney and counsel worked on case for three years and obtained decree that might be followed up by clients to reach property valued at nearly \$500,000); *Trimble v. Kansas City, S. & G. R. Co.* (1907) 201 Mo. 372, 100 S. W. 7 (services rendered resulted in large enhancement of value of property of defendant corporation); *Thompson v. Knickerbocker Ice Co.* (1889) 25 N. Y. S. R. 581, 6 N. Y. Supp. 7, affirmed in (1891) 127 N. Y. 671, 28 N. E. 255 (attorney secured ruling that his client would not be liable to pay tax on its "ice tickets," which amounted to \$168,178.27); *Randall v. Packard* (1894) 142 N. Y. 47, 36 N. E. 823 (proceedings instituted by attorney resulted in compromise whereby client obtained reconveyance of invested property worth \$55,000);

\$8,000—*Doutre v. Reg.* 4 Montreal Leg. N. 34 (attorney was exclusively engaged for eight months representing government interest before Commission);

\$6,000—*Celluloid Mfg. Co. v. Chandler* (1886) 27 Fed. 9 (attorney entered appearances as defendant in 164 suits for patent infringements, and supervised cases and recovered costs, but took no part in evidence or argument of test case); *Ex parte Plitt* (1853) 2 Wall. Jr. (C. C.) 453, Fed. Cas. No. 11,228 (attorney rendered valuable assistance in protracted litigation concerning estate of \$800,000);

Fillmore v. Wells (1887) 10 Colo. 228, 3-Am. St. Rep. 567, 15 Pac. 343 (fruits of legal victory upwards of \$20,000 in value); *Lamar Ins. Co. v. Pennell* (1886) 19 Ill. App. 212 (attorney recovered \$18,000 from railroad company for destruction of client's hotel by fire; client was insolvent; suit involved two trials and three appeals, was ably defended, and lasted nine years);

\$5,037—*Re Kellogg* (1904) 96 App. Div. 608, 88 N. Y. Supp. 1033, affirmed in (1905) 180 N. Y. 534, 72 N. E. 1114 (attorney made several arguments of case on appeal and one reargument, but those arguments were mere restatements of same proposition; court did not consider them as services rendered in separate cases; allowance reduced from \$5,837 to \$5,037);

\$5,000—*St. Louis, I. M. & S. R. Co. v. Clark* (1892) 2 C. C. A. 331, 10 U. S. App. 66, 51 Fed. 483 (attorney successfully prosecuted suit through United States Supreme Court for recovery of land worth \$25,000 or \$50,000, under agreement of no fee in case of failure); *Re Treadwell* (1883) 23 Fed. 442 (attorney for assignee saved \$30,000 to estate after protracted litigation, and rendered services in defeating other claims); *Martin v. Manning* (1916) 124 Ark. 74, 186 S. W. 302 (attorney succeeded in releasing client's property from levy of execution for \$28,000, and also procured dismissal of two other suits against him); *Sanders v. Seelye* (1889) 128 Ill. 631, 21 N. E. 601 (attorneys secured reversal of judgment by state supreme court in case involving large amount of bonds); *McCaughey v. Wilson* (1915) 130 Minn. 196, 153 N. W. 310 (attorneys succeeded in setting aside antenuptial agreement which resulted in giving client about \$500,000; work was protracted over several years and compensation was contingent on success); *Brown v. New York* (1877) 11 Hun (N. Y.) 25 (attorney recovered judgment for \$35,000 on contract between his client and city concerning public works; judgment was later included in compromise); *Re Commercial Bank* (1896) 4 Ohio S. & C. P. Dec. 440, 3 Ohio N. P. 193

(attorney representing estate of bank, rendered services to assignee and to trustees, and assisted in large number of proceedings);

\$4,400—*Re Bignall* (1881) 3 McCrary, 440, 9 Fed. 385 (attorneys for assignee in bankruptcy recovered over \$22,000 from fraudulent creditor);

\$4,200—*Greeff v. Miller* (1898) 87 Fed. 33 (attorneys handled several test cases, going to the United States Supreme Court);

\$4,000—*Epp v. Hinton* (1918) 102 Kan. 435, 170 Pac. 987 (attorney recovered judgment on land contract for \$15,000, compensation being contingent on success);

\$3,750—*Germania Safety Vault & T. Co. v. Hargis* (1901) 23 Ky. L. Rep. 874, 64 S. W. 516 (attorney unsuccessfully conducted hard-fought litigation for removal of certain receivers of railroad);

\$3,600—*Re Lutz* (1914) 175 Mo. App. 427, 162 S. W. 679 (attorney was retained by administrator of estate consisting of \$125,000 in personalty besides much realty);

\$3,500—*Hazeltine v. Brockway* (1899) 26 Colo. 291, 57 Pac. 1077 (attorney recovered about \$7,400 in bonds and dividends; fee was contingent on recovery); *Kirchoff v. Bernstein* (1919) 92 Or. 378, 181 Pac. 746 (attorney rendered services to executors of estate amounting to nearly \$100,000, including successful compromise of contest of will);

\$3,250—*Gilmore v. McBride* (1907) 84 C. C. A. 274, 156 Fed. 464 (property recovered for client was one twenty-fourth interest in mine worth about \$100,000, and client's share of one year's output was \$4,000);

\$3,000—*Stucky v. Smith* (1912) 148 Ky. 401, 146 S. W. 1128 (guardian ad litem and corresponding attorney, representing three fourths of \$200,000 estate, conducted successful proceedings which extended over four years, but which could have been concluded in six months if court calendar had been favorable; court said that in fixing allowance to guardian ad litem or corresponding attorney it should take into consideration character of litigation, value of estate, nature, duration and 9 A.L.R.—16.

extent of services performed, responsibility resting on attorney, and result of his efforts); *Morehead v. Anderson* (1907) 125 Ky. 77, 100 S. W. 340 (attorney worked five months and made thirty-five separate abstracts in perfecting title to lands that sold for \$189,927); *Irvine v. Stevenson* (1919) 183 Ky. 305, 209 S. W. 7 (attorneys represented infants whose entire estate, amounting to about \$30,000, was involved in suit; action was pending thirteen months, 144 witnesses were examined, depositions filled 1,400 typewritten pages; compensation was necessarily contingent on success);

\$2,890—*Re Brown* (1914) 87 Misc. 541, 151 N. Y. Supp. 390 (surviving partner of firm of attorneys continued in charge of client's estate for one year, reinvested \$26,000, foreclosed several mortgages, was successful in litigation concerning trust deed, thereby securing \$35,000);

\$2,800—*National Home Bldg. & L. Asso. v. Fifer* (1897) 71 Ill. App. 295 (attorneys assisted in successful defense through state supreme court of suit for dissolution of corporation whose assets amounted to \$1,260,000); *Cressman v. Whittall* (1884) 16 Neb. 592, 21 N. W. 458 (attorneys established lien and recovered nearly \$8,000 after six years' litigation; attorneys carried all risks of suit);

\$2,600—*Hempstead v. New York* (1903) 86 App. Div. 300, 83 N. Y. Supp. 806 (attorney prosecuted four actions for damages, under statute relative to navigability of certain creeks; matter was settled by subsequent legislation according to which \$10,000 per year for five years was paid to client; it appeared that attorney's services were factor, though not sole factor, in effecting settlement; fee, which had first been allowed on assumption that services were only inducing cause of beneficial legislation, was reduced from \$3,600 to \$2,600); *Remington v. Eastern R. Co.* (1901) 109 Wis. 154, 84 N. W. 898, 85 N. W. 321 (attorneys worked 104 days, fully protecting rights of client railroad company in two important suits for timber damage resulting from fire);

\$2,500—*Meers v. Daley* (1916) 203

Ill. App. 515 (attorney defended suit to set aside will disposing of estate of \$150,000, and secured settlement favorable to client's interest; fee of \$2,000 allowed in addition to \$500 paid); *Graham v. Dubuque Specialty Mach. Works* (1908) 138 Iowa, 456, 15 L.R.A. (N.S.) 729, 114 N. W. 619 (attorney brought two suits for stockholders on behalf of corporation against officers of corporation, and recovered over \$9,000; court said that in such case contingent nature of fee could not be considered in determining what was reasonable amount, but that time employed, amounts involved, amounts recovered, ability and standing of attorney, and also prominence of defendants, should be taken into account);

\$2,480—*Currey v. Robinson* (1914) 92 Kan. 117, 139 Pac. 1023;

\$2,000—*CORNELIUS v. SMITH* (reported herewith) ante, 233 (client agreed to pay attorney "liberal" fee, based on amount of recovery; as result of compromise, client realized \$47,500 on investment of \$100); *Western Clay Drainage Dist. v. Day* (1919) — Ark. —, 210 S. W. 338 (attorney successfully defended drainage district in suit brought to resist collection of further assessments of benefits); *Butler v. King* (1898) — Tenn. —, 48 S. W. 697 (attorneys successfully prosecuted through appellate courts, suit for land worth over \$10,000); *Donworth v. Benton County* (1918) 103 Wash. 382, 174 Pac. 441 (attorneys successfully represented county in important litigation seeking to nullify bond issue of \$125,000; board of county commissioners passed resolution approving fee of \$2,000 as additional compensation to \$1,000 previously paid);

\$1,750—*Lemon v. Snell* (1914) 188 Ill. App. 101 (attorneys handled cause involving large amount and hot contest);

\$1,539—*Farmers' Loan & T. Co. v. Mann* (1867) 4 Robt. (N. Y.) 356 (attorney prosecuted through appellate court disallowance of claim, resulting in increasing client's distributive share by \$7,500);

\$1,500—*Re Rude* (1900) 101 Fed.

805 (attorney for preferred creditor of bankrupt successfully prosecuted claim for \$7,300; worked thirty-five days, receiving compensation also from another source; fee reduced from \$2,500 to \$1,500, exclusive of retainer of \$250); *Breaux v. Francke* (1878) 30 La. Ann. 336 (attorneys defended married woman in suit of interdiction); *Atlantic Sav. Bank v. Hetterick* (1875) 5 Thomp. & C. (N. Y.) 239 (attorney successfully prosecuted action to have \$41,950 judgment declared lien; there was separate compensation for obtaining judgment);

\$1,315—*Young v. Lanznar* (1908) 133 Mo. App. 130, 112 S. W. 17 (attorney, defeating injunction, obtained for his client \$6,500, full amount due on note and deed of trust; also rendered laborious and valuable services in other cases, in midst of which he severed relations with client on account of client's failure to pay him reasonable amounts);

\$1,250—*Rose v. Spies* (1869) 44 Mo. 20 (attorney recovered \$6,000 for client on suit against man who contracted marriage with client while having wife living); *Re Commercial Bank* (1896) 4 Ohio S. & C. P. Dec. 440, 3 Ohio N. P. 193 (services rendered to assignee of bank);

\$1,100—*Elosser v. Fletcher* (1915) 126 Md. 244, 94 Atl. 776 (attorneys settled for \$9,000 and interest claim in favor of estate amounting to about \$18,000; \$100 of fee was for nonresident counsel);

\$1,000—*Davis v. Webber* (1899) 66 Ark. 190, 45 L.R.A. 196, 74 Am. St. Rep. 81, 49 S. W. 822 (attorney brought suit against sheriff and bondsmen; there was little uncertainty as to outcome of suit; \$8,850 collected); *Sain v. Bogle* (1916) 122 Ark. 14, 182 S. W. 515 (attorneys successfully defended suit attacking legality of formation of drainage district; statute was passed immediately thereafter dissolving district; fee reduced from \$4,000 to \$1,000); *Wright v. Knoxville Livery & Stock Co.* (1900) — Tenn. —, 59 S. W. 677 (attorney represented stockholder suing on behalf of himself and other stockholders to wind up corporation; bill was wide in its scope and

sought to accomplish many things that were not successful, but corporation was wound up and its assets distributed, \$25,000 coming within jurisdiction of court); *McMillan v. Northport Smelting & Ref. Co.* (1908) 49 Wash. 76, 94 Pac. 761 (attorneys secured, without opposition, restraining order preventing removal of certain machinery, saving \$250,000; fee reduced from \$3,500 to \$1,000); *Jones v. Jones* (1913) 72 Wash. 517, 130 Pac. 1125 (attorney rendered extensive services in divorce action, involving large amount of property);

\$800 to \$900 per year—*Re Brown*, (1914) 87 Misc. 541, 151 N. Y. Supp. 390 (attorney cared for and reinvested funds of \$150,000 estate during several years);

\$878—*Joyce v. Miami County Nat. Bank* (1913) 90 Kan. 745, 136 Pac. 232 (attorney made investigations and reduced to judgment notes that had long been charged to profit and loss; \$1,650 was realized by bank eleven years after judgment; fee allowed was 50 per cent of amount collected, with interest);

\$840—*People ex rel. Nash v. Onondaga County* (1914) 164 App. Div. 89, 149 N. Y. Supp. 572 (attorney devoted forty-two days to preparation and trial of case for removal of sheriff; to some extent services could have been rendered by competent clerk);

\$800—*Eakin v. Peeples Hotel Co.* (1899) — Tenn. —, 54 S. W. 87 (attorney was one of those employed by hotel in suit against insurance company, in which \$38,500 damages were claimed and \$16,000 recovered by hotel; attorney was consulted before trial and was present during trial and appeal);

\$775—*Montana Coal & I. Co. v. Hoskins* (1918) 88 Or. 523, 172 Pac. 118 (attorneys unsuccessfully defended suit by attorney against corporation to recover \$1,000 attorneys' fees, with interest, and to enforce lien therefor);

\$700—*Auld's Succession* (1898) 45 La. Ann. 248, 11 So. 948 (attorney represented absent heirs in litigation connected with succession); *Roth's Succession* (1881) 83 La. Ann. 540 (attor-

ney succeeded in establishing will, case going through appeal on novel and important questions); *Gillette v. Murphy* (1897) 7 Okla. 91, 54 Pac. 413 (attorney defended ex-sheriff in suit by county involving over \$3,000, and succeeded in recovering affirmative judgment against county);

\$600—*Garrigus v. Gilbert* (1883) 4 Ky. L. Rep. 1001 (attorney directed two suits for recovery of land in another state, making several trips; recovery, \$2,700 on compromise);

\$530—*Halaska v. Cotzhausen* (1881) 52 Wis. 624, 9 N. W. 401 (attorney represented interests of landowners in condemnation proceedings, and on appeal succeeded in having amount of damages raised from \$630 to \$1,700);

\$500—*Stewart v. Beggs* (1908) 56 Fla. 565, 47 So. 932 (in proceeding for malicious prosecution attorney secured judgment of \$8,000 for his client); *Desky v. Orpheum Co.* (1901) 13 Haw. 634 (attorney's services consisted in foreclosure of mortgage to recover claim exceeding \$30,000); *Warren Deposit Bank v. Barclay* (1901) 22 Ky. L. Rep. 1555, 60 S. W. 853 (attorney rendered services in unsuccessful attempt to have client appointed administrator of client's son, who had been killed in railroad accident; through administrator that was appointed, client received \$7,500 for his son's death); *Sterry's Succession* (1886) 38 La. Ann. 854 (attorney who had represented a certain estate was directed by executor to file answer in later suit connected therewith, and to notify heirs to defend; attorney held consultations, but was not charged with responsibility of attending to suit; heirs effected compromise at \$15,000); *Copley v. Harrison* (1842) 3 Rob. (La.) 83 (attorney was employed in case that was pending several years and was twice before appellate court; parties finally compromised without consulting attorney); *Heinsheimer v. Schulte* (1914) 164 App. Div. 265, 149 N. Y. Supp. 631, modified on another point and affirmed in (1915) 214 N. Y. 361, 108 N. E. 636, Ann. Cas. 1916E, 384 (attorney recovered judgment for \$4,176 in easy trial, lasting less than one day; fee reduced

from \$1,000 to \$500); *Vinson v. Cantrell* (1900) — *Tenn.* —, 56 S. W. 1034 (attorneys brought suit for \$10,000 for breach of marriage contract; after hot fight in trial and appellate court, \$4,000 was recovered); *Belmont v. McAllister* (1914) 116 Va. 285, 81 S. E. 81 (attorney, in caring for 250 acres of land, secured contract for water supply, prepared charters for water company and park association, and rendered other services; but in most of work he was acting without authority from client; fee reduced from \$4,000 to \$500);

\$475—*Wilson v. Minneapolis & N. W. R. Co.* (1884) 31 Minn. 481, 18 N. W. 291 (attorneys defended client in action involving \$20,000);

\$450—*Fryer v. Dicken* (1898) 20 Ky. L. Rep. 696, 47 S. W. 341 (attorney defended mortgagee in suit by creditors seeking to set aside mortgage for \$3,300, result of suit being that mortgage was held to operate as assignment, but mortgagee's claim was adjudged to be preferred one; other services were rendered, consisting of preparation of deed and lien notes and in collecting some money; court held that fee of \$1,000 was excessive, and that sum of \$450, which attorney had received, was ample compensation);

\$400—*Patterson v. Fleenor* (1905) 28 Ky. L. Rep. 582, 89 S. W. 705 (attorney assisted in recovery of 2,200 acres of land, worth from \$30,000 to \$50,000); *Re Leech* (1893) 45 La. Ann. 194, 12 So. 126 (attorney prosecuted suit and obtained judgment of interdiction);

\$350—*Brennan's Estate* (1906) 215 Pa. 272, 64 Atl. 537 (general services to estate, involving investments and auditing accounts); *Whitham v. Hilton* (1914) 78 Wash. 446, 139 Pac. 209, Ann. Cas. 1916B, 260 (after failure of attorney in fact to secure more than \$4,500 in condemnation proceedings for 3 acres of land, attorney at law succeeded in obtaining \$7,250 for approximately 2 acres);

\$343—*Reid v. Warren Improv. Co.* (1911) 17 Cal. App. 746, 121 Pac. 694 (attorney's services amounted to \$347.50, according to his own bills);

\$825—*Hollingsworth v. Shannon*

(1918) 167 Wis. 224, 167 N. W. 248 (attorneys collected \$6,512.50 in suit to foreclose land contract);

\$259—*Beard v. Morgan* (1897) 71 Ill. App. 564 (attorneys assisted in successful defense of newspaper editor in two suits for libel and one for false imprisonment);

\$250—*Valley Oil Co. v. Ready* (1917) 131 Ark. 531, 199 S. W. 915 (attorneys procured appointment of receiver in amicable proceeding; fee reduced from \$2,500 to \$250); *Meadows v. Shelbourne* (1910) — *Ky.* —, 127 S. W. 477 (action for divorce, wherein attorney secured settlement of \$75 per month alimony); *Scharps v. Hess* (1909) 120 N. Y. Supp. 56 (attorney spent seven hours in consultation with client relative to mortgage on client's property and in examination of subject; advised line of defense, which was adopted by client's next attorney; offered to appear up to trial for retainer of \$500, and offered, further, to try case for \$500, if unsuccessful, or larger amount if successful; fee reduced from \$500 to \$250); *Callender v. Turpin* (1901) — *Tenn.* —, 61 S. W. 1057 (attorney procured affidavits that enabled man convicted of murder to get new trial);

\$225—*Warren v. Sheehan* (1909) 156 Mich. 482, 120 N. W. 810 (attorney attended court four days, watching progress of important litigation, in which his client was greatly interested, and examined decree);

\$200—*Billington v. Poitevent & F. Lumber Co.* (1900) 52 La. Ann. 1397, 27 So. 725 (attorneys succeeded in dissolving attachment issued against mill, case going through appellate court); *Uzee v. Biron* (1851) 6 La. Ann. 565 (attorney settled estate of about \$10,000; debts amounted to not over \$1,000; there was no intricacy or litigation); *Koenig v. Harned* (1888) — *N. J. Eq.* —, 13 Atl. 236 (attorney obtained for client divorce and \$8 per week alimony; this fee was in addition to one of \$50 allowed in divorce suit); *Taylor v. Badoux* (1899) — *Tenn.* —, 58 S. W. 919 (attorneys conducted protracted litigation in collecting foreign judgment, involving about \$500);

\$200 per year—*Farmers' Loan & T.*

Co. v. Mann (1867) 4 Robt. (N. Y.) 356 (general supervision for eleven years of the sale of a large number of parcels of land);

\$175—Western Iron Co. v. Brittain (1917) 206 Ill. App. 14 (attorney procured judgment for client, and rendered other services looking to payment of judgment);

\$150—Herman v. Metropolitan Street R. Co. (1903) 121 Fed. 184 (judgment for \$500, obtained through attorney's efforts); Hays v. Johnson (1907) 30 Ky. L. Rep. 614, 99 S. W. 332 (attorney assisted in settling estate); Lartigue v. White (1873) 25 La. Ann. 325 (attorney obtained, without opposition, order discharging executor and order requiring erasure of certain mortgages against estate; fee reduced from \$1,500 to \$150); Kult v. Nelson (1898) 25 Misc. 238, 55 N. Y. Supp. 56, modifying (1898) 24 Misc. 20, 53 N. Y. Supp. 95 (attorney for infant was substituted before trial for another counsel, who received \$100 for prior services; attorney had burden of preparing case for trial and of trying it); Thomasson v. Latourette (1901) 63 App. Div. 408, 71 N. Y. Supp. 559 (attorney recovered judgment for \$674; was aided by other counsel to whom client paid \$200; fee reduced from \$250 to \$150); Goldstein v. Coronum Equipment Co. (1918) 169 N. Y. Supp. 42 (attorney defended action brought to recover \$1,406, which, after trial lasting less than one day, was dismissed on merits at close of plaintiff's case; fee reduced from \$350 to \$150);

\$130—Frost v. Reinach (1903) 40 Misc. 412, 81 N. Y. Supp. 246 (attorney prepared answer and made two motions, then client substituted another attorney; fee reduced from \$225 to \$130);

\$120—Baker v. Tate (1914) 41 Okla. 353, 138 Pac. 171 (services by attorney resulted in client's recovery of \$620);

\$100—Lartigue v. White (La.) supra (attorney obtained certain orders in case of succession; orders were obtained without opposition and by consent; fee reduced from \$1,000 to \$100); Re Brown (1914) 87 Misc. 541,

151 N. Y. Supp. 390 (drawing will for estate worth over \$150,000; same price allowed for each of several wills by same testator);

\$75—Szymanski v. Szymanski (1912) 151 Wis. 145, 138 N. W. 53 (attorney served summons, complaint, and affidavit in divorce proceedings; parties became reconciled and notified attorney to stop proceedings; fee reduced from \$150 to \$75);

\$60—Reisterer v. Carpenter (1890) 124 Ind. 30, 24 N. E. 371 (attorney brought suit and collected note; defendant tendered \$510; attorney recovered \$918);

\$51—Gordon v. Miller (1859) 14 Md. 204 (allowance of $\frac{1}{4}$ of 5 per cent of collection to representative of attorney who reduced claims to judgment, and died before collection was made, other half of 5 per cent being awarded to one making collection);

\$50—Greeff v. Miller (1898) 87 Fed. 33 (attorneys handled group of forty to fifty cases, all involving same question; \$50 allowed in each case); Johnson v. Ravitch (1906) 113 App. Div. 810, 99 N. Y. Supp. 1059 (attorney drew complaint and put cause on calendar, but failed to answer on call, and client put case in hands of another); Aultman & T. Co. v. Gibert (1888) 28 S. C. 303, 5 S. E. 806 (attorney prosecuted suits for collection of \$1,250 note secured by mortgage); Proulx v. Stetson & P. Mill Co. (1893) 6 Wash. 478, 33 Pac. 1067 (attorney was employed in enforcing loggers' liens); Hitchcock v. Merritt (1862) 15 Wis. 522 (foreclosure of mortgage for \$11,359). See also Lindquist v. Young (1912) 119 Minn. 219, 138 N. W. 28.

\$35—Re Deck (1913) 158 Iowa, 242, 139 N. W. 550 (attorney resisted objections to report of guardian, being engaged at least one day on trial); Re Peterson, 74 Hun, 93, 26 N. Y. Supp. 405 (attorney collected \$160 by suit in justice's court and proceedings supplementary to execution);

\$25—Farley v. Geisheker (1889) 78 Iowa, 453, 6 L.R.A. 533, 43 N. W. 279 (attorney brought action for abatement of nuisance caused by selling liquor; judgment was easily recovered);

\$22.50—*Burns v. Allen* (1885) 15 R. I. 32, 35, 2 Am. St. Rep. 844, 23 Atl. 35 (attorney issued writ of attachment, secured judgment for \$75, and collected that amount after considerable trouble);

\$15 per week—*Re Brown* (1914) 87 Misc. 541, 151 N. Y. Supp. 390 (consultations during several years concerning estate of \$150,000).

III. Unreasonable fees.

The following amounts have been held to be unreasonable as fees for legal services:

\$388,156—*Starin v. New York* (1887) 106 N. Y. 82, 12 N. E. 643 (attorney for excise commissioners commenced over 14,000 actions for violations of law by selling liquor without license; in over 8,000 of such actions defendants appeared and put in answers of general denial; in over 1,000 cases judgments were taken by default; county paid expenses of printing, clerk's and sheriff's fees, etc.; attorney collected and appropriated to his own use \$10,000 of costs and penalties; court held that, in view of character of services required, which were largely clerical, amount allowed was grossly excessive);

\$200,000—*Brown v. Pennsylvania R. Co.* (1918) 162 C. C. A. 529, 250 Fed. 513 (attorney recovered from railroad company for benefit of bondholders of another corporation the sum of \$1,900,000; allowance of \$200,000 from fund recovered reduced to \$100,000);

\$85,000—*McMannomy v. Chicago, D. & V. R. Co.* (1897) 167 Ill. 497, 47 N. E. 712 (attorney defended railroad in protracted foreclosure litigation, involving large amount and requiring much time and labor, but attorney did not devote whole of his time to case; fee reduced to \$50,000);

\$47,600—*Re Kings County Trust Co.* (1916) 219 N. Y. 590, 114 N. E. 1070, affirming (1915) 169 App. Div. 966, 153 N. Y. Supp. 1122, which modified (1914) 86 Misc. 176, 149 N. Y. Supp. 124 (attorneys for executor recovered \$346,900 from trustees under will, services being rendered with understanding that compensation was to be contingent on success; fee reduced to \$30,000);

\$20,735.60—*Percival's Succession* (1915) 138 La. 543, 70 So. 505 (services rendered in administration of estate amounting to \$264,000, and defending will against attack of heirs; fee reduced to \$13,735.60);

\$5,837—*Re Kellogg* (1904) 96 App. Div. 608, 88 N. Y. Supp. 1033, affirmed in (1905) 180 N. Y. 534, 72 N. E. 1114 (attorney made several arguments of case on appeal and one reargument, but those arguments were mere restatements of same propositions; court did not consider them as services rendered in separate cases; allowance reduced to \$5,037);

\$4,000—*Sain v. Bogle* (1916) 122 Ark. 14, 182 S. W. 515 (attorneys successfully defended suit attacking legality of formation of drainage district; statute was passed immediately thereafter dissolving district; fee reduced to \$1,000); *Belmont v. McAllister* (1914) 116 Va. 285, 81 S. E. 81 (attorney, in caring for 250 acres of land, secured contract for water supply, prepared charters for water company and park association, and rendered other services; but in most of work he was acting without authority from client; fee reduced to \$500);

\$3,600—*Hempstead v. New York* (1903) 86 App. Div. 300, 83 N. Y. Supp. 806 (attorney prosecuted four actions for damages, under statute relative to navigability of certain creeks; matter was settled by subsequent legislation according to which \$10,000 per year for five years was paid to client; it appeared that attorney's services were factor, though not sole factor, in effecting settlement; fee, which had first been allowed on assumption that services were only inducing cause of beneficial legislation, was reduced to \$2,600);

\$3,500—*McMillan v. Northport Smelting & Ref. Co.* (1908) 49 Wash. 76, 94 Pac. 761 (attorneys secured, without opposition, restraining order preventing removal of certain machinery, saving \$250,000; fee reduced to \$1,000);

\$2,500—*Re Rude* (1900) 101 Fed. 805 (attorney for preferred creditor of bankrupt successfully prosecuted claim for \$7,300; worked thirty-five

days, receiving compensation also from another source; fee reduced to \$1,500, exclusive of retainer of \$250); *Valley Oil Co. v. Ready* (1917) 131 Ark. 531, 199 S. W. 915 (attorneys procured appointment of receiver in amicable proceeding; fee reduced to \$250);

\$1,500—*Lartigue v. White* (1873) 25 La. Ann. 325 (attorney obtained, without opposition, order discharging executor and order requiring erasure of certain mortgages against estate; fee reduced to \$150);

\$1,000—*Reynolds v. McMillan* (1872) 63 Ill. 46 (simple partition proceedings); *Fryer v. Dicken* (1898) 20 Ky. L. Rep. 696, 47 S. W. 341 (attorney defended mortgagee in suit by creditors seeking to set aside mortgage for \$3,300, result of suit being that mortgage was held to operate as assignment, but mortgagee's claim was adjudged to be preferred one; other services were rendered, consisting of preparation of deed and lien notes and in collecting some money; court held that sum of \$450, which attorney had received, was ample compensation); *Lartigue v. White* (1873) 25 La. Ann. 291 (attorney obtained certain orders in case of succession; orders were obtained without opposition and by consent; fee reduced to \$100); *Heinsheimer v. Schulte* (1914) 164 App. Div. 265, 149 N. Y. Supp. 631, modified on another point and affirmed in (1915) 214 N. Y. 361, 108 N. E. 636, Ann. Cas. 1916E, 884 (attorney recovered judgment for \$4,176 in easy trial lasting less than one day; fee reduced to \$500);

\$975—*Re Raby* (1898) 25 Misc. 240, 55 N. Y. Supp. 87 (attorney obtained injunction to prevent wrongful conversion of license, unearned balance of which amounted to \$600);

\$500—*Dorsey v. Corn* (1878) 2 Ill. App. 533 (simple partition proceedings); *Scharps v. Hess* (1909) 120 N. Y. Supp. 56 (attorney spent seven hours in consultation with client relative to mortgage on client's property and in examination of subject; advised line of defense, which was adopted by client's next attorney; offered to appear up to trial for retainer of \$500, and offered, further, to try

case for \$500, if unsuccessful, or larger amount if successful; amount of fee reduced to \$250); *Re Ludeke* (1898) 22 Misc. 676, 50 N. Y. Supp. 952 (attorney defended estate from claim for \$950 for alimony by wife of assignor; attorney was working partly in his own interest);

\$375—*Baldwin v. Mills* (1911) 66 Wash. 302, 119 Pac. 816 (attorney made up issues in simple ejectment suit);

\$350—*Goldstein v. Coronum Equipment Co.* (1918) 169 N. Y. Supp. 42 (attorney defended action brought to recover \$1,406, which, after trial lasting less than one day, was dismissed on merits at close of plaintiff's case; fee reduced to \$150);

\$300—*Parsons v. Hawley* (1894) 92 Iowa, 175, 60 N. W. 520 (judgment recovered for \$778 was excessive, and parties subsequently compromised; court held that attorneys' fees should be based on amount of recovery, without regard to judgment);

\$250—*Thomasson v. Latourette* (1901) 63 App. Div. 408, 71 N. Y. Supp. 559 (attorney recovered judgment for \$674; was aided by other counsel to whom client paid \$200; fee reduced to \$150);

\$225—*Frost v. Reinach* (1903) 40 Misc. 412, 81 N. Y. Supp. 246 (attorney prepared answer and made two motions, then client substituted another attorney; fee reduced to \$130);

\$200 per year—*Baldwin v. Mills* (1911) 66 Wash. 302, 119 Pac. 816 ("general services so mythical and indefinite that they cannot be itemized");

\$150—*Szymanski v. Szymanski* (1912) 151 Wis. 145, 138 N. W. 53 (attorney served summons, complaint, and affidavit in divorce proceedings; parties became reconciled and notified attorney to stop proceedings; defendant offered to pay attorney \$75; in holding this amount to be ample compensation, court said: "There seems to be apparent in this case as well as in some others which have come before us, a notion that any young gentleman two or three years out of law school has a right to charge at the rate of \$50 per day for his services

because men of age, experience, and established reputation and capacity to perform much legal work in one day sometimes or ordinarily receive that much. But this is not correct”);

\$100—*Combs v. Combs* (1904) 26 Ky. L. Rep. 617, 82 S. W. 298 (attorney succeeded in setting aside deed to land appraised at \$500; he had been paid \$75 for services in lower court

and it was held that allowance of \$100 for services on appeal was unreasonable);

\$75—*Baldwin v. Mills* (1911) 66 Wash. 302, 119 Pac. 816 (attorney wrote few letters concerning price of jack);

\$50—*Baldwin v. Mills* (Wash.) *supra* (attorney represented client in trial in justice's court). H. N. G.

JAMES FARNON, Respt.,

v.

SILVER KING COALITION MINES COMPANY, Appt.

Utah Supreme Court — August 30, 1917.

(50 Utah, 295, 167 Pac. 675.)

Damages — personal injury — acts of physicians.

1. An employer whose negligence causes the breaking of an employee's leg is not relieved from liability for the full damages caused by its shortening and forming an imperfect union, by the fact that after the leg was properly set the cast accidentally slipped, and the physicians feared to attempt to replace the ends of the break in apposition because of danger of loss of the leg.

[See note on this question beginning on page 255.]

Pleading — several causes of action — switching.

2. One seeking damages from his employer for personal injuries may charge as many acts or omissions constituting negligence as the circumstances warrant, and rely on one or all, without being subject to the charge of switching from one theory to another.

[See 18 R. C. L. 621; 20 R. C. L. 176; 21 R. C. L. 500.]

Master and servant — vice principal — operation of cage in mine.

3. One employed by the owner of a mine to operate the cage by which employees are conveyed to and from their work is, in the performance of such work, a vice principal of the owner.

Joint debtors — employer and vice principal.

4. An employer and his vice prin-

cipal may properly be charged jointly with liability for the negligence of the latter in the performance of the duties of his employment.

Master and servant — fellow servant — miner and operator of cage.

5. One employed in the ordinary work in a mine is not a fellow servant of the one charged with the operation of the cage by which he is conveyed to his place of work.

— negligence as matter of law — forgetting to perform duty.

6. For the one employed to operate the cage by which employees are lowered to their work in a mine, to forget to engage the clutch when releasing the brake to lower a cage containing employees, so that the cage falls to the injury of the employees, is negligence as matter of law.

[See 18 R. C. L. 545; 20 R. C. L. 9.]

APPEAL by defendant from a judgment of the District Court for Salt Lake County (Lewis, J.) in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Dickson, Ellis, Ellis, & Schulder and Marioneaux, Stott, & Beck for appellant.

Messrs. Weber & Olson, for respondent:

Johnson, the engineer, was negligent, and his negligence was the proximate cause of plaintiff's injuries.

Nye v. Sochor, 92 Wis. 40, 53 Am. St. Rep. 896, 65 N. W. 854; 4 Labatt, Mast. & S. 2d ed. 4995; *Toledo Brewing & Malting Co. v. Bosch*, 41 C. C. A. 482, 101 Fed. 530; *Parker v. Fairbanks-Morse Mfg. Co.* 130 Wis. 525, 110 N. W. 409; *Union P. R. Co. v. McDonald*, 152 U. S. 262, 38 L. ed. 434, 14 Sup. Ct. Rep. 619; *Ergo v. Merced Falls Gas & E. Co.* 161 Cal. 334, 41 L.R.A. (N.S.) 79, 119 Pac. 101.

The plaintiff was in no way negligent in selecting the physicians, and unless he himself did something to aggravate his injuries the company would still be liable for the full extent of the damages.

Secord v. St. Paul, M. & M. R. Co. 5 McCrary, 515, 18 Fed. 221; 13 Cyc. 77; *Pullman Palace Car Co. v. Bluhm*, 109 Ill. 20, 50 Am. Rep. 603; *Loeser v. Humphrey*, 41 Ohio St. 378, 52 Am. Rep. 86, 12 Am. Neg. Cas. 487; *Reed v. Detroit*, 108 Mich. 224, 65 N. W. 967; *McGarrahan v. New York, N. H. & H. R. Co.* 171 Mass. 211, 50 N. E. 610, 4 Am. Neg. Rep. 284; *Hunt v. Boston Terminal Co.* 212 Mass. 99, 48 L.R.A. (N.S.) 116, 98 N. E. 786; *Gray v. Boston Elev. R. Co.* 215 Mass. 143, 102 N. E. 71, 8 N. C. C. A. 602, 8 R. C. L. 449; *Fields v. Mankato Electric Traction Co.* 116 Minn. 218, 133 N. W. 577; *Wallace v. Pennsylvania R. Co.* 222 Pa. 556, 128 Am. St. Rep. 817, 71 Atl. 1086; *Doran v. Waterloo, C. F. & N. R. Co.* — Iowa, —, 147 N. W. 1100; *Selleck v. Janesville*, 100 Wis. 157, 41 L.R.A. 563, 69 Am. St. Rep. 906, 75 N. W. 975, 4 Am. Neg. Rep. 352.

Thurman, J., delivered the opinion of the court:

The respondent, a miner, was severely injured while in the employment of defendant corporation in one of its mines in Park City, Utah. His place of work was on the 600-foot level of what is known as the Alliance tunnel. His mode of ingress and egress to and from his place of work was by means of a vertical double compartment shaft, extending from the 500-foot level down-

ward, in which a cage was operated by an engineer employed by the defendant company. The cage was operated by means of an electric engine, controlled and manipulated by the engineer, whose place of work was on the 500-foot level, about 30 feet from the top of the shaft. A cage was connected with the engine by a steel cable, and it was the duty of the engineer, by means of the engine, to lower and raise the cage as might be necessary for the purpose of carrying men to and from their places of work on the lower levels of the mine. The cage in its downward course was controlled by the engineer by means of a brake and clutch. When the men were in the cage and ready to be lowered, they would give a signal to the engineer, who would release the brake and simultaneously set the clutch. The clutch prevented the cage from dropping to the bottom by its own weight. On the date of the accident in which the plaintiff was injured, he and another miner entered the cage on the 500-foot level, for the purpose of being lowered to the 600-foot level, their place of work. They gave the signal to the engineer, who immediately released the brake, and, according to his own admission, forgot to set the clutch. The result was, the cage, by force of gravity, suddenly dropped to and upon a bulkhead constructed across the shaft at a point 10 feet below the 600-foot level. The cage dropped by its own weight and the weight of its cargo a vertical distance of 110 feet, and necessarily fell with tremendous impact upon the bulkhead below. The plaintiff was severely injured in the fall. His left leg was fractured between the knee and hip about the middle of the long bone. His foot was crushed and lacerated on the bottom, and his whole side, clear up into the shoulder, was bruised, contused, and had begun to become discolored, due to extravasation of blood in the tissues, at the time the physician made his first examination. Plaintiff was taken to the hospital in Park City and treated

for his injuries. After he had been there for several days, by some means unexplained, the cast, which had been used by the physicians in setting his limb and holding the broken bones in apposition so that the needs would knit together, became displaced and pushed down. The upper part of the leg became out of place. The bones, instead of being in apposition, lapped over. A new cast was put on the leg in that condition. No weight was attached or used, on account of his nervous condition and the expressed fear of the attending physician that he would be more likely to lose his leg. The injury to the plaintiff was permanent. He brought this action to recover damages. The case was tried to a jury, and a verdict rendered in his favor. The defendant corporation appeals and assigns numerous errors, but relies mainly on the following:

"The court erred in overruling appellant's objection, made at the trial, to any evidence being received in this action, on the ground that the plaintiff failed to state a cause of action."

"The court erred in giving to the jury the following portion of instruction No. 6: 'The court instructs you in this case, as a matter of law, that the dropping of the cage in the manner shown by the undisputed evidence in the case occurred through the negligence of the defendant Johnson, and that for such negligence both defendants Johnson and the mining company are equally responsible to the plaintiff. . . .'"

"The court erred in giving the jury the following portion of instruction No. 13: 'The amount you are to award the plaintiff should not be diminished because of anything the physicians did or failed to do.'"

"The court erred in refusing to give to the jury the appellant's request No. 1, which was as follows: 'The court instructs the jury that under the undisputed evidence in this case the engineer Johnson was a fellow servant of the plaintiff, and that the defendant Silver King

Coalition Mines Company is, therefore, not liable to the plaintiff for the injury which he sustained, and your verdict must be in favor of the defendant mining company.'"

The proposition of appellant relied on in its first assignment of error, that "the complaint fails to state a cause of action," will now be considered. The complaint, in substance, alleges: (1) Defendant's corporate capacity; (2) its ownership of the mine; (3) the employment of plaintiff; (4) his place of work; (5) the location of the shaft in which the cage was operated; (6) its relation to plaintiff's place of work; (7) the purpose of the cage; (8) how it was operated by the engineer; (9) the employment of the engineer; (10) his duties in respect to the cage and the persons being carried therein; (11) the carelessness of defendant company in failing to employ a competent engineer; and, finally, the carelessness and negligence of both the engineer and the company in operating the cage while attempting to convey plaintiff to his place of work, together with the consequent injury to him and his claim for damages. Not a single element of a good complaint against both defendants is omitted, although it may not be perfect in form as against objections made by a hypercritical pleader seeking for technical defects. Plaintiff had the right to charge as many acts or omissions constituting negligence as, in the mind of the pleader, the circumstances warranted, and to rely upon one or all, according to the facts, without being subject to the charge of switching from one theory to another.

The defendant Johnson, under the allegations of the complaint, was a vice principal of the defendant corporation, and was employed to do work which could only be done by the company; and the company was responsible for the manner in which he did it, and could not, even if it desired, evade the responsibility or shift the

Pleading several causes of action—switching.

Master and servant—vice principal—operation of cage in mine.

burden to the shoulders of another. Hence the negligence of Johnson was also the negligence of the company,

Joint debtors—
employer and
vice principal.

and the charge against both was therefore not objectionable from the standpoint of good pleading. Taking from the jury, for failure of proof, the charge of negligence in employing the engineer, did not and could not affect the other allegations charging both defendants with negligence in operating the cage. This assignment of error is manifestly without merit.

In this connection we may as well consider the trial court's refusal to instruct the jury, as requested by the defendant, that the engineer Johnson and the plaintiff were fellow servants. This refusal of the court is assigned as error, but it is doubtful if appellant relies on it, inasmuch as it is barely referred to in the argument. What we have already said in this opinion practically disposes of this question also. The relation of the parties to each other and to the company, the nature of their work, and the places where they worked, rendered it impossible for them to have been fellow servants

Master and servant—
fellow servant—
miner and
operator of cage.

under any theory of the law as declared by our statute. This assignment, therefore, cannot be sustained.

But it is assigned as error, and urged with much force, that the trial court erred in instructing the jury, as matter of law, that the dropping of the cage in the manner shown by the undisputed evidence in the case occurred through the negligence of the defendant Johnson, and that for such negligence both defendants Johnson and the mining company were equally responsible to the plaintiff. We have taxed our mentality in a conscientious endeavor to prepare a proper instruction that could have submitted this matter to the jury as a question of fact. Every instruction we have been able to conceive of, if given, would have been manifest error against the plaintiff.

While this is not a case of *res ipsa*

loquitur, it is just as conclusive, and, if possible, more convincing and satisfactory, as proof of the fact.

The defendant Johnson was the company's engineer. His duty, as disclosed by the record, was to operate the cage for the purpose of carrying men and material to and from the lower workings of the mine. If the engineer kept control of the cage by properly using the brake and clutch, there was little or no danger. If by inattention to these simple details he lost control, disaster would result. His mind was not engrossed by attention to other duties. It was a position of grave responsibility, but the duties pertaining to it were so simple and free from complications as to render it almost impossible to fail in a proper performance of them, except through a want of care constituting negligence. The plaintiff, as before stated, on the occasion of the accident, entered the cage to be lowered into the mine. The signal to lower was given to the engineer in the usual manner. He released the brake, but did not set the clutch. The result was inevitable. The cage, in which were the plaintiff and a fellow laborer, suddenly dropped to a depth of 110 feet, and, in the language of plaintiff's companion, who was a witness, "smashed into the bulkhead" below. The plaintiff was, as before stated, severely injured. The only excuse offered by the engineer for failing to set the clutch was that "it slipped" his "mind;" in other words, he forgot it. He forgot to perform one of the most important duties that was ever imposed by a master upon a servant. There is no possible excuse in law for such neglect. The instruction of the trial court was, in effect, the only proper instruction that could have been given under the undisputed facts. It therefore became a question of law, and the court did not err when it took it from the jury. 4 Labatt, Mast. & S. 2d ed. p. 4995; 38 Cyc. p. 1534, note 34, and cases cited.

—negligence as
matter of law—
forgetting to
perform duty.

There is but one question remain-

ing to be disposed of, but the zeal and earnestness of appellant's counsel in maintaining the validity of their contention on this point implies a conviction which calls for a careful examination of the question. In its fifth assignment of error appellant charges that the court erred in giving to the jury the following portion of instruction No. 13: "The amount you are to award the plaintiff should not be diminished because of anything the physicians did or failed to do." Whether this instruction was valid or invalid depends, of course, upon the facts and circumstances of the case and the law applicable to such facts, rather than upon propositions of law applicable to a different state of facts.

As already stated, after plaintiff was taken to the hospital his injuries were dressed by the physicians. The ends of the broken bones of his leg were brought together in apposition so they would knit. The leg was then placed in a plaster cast. Other treatment was administered, but it is not pertinent here. After he had been in the hospital for several days under treatment, the attending physician was called to the hospital and found that the cast had been pushed down on the leg. The upper part of the leg was not in position. The attending physician called in another physician. They put a new cast on the leg and put the patient to bed without any weights on the limb. They decided if they put weights on they might lose the foot and the lower part of the leg. His nervous condition would not allow the use of weights, as the weights would be pulled one way or the other and he would be more likely to lose his leg. Instead of the bones being in apposition, as they were when first set, they had become displaced about 2 inches. They tried to replace the bones, but could not do it. They put on a new cast while the leg was in that condition. It would have required considerable force to pull the bones into position. They would have done more injury to the leg be-

low than the overlapping of the bones would cause.

The foregoing is the substance of the testimony on that point, of the attending physician, Dr. Browning. Upon the point that the limb could not be restored to apposition and weights put on under the circumstances, this testimony is corroborated by Dr. Le Compte, the assisting physician. The testimony also strongly tends to show that for several days before the cast became loose and displaced, and at about that time, plaintiff was more or less delirious, unconscious, and restless. There was also some evidence to the effect that plaintiff had indulged in intoxicants, and became intoxicated. Appellant contends that this accounts for the condition he was found in when the cast became displaced; that while in a state of intoxication he himself removed the cast, and thus became responsible for the increased injury. Respondent denies that he became intoxicated, and attributes the displacement of the cast to his unconscious movements while in a delirious condition. The court, by its instruction, fairly submitted this question to the jury. He instructed them to the effect that the plaintiff could not recover for increased injury caused by his own wilfulness or negligence. The verdict of the jury is, therefore, conclusive against appellant's contention that any increased injury to the plaintiff was due to his own wilfulness or negligence.

This brings us back to the particular question under review: Did the court err in instructing the jury that the damages to be awarded the plaintiff should not be diminished by anything the physicians did or failed to do? The question arises, What did the physicians do to increase the injury? As far as the record discloses, they did nothing that could have had that effect. They found the plaintiff in a certain condition, for which they were not in any sense responsible. They found him with the cast slipped down and the broken bones lapping one over the other.

They did their best, under the circumstances, according to their testimony. They put on a new cast in the condition the limb was in without effecting an apposition of the broken bones, and without attaching weights to the limb. This, they concluded, would be impracticable and exceedingly dangerous. So far from doing anything to increase the injury, what they did was a distinct benefit, and left the limb in better condition than they found it.

The next question is, What did the physicians fail to do that increased the injury? This question has already been answered. The testimony tends to show that all was done that could be done without making matters worse. We have the uncontroverted opinion of Dr. Browning and Dr. Le Compte, graduates of medical colleges and physicians of standing and repute. If their professional opinions as to what could be done, or what should have been done under the circumstances, were incorrect, they ought to have been controverted and the truth made to appear. But they were not, and their testimony and professional opinions stand in the record as uncontroverted facts. Unless, therefore, the law is such that a party who is responsible for an original injury may, nevertheless, be relieved from responsibility for an aggravation of that injury by accidental means, we cannot conceive how appellant in the case at bar can escape liability for whatever injuries the plaintiff has sustained. It is necessary, therefore, to give due consideration to the authorities cited by appellant in support of its contention.

Appellant cites the following cases: *Secord v. St. Paul, M. & M. R. Co.* (1883) 5 McCrary, 515, 18 Fed. 221; *Pittsburgh, C. C. & St. L. R. Co. v. Sullivan* (1895) 141 Ind. 83, 27 L.R.A. 840, 50 Am. St. Rep. 313, 40 N. E. 138; *Eighmy v. Union P. R. Co.* (1895) 93 Iowa, 538, 27 L.R.A. 296, 61 N. W. 1056; *York v. Chicago, M. & St. P. R. Co.* (1896) 98 Iowa, 544, 67 N. W. 574; *Atchison, T. &*

S. F. R. Co. v. Zeiler (1894) 54 Kan. 340, 38 Pac. 282; *South Florida R. Co. v. Price* (1893) 32 Fla. 46, 13 So. 638, 13 Am. Neg. Cas. 839; *Union P. R. Co. v. Artist* (1894) 23 L.R.A. 581, 9 C. C. A. 14, 19 U. S. App. 612, 60 Fed. 365; notes in 4 L.R.A. (N.S.) 66, subd. IV., and 17 L.R.A. (N.S.) 1168; *Texas C. R. Co. v. Zumwalt*, 30 L.R.A. (N.S.) 1206; 40 L.R.A. (N.S.) 486.

Secord v. St. Paul, M. & M. R. Co. supra, is similar to the case at bar only in respect to the form of action. The plaintiff sought to recover damages for a personal injury. The question as to increased injury on account of negligence of the physicians arose incidentally, during the progress of the case, the same as in the present case. The opinion is merely instructions to the jury rendered by a Federal district court during the trial of the case, and is subject to the criticism made by respondent that it is not an opinion by an appellate court or on motion for a new trial, where opportunity is afforded for a deliberate exercise of calm and enlightened judgment. But, in addition to this, the case is one in which the court submits to the jury two questions of fact, namely: (1) Whether or not the plaintiff himself was guilty of contributory negligence; and (2) whether or not the attending physician selected by the company was negligent in his treatment, and the injury to the plaintiff was thereby increased. In either case, if answered in the affirmative, the court states the law to be that plaintiff could not recover. But, as we have shown in the present case, the jury by its verdict found the plaintiff was not guilty of either wilfulness or negligence, and the undisputed facts show the physicians were not. In our judgment, respondent concedes too much when it admits that the *Secord Case* supports appellant's contention.

In *Pittsburgh, C. C. & St. L. R. Co. v. Sullivan* (1895) 141 Ind. 83, 27 L.R.A. 840, 50 Am. St. Rep. 313, 40 N. E. 138, the plaintiff sued the defendant direct for damages in-

curred by the alleged malpractice of a company physician in amputating his arm, while treating him for an injury to his hand which occurred while engaged in coupling cars on defendant's railroad. The physician administered chloroform to the plaintiff under promise to him that he would not amputate his arm while under its influence. The original injury was apparently lost sight of entirely. There was no claim for damages on that account. The court held that if the defendant in that case used reasonable care in selecting a competent physician it was not responsible for his acts or omissions. This seems to be the law in a case of that kind, but it has no application to the facts of this case.

In *Eighmy v. Union P. R. Co.* (1895) 93 Iowa, 538, 27 L.R.A. 296, 61 N. W. 1056, the plaintiff, a brakeman, while coupling cars on defendant's road, had his hand crushed between the bumpers of the cars. He sued for damages on two counts: One directly for the injury occurring in the accident; the other for negligent treatment by the company physician. On the first count the special verdict of the jury went far towards establishing plaintiff's contributory negligence. The jury returned a general verdict for plaintiff for \$1,500 damages. This is another case in which the court held that the duty of defendant was discharged when it selected a reasonably competent physician, and that in such case it was not responsible for his negligence. It is not necessary for us to express an opinion as to whether or not we approve that opinion. It is sufficient to say it has no application in a case where, as matter of law, the court is able to say the physician was not negligent.

York v. Chicago, M. & St. P. R. Co. (1896) 98 Iowa, 544, 67 N. W. 574. In this case the plaintiff's intestate was injured in a collision, and was treated by a physician selected by the company. The injury proved fatal. Plaintiff sued for damages. The case was tried by a jury. At the close of the evidence the court

directed a verdict for the defendant. Damages were claimed both on account of the accident and the negligence of the physician. Having found that the defendant was not liable for the accident, the court applied the ordinary rule that defendant was not liable for the negligence of its physicians if it used ordinary care in selecting reasonably competent persons.

Atchison, T. & S. F. R. Co. v. Zeiler (1894) 54 Kan. 340, 38 Pac. 282. In this case plaintiff's intestate was injured in a railroad accident on defendant's railroad, and subsequently died. The action was for both the original injury occurring in the accident, and for the negligent treatment by the physician. As to the original injury, defendant was held not liable, as the injury resulted from the negligence of a fellow servant. On the question of negligent treatment by the physician, the court held in accordance with the usual rule; there being no allegation or proof that the physician employed was not competent or skilled in his profession, the company could not be held liable for his negligence.

Union P. R. Co. v. Artist (1894) 23 L.R.A. 581, 9 C. C. A. 14, 19 U. S. App. 612, 60 Fed. 365. The question to be decided in this case is thus put by the learned judge who rendered the opinion: "Was the company liable for the malpractice of the physicians or the carelessness of the attendants at the hospital, if that hospital was maintained as a charitable enterprise, and not for the purpose of deriving profit from it?" The court decided it was not. The question put and determined by the court shows that the case has no application here.

The case and notes in 17 L.R.A. (N.S.), 30 L.R.A. (N.S.), and 40 L.R.A. (N.S.), supra, shed no light whatever on the question now under review. They are generally to the same effect as the cases we have examined.

In view of the facts found and

opinion expressed before commencing a review of these cases, it was perhaps unnecessary to devote the time we have to their consideration. Our excuse for so doing has been promoted by a desire to make our position as clear and free from doubt as possible. Finding, as we do from the record before us, that the increased injury to the plaintiff was not due to his own negligence or wilfulness, or to any intervening efficient cause, it follows, as a matter

of law, that it must be attributed to the original injury, resulting from the negligence of the defendant. This being the view of the court, it is not necessary to review the authorities cited by respondent or the other assignments of error.

Damages—personal injury—acts of physicians.

The judgment of the trial court is affirmed, respondent to recover costs.

Frick, Ch. J., and McCarty, Corfman, and Gideon, JJ., concur.

ANNOTATION.

Liability of person causing injury for aggravation thereof by accident.

- I. Generally, 255.
- II. Injury aggravated by fall generally, 255.
- III. Injury aggravated by fall while using crutches, 257.

- IV. Injury aggravated while bedridden, 258.
- V. Injury aggravated while riding in conveyance, 259.
- VI. Miscellaneous, 260.

I. Generally.

The rule that a wrongdoer is liable only for the direct and proximate result of his wrongful act, and cannot be charged with liability for the result of a separate, independent, and intervening act, for which he is in no way responsible, has been applied in a number of cases to the situation existing where a person receives an injury through the negligent act of another, and the injury is afterwards aggravated, and a recovery retarded, by some accident not resulting from the failure of the injured person to use ordinary care. Under such circumstances, if the accidental or second injury is conceived to be a sequence or natural result likely to flow from the original injury, the wrongdoer is held to be liable for the entire damage sustained; but, if the second injury is considered as attributable to a distinct intervening cause, the wrongdoer is held to be liable only for the original injury.

See the following subdivisions, wherein the cases are grouped, for convenience only, according to the circumstances under which the accident aggravating the original injury occurred.

II. Injury aggravated by fall generally.

In *Wilder v. General Motorcycle Sales Co.* (1919) 232 Mass. 305, 122 N. E. 319, it appeared that the plaintiff was injured in a motorcycle accident, sustaining, among other injuries, a broken leg. Several months after the accident, while descending a flight of stairs, the plaintiff's leg gave way under her, and it was found that the leg had again been broken at or near the place of the first break. The court held that a finding of the jury to the effect that the second break was "the result of the accident, without the intervention of any negligence on her part or any independent cause," was warranted, saying: "It could have been found that the second injury was received while the bone was weak and had not recovered its normal strength, owing to the septic condition which developed after the original fracture; and from this the jury also could have found that the second fracture was a natural and proximate result of the first injury. The act of the plaintiff in attempting to walk downstairs was not negligent as matter of law. Whether the second injury was the result of a separate and independent cause was a question of fact."

On the other hand, in *Raymond v. Haverhill* (1897) 168 Mass. 382, 47 N. E. 101, 2 Am. Neg. Rep. 718, it was held that the defendant city was not liable for the aggravation of an injury caused by a second accident. While the action was apparently brought under a statute (Pub. Stat. chap. 52, § 18) providing that, in actions against towns and cities for injuries received in consequence of defects in public ways, the towns and cities should be liable in damages only for the direct and immediate result of the injury, the court, on appeal, intimated that no different holding would have been made if the action had been one of tort for negligence at common law. It appeared in that case that the plaintiff, while traveling on a street in the defendant city, fell and received injuries in consequence of a defect in the sidewalk, and that thereafter, by reason of the injury, her right ankle was weakened and disabled so that at times it was likely to turn, and to fail to support her. Several months subsequent to the accident, the plaintiff, while assisting to prepare for an entertainment in a public hall, undertook to step from a chair on which she was standing to a settee, and while so in the act of stepping her right ankle failed to support her, and she fell and fractured her leg. The trial judge charged the jury that "if the plaintiff, when she fell in the hall, was in the exercise of due care, and if that fall was the natural result of the weak and disabled condition of her ankle, caused by the fall on the sidewalk, then, if she was entitled to recover for the injuries sustained by reason of the fall on the sidewalk, she would also be entitled to recover for the injuries sustained subsequent to the fall." The appellate court held that this charge was erroneous, and reversed that part of the judgment allowing damages for the accident while decorating the hall, saying: "The damage received by the plaintiff from undertaking to step from the chair to the settee on October 9, 1894, when her right ankle failed to support her and she fell, is not a direct and immediate

result of the accident which happened on June 18, 1894. On October 9, 1894, she was not acting from any necessity caused by her previous injury, but acting independently and voluntarily. As a result of her voluntary conduct she was again injured. A new and independent cause intervened between the original injury and the injury she received on October 9. We do not mean to intimate that, if this were an action of tort for negligence at common law, and not under statutes, the injury received on October 9 could be considered as the natural and proximate result of the injury received on June 18."

The foregoing case was followed in *Snow v. New York, N. H. & H. R. Co.* (1904) 185 Mass. 321, 70 N. E. 205, wherein it was held that the damages sustained by a second injury were not recoverable, and evidence of such injuries was properly excluded. It was proved that the plaintiff, while a passenger, was injured in a collision on the defendant's railroad. There was testimony tending to show that as a result of the injury received the plaintiff became subject to attacks of dizziness, and that on one occasion, when alone in her home several months after the accident, she got into a pantry sink by means of a chair to examine a water pipe, and while standing in the sink had an attack of dizziness, and fell to the floor and broke her wrist. The plaintiff claimed damages for the pain and suffering resulting from the broken wrist, but the trial judge excluded the evidence, and instructed the jury not to consider the consequences of the broken wrist, as they were too remote, and the defendant was not responsible. This instruction was upheld on appeal.

In *Wineberg v. Du Bois* (1904) 209 Pa. 430, 58 Atl. 807, it appeared that the plaintiff, while walking on a public street, fell and sprained her knee. Several months after, she had a second fall caused, as she testified, by the stiffness of her injured leg, whereby she received additional injury to that leg. The court, on appeal, reversed a judgment for the plaintiff, stating that the question whether the

plaintiff was guilty of contributory negligence in not exercising proper care at the time she suffered the second fall did not arise in the case, as it did not appear that the counsel for the plaintiff intended to charge the defendant with the results of the second fall, they having expressly disclaimed any intention of claiming damages on that account when the testimony was offered, and having sought to use it only as accounting for the condition of the plaintiff. It was accordingly held to be reversible error for the court to charge at length on the second injury, and to call the attention of the jury to the pain and suffering resulting from the second accident.

III. Injury aggravated by fall while using crutches.

A second injury was held to be the direct and proximate result of the original injury in *Hartnett v. Tripp* (1918) 231 Mass. 382, 121 N. E. 17, wherein the evidence showed that the plaintiff was struck by the defendant's automobile and received a fracture of the right leg. After being confined in bed for several weeks, he was able to get up by the use of crutches and sit in a wheel chair. Evidence was admitted to the effect that, in getting out of the chair on one occasion, one of his crutches slipped and he fell, breaking his leg at the place of the original fracture. On appeal, the court held that the evidence was properly admitted, and in affirming a judgment for the plaintiff said: "While a wrongdoer cannot be charged with liability for the result of a separate, independent, and intervening act for which he is in no way responsible, he is liable for the direct and proximate result of the first injury. The second injury, caused by the slipping of the plaintiff's crutch, could have been found to have had a causal relation to the original injury, for which the defendant would be liable. It does not appear that the plaintiff acted carelessly or improperly; he had so far recovered from his first injury that he was permitted to use crutches, although still being treated at the hospital. In attempting to get out of the

9 A.L.R.—17.

chair with the aid of his crutches, he was performing a natural and necessary act, which it could not be ruled was negligent or so distinct from his original injury as to be a separate and independent act. The presiding judge clearly and accurately instructed the jury that the plaintiff could not recover for the second fracture as an element of damages, unless they were satisfied that it was a natural and proximate result of the original injury."

Similarly, in *Smith v. Northern P. R. Co.* (1914) 79 Wash. 448, 140 Pac. 685, 5 N. C. C. A. 947, an action to recover damages for personal injuries sustained by the plaintiff while in the defendant's employ, it appeared that the defendant, among other injuries, sustained a fracture of the left leg. While still in the hospital, although going about on crutches, he fell, in the attempt to descend a stairway, and refractured the bone at the place of the original fracture. This accident confined him to his bed for an additional eleven weeks, and correspondingly increased his sufferings and delayed his recovery. The defendant introduced evidence tending to show that the respondent was in an intoxicated condition at the time of the second fracture, and that such fracture was the direct and proximate result of his intoxicated condition. The appellate court held that an instruction to the effect that, if the plaintiff was not intoxicated at the time he fell and fractured his leg the second time, they should take into consideration the resulting injuries, was correct, and a judgment for the plaintiff was held to be correct, although the amount was held to be excessive.

On the other hand, in *Vander Velde v. Leroy* (1905) 140 Mich. 359, 103 N. W. 812, the action was brought to recover for an injury alleged to have been sustained by the plaintiff by reason of a defective sidewalk, and it appeared that the plaintiff, while recovering from the injury, was again injured by the slipping of the crutch he was required to use. The trial court charged the jury that it was the duty of the plaintiff to use reason-

able care, but if he used reasonable care and the slipping of the crutch was an accident for which he was not responsible, he would be entitled to full compensation for the entire disability. The court, on appeal, held that this charge was erroneous, as the second injury was clearly outside of the case declared on, and the jury should have been instructed that no damage should be allowed because of it.

A judgment for the plaintiff was reversed in *Hoseth v. Preston Mill Co.* (1908) 49 Wash. 682, 96 Pac. 423, because the trial judge gave conflicting instructions as to the right of recovery for a second injury. In that case it appeared that, about three months after the respondent received his original injury, he was permitted by his physician to go about the hospital wards on crutches, and as he was ascending the stairs from the wards one of his crutches slipped on the landing and he fell to the floor, rebreaking his leg. The court, in instructing the jury, told them that the plaintiff could not recover damages for the additional injuries caused by the rebreaking of the leg, and later that he could recover for such injuries under certain conditions. The appellate court stated that the plaintiff was entitled to recover for the second injury if he was in the exercise of due and reasonable care at the time of his fall, provided that the second injury was attributable to and would not have occurred except for the original injury. The effect of this holding seems to be merely that the questions of proximate cause and contributory negligence were questions for the jury.

While the plaintiff in *Papic v. Freund* (1918) — Mo. App. —, 181 S. W. 1161, disclaimed throughout the case any right of recovery for an aggravation of his original injury, the language of the appellate court in affirming a judgment for the plaintiff is pertinent to the present discussion. It appeared that the plaintiff, whose leg had been broken by the defendant's automobile truck and who had been confined in a hospital for several weeks, walked out one day with

a crutch. Through an accidental slipping of the crutch, he was precipitated to the pavement, and the leg was broken a second time at the same place. The trial court admitted evidence tending to show the length of time the plaintiff was confined from the two separate injuries, but expressly instructed the jury that no recovery should be allowed on account of the second breaking of the leg. Holding that the evidence as to the second fracture of the leg was properly admitted, since it was competent for the jury to have all of the facts before them in order to determine the liability entailed on the defendants through the first injury inflicted on the plaintiff by their negligence, the appellate court said: "The instruction, it may be, was more favorable than defendants were entitled to on the facts of the case, for indeed the evidence suggests with great force that the second injury was attributable in part to the first. For, as said by our supreme court, whilst it was the duty of the plaintiff to use reasonable care to promote a recovery, yet if he was guilty of no negligence in this respect, and an accident happened to him in which the result was more serious, because of his then condition, than it would have been if he had not already been afflicted, such more serious result in reality is to be traced to the first injury, and treated as a proximate ground of recovery. See *Conner v. Nevada* (1905) 188 Mo. 148, 107 Am. St. Rep. 314, 86 S. W. 256. But be this as it may, in order to make his case, it devolved upon plaintiff to show all of the facts; and, in the view it was tried, it was for the jury to determine to what extent his subsequent loss was entailed through the injury sued on; that is, the original fracture."

IV. Injury aggravated while bedridden.

In the reported case (*FARNON v. SILVER KING COALITION MINES CO.* ante, 248) an action to recover damages for personal injuries sustained while in the employ of the defendant, it appears that, when injured, the plaintiff was removed to a hospital, and it was found that, among other injuries, he had sustained a broken

leg. The ends of the broken bones were brought together in apposition and the leg was then put in a plaster cast. After being in the hospital several days under treatment, the attending physician found that the cast had been pushed down on the leg, permitting the ends of the bones to overlap. The plaintiff claimed that the cast had become displaced through his unconscious movements while in a delirious condition, while the defendant attributed the displacement of the cast to the act of the plaintiff while intoxicated. It appeared that the leg could not be reset without danger of its loss, so that the break was allowed to knit with the bones overlapping, thereby shortening the leg. The trial court instructed the jury that the plaintiff could not recover for an increased injury caused by his own wilfulness or negligence. On appeal, the court holds that this instruction was correct, and, as the increased injury to the plaintiff was not due to his own negligence or wilfulness, it followed as a matter of law that it must be attributed to the original injury, resulting from the negligence of the defendant.

Somewhat similarly, it was held in *Postal Teleg. Cable Co. v. Hulsey* (1901) 132 Ala. 444, 31 So. 527, that a charge which would prevent the plaintiff from recovering for a second injury was properly refused. The action was brought by an employee to recover for personal injuries received while in the defendant's employ, and it appeared that after the accident, and during the time the plaintiff was confined to his bed from a broken leg received in the accident, he was taken sick, and in attempting to turn over he felt something like a sting in his thigh. It developed that the leg was rebroken, or the fracture disunited after it began to heal. On the trial the following charge was given: "The court charges the jury that if they find the plaintiff rebroke his leg by reason of vomiting from an attack of colic, or from any other reason, the plaintiff is not entitled to recover damages of the defendant for any injury resulting from the rebreaking of the leg." In holding that this charge was

properly refused and in affirming a judgment for the plaintiff, the court said: "It is not pretended that the leg was rebroken by any conscious fault of the plaintiff; but, if rebroken, it was a natural result, or one liable to happen flowing from the cause of its being broken in the first instance, having immediate and causal connection therewith. But for the original breaking, the rebreakage could not have occurred."

V. Injury aggravated while riding in conveyance.

In *Conner v. Nevada* (1904) 188 Mo. 148, 107 Am. St. Rep. 314, 86 S. W. 256, it appeared that the plaintiff, while walking along a street in the defendant city, fell into a hole which the city had negligently permitted to exist, and received serious injuries, among which was a broken leg. Subsequently, while riding in a carriage, a wheel broke, and the broken bone received a jar, causing the joint to slip a little. The trial court, at the request of the defendant, gave the following instruction: "If the jury should find for the plaintiff, then they should assess only such damages as she sustained on account of her fall in the street on the 17th day of July, 1901, and should not allow damages for any aggravation or increase of said injury caused by plaintiff's neglect of, or imprudence in using, her injured limb, or by any new injury to said limb, if any be shown by the evidence." On appeal the supreme court held that the case did not call for a decision as to whether the defendant was entitled to this instruction, but in affirming a judgment for the plaintiff the court said: "Whilst it was the duty of the plaintiff to have used reasonable care to promote a recovery, yet if she was guilty of no negligence in this respect, and an accident happened to her in which the result was more serious because of her then condition than it would have been if she had not already been afflicted, such more serious result in reality becomes the result of the first accident. There was nothing to indicate that the plaintiff was imprudent in this respect; the accident occurred by the breaking

down of the wheel of the vehicle, but for which there would have been no jar, and but for the already broken and yet ununited bone in her leg the jar would have produced no ill effect."

Similarly, in *Wieting v. Millston* (1890) 77 Wis. 523, 46 N. W. 879, an action to recover damages for an injury received on a highway in the defendant town, it appeared that after the plaintiff had partially recovered from the injury thus received, he was further injured by being thrown from a buggy in which he was riding with a neighbor. The trial court submitted the question to the jury whether the negligence of the town was the proximate cause of the second accident, as follows: "The evidence, as it stands before you, perhaps does not show very clearly whether there was any new cause there which would have broken a sound limb, or whether the fact that it was broken by this overturning was due to the fact that the limb was weakened and impaired by the previous accident. So I think that if it should be true that his being at the place that he was in this buggy was not negligence, if it was a thing he might do with reasonable safety, and if there was no negligence on his part, or the part of the driver of the team with whom he was riding, which caused the oversetting of the wagon, and if there was no cause at the time of the oversetting which would have broken his leg, except from this weakened and impaired condition from the previous accident, then I think it would be, in contemplation of law, one of the consequences of the previous accident which broke it the second time; but this would not be true at all if it was negligence for him to be where he was riding in his wagon, or if either he or the man who drove his team was negligent, and their negligence caused this oversetting of the wagon and the breaking of the leg, under circumstances where it would not have been broken but for the previous injury." The appellate court held that this instruction was a correct statement of the law and affirmed a judgment in favor of the plaintiff.

In *East Tennessee Teleph. Co. v.*

Jeffries (1913) 153 Ky. 133, 154 S. W. 1112, the evidence showed that the plaintiff was injured while in the employ of the defendant, receiving a compound fracture of the leg. After the plaintiff had recovered from the injury he returned to work, but fractured his leg a second time. Subsequently the bone was broken a third time by the plaintiff falling while riding in a wagon. After the third fracture the plaintiff remained in a hospital for several months, when it was found necessary to amputate the leg. There was a conflict in the evidence as to whether the second breaking of the leg was the proximate cause of the amputation, but the court held that it was properly submitted to the jury. The judgment was reversed, however, on other grounds, and the court stated that on another trial the jury should be instructed that if they should "find for plaintiff, they should not allow him anything by way of damages for any sufferings, physical or mental, or impairment of his ability to earn money, or expense incurred for surgical treatment, caused alone by the first or third breaking of his leg. Nor should they allow him any damages for the amputation of his leg following his third breaking, unless they believe from the evidence that such amputation was the direct and proximate result of the second breaking of his leg caused by his fall from the ladder, if he did so fall."

VI. Miscellaneous.

In *Thompson v. Louisville & N. R. Co.* (1890) 91 Ala. 496, 11 L.R.A. 146, 8 So. 406, an action to recover damages for personal injuries received by the plaintiff's intestate while in the defendant's employ, and resulting in death, it appeared that by mistake the wife of the deceased, who was his nurse, gave to him internally four or five grains of corrosive sublimate, which had been left by the physician to be used as a wash. The testimony was conflicting as to whether the original injury inflicted was mortal, but it was proven that the poison would have caused the death of a well person, and that the wound was of such a character that the effects of

the poison might have caused him to die sooner than if he had not received the wound. The trial court charged the jury that, under the evidence in the case, the death of the plaintiff's intestate must have resulted, either from the injury he received, or from the poison he took; that the injury and the poison could not both be the cause of his death; and that if he died from the result of the poison, then they must find for the defendant, although the death was accelerated by reason of the injury received. On appeal, the court held the charge of the trial judge to be erroneous, saying: "If the injury had not been mortal, the poison would have been regarded as the proximate cause, according to the facts of the case, governed by other principles of law. . . . But if the wound was mortal, the person who inflicted it cannot shelter himself under the plea of a new intervening cause, if it be shown that the injury caused death to happen 'sooner' than it would have happened without the injury."

In *Baxter v. St. Louis Transit Co.* (1903) 103 Mo. App. 597, 78 S. W. 70, a recovery which apparently included damages for a second fracture of the leg was upheld by the appellate court, but the recovery was allowed on the theory, as against the claim of contributory negligence, that there never was a cure of the original injury. The action was to recover for personal injuries sustained by the plaintiff's son through the alleged negligence of the defendant, and the evidence showed that, after the son had been in the hospital for several months, he was sent home with instructions to exercise his leg carefully on crutches. After returning home, he went out on his crutches and was playing with his sisters. One of them handed him a lemon, which he tossed back to her. He heard his leg snap when he made the throw, and thought and said that he had rebroken it. The leg was placed in a splint, but failed to improve, and the patient was removed to the hospital, where it was found that there was no union of the bones and that the ends at the fracture were dis-

eased. The trial court charged to the effect that a recovery could not be had if the second injury was caused by the carelessness of the injured boy. Upholding the instruction given and affirming a judgment for the plaintiff, the appellate court said: "We think it reasonably appears from this evidence that there never was a cure of the injury; that it continued from its inception down to the day of the trial; that there never was a second fracture of the bone for the reason the original fracture had never healed; at any rate, there is substantial evidence to this effect, and it was appropriately submitted to the jury."

The case of *Salladay v. Dodgeville* (1893) 85 Wis. 318, 20 L.R.A. 541, 55 N. W. 696, while not involving an accidental aggravation of an existing injury, and not being, therefore, within the exact scope of this note, is nevertheless sufficiently close in point of analogy to warrant its inclusion. The action was brought to recover damages for personal injuries sustained by the plaintiff by reason of a defective highway. It appeared that the plaintiff's back and spine had been severely injured, and an attempt was made to cure the trouble, but pregnancy had occurred about eight weeks after the injury, and during that period there had not been a chance of giving as active treatment as there would have been otherwise. On the trial, the court charged the jury that "if the after pregnancy of the plaintiff may have prolonged the injury, or delayed her recovery, the damages which she is entitled to recover in this action, if you find that she is entitled to recover, are not to be reduced by you because of such pregnancy." And also, at the request of the defendant, that "it was the duty of the plaintiff, after the accident, to take reasonable care of herself and to avoid, so far as was reasonably possible, doing anything which would tend to increase, prolong, or render permanent her injuries, sufferings, or disability." The appellate court held that the instructions as given were correct, as, if the plaintiff had rendered the consequences of the wrongful act of the defendant more

severe or injurious to herself by negligent conduct, or by some voluntary act which it was her duty to refrain from, there would be ground for a reduction of damages. But the court added: 'It does not appear that her medical adviser gave her any caution to avoid sexual intercourse or even pregnancy, nor is there any evidence to show that she knew or understood that the nature of her injury was such that it was prudent that she should

do so. The mere fact that eight weeks after the injury pregnancy occurred, and when no caution in that respect appears to have been given by her medical adviser, is not, necessarily and as a matter of law, sufficient ground to justify a reduction of damages for the injury caused by the defendant's negligence, although the results of the injury may have been thereby prolonged or her recovery delayed."

E. C. B.

DONNA E. SNOOK, Respt.,
v.
HERBERT E. SNOOK, Appt.

Washington Supreme Court (In Banc) — March 19, 1920.

(— Wash. —, 188 Pac. 502.)

Contempt — to compel payment of alimony — effect of inability.

Inability to pay is a complete defense to a civil contempt proceeding to compel a man to pay alimony past due, under a decree of divorce, although he might have paid instalments as they fell due.

[See note on this question beginning on page 265.]

(Main, Bridges, and Mackintosh, JJ., dissent.)

APPEAL by defendant from a judgment of the Superior Court for King County (Holden, J.) holding him in contempt of court in a proceeding to compel payment of alimony awarded to plaintiff by a decree of divorce. *Reversed.*

The facts are stated in the opinion of the court.

Mr. Jay C. Allen for appellant.

Messrs. George H. Rummens and Philip Tworoger for respondent.

Parker, J., delivered the opinion of the court:

This is a civil contempt proceeding instituted in the superior court for King county on April 8, 1918, by the plaintiff, Donna E. Snook, against the defendant, Herbert E. Snook, to compel the payment by him of alimony awarded to her by the decree of divorce rendered in this action by that court on July 16, 1916, dissolving the marriage relation theretofore existing between them. A trial in the superior court upon the merits resulted in a judgment

being rendered against the defendant as follows:

"It is considered, ordered, and adjudged by the court that on the 8th day of April, 1918, there was due, owing, and unpaid to the plaintiff from the defendant the sum of \$887.50 on account of alimony accruing and unpaid under and by virtue of the terms of the decree herein, no part of which has since been paid, and the same is now due; that at all times since the entry of the aforesaid decree the defendant has had and now has ample and sufficient means and ability with which to make said payments as they become due under the terms of said de-

cree, but that during all of said time while said sums were accruing, said defendant, for the purpose of thwarting and defeating the terms of the aforesaid decree, has wilfully and contemptuously neglected and refused, and now continues to wilfully and contemptuously neglect and refuse, to pay said sums, and on account of such failure so to pay said sums he, said defendant, is in contempt of this court.

"It is further considered, ordered, and adjudged that the defendant, Herbert E. Snook, be, and he is hereby, committed to the jail of King county, state of Washington, there to be held and confined until such time as he shall have paid into the registry of this court for the use and benefit of the plaintiff, or into the American Savings Bank & Trust Company for the credit of plaintiff, the sum of \$887.50."

The judgment concludes with an order staying the execution thereof for a period of ten days, within which time the defendant might make payment as ordered, and thereby free himself from liability to imprisonment. From this disposition of the proceeding the defendant has appealed to this court.

By the decree of divorce Mrs. Snook was awarded property of considerable value, which apparently constituted all of the property then possessed by either of them, except appellant's law library, law office furniture, and personal effects, which he was permitted to retain. Mrs. Snook was also awarded the custody of their three children, one of which has since then become of age. She was also awarded periodical alimony to be paid by appellant at the rate of \$12.50 a week. At the time of the commencement of this proceeding in the superior court on April 8, 1918, there had accrued to Mrs. Snook, under the alimony terms of the divorce decree, \$1,687.50, of which appellant had paid to her \$800, leaving \$887.50 unpaid. The unpaid portion is that which accumulated during the period of approximately seventy-one weeks im-

mediately preceding the commencement of this proceeding. Appellant answered alleging facts to show that he has been excusable for his failure to make the payments of the instalments of alimony as they fell due, and also alleging that he is now unable to make payment thereof. On September 27, 1918, this proceeding came on for trial upon the merits, resulting in the judgment from which this appeal is prosecuted.

The evidence introduced upon the trial consists wholly of the testimony of the parties themselves. Mrs. Snook's testimony goes no farther than to show the amount of alimony remaining unpaid. Appellant's testimony goes to the question of his inability to pay during the period he was in default, and to the question of his inability to pay at the time of the hearing in this proceeding, which latter question, as we think will presently appear, is the ultimate question to be here decided. Appellant is fifty years old, and has been engaged in the practice of law in Seattle for a period of twenty-nine years. He admits that prior to the rendering of the decree of divorce in 1916 he earned in his practice a considerable annual income, but testifies that since then his earnings have been at no time more than barely sufficient to pay the expenses of maintaining his law office. This condition, he asserts, is due to the publicity given to the divorce action and the result thereof, and Mrs. Snook's annoyance of him in various ways, together with the decrease in law business generally prevailing during the recent war. The trial judge, as evidenced by his findings and remarks in disposing of this proceeding, it seems to us, was unduly influenced by what he conceived to be the inexcusable fault of appellant in failing to pay the instalments of alimony as they fell due during the seventy-one weeks immediately preceding the commencement of this proceeding; and we may concede for present purposes that his testimony fails to show good excuse for the whole of such failure during that

period. In so far as the trial judge finds and adjudges that appellant has the present ability to make payment as adjudged against him in this proceeding, which we think is the controlling question here, we feel constrained to hold that the clear weight of the evidence is to the contrary. Whatever may be said as to appellant's testimony touching the question of his past faults, and his claimed excuse for not paying the alimony instalments as they fell due, it does, we think, convincingly appear that he did not, at the time of rendering the judgment in this proceeding, possess any property other than his law library and law office furniture, which are of a modest character, in so far as their money value is concerned, that his present earning power is very small, and that he is in debt several hundred dollars. His testimony is direct and positive as to these matters, and we think it cannot be ignored in this proceeding, however much his testimony may be doubted touching his excuse for past failures in payment. It does appear that since appellant's divorce he has married a woman of large means, that he is well provided for by his present wife in so far as his personal wants and living expenses are concerned, and that his present wife has permitted him to purchase at stores in Seattle from time to time wearing apparel and things of considerable value for his children, and have the same charged to her, but that his present wife will not provide him with funds to pay towards the alimony allowance awarded to his former wife. It also appears that appellant has done some law work for his present wife in connection with her property interests for which he has made no charge, but it is apparent that such work has not been of such a character as to call for the payment of any considerable amount in fees therefor, even had he performed it for a stranger, nor has such service rendered to his present wife in the least interfered with legal services rendered or which he had opportu-

nity to render to others. Indeed, her legal matters have, for the most part, been attended to by other attorneys employed by her.

This is not a criminal contempt proceeding. It is a civil contempt proceeding, the object of which is not to punish the appellant, but to coerce him to pay the money in satisfaction of the alimony portion of the decree of divorce. 6 R. C. L. 490. It may be that appellant's past failure to make the payments is of such inexcusable character that he could be punished by fine or imprisonment in a criminal contempt proceeding, regardless of his present inability to make payment thereof; but, if so, such punishment would have to be in the nature of a fine of a fixed amount payable to the state, or to be satisfied by imprisonment at the rate of a fixed sum for each day of imprisonment, or such punishment would have to be imprisonment for a fixed term. Such is not the nature of the judgment sought or rendered in this proceeding. In a contempt proceeding of this character, the object of which is to coerce the payment of money, the lack of ability to pay on the part of the defendant is always a complete defense against enforcing payment from the defendant by imprisonment. In harmony with the law on that subject in most of the jurisdictions of this country, this court has repeatedly so held. *Holcomb v. Holcomb*, 53 Wash. 611, 102 Pac. 653; *Boyle v. Boyle*, 74 Wash. 529, 133 Pac. 1009; *Crombie v. Crombie*, 88 Wash. 520, 153 Pac. 306; *Smiley v. Smiley*, 99 Wash. 577, 169 Pac. 962; *Wells v. Wells*, 99 Wash. 492, L.R.A. 1918C, 291, 169 Pac. 970.

We conclude that appellant's inability to pay the money as directed by the judgment from which he has appealed sufficiently appears to call for a reversal of the judgment. It is so ordered. Of course, it must be understood that we are determining appellant's right to be absolved from the consequences of the judgment he appeals from, as of the time of

Contempt—to
compel payment
of alimony—ef-
fect of inability.

the rendering of that judgment. What has happened since then touching the question of his ability to pay, as adjudged by the decree of divorce, is wholly outside this record and our present inquiry. The court is still open for further inquiry in that behalf.

Holcomb, Ch. J., and Tolman, Fullerton, Mitchell, and Mount, JJ., concur.

Main, J., dissenting:

The rule of the cases cited in the majority opinion, as stated in the Boyle Case, 74 Wash. 531, 133 Pac.

1009, is: "The rule is that a defendant is not guilty of contempt of court for failure to pay alimony, where it appears by clear and satisfactory evidence that he has neither the means nor the ability to do so, and that his disobedience, therefore, is not wilful."

In my opinion the facts of this case do not bring it within that rule. The findings and judgment of the trial court should be sustained. I therefore dissent.

Bridges and Mackintosh, JJ., concur in the foregoing dissent.

ANNOTATION.

Present inability to pay as defense to contempt proceedings to enforce payment of past instalments of alimony, nonpayment of which was inexcusable.

It will be seen that it is held in the reported case (SNOOK v. SNOOK, ante, 262) that the present lack of means is a conclusive defense to a contempt proceeding to enforce payment of instalments of alimony, although the past failure to pay was inexcusable.

In *Staples v. Staples* (1894) 87 Wis. 592, 24 L.R.A. 433, 58 N. W. 1036, it was held that inability to pay instalments of alimony, brought on by the party himself with intention to avoid payment, will not prevent his refusal to pay from being contumacious and punishable as a contempt of court.

Most of the cases are not so specific. It seems to be the general practice, however, not to accept present lack of money as a defense for failure to pay past instalments of alimony, when there has been any material income.

Where the husband, who was in receipt of a good salary, claimed that on account of his absolutely necessary expenses he was unable to pay more than \$40, the court ordered him committed in default of paying \$600, a portion of arrears of alimony. *Tolman v. Leonard* (1895) 6 App. D. C. 224.

In *Barclay v. Barclay* (1900) 184 Ill. 471, 56 N. E. 821, the court, in ordering the husband in contempt for failure to pay over \$600 in \$40 monthly instalments for the separate main-

tenance of his wife and child, said: "He, as appears from his own showing, seems to have acted upon the theory that he was justified in spending the whole of his salary, amounting to \$125 per month, for his own support and that of his minor son, and in fruitless litigation to escape the performance of the decree for the maintenance of his wife and daughter, leaving them without any support whatever. Nor does he show that the amounts claimed to have been expended for his own support and that of his son were necessary for that purpose."

Where the husband, shortly after his wife began divorce proceedings, disposed of his property, and three days after the decree was made left the jurisdiction and remained away for six or seven years, paying nothing on account of the monthly alimony directed by the decree, though at times earning and laying up money, he was committed, in that, "being financially able in whole or in part," he had wilfully neglected to pay the alimony or any part thereof, although he claimed that he was not then, and had not been, "able to pay any part of the decree for alimony." *Deen v. Bloomer* (1901) 191 Ill. 416, 61 N. E. 131.

Where the husband had been committed for contempt for failure to pay, altogether, \$57 for a retainer fee to

his wife's lawyers, court fees, and expenses, and one monthly instalment of temporary alimony of \$20, it was held that no excuse was shown by an answer reciting that, at the time the order to pay was made, he had in the bank \$260, that he had paid it out: \$150 to his solicitors, \$25 to his doctor, \$20 to the complainant, \$15 for clothing, and the balance, \$50, in the payment of debts then due; that he earns \$55 a month; that he has used all of his wages in the payment of expenses; that he has sent \$35 to Finland to people who are bringing up his child; that he has some stock tied up by the court's injunction, and \$2.05 in money, and that the only other personal property not tied up by injunction is a watch of the value of \$10, which he tenders into court; and that he is now under the treatment of a physician. *Lake v. Houghton Circuit Judge* (1912) 172 Mich. 660, 138 N. W. 249.

Where the husband was committed for contempt for failing to pay for five months, weekly alimony of \$12.50, pendente lite, the court said, on his application for relief on account of inability to pay and reduced means: "He had no right to dispose of his earnings otherwise, and leave his wife and children without the support ordered, and then ask the court as a favor to discharge him. The affidavits, however, disclose a diminution of income, and during his imprisonment he, of course, earned nothing. The order for his commitment may be discharged on his paying the amount due for alimony for which he was committed. The order for alimony during his imprisonment may be considered as suspended, and, on paying such amount, the order for alimony may be reduced to \$10 a week." *Graley v. Graley* (1866) 31 How. Pr. (N. Y.) 475.

Where the decree made alimony of \$187 a year a lien on the husband's real estate, which was already encumbered, the court committed him for contempt in not paying the year's alimony, where it appeared that he had received as income during the year \$946. *McSherry v. McSherry* (1893) 49 Ill. App. 90.

In affirming an order for contempt for failure to pay alimony pendente lite of \$25, the court said: "The defendant had been in good health; he had no children; he had for months, between the order to pay and the order to commit, earned \$30 per month; had furnished moneys to his parents who had means and did not need it; he had signified his intention not to comply with the order to pay the alimony, and set forth that he paid board at the rate of \$8 per week. A more reasonable rate of board would have enabled him, in but a small part of the time that had elapsed, to pay the \$25, and we think the court did wisely in its order to commit." *Kaderabek v. Kaderabek* (1888) 2 Ohio C. D. 236.

But in *Schuele v. Schuele* (1894) 57 Ill. App. 189, the court reversed an order committing the husband for contempt, for failure to pay \$6 a week alimony for many weeks, where his small earnings were all taken up in support of himself and his small children.

Where the husband moved for release from imprisonment for contempt, for failure to pay alimony of \$5 per week, the court affirmed an order denying the motion, on the ground that his inability to pay arose out of his marrying again, which he did out of the state, in disobedience to the decree of divorce. *Ryer v. Ryer* (1884) 33 Hun (N. Y.) 116, 67 How. Pr. 369.

In *Hoffman v. Hoffman* (1906) 28 Ohio C. C. 658, it was held that a decree for the payment of alimony in monthly instalments will be enforced by proceedings in contempt, where the husband has remarried, and it is not shown that he is using the strictest economy in his new family relations and is, notwithstanding, unable to comply with the order of the court.

In *Shaffner v. Shaffner* (1904) 212 Ill. 492, 72 N. E. 447, the court, in affirming an order committing the husband for contempt in failure to pay several instalments of alimony, said: "He who seeks to establish the fact that his failure to pay is the result of lack of funds must show with reasonable certainty the amount of money

he has received. He must then show that that money has been disbursed in paying obligations and expenses which, under the law, he should pay, before he makes any payment on the decree for alimony. It is proper that he first pay his bare living expenses; but whenever he has any money in his possession that belongs to him, and which is not absolutely needed by him for the purpose of obtaining the mere necessities of life, it is his duty to make a payment on this decree."

It may be noted that there are a

number of decisions under a New York statute, to the effect that inability to pay is no defense to a motion to commit for contempt for failure to pay alimony, the remedy being to apply for release from imprisonment on that ground. See *Ryckman v. Ryckman* (1884) 34 Hun (N. Y.) 235; *Delanoy v. Delanoy* (1897) 19 App. Div. 295, 46 N. Y. Supp. 106 (obiter); *Young v. Young* (1902) 35 Misc. 335, 71 N. Y. Supp. 944; *Cahzin v. Cahzin* (1908) 112 N. Y. Supp. 525.

B. B. B.

JOHN HEVA, by Guardian ad Litem, Appt.,
v.

SEATTLE SCHOOL DISTRICT NO. 1, Respt.

Washington Supreme Court (Dept. No. 2) — April 6, 1920.

(— Wash. —, 188 Pac. 776.)

Negligence — attractive nuisance — fire escape on school building.

A ladder attached to a school building as a fire escape, in compliance with the municipal ordinances, is not an attractive nuisance which will render the school district liable for injury to a boy of sufficient age and intelligence to appreciate the danger, by falling after climbing to the roof of the building on the ladder, by the fact that the bottom of the ladder is sufficiently near the ground to be accessible from objects near it.

[See note on this question beginning on page 271.]

APPEAL by plaintiff from a judgment of the Superior Court for King County (Hall, J.) sustaining a motion for judgment notwithstanding a verdict for plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Baxter & Jones, for appellant:

Plaintiff was but twelve years old, and cannot be treated as a trespasser so as to preclude his right to recovery in case the other elements are found, fixing the liability.

Ilwaco R. & Nav. Co. v. Hedrick, 1 Wash. 446, 22 Am. St. Rep. 169, 25 Pac. 335; *Nelson v. McLelland*, 31 Wash. 208, 60 L.R.A. 793, 96 Am. St. Rep. 902, 71 Pac. 747, 13 Am. Neg. Rep. 627; *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 21 L. ed. 745; *Pekin v. McMahon*, 154 Ill. 146, 27 L.R.A. 206, 45 Am. St. Rep. 114, 39 N. E. 484; *Haynes v. Seattle*, 69 Wash. 419, 125

Pac. 147; *Peirce v. Lyden*, 85 C. C. A. 312, 157 Fed. 552.

Liability may be fixed not only by the thing artificially created, but a thing not in itself dangerous may be left exposed in such a way, or so in conjunction with something else, as for the two together to form a dangerous and attractive situation for children.

Foster v. Lusk, 129 Ark. 1, 194 S. W. 855, 17 N. C. C. A. 361; *McAllister v. Seattle Brewing & Malting Co.* 44 Wash. 179, 87 Pac. 68; *Holt v. School Dist.* 102 Wash. 442, 173 Pac. 335; *Biggs v. Consolidated Barb-Wire Co.* 60 Kan. 217, 44 L.R.A. 655, 56 Pac. 4,

5 Am. Neg. Rep. 335; *Howard v. Tacoma School Dist.* 88 Wash. 167, 152 Pac. 1004, Ann. Cas. 1917D, 792; *Temple v. McComb City Electric Light & P. Co.* 89 Miss. 1, 11 L.R.A.(N.S.) 449, 119 Am. St. Rep. 698, 42 So. 874, 10 Ann. Cas. 924.

This was a question for the jury under all the circumstances.

Holt v. School Dist. 102 Wash. 442, 173 Pac. 335; *Bjork v. Tacoma*, 76 Wash. 225, 43 L.R.A.(N.S.) 331, 135 Pac. 1005; *McAllister v. Seattle Brewing & Malting Co.* 44 Wash. 184, 87 Pac. 68; *Donk Bros. Coal & Coke Co. v. Leavitt*, 109 Ill. App. 385; *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 21 L. ed. 745; *Olson v. Gill Home Invest. Co.* 58 Wash. 161, 27 L.R.A.(N.S.) 884, 108 Pac. 140; *Haynes v. Seattle*, 69 Wash. 419, 125 Pac. 147; *Kansas C. R. Co. v. Fitzsimmons*, 22 Kan. 686, 31 Am. Rep. 203; *Fitzgerald v. Chicago, R. & Q. R. Co.* 114 Ill. App. 118; *Johnson v. St. Charles*, 200 Ill. App. 184; *Mitchell v. Illinois C. R. Co.* 110 La. 630, 98 Am. St. Rep. 472, 34 So. 714; *Pekin v. McMahon*, 154 Ill. 141, 27 L.R.A. 206, 45 Am. St. Rep. 114, 39 N. E. 486; 23 Am. & Eng. Enc. Law, 560; *Steele v. Northern P. R. Co.* 21 Wash. 301, 57 Pac. 820; *Akin v. Bradley Engineering & Machinery Co.* 48 Wash. 97, 14 L.R.A.(N.S.) 586, 92 Pac. 903, 51 Wash. 658, 99 Pac. 1038; *Tibbits v. Spokane*, 64 Wash. 570, 117 Pac. 397; *Cleveland, C. C. & St. L. R. Co. v. Scott*, 111 Ill. App. 234; *Anderson v. Union Terminal R. Co.* 81 Mo. App. 119; *Burger v. Missouri P. R. Co.* 112 Mo. 238, 34 Am. St. Rep. 379, 20 S. W. 439; *Lane v. Atlantic Works*, 111 Mass. 136; *Harriman v. Pittsburg, C. & St. L. R. Co.* 45 Ohio St. 11, 4 Am. St. Rep. 507, 12 N. E. 451.

Mr. Henry W. Pennock, for respondent:

Defendant was not liable to plaintiff.

Barnhart v. Chicago, M. & St. P. R. Co. 89 Wash. 306, L.R.A.1916D, 443, 154 Pac. 441, 12 N. C. C. A. 966; *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 21 L. ed. 745; *Gordon v. Snoqualmie Lumber & Shingle Co.* 59 Wash. 277, 29 L.R.A.(N.S.) 88, 109 Pac. 1044; *Clark v. Northern P. R. Co.* 29 Wash. 139, 59 L.R.A. 508, 69 Pac. 636; *Curtis v. Tenino Stone Quarries*, 37 Wash. 355, 79 Pac. 955; *Harris v. Cowles*, 38 Wash. 331, 107 Am. St. Rep. 847, 80 Pac. 537; *Akin v. Bradley Engineering*

& Machinery Co. 48 Wash. 97, 14 L.R.A.(N.S.) 586, 92 Pac. 903.

The ladder was not a dangerous instrument, nor was it an attractive nuisance.

Barnhart v. Chicago, M. & St. P. R. Co. 89 Wash. 305, L.R.A.1916D, 443, 154 Pac. 441, 12 N. C. C. A. 966; *Wheeling & L. E. R. Co. v. Harvey*, 77 Ohio St. 235, 19 L.R.A.(N.S.) 1143, 122 Am. St. Rep. 503, 83 N. E. 66, 11 Ann. Cas. 981, 21 Am. Neg. Rep. 272; *Kelly v. Smith*, 29 App. Div. 346, 51 N. Y. Supp. 413, 4 Am. Neg. Rep. 668; *Howard v. Tacoma School Dist.* 88 Wash. 167, 152 Pac. 1004, Ann. Cas. 1917D, 792; *Biggs v. Consolidated Barb-Wire Co.* 60 Kan. 217, 44 L.R.A. 655, 56 Pac. 4, 5 Am. Neg. Rep. 335; *Giannini v. Campodonico*, 176 Cal. 548, 169 Pac. 80; *Clark v. Northern P. R. Co.* 29 Wash. 148, 59 L.R.A. 508, 69 Pac. 636; *Curtis v. Tenino Stone Quarries*, 37 Wash. 355, 79 Pac. 955; *Bottum v. Hawks*, 84 Vt. 370, 35 L.R.A.(N.S.) 440, 79 Atl. 858, Ann. Cas. 1913A, 1025, 3 N. C. C. A. 186; *Savannah, F. & W. R. Co. v. Beavers*, 113 Ga. 398, 54 L.R.A. 314, 39 S. E. 82, 10 Am. Neg. Rep. 8; *Stendal v. Boyd*, 73 Minn. 53, 42 L.R.A. 288, 72 Am. St. Rep. 597, 75 N. W. 735; *Moran v. Pullman Palace Car Co.* 134 Mo. 641, 33 L.R.A. 755, 56 Am. St. Rep. 543, 36 S. W. 659; *Dobbins v. Missouri, K. & T. R. Co.* 91 Tex. 60, 38 L.R.A. 573, 66 Am. St. Rep. 856, 41 S. W. 62; *Richards v. Connell*, 45 Neb. 467, 63 N. W. 915; *Mayfield Water & Light Co. v. Webb*, 129 Ky. 395, 18 L.R.A.(N.S.) 179, 130 Am. St. Rep. 469, 111 S. W. 712; *Peters v. Bowman*, 115 Cal. 345, 56 Am. St. Rep. 106, 47 Pac. 113, 598, 1 Am. Neg. Rep. 4.

Plaintiff appreciated the danger of climbing.

Clark v. Northern P. R. Co. 29 Wash. 139, 59 L.R.A. 508, 69 Pac. 636; *Akin v. Bradley Engineering & Machinery Co.* 48 Wash. 97, 14 L.R.A.(N.S.) 586, 92 Pac. 903; *Gordon v. Snoqualmie Lumber & Shingle Co.* 59 Wash. 277, 29 L.R.A.(N.S.) 88, 109 Pac. 1044; *Howard v. Tacoma School Dist.* 88 Wash. 167, 152 Pac. 1004, Ann. Cas. 1917D, 792; *Loftus v. Dehail*, 133 Cal. 214, 65 Pac. 379; *Gates v. Northern P. R. Co.* 37 Mont. 103, 94 Pac. 751.

Defendant had no notice that young children were using the fire ladder.

MacDermid v. Seattle, 93 Wash. 167, 160 Pac. 290; *Savana v. Trusty*, 98 Ill. App. 277; *Reed v. Chicago*, 83 Ill. App. 554; *Cook v. Anamosa*, 66 Iowa, 427, 23

(— Wash. —, 188 Pac. 776.)

N. W. 907; *Corey v. Ann Arbor*, 134 Mich. 376, 96 N. W. 477; *Touhey v. Rochester*, 64 App. Div. 56, 71 N. Y. Supp. 661; *Cleveland v. Payne*, 72 Ohio St. 347, 70 L.R.A. 841, 74 N. E. 177, 18 Am. Neg. Rep. 211.

Tolman, J., delivered the opinion of the court:

The appellant, as plaintiff, through a guardian ad litem, brought this action to recover damages for personal injuries. The cause was tried to a jury, which found a verdict in appellant's favor, and the trial court, on motion of respondent, entered judgment in its favor non obstante verdicto. The appeal is from the judgment so entered.

The respondent constructed in 1914 what is known as the "New Ballard High School." After the building was completed the building department of the city of Seattle notified the school district officials that an additional fire ladder must be provided, extending from a point 9 feet above the ground to the roof, as required by city ordinance, and the matter was referred to the fire chief, who had authority under the ordinance to act in such cases. The fire chief, after examination, directed where and how such ladder should be attached to the building, and the district caused the ladder to be constructed and attached to the building as the ordinance required, and in the place designated by the fire chief. The iron railing herein-after referred to was already constructed and in position at the time the place for so attaching the ladder was designated. On Sunday, May 12, 1918, appellant, then two months past his twelfth birthday, with a companion of about the same age, went to the high school grounds, climbed onto an iron fence or railing which was immediately below the lower terminus of the fire ladder, and from which they could reach the lower rungs of the ladder, and from there they climbed onto the ladder, and up it to the roof of the central portion of the building, which was some 15 feet lower than the wings. Passing over the roof, they found

another ladder, by means of which they ascended to the roof of the higher portion, and there, finding a sheltered and sunny spot, they remained, looking at the Sunday paper and smoking cigarettes, for some little time. The other boy, thinking he saw someone approaching, gave the alarm and started to run, the appellant following him. The first boy climbed over the projecting wall of the cornice, and from there jumped or dropped to the roof of the main building below. Appellant ran rapidly along the cornice to the northwest corner of the building, seeking a way to descend, and then turned and ran or walked rapidly back, when, as he testifies, his foot caught on something which projected, and he fell to the fire escape landing below, causing the injuries complained of. Such other facts as are material will appear as we proceed.

Courts differ as to what constitutes a nuisance attractive to children, but this court has been somewhat liberal in applying the doctrine, and now has no intention or desire to depart from the rule heretofore followed. *Ilwaco R. & Nav. Co. v. Hedrick*, 1 Wash. 446, 22 Am. St. Rep. 169, 25 Pac. 335; *McAllister v. Seattle Brewing & Malting Co.* 44 Wash. 179, 87 Pac. 68; *Haynes v. Seattle*, 69 Wash. 419, 125 Pac. 147; *Bjork v. Tacoma*, 76 Wash. 225, 48 L.R.A.(N.S.) 331, 135 Pac. 1005; *Jorgenson v. Crane*, 86 Wash. 273, L.R.A.1917F, 983, 150 Pac. 419.

But while the court permitted recovery in the cases cited, and also in cases involving the possession and control of dangerous explosives (*Nelson v. McLellan*, 31 Wash. 208, 60 L.R.A. 793, 96 Am. St. Rep. 902, 71 Pac. 747, 13 Am. Neg. Rep. 627; *Akin v. Bradley Engineering & Machinery Co.* 48 Wash. 97, 14 L.R.A.(N.S.) 586, 92 Pac. 903; *Olson v. Gill Home Invest. Co.* 58 Wash. 151, 27 L.R.A.(N.S.) 884, 108 Pac. 140), it has not hesitated to distinguish and limit the doctrine (*Clark v. Northern P. R. Co.* 29 Wash. 139, 59 L.R.A. 508, 69 Pac. 636; *Curtis v. Tenino Stone Quarries*, 37 Wash. 355, 79 Pac. 955;

Harris v. Cowles, 38 Wash. 331, 107 Am. St. Rep. 847, 80 Pac. 537; Gordon v. Snoqualmie Lumber & Shingle Co. 59 Wash. 272, 29 L.R.A.(N.S.) 88, 109 Pac. 1044; Barnhart v. Chicago, M. & St. P. R. Co. 89 Wash. 304, L.R.A.1916D, 443, 154 Pac. 441, 12 N. C. C. A. 966).

In the latter case it was said:

"The question here presented is not whether the owner of the property may be liable: (a) By reason of a trap or pitfall upon his property which may produce the death or injury; (b) a hidden or concealed danger; or (c) a dangerous agency in close proximity or so near a highway that in the use of the highway an accident may occur; but is whether a pond of water is a dangerous agency such as will subject the owner of the property to liability for damages for the death of a child of tender years, attracted to the pond for the purpose of play. The turntable doctrine makes the owner liable because the dangerous agency was attractive to children of tender years, and in playing about or with such agency accident or injury would probably result.

"That a pond of water is attractive to boys for the purposes of play, swimming, and fishing no one will deny. But its being an attractive agency is not sufficient to subject the owner to liability. It must be an agency such as is likely to, or will probably result in, injury to those attracted to it. That many boys every year lose their lives by drowning is a matter of common knowledge. But the number of deaths in comparison to the total number of boys that visit ponds, lakes, or streams for purposes of play, swimming, and fishing is comparatively small. It would be extending the doctrine too far to hold that a pond of water is an attractive nuisance, and therefore comes within the Turntable Cases."

In all cities there are ordinances requiring fire ladders on buildings of any considerable height. It is

quite impractical to construct and maintain them so that they will serve their intended purpose, and yet be inaccessible to venturesome children who love to climb. Here the boys found access to the ladder by means of the railing or fence, and the evidence shows that they might also have reached it from the water table, which projects from the building all the way around at about the same height as was the railing, or, as others did, by climbing on one another's shoulders. When boys are intent on climbing, they can usually find a box or barrel or some object near at hand from which to mount. Appellant was a bright, active boy of twelve years, used to climbing, and admits that he knew the danger of injury from falling. The ladder is a simple appliance, not inherently dangerous, and as a rule any child old enough to climb one has intelligence enough to realize that if he falls injury and pain will follow. Ladders are nearly as common as fences and trees, and to hold that a jury might find an ordinary ladder to be an attractive nuisance, under the doctrine of the Turntable Cases, would be to require every property owner having a fence or tree accessible to children at play to maintain a constant guard about them. Common objects, the uses and dangers of which are obvious and well known, at least to the normal child of twelve years, and which cannot be made inaccessible without destroying the purpose for which they exist, may not, under the law as established in this state, be found to be attractive nuisances simply because injury from their use has occurred to a licensee or trespasser of sufficient age and understanding to appreciate the danger.

The judgment of the trial court is affirmed.

Holcomb, Ch. J., and Fullerton, Bridges, and Mount, JJ., concur.

Negligence—
attractive
nuisance—are
escape on school
building.

ANNOTATION.

Fire escape as an attractive nuisance.

The general rule is that a fire escape is not an attractive nuisance, so as to render the owner of the building liable under the "attractive nuisance" doctrine, for injuries sustained by children while using a fire escape in their play. *McAlpin v. Powell* (1877) 70 N. Y. 126, 26 Am. Rep. 561; *Kelly v. Smith* (1898) 29 App. Div. 346, 51 N. Y. Supp. 413, 4 Am. Neg. Rep. 668; *HEVA v. SEATTLE SCHOOL DIST.* (reported herewith) ante, 267.

The reason for so holding given in the reported case (*HEVA v. SEATTLE SCHOOL DIST.*) is that the owner of a building of any considerable height is obliged by statute or ordinance to place fire escapes thereon, that it is impractical to construct them so that they will serve their intended purpose and yet be inaccessible to venturesome children, and that a fire escape is a simple appliance, not inherently dangerous, and any child old enough to climb one has intelligence enough to realize that if he falls injury will follow. In this case, a school district was held not liable for injuries to a boy of twelve, who had reached the roof of a school building by means of an iron fence and the fire escape, and on coming down had fallen to his injury.

And in *Kelly v. Smith* (1898) 29 App. Div. 346, 51 N. Y. Supp. 413, 4 Am. Neg. Rep. 668, it was held that no liability arose against one who, in compliance with a statute, had pro-

vided the fire escape on his building with a suitable ladder for reaching the ground, where the ladder was removed by boys from a place of safety on the second balcony, and hung on the first balcony in order to "play firemen," and one of them, about seven years of age, fell from the ladder and was killed.

And in *McAlpin v. Powell* (N. Y.) supra, in holding that the owner of a tenement building was not liable for the death of an intelligent boy in his tenth year who went out upon the platform of a fire escape and fell through an insecure trapdoor, the court said that the *Turntable Cases*, in which a child was attracted from a public highway, where it had a right to be, to the place of danger, had no similarity to one in which the child was left without anyone to take special charge of it, and had escaped through an open unguarded window to a place of danger, and had sustained an injury without any allurement having been held out; and that a wide distinction existed between the two cases; and while the one at bar was on the border line, and the point of difference was perhaps very close, this distinction was fully recognized in the best-considered adjudications in the courts, and was the turning point upon which cases of this character were to be determined.

G. V. I.

H. C. ALLEN

v.

WOLF RIVER LUMBER COMPANY.

Wisconsin Supreme Court — April 29, 1919.

(169 Wis. 253, 172 N. W. 158.)

Sale — offer of season's product — amount to be furnished.

1. A contract to sell 1,000 cords of bark is formed by acceptance of a proposition to the effect that the seller is peeling about a thousand cords

this year, "I will sell you the 500 or 1,000 cords," afterwards referred to as this year's peel, for a named price, if in subsequent correspondence seller does not deny buyer's claim that amount was 1,000 cords.

[See note on this question beginning on page 276.]

Evidence — letters leading to contract.

2. In an action for breach of contract alleged to have been formed by letters, all letters relating to the transaction are admissible in evidence, the interval which elapsed between which is not sufficient to warrant an inference that the parties considered they were starting anew to make a contract.

[See 10 R. C. L. 1147.]

Contract — acceptance by return mail.

3. One making a proposal to be accepted by return mail, in the absence of revocation, holds himself ready and willing to abide by it until the acceptance or rejection can reach him by return mail.

[See 6 R. C. L. 611.]

— keeping alive after breach.

4. The unsuccessful attempt of a buyer to induce a seller to perform after he has announced his intention not to do so cannot be considered to amount to keeping the contract alive for the benefit of both parties.

Sale — place of delivery — price including freight rate.

5. The place of delivery of goods

sold is not where they are to be delivered to the carrier where the contract names a price including delivery at a point having the freight rate of a specified city, where the statute provides that if the seller is to pay freight the title does not pass until the goods are delivered or have reached the place agreed upon.

— when title passes.

6. Unless provision to the contrary is made, title to goods sold passes with delivery.

[See 24 R. C. L. 37.]

— destination as place of delivery.

7. The place of delivery of goods sold at a price including a certain freight rate is destination, where, in response to a request for shipping directions, the buyer names a place having the agreed rate.

Damages — for breach of contract of sale.

8. The damages for breach of contract to sell bark are the difference between the contract price and market price at the place of delivery and time of breach.

[See 24 R. C. L. 69.]

CROSS APPEALS from a judgment of the Municipal Court for Langlade County (Hogan, J.) in favor of plaintiff in an action brought to recover damages for alleged breach of a contract to deliver certain tanbark sold by defendant to plaintiff, both parties appealing from the judgment as to the amount of bark sold, the place of delivery, and the measure of damages. *Modified and affirmed.*

Statement by Vinje, J.:

Action to recover damages for breach of a contract to deliver certain tanbark sold to plaintiff.

June 25, 1915, defendant wrote plaintiff at Buffalo, New York, as follows: "Your card of the 23d received. I am peeling about a thousand cords of bark this year, have now between 600 and 700 cords peeled from the tree. The most of this will not be shipped until sleighing comes along about the first of the year. . . . I will sell you the 500 or 1,000 cords of bark, 2,240 pounds to the cord, for \$13.50, f. o. b. Buffalo, but understand a good

deal cannot be delivered until winter, but if you wanted 200 or 300 cords before, I could arrange to ship it to you."

June 28th plaintiff wrote defendant at Antigo, Wisconsin, as follows: "Replying to your esteemed favor of the 25th. Would like very much to have the 1,000 cords bark, but the price is too high for me. If you could make that price \$12 per 2,240 pounds, I would be inclined to place it, though we are buying our local bark for \$10.50 to \$11 per ton. . . ."

June 30th, 1915, defendant replied: "Now I will tell you what

I will do, I will split the difference with you and call it \$12.75 f. o. b. Buffalo, 2,240 pounds to the cord."

In reply plaintiff wrote under the date of July 2, 1915: "I have done my best to get the price from tanners to meet your price of \$12.75, Rochester, New York, but can't do it. They claim extracts are cheaper and they use them. Perhaps another season I can use some bark from you, but \$12—2,240 pounds deld Rochester rate is all our market will stand this season."

July 21, 1915, defendant wrote plaintiff as follows: "In regard to our hemlock bark, inasmuch as you offer us \$12 per cord delivered on a Rochester rate of freight, if you cannot pay us more we are inclined to accept your price of \$12 per cord, of 2,240 pounds to the cord, delivered on a Rochester rate of freight, for our peel this year. Please let us know how to bill this bark. I may ship a car or two in a few days, and then the balance will come out when we have snow. If this is satisfactory let us know by return mail."

July 23d plaintiff replied: "Replying to yours 21st. Confirm purchase of your bark at \$12 per 2,240 pounds, delivered Rochester rate. You may ship the cars now ready to H. C. Allen, Olean, New York, Erie delivery. Send papers to me here, and I will look out for cars when they arrive. Would like as much of this bark shipped promptly as possible. Kindly advise me about the amount to be shipped now, and amount for winter shipment, and oblige. If you can ship 300 cords now I would like it very much."

In reply to this, defendant wrote plaintiff on July 24, 1915. "On account of not hearing from you, I, to-day, sold what bark we had peeled to Grand Rapids, Michigan, people, getting \$6.75 f. o. b. cars Monico for same, as I wanted to dispose of what we had, as I stopped peeling on account of the low prices. As shipping it to Buffalo the rate is 21 cents and to Syracuse the rate is 26 cents so it would

leave me a loss, so when I got my price I sold it all."

Then follow a number of letters in which plaintiff insists he is entitled to the 1,000 cords of bark, and the defendant offers 200 cords of bark at a different price, and upon the payment of \$1,000 down. The new terms are not accepted, and bark is not shipped to plaintiff.

The defendant's principal place of business was at Antigo, Wisconsin, and plaintiff's place of business was in Buffalo, New York. The tanbark was located in the woods near Monico, Wisconsin, about 40 miles north of Antigo. The evidence showed that defendant peeled only 317 cords during 1915. A jury was waived, and the court found that the place of delivery of the bark was Monico, Wisconsin; that the quantity sold was 317 cords, the peel of that year, plus 200 cords which defendant bought at Mattoon, Wisconsin; that plaintiff's damage was the difference between the contract price at Monico, which the court found was the Rochester delivery price of \$12 per cord, less the freight rate of \$6.16 per cord from Monico and \$5.82 from Mattoon, and the price of bark at Monico and Mattoon found to be \$6.25 per cord of 2,240 pounds. This made a loss of 41 cents per cord on the 317 cords and a loss of 7 cents per cord on the 200 cords bought at Mattoon, in all a loss of \$143.97, for which amount it awarded judgment to plaintiff. Both parties appealed.

Mr. Henry Hay for plaintiff.

Messrs. E. J. Goodrick and H. F. Morson for defendant.

Vinje, J., delivered the opinion of the court:

Plaintiff appealed because he claimed the amount of bark sold was 1,000 cords, the place of delivery was Olean, New York, and the measure of damages the difference between the contract price and the market price of bark at Olean at the time of the breach. The defendant appealed because it claimed the amount of bark sold was 317 cords and did not include the 200 cords

bought at Mattoon, the place of delivery was Antigo, and the measure of damages was the difference between \$12 less \$5.82, the freight rate from Antigo, and the market price at Antigo, which, it claimed, did not exceed \$6.25 per cord. It will thus be seen that the amount of bark sold, the place of delivery, and consequently the measure of damages are in dispute.

As to the amount of bark sold, the defendant's claim is that its letter of July 21st, offering to sell its peel of this year, and the acceptance of that in plaintiff's letter of July 23d, constitute the contract between the parties. The trial court adopted this view, for it excluded from evidence the letters of June 25th and of July 2d. It is clear that the whole correspondence relating to

Evidence—
letters leading
to contract.

this transaction is admissible in evidence to show what the contract was, and the letters mentioned were improperly excluded. The contract must be read out of the whole correspondence, since every letter therein related to the same matter, and no such interval elapsed between any as to warrant an inference that the parties considered they were starting anew to make a contract.

From the whole correspondence we reach the conclusion that defendant offered to sell

Sale—offer of
season's product
—amount to be
furnished.

1,000 cords, and plaintiff accepted that offer. If so, that made a contract for the sale of 1,000 cords. Our conclusion is based upon the fact that defendant, in its first letter, stated it was going to peel about 1,000 cords that year, and had already between 600 and 700 cords peeled; that it offered to sell the 500 or 1,000 cords; that plaintiff replied he would like to have the 1,000 cords, if the price was right. After that the correspondence was all about the quality of the bark and the price. So when defendant, on July 21st, accepted plaintiff's price for this year's peel it knew plaintiff understood it was

to be at least 1,000 cords, and it must be held to have made an offer of that amount. This is confirmed by the fact that, in letters passing between the parties subsequent to the breach, plaintiff claims the quantity was 1,000 cords, and defendant does not deny such claim, though it offers him only 200 cords upon different terms. It is also in evidence that plaintiff, immediately after accepting the offer from defendant, resold 1,000 cords to eastern tanners, in the belief that such was the amount he had bought. This evidence, of course, bears only upon the question of what he understood the contract to be, and could not bind defendant if he made no offer of 1,000 cords. But it is clear from the evidence that he did make a specific offer of 1,000 cords, which plaintiff said he wanted if the price was right. It is also uncontradicted that defendant represented that its peel for that year would be about 1,000 cords. Hence, from the correspondence had when it made an offer of this year's peel, it meant 1,000 cords.

The breach of contract by the defendant is clearly established. In its letter of July 21st, accepting plaintiff's terms, it said: "If this is satisfactory, let us know by return mail." This authorized plaintiff to accept by return mail, and he did so accept. A party who makes a proposal to another, to be answered by return mail, in the absence of revocation, holds himself ready and willing to abide by it until acceptance or rejection can reach him by return mail. 6 R. C. L. 611. Here the defendant did not wait until a letter could reach him from Buffalo by return mail, but sold the bark on the 24th to another party. This constituted a breach of his offer.

Plaintiff's unsuccessful effort to induce defendant to perform cannot be considered tantamount to keeping the contract alive for the benefit of both parties.

Contract—
acceptance by
return mail.

—keeping alive
after breach.

Plaintiff insisted upon performance or full damages for the breach. He did not secure performance, so he is relegated to his only other remedy, damages.

We think the trial court erred in finding that the place of delivery was at Monico, Wisconsin. Defendant in his first letter offered to sell the bark f. o. b. Buffalo, for \$13.50 per cord. This price was not satisfactory to plaintiff. He suggests he would pay \$12 per cord, in his letter of June 28th, but in his letter of July 2d he says \$12 per cord, "deld Rochester rate," is all the market will stand this season, and it is this offer that the defendant accepts. He therefore agrees to deliver bark

at any point having Rochester rate for \$12 per cord. His contract is not complete till he makes such delivery. He must pay the freight and deliver before he can demand his \$12 per cord. Nothing is said about any price per cord in Wisconsin. The price is fixed as of the place of delivery. In such case subdivision 5, § 1684t-19, Stats. applies. It provides: "If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon."

See also *McLaughlin v. Marston*, 78 Wis. 670, 47 N. W. 1058, and *Southern Flour & Grain Co. v. McGeehan*, 144 Wis. 130, 128 N. W. 879.

Here the contract required the seller to ship to a designated place and to pay the freight to such place. Unless provision to the contrary is made, title passes with delivery. *Gehl v. Peycke Bros. Commission Co.* 158 Wis. 494, 149 N. W. 275. Here delivery was to be made at a place having a Rochester rate, designated by

plaintiff. Defendant asked for shipping directions, and plaintiff named ^{—destination as place of delivery.} Olean, New York, a point having a Rochester rate. That, then, was the place of delivery.

Plaintiff's measure of damages was the difference between the contract price and the market price of the bark at the place of delivery and at the time of the breach. Subdivision 3, § 1684t-67; *Southern Flour & Grain Co. v. McGeehan*, supra; *Pope Metals Co. v. Sadek*, 149 Wis. 394, 135 N. W. 851. No specified times of delivery are contained in the letters. It was contemplated that the major part of the bark could not be shipped till it could be hauled to the railroad on sleighs. Therefore, since no time was fixed for delivery, the time of refusal governs as to date of market price measuring damages. *Id.*

The evidence shows that the market price of bark at Olean, New York, at the time of the breach, was \$13.44 per cord of 2,240 pounds each. Plaintiff's measure of damages, therefore, was the difference between the contract price of \$12 per cord and the market price of \$13.44 per cord, or \$1.44 per cord. On 1,000 cords this amounts to \$1,440, for which sum, with interest thereon from July 24, 1915, at 6 per cent per annum, he is entitled to judgment. *Vogt v. Schienebeck*, 122 Wis. 491, 67 L.R.A. 756, 106 Am. St. Rep. 989, 100 N. W. 820, 2 Ann. Cas. 814; *Pope Metals Co. v. Sadek*, supra.

The judgment is modified by inserting, in lieu of the words, "one hundred forty-three and 97/100 dollars (\$143.97) with interest from the 1st day of September, 1915, which interest amounts to seventeen and 84/100 dollars (\$17.84), in all the sum of one hundred sixty-one and 81/100 dollars' (\$161.81)," the following, "fourteen hundred and forty dollars with interest thereon at 6 per cent from July 24, 1915, which interest amounts to \$218.40,

in all the sum of sixteen hundred and fifty-eight and 40/100 dollars," and by inserting in lieu of the words, "two hundred twenty-three and 61/100 dollars (\$223.61), at the end

of the judgment, the words "seventeen hundred twenty and 21/100 dollars (\$1,720.21)," and as so modified is affirmed, with costs to the plaintiff.

ANNOTATION.

Validity and construction of contract for sale of season's output.

- I. Introductory, 276.
- II. Validity, 276.
- III. Construction as regards duty of seller to operate plant and furnish amount estimated, 276.
- IV. Miscellaneous matters of construction, 277.

I. Introductory.

The validity and construction of a contract for the sale of the season's output is exhaustively discussed in the annotation in 1 A.L.R. 1392. The present annotation reviews the recent cases on the subject.

II. Validity.

(Supplementing annotation in 1 A.L.R. p. 1392.)

As stated in the original annotation, contracts for the sale of an entire season's output are not generally regarded as invalid on the ground of a want of mutuality. Thus, in *Ross-Vaughan Tobacco Co. v. Johnson* (1918) 182 Ky. 325, 206 S. W. 487, a contract for the sale of a present crop of tobacco at a specified price, which contained a statement that the tobacco was to be delivered "at the option of the purchasers," was held to be a mutual obligation and binding on both parties, it appearing that the phrase, "at the option of the purchasers," had reference to the exercise of an option as to the place of the delivery of the tobacco, and not as to the acceptance or rejection of the crop.

So, in *Warren v. Ray County Coal Co.* (1919) 200 Mo. App. 442, 207 S. W. 883, the court held that a contract whereby one party agreed that another should be its exclusive agent in the disposal of its entire output of coal for one year, at an agreed remuneration, was not void as unilateral because of the inequality of the respective undertakings of the parties, since mutual-

ity of obligation required only that one party should agree to do one thing and the other should agree to do some other thing.

And where a contract to sell the entire crop of figs grown during the current year requires the seller to cure the crop and to deliver it free from defective figs, and gives the purchaser the option to reject the defective figs, such option is not void for lack of mutuality, since it is a part of the entire contract, which is supported by mutual promises and a money consideration. *Rosenberg v. Rogers* (1902) — Cal. App. —, 186 Pac. 366.

III. Construction as regards duty of seller to operate plant and furnish amount estimated.

(Supplementing annotation in 1 A.L.R. p. 1393.)

In *Kenan, McKay & Spier v. Yorkville Cotton Oil Co.* (1919) — C. C. A. —, 260 Fed. 28, it appeared that the defendant who had previously agreed to sell to the plaintiff its "season's output of cotton linters for season 1915-1916, about 400 bales," on terms specified, was subsequently, and before the close of the season, compelled to close its mill because of its inability to borrow money for operating purposes. The court held that the closing of the mill was not a violation of the agreement for which the defendant was liable to respond in damages, saying: "It is well settled that such a contract as is here considered carries no guaranty that the estimated quantity will be delivered. The promise of the seller is not absolute. It is essentially a pledge of good faith; and so the courts have held."

An agreement to sell all of the syrup manufactured by the seller at its mill at a named place, during the

cane-grinding season of a certain year, estimated to be about a specified number of gallons, binds the seller to deliver only the syrup manufactured at such mill during such season, and not the amount of the estimate. *Arcola Sugar Mills Co. v. Farmer Hamlett's Co.* (1920) — *Tex. Civ. App.* —, 220 S. W. 385.

IV. Miscellaneous matters of construction.

(Supplementing annotation in 1 A.L.R. p. 1396.)

A breach by the vendee of a provision of a contract for the sale of a crop of beans, requiring him to purchase sufficient seed for the crop bargained for, was held to have been waived in *Lompoc Produce & Real Estate Co. v. Browne* (1919) — *Cal. App.* —, 183 Pac. 166, it appearing that the vendor had subsequently retained a payment made by the vendee, and thereafter kept the contract open for his own benefit without objection.

In that case it was also held that the refusal of the vendor to perform the contract, although premature to the time of delivery of the beans, gave the vendee an immediate right of action for the breach.

Where a vendor, who had agreed to deliver to the plaintiff all the tomatoes grown during the season on a certain plot of ground, refused to deliver them as required by the contract, the court held that the measure of damages was the difference between the contract price and the market price of tomatoes during the season, including expenses incidental to their purchase. *Liberty Brand Canning Co. v. Denby* (1918) — *Del.* —, 108 Atl. 142. And see *Lompoc Produce & Real Estate Co. v. Browne* (Cal.) *supra*, wherein it was held that the measure of damages for the breach of a contract to deliver a crop of beans was the market value of the beans at the time of the breach.

In *Gilbert v. Copeland* (1918) 22 Ga. App. 753, 97 S. E. 251, it appeared that, by the terms of a contract, one Bell, having been furnished with a stock of seed by one Gilbert, agreed to "raise for and deliver to D. H. Gilbert the increase therefrom," the seed to remain the property of Gilbert. It was

held that this was not an executory contract for the sale of the entire product of the culture, but was rather a contract for work and labor to be performed, so that a proceeding in trover against a person purchasing from the vendor was not subject to a general demurrer.

In *Ross-Vaughan Tobacco Co. v. Johnson* (1918) 182 Ky. 325, 206 S. W. 487, the court held that the phrase, "at the option of the purchasers," contained in a contract for the sale and delivery of a present crop of tobacco, had reference to the option of the vendee as to the place of delivery, and not as to the acceptance or rejection of the crop.

A provision of a contract whereby the plaintiff obligated himself to deliver his entire rice crop to the defendant, who had made advances to him, which provision authorized the pledgee to sell the crop in the open market, has been held not to authorize the latter to buy the crop itself. *Shexneider v. Simon Rice Mill. Co.* (1919) 145 La. 831, 83 So. 28.

In *Montague v. Lumpkins* (1919) 178 N. C. 270, 100 S. E. 417, a contract for the purchase of the seller's tobacco crop for \$1,000, not less than 3,000 pounds, one lot of tips, next to tips, and primings graded," this price to be payable "\$600 when tips is delivered, \$300 when the next load, and \$100 when the last is delivered, if there is 3,000 pounds," was construed as an agreement to pay \$1,000 if the crop weighed 3,000 pounds, but only \$900 if it weighed less.

In *Propst v. William Hanley Co.* (1919) — *Or.* —, 185 Pac. 766, it was held that a provision in a contract for the sale of an entire crop of hay which required that the buyer should stack it for measurement might be waived, either by a subsequent oral agreement to the effect that hay taken for immediate use need not be stacked, or by a failure to object to the buyer's action in taking such hay without stacking it for measurement.

In *Avgikos v. Lowry* (1919) — *Utah*, —, 179 Pac. 988, it appeared that a vendor who had contracted to sell the wool to be clipped from 750

ewes and 250 lambs, which wool he estimated would amount to 8,000 pounds, was unable to fulfil his contract because of the death of a large number of sheep during a spell of severe weather. The court held, however, that this was no legal justification for his failure to deliver the agreed amount of wool, saying: "There are certain authorities which hold that, where the contract provides for a sale of all the fruit harvested from a particular orchard, or all the wool from a particular flock, when it is shown that the vendor has in good faith delivered the fruit harvested from that particular orchard or the wool clipped from the particular flock mentioned, then there has been a substantial compliance with the contract, even though the amount falls far short of that estimated in the contract. In the case at bar no reference is made to any particular flock of sheep. Plaintiff undertook to sell so many pounds to be clipped from a definite number of sheep, and it is admitted in the pleadings and by all the testimony that he failed to do so."

A contract for the purchase of all the surplus hops of certain yards, being 40,000 pounds more or less, after the delivery of a lot of 22,000 pounds previously sold to the buyer, and 20,000 contracted to be sold to a third person, has been strictly construed as binding the buyer only to the purchase of the surplus hops from the described yards, so that the seller, on the failure of the surplus crop, could

not, by repurchasing hops from the third person, change the terms of the contract and make it include that which was specifically excluded. *Tacoma Sav. Bank & T. Co. v. Herren* (1918) 104 Wash. 437, 176 Pac. 543.

In the reported case (*ALLEN v. WOLF RIVER LUMBER Co.* ante, 271), the contract involved consisted of a statement that the seller would peel about 1,000 tons of bark during the season, accompanied by an offer to sell that amount, the offer being accepted by a letter stating that the buyers "confirm purchase of your bark." The court held that this was a sale of just 1,000 tons of the bark.

A contract for the purchase of all the bark that the vendor shall peel, or have for sale during a specified season, does not entitle the purchaser to all the bark owned by the vendor during such season, including bark not peeled by him, but purchased from others, and bark which he intended to keep for sale the next year. *Gardiner v. Gyorog* (1920) — Wash. —, 187 Pac. 318.

An agreement for the sale of the entire crop of figs grown during the current year, which the seller agrees to cure and to deliver free from defective figs, giving the purchaser the right to reject any portion of the lot not conforming to the terms of the contract, requires the seller to deliver the entire crop, including the defective figs. *Rosenberg v. Rogers* (1920) — Cal. App. —, 186 Pac. 366.

R. E. B.

TOM DORSETT et al., Plffs. in Err.,
v.

F. E. WATKINS.

Oklahoma Supreme Court — June 20, 1916.

(59 Okla. 198, 158 Pac. 608.)

Landlord and tenant — lien on crop for pasture rent.

1. Where the rent contract for the lease of 200 acres of land, embracing 135 acres of cultivated land and 65 acres of pasture, stipulates that the

Headnotes by GALBRAITH, C.

rent on the cultivated land shall be payable in certain parts of the crop produced, and the rent for the pasture shall be payable 50 cents per acre, held, that the lien for the rent due upon the pasture land extends to and may be enforced against the crops grown on the cultivated land.

[See note on this question beginning on page 300.]

Definition — farm.

2. A "farm," within the meaning of the statute giving the landlord a lien for rent, in standard and common acceptance, means a body of land under one ownership, devoted to agriculture, either to raising crops, or pasture, or both.

Landlord and tenant — lien for rent.

3. The lien given for rent by § 3806, Rev. Laws 1910, extends to all products produced thereon, and may be

enforced by attachment in a proper action against all or any part of such products.

[See 16 R. C. L. 993.]

— necessity of contract.

4. The lien given the landlord for rent by § 3806 is not dependent upon a written contract, but arises from the relationship of landlord and tenant, and is superior to a mortgage lien given on the crops by the tenant.

ERROR to the District Court for Jefferson County (Bailey, J.) to review a judgment in favor of plaintiff in an action brought to recover rent alleged to be due under a farm lease. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Messrs. Guy Green and Joseph T. Dillard, for plaintiffs in error:

Plaintiff had no landlord's lien on the crops raised on the farming lands for the amount alleged to be due, and his attachment should have been dissolved for the reason that it depended upon a supposed landlord's lien, which he did not have.

Eckhardt v. Taylor, 90 Kan. 698, 136 Pac. 218; Hoopes v. Brier, 9 Ariz. 154, 80 Pac. 327.

Mr. W. Y. Dilley, for defendant in error:

Plaintiff as landlord had a lien upon the crops raised upon the cultivated land for rent due on the pasture land.

2 Tiffany, Land. & T. p. 1917; Scroggins v. Foster, 76 Miss. 318, 24 So. 194; Thompson v. Mead, 67 Ill. 395; Robinson v. Lehman, 72 Ala. 401; Tootle, W. & M. Mercantile Co. v. Floyd, 28 Okla. 308, 114 Pac. 259.

The statutory lien for rent, given a landlord on crops grown on agricultural lands, is superior to a mortgage lien given by a tenant to a third party on such crops, and may be enforced by attachment without regard to the mortgage.

Crump v. Sadler, 41 Okla. 26, 136 Pac. 1102; Scully v. Porter, 57 Kan. 322, 46 Pac. 313.

Galbraith, C., filed the following opinion:

F. E. Watkins, as landlord, commenced this action in the court be-

low against Tom Dorsett, his tenant, to recover rent claimed under a farm lease, and caused an attachment order to issue, and certain crops grown upon the leased premises to be seized thereunder. The First National Bank of Ryan, claiming a part of the property, to wit, certain cotton, under a chattel mortgage executed to it by the tenant, intervened, contending that its mortgage lien was superior to the claim of the landlord's lien. A jury was waived, and there was a trial to the court upon an agreed statement of facts, and judgment rendered for the plaintiff against the tenant and intervener, from which an appeal has been duly prosecuted to this court.

It was agreed that F. E. Watkins entered into a lease contract with Tom Dorsett, by which the former let and leased to the latter the west 200 acres of the S. $\frac{1}{4}$ of section 15, township 6 S., range 7 W., in the county of Jefferson, state of Oklahoma, for the year commencing January 1, 1913, and ending December 31, 1913; that the tenant agreed to plant 50 acres or more of said land to cotton, and the balance of the cultivated land to wheat, oats, kaffir corn, maize, and peanuts, and

that the cultivated land embraced an area of 135 acres and the pasture land an area of 65 acres; that the tenant agreed to pay as rental for said premises one third of the oats, wheat, corn, and other feed crops, and one fourth of the cotton raised on the land, and also to pay 50 cents per acre for the pasture land. It is also agreed that the tenant has paid the rental on all of the cultivated land, and that this action is for \$32.50, the rent due upon the grazing land, and that the tenant had, within thirty days next preceding the filing of the action, commenced to remove the crops from the cultivated land, and had removed cotton to the amount of \$32.50; that the tenant was willing to sell the cotton so removed and pay the rent on the grazing land, but that the First National Bank of Ryan, the mortgagee of the cotton, would not permit this to be done, and that the amount of rent claimed was due and unpaid. It is also agreed that the rent contract between the landlord and the tenant was not placed of record, and that the chattel mortgage given by the tenant to the bank was properly recorded.

The defendant in error presents a motion to dismiss, upon the ground that the case made fails to show that the order extending the time for making and serving the case made was ever filed with the clerk and entered upon the journal. While this is true, the journal entry of the order extending the time is set out in the case made, and from this it affirmatively appears that the order was made in open court. This is sufficient evidence that the order was made. *Holmberg v. Will*, 49 Okla. 138, 152 Pac. 357. The motion to dismiss is therefore denied.

It is insisted by the plaintiff in error that the landlord had no lien for the rent due on the grazing land, on the cotton and other products grown on the cultivated land, and that therefore his attachment was improperly sued out, and that the mortgage lien of the bank on the

crop was superior to the claim of the landlord for rent. The statute (Rev. Laws 1910, § 3806), giving the landlord a lien for rent, reads as follows: "Any rent due for farming land shall be a lien on the crop growing or made on the premises. Such lien may be enforced by action and attachment therein, as hereinafter provided."

The sections following make provision for the method of enforcing the landlord's lien for rent.

The case of *Eckhardt v. Taylor*, 90 Kan. 698, 136 Pac. 218, relied upon by the plaintiff in error to sustain its contention that the landlord's lien for the rent due for the grazing land cannot be enforced against crops grown upon the cultivated land, does not support that contention. The claim sought to be enforced in that action was partly for rent and partly for damages arising under the rent contract, and the attachment issued on behalf of the landlord was levied upon a quantity of hay and upon some live stock. When the court found that the attachment permitted by the statute to the landlord to enforce a lien for rent had not been complied with, and that the ground for the attachment set out in the affidavit was that set out in the general statute authorizing attachments for the enforcement of claims for debt, the suggestion was made in the argument that crops grown on the premises only were subject to the landlord's attachment for rent, but the court did not hold in that case that, if the farm rented by the landlord to the tenant embraced cultivated land and grazing land, and the cultivated land includes cotton land, corn land, wheat land, oats land, millet and kaffir corn, that the landlord did not have a lien for his rent on the crops growing or made on the premises, or any part thereof, for the rent due on the grazing land. "Farming land," as used in the statute, does not mean simply cultivated land. In *Gafney v. Kenison*, 64 N. H. 354, 10 Atl. 706, the court held that a farm "includes the meadow

land." In *Com. v. Carmalt*, 2 Binn. 235-238, the court said: "Books have been cited to show the meaning of the word 'farm.' It does not appear that the English affix a meaning to that word different from our idea of it. But if they did, it would signify nothing. We must understand it as it is generally understood in Pennsylvania. By a farm we mean an indefinite quantity of land, some of which is cultivated. Most farms contain parcels of land applied to different purposes. Some are used for the cultivation of grass, some of grain, and some remain in wood. It is very common for the proprietors of farms to have a piece of woodland, not contiguous to the place of their residence, but appurtenant to it. I can see no reason why those different parcels of land should not be reckoned as one farm; nor has any authority been cited to the contrary."

In *Re Drake* (D. C.) 114 Fed. 229, at page 231, in discussing the meaning of the word "farming" as used in the Bankruptcy Act, the court said: "Nor will it profit to trace historically the meaning of the word 'farming.' In its purely agricultural sense, its use is comparatively modern. Within the purview of this statute it is understood to mean the business of cultivating land, or employing it for the purposes of husbandry; and a farm is a tract devoted to cultivation under a single control, whether it be large or small, isolated or made up of many parcels. For a long time after the words began to be used in an agricultural sense, they were applied to lands held on lease, and 'demise, lease, and to farm let' are still the operative words of a lease, but they are in modern use, applied without respect to nature of tenure. *Robinson Crusoe* says, 'I farmed upon my own land,' so it appears that the words have been used in their present sense for nearly 200 years."

In *Kendall v. Miller*, 47 How. Pr. 446, at page 448, the supreme court of New York said: "In more

modern times the word 'farm' has received a still more extended signification, and now denotes, in this country, both in a popular and legal sense, a considerable tract of land, devoted, in part at least, to cultivation, with suitable buildings, and under the supervision of a single occupant, regardless of the nature or extent of his tenure."

In *Williams v. Chicago & N. W. R. Co.* 228 Ill. 596, 81 N. E. 1135, the supreme court of Illinois said: "The word 'farm' has a well-defined meaning. The Standard Dictionary defines a farm as

<p>'a tract of land under one control, or forming a single property, devoted to agriculture, stock raising, dairy produce, or some allied industry.' Worcester's Dictionary defines it as 'a tract of ground cultivated or designed for cultivation by a farmer.' Webster's Dictionary defines it to be 'a piece of ground devoted by its owner to agriculture.' In <i>People ex rel. Rogers v. Caldwell</i>, 142 Ill. 434, this court, p. 441, 32 N. E. 693, defined a farm as 'both by the standards and in common acceptation . . . to be a body of land, usually under one ownership, devoted to agriculture, either to the raising of crops, or pasture, or both.'</p>	<p>Definition— farm.</p>
---	-------------------------------------

Under these authorities it seems clear that the grazing land included in the lease involved in this case was a part of the farm leased by the landlord to the tenant. It was included in the contract of lease and was occupied by the tenant. It was contiguous to and appurtenant to cultivated land, and was a part of the farm.

In *Collier v. Gannon*, 40 Okla. 275, 137 Pac. 1179, the court, after quoting the sections of the statute in regard to the landlord's lien for rent, says: "These sections being construed together, it is obvious that the remedy is cumulative; that the landlord may elect to take his share of the crop, or, if the tenant disposes of the landlord's share, then he may elect to enforce his lien by attachment, for in § 3809 it is provided

that, whether the rent 'be payable in money or other things,' an attachment may issue. The contention that an attachment will not lie to enforce the landlord's lien where the rent is payable in kind or a certain portion of the crop is without merit."

The supreme court of Kansas in *Knowles v. Sell*, 41 Kan. 171, at page 173, 21 Pac. 102, says: "Section 24, of chapter 55, provides that the landlord shall have a lien upon the crops growing or made upon the premises, and such lien may be enforced by action and attachment therein. Under this statute his lien extends to the entire crop that may have been grown, not simply to any part of it."

The supreme court of Arkansas says: "The landlord's lien extended to the whole crop. The specific rents in several kinds of produce were agreed modes of satisfaction. If not paid, the landlord's lien for their value remained, overflowing all the crops of every kind." *Lemay v. Johnson*, 35 Ark. 225, at page 231.

To hold, as contended by the plaintiff in error, that the landlord's lien for rent due for the pasture land can only be enforced against the products grown on that land, or that the rent due on the land cultivated to wheat or to cotton can only be collected from wheat or cotton produced on such land, would be too narrow a construction of the terms used by the statute giving the landlord's lien, and would not be in keeping with either the popular or the legal sense of the terms used therein. Pasture lands are just as essential to the farm as cultivated lands, and are equally as profitable to its successful operation. The horses used in cultivating the crops, and the cows that supply the table with necessary food, cannot be properly cared for without the pasture land.

From the agreed statement of facts it appears that there was but one contract made between the land-

lord and the tenant, and under this contract the farm of 200 acres was leased, and the rental agreed upon. Inasmuch as the statute giving the lien to the landlord for the rent extends to all of the crops grown upon the leased premises, we conclude that the trial court was right in holding that the landlord's lien for the rent on the grazing land extended to and may be enforced against the crops grown upon the cultivated land embraced in the farm. The fact that the rent contract between the landlord and the tenant was not recorded cannot affect the landlord's lien. The lien did not arise by virtue of the contract between the landlord and the tenant, but by virtue of the statute and the relationship, and no written contract of lease was necessary to the existence of or to enforcement of the landlord's lien. Therefore, the fact that the contract was not recorded does not affect the lien. *Turner v. Wilcox*, 32 Okla. 56, 40 L.R.A. (N.S.) 498, 121 Pac. 658; *Earl v. Tyler*, 36 Okla. 179, 128 Pac. 269.

The landlord's lien for the rent was superior to the chattel mortgage lien under which the bank claimed the attached property (*Crump v. Sadler*, 41 Okla. 26, 136 Pac. 1102); the mortgage having been given after the relationship of landlord and tenant existed.

Finding no error in the record, we conclude that the judgment appealed from should be affirmed.

Per Curiam:

Adopted in whole.

NOTE.

The general question of the meaning of the term "crops," as used in statutes creating landlords' liens for rent, which is considered in the reported case (*DORSETT v. WATKINS*, ante, 278) is discussed in III. b, of the annotation, post, 300, which treats the question of "Subject-matter covered by landlord's statutory lien for rent."

F. E. SNYDER, Appt.,
v.

W. C. COLLINS et al.

Iowa Supreme Court — October 20, 1917.

(184 Iowa, 122, 164 N. W. 624.)

Landlord and tenant — lien for rent on property of one lessee.

1. Property of either of two lessees brought upon the leased premises during the term is subject to the landlord's lien, under a statute giving a lien for rent upon all property of the tenant kept or used on the premises during the term.

[See note on this question beginning on page 300.]

— priority of lien over conditional vendor.

2. The interest of the vendor in property obtained by a tenant under conditional sale contract, and brought by him on leased premises after the

beginning of the term, is not within the operation of a statute giving a landlord lien for rent on all property of the tenant kept or used on the premises during the term.

APPEAL by plaintiff from a judgment of the District Court for Benton County (Willett, J.) in favor of defendants in an action brought to enforce a landlord's lien for rent of certain property. *Affirmed.*

Statement by Weaver, J.:

Action at law to enforce landlord's lien for rent. The priority of this lien upon certain personal property was contested by the defendant J. J. Snyder Company. On trial to the court it was found and adjudged that plaintiff's lien for rent was inferior and subject to the claim of said J. J. Snyder Company, and plaintiff appeals.

Mr. C. W. E. Snyder, for appellant:

An instrument in the form of a lease is a conditional sale.

35 Cyc. 656; Handlan-Buck Mfg. Co. v. Waterloo Drop Forge Co. 173 Iowa, 452, 155 N. W. 802; Crary v. Beatty, — Iowa, —, 156 N. W. 745; Singer Sewing Mach. Co. v. Holcomb, 40 Iowa, 33.

A landlord claiming under a lien for rent is a creditor within the protection of the statutes.

Crary v. Beatty, — Iowa, —, 156 N. W. 745; National Cash Register Co. v. Broeksmit, 103 Iowa, 271, 72 N. W. 526.

A conditional sale becomes void, and the property becomes the absolute property of the vendee as to subsequent purchasers or creditors, where no notice, actual or constructive, is given of the conditional sale.

National Cash Register Co. v. Maloney, 95 Iowa, 573, 64 N. W. 618; Pash v. Weston, 52 Iowa, 677, 3 N. W. 713; Moline Plow Co. v. Braden, 71 Iowa, 142, 32 N. W. 247; Wright v. Barnard Bros. 89 Iowa, 166, 56 N. W. 424; National Cash Register Co. v. Broeksmit, 103 Iowa, 271, 72 N. W. 526; Vorse v. Loomis, 86 Iowa, 523, 53 N. W. 314; Myer v. Western Car Co. 102 U. S. 10, 26 L. ed. 60.

Mr. W. C. Scrimgeour, for appellees:

The common-law rule which allowed the landlord to distrain for rent property belonging to a stranger, if he suffered the property to be used by the tenant upon the leased premises during the term of the lease, is abrogated.

Jarchow v. Pickens, 51 Iowa, 381, 1 N. W. 598.

The remedy by landlord's attachment is purely statutory, and will be strictly construed.

Merrit v. Fisher, 19 Iowa, 354.

There can be no lien for rent on property of third persons.

Perry v. Waggoner, 68 Iowa, 403, 27 N. W. 292; Ward v. Walker, 111 Iowa, 611, 82 N. W. 1028; Wells, P. & Co. v. Sequin, 14 Iowa, 143.

The landlord is not a creditor.

National Cash Register Co. v. Maloney, 95 Iowa, 573, 64 N. W. 618; Merrit v. Fisher, 19 Iowa, 354; Clark v. Haynes, 57 Iowa, 96, 10 N. W. 292.

Weaver, J., delivered the opinion of the court:

The cause was tried and the appeal has been submitted upon an agreed statement of facts, the reading of which sufficiently reveals the nature of the issue and the questions of law presented. The terms of the lease are not in dispute, and we do not set them out except as certain clauses therein become material to an understanding of the stipulation on which the case was determined. We quote, so far as material, the mutual concessions and admissions of the parties from the printed record:

In behalf of the plaintiff.

Mr. Snyder. It is agreed by the plaintiff and the defendant J. J. Snyder Company, Incorporated, that W. C. Collins and A. D. Collins entered into a certain lease with F. E. Snyder, of a certain business property in Belle Plaine, Iowa, on the 20th day of September, 1913, . . . at the monthly rental, in advance, of \$50 per month, for a five-year period from January 1, 1914.

That under said lease said Collinses entered into possession of the said premises on January 1, 1914, and opened a lunch room and restaurant, and a billiard and pool room; that they purchased certain merchandise from the J. J. Snyder Company, Incorporated, and other persons, and placed same in said building, and used the same as a part of their equipment in the conducting of the businesses above named.

That the said Collinses became delinquent in the rent of said building on April 1, 1914, being rent for the month of April, 1914, and never paid any rent thereafter.

That judgment was obtained in this court against said Collinses at the September, 1914, term, in the sum of \$275 and costs, and that the landlord's attachment, which had been levied on all of the merchandise found in said building on April 1, 1914, was confirmed as to all property except that claimed by the J.

J. Snyder Company, Incorporated, and which is fully described in the original contract between the J. J. Snyder Company and W. C. Collins, marked exhibit 1.

That all of the property contained in said building was sold at execution sale by the sheriff of Benton county, Iowa, except that claimed by J. J. Snyder Company, and the net proceeds of said sale were insufficient to pay off the face of said judgment and a part of the costs, leaving the unpaid part at issue.

That the plaintiff had no actual or constructive notice of any claim by the defendant J. J. Snyder Company against any of said property until the filing of the exhibit 1 on the 4th day of April, 1914, at 8 o'clock and 30 minutes A. M., which was recorded in book 18, on page 6, of the records of the recorder's office of Benton county, Iowa, which recording was done by the defendant J. J. Snyder Company. . . .

That there are no exemptions claimed under the statutes of Iowa as against any of this property, the same having been used for business purposes only, and not any household or family uses.

That the property in controversy between the plaintiff and the J. J. Snyder Company, as specifically described in exhibit 1, was brought into the building leased by said Collins on or about January 1, 1914, and remained therein until possession thereof was taken by the sheriff of Benton county, Iowa, under a landlord's attachment issued in this case, and still remains in his possession, and the same was used by the defendants Collinses in the conducting of their said business in said building from January 1, 1914, until about the 31st day of March, 1914, when they absconded, leaving said property in the building leased.

That said property remained in said building until taken under the landlord's attachment, and that said building was untenanted except by said Collinses' merchandise, as above described, until about September 15, 1914, when the building was

leased to other parties, and the claim of the plaintiff for rent ceased under said lease.

Plaintiff offers and reads in evidence exhibit A.

Plaintiff rests.

In behalf of defendant J. J. Snyder Company.

Mr. Scrimgeour. It is agreed on behalf of the defendant J. J. Snyder Company as follows:

That it entered into a certain written agreement with W. C. Collins, which is identified as exhibit 1 herein, and herewith offered and made a part hereof, including the filing record of the recorder of Benton county, Iowa, Joe S. Pyne.

That the property described in said exhibit 1 was delivered to the said Collins under the terms of said contract, and by Collins said property was taken to the premises owned by plaintiff and described in said lease, on or about the 1st day of January, 1914; that on or about the 4th day of April, 1914, the defendant J. J. Snyder Company demanded the possession of the property described in said exhibit 1 from the landlord, to which demand the landlord refused to accede, which demand was made of the landlord by the defendant J. J. Snyder Company under and by virtue of his rights under said exhibit 1.

It is further agreed that all of the right, title, and interest that W. C. Collins has in the property described in exhibit 1 arose under and by virtue of the terms of said exhibit 1, and that there is remaining unpaid under said contract, exhibit 1, the sum of \$215, and interest at 6 per cent from April 7, 1914.

Defendant J. J. Snyder rests.

The contract, exhibit 1, referred to, under which it is agreed that the J. J. Snyder Company furnished the property in dispute to W. C. Collins, is as follows, omitting only formal parts not affecting the issues in this case:

The J. J. Snyder Company (Inc.)
Des Moines, Iowa.

Gentlemen:—Please ship to the un-

dersigned at Belle Plaine, Iowa, the following described goods: [Here follows a detailed statement and description of the property.]

Eight hundred & sixty-five & no-100 dollars (\$865). In consideration of the above, the undersigned agrees to pay you in lawful money of the United States, being price of goods f. o. b., on the following terms: \$300 cash with order; \$300 cash on arrival of goods; \$265 in 10 monthly payments of \$25 each, and 1 of \$15, the amounts and times of payment of such payments to be evidenced by promissory note in amount of \$265.

Upon refusal of undersigned to accept said goods when tendered, or to make any cash payment above provided for, or to execute and deliver the note above provided for when presented for execution, it is agreed that the purchase price of said goods, less the actual cash payment thereon, shall at once become due and payable. Upon default of payment of any payments as provided by said note, it is agreed that all unpaid payments shall at once become due and payable. Upon failure of undersigned to make any payment provided for herein at the time same is due and payable, you, or any person by your order, may take possession of and remove said goods with or without legal process, and in any such case it is agreed that all payments heretofore made to you hereunder shall be considered as having been made for use of goods while in the possession of undersigned, and such payment shall be retained by you as rental. It is agreed that title to said goods shall not pass to undersigned until the price thereof or any judgment for all or part of the same is paid in full, and that until such payment said goods shall remain your property.

W. C. Collins.

Accepted October 21st, 1913.

The J. J. Snyder Co. (Inc.), by
J. J. Snyder.

Mailing address, Charles City.

As will readily be seen from the

foregoing stipulation, the first and decisive question presented is whether the landlord's lien for rent takes precedence over the claim of J. J. Snyder Company under its contract of conditional sale to the tenants.

At the outset of this discussion we will consider the proposition advanced by the appellee that the case presented by the stipulation comes within the rule of *Ward v. Walker*, 111 Iowa, 611, 82 N. W. 1028, holding that, where the tenant is a partnership or firm, the statute (Code, § 2992) giving the landlord a lien for his rent upon all personal property of the tenant kept or used on the premises during the lease has no application to the property of an individual partner. The conceded facts, however, would seem to demonstrate that the case before us is not one of that character. It is true that counsel for plaintiff does at times speak of "the firm, Collins & Son," as the lessee; yet the agreed statement is that W. C. Collins and A. D. Collins were the lessees from the plaintiff. Turning also to the lease itself, we there find it recited that the lease is made to "W. C. Collins and A. D. Collins," both of whom execute it in their individual names, no mention being found anywhere in the contract to the effect that the lessees constituted a partnership; while the order or contract upon which the goods in controversy were procured from defendant Snyder Company was made by the defendant W. C. Collins alone. These admitted facts so differentiate the case from *Ward v. Walker* that it does not afford a ruling precedent upon which the issue here presented may be determined. Where there are two or more lessees, it cannot be doubted that the individual property of either kept and used on the leased premises is subject to the lien for rent.

Landlord and tenant—lien for rent on property of one lessee.

On the other hand, it is not fully in line with *Crary v. Beatty*,—Iowa, —, 156 N. W. 745, which is the ap-

pellant's chief reliance. Indeed, the question now pressed upon our attention was not there considered or decided. In that case the intervener rested her claim for a reversal of the judgment appealed from upon three propositions only: (1) That the contract which she sought to enforce was a lease, and not a conditional sale; (2) that the landlord's lien had been waived by taking additional security; (3) that there was no competent evidence of the amount of rent due. Each of these contentions being overruled, an affirmance of the judgment followed of necessity. In *Handlan v. Waterloo Drop Forge Co.* 173 Iowa, 452, 155 N. W. 802, also cited, the party to whom the conditional sale had been made had conveyed or transferred the property to a trustee to secure certain of the company's creditors, and we held that by such a sale or transfer to him without notice the trustee took the title unaffected by the condition. So also is the present case to be distinguished from *National Cash Register Co. v. Broeksmit*, 103 Iowa, 271, 72 N. W. 526. There the question brought to this court was not between the landlord and tenant, but between an attaching creditor and the vendor, who had sold the register to the tenant under a conditional agreement. Though the instant case is not without doubtful features, we conclude that it comes more properly under the rule applied by us in *Amundson v. Standard Printing & Mfg. Co.* 140 Iowa, 464, 118 N. W. 789; *Ancient Order of United Workmen v. Martin*, 172 Iowa, 702, 154 N. W. 913; *Davis Gasoline Engine Works Co. v. McHugh*, 115 Iowa, 415, 88 N. W. 948; *Arnold v. Hewitt*, 128 Iowa, 671, 104 N. W. 843. It will be remembered that the conditional sale by the intervener to Collins was made after the lease to Collins was executed, and some time before the latter took possession. It is clear, therefore, that no credit was extended to Collins on the strength of his possession or apparent ownership of the property, nor that the

landlord, on the strength of such appearance, was thereafter led into any change of position to his loss or damage. The lien which he seeks here to enforce is one specially provided by statute (Code, § 2992), and to be entitled thereto he must bring himself clearly within the statutory terms. *Merrit v. Fisher*, 19 Iowa, 354. The lien thus created is upon the crops grown upon the premises, and other personal property of the tenant used or kept thereon during his term. If the tenant has or uses on the premises personalty which is not his property, no lien attaches to it under the statute. On this ground it seems to be settled that if a tenant, while in possession, purchases any item of personal property for use on the leased premises, and as part of the same transaction gives to the seller a chattel mortgage to secure the payment of the purchase money, the landlord's lien will not be given priority over the mortgage. See the cases last above cited. The principle upon which these cases are to be sustained, though not always specifically mentioned, would appear to be that, as the statute confines the lien to the personal property of the tenant, the title to such property must have passed to him before the lien will attach, and as the transfer of title and the giving back of the mortgage become effective at the same instant, the mortgage is superior to the landlord's lien. Now a sale with condition that the title shall remain in the seller until the purchase price is paid is good, as between the parties, against all persons except those indicated by the provisions of Code, § 2905. When, therefore, a tenant already in possession receives property under a conditional agreement of that kind, the only property he has therein as between himself and the vendor is the right to acquire the title by performing the condition. That property right may be subject to the landlord's lien, but the lien so attaching is subject to the vendor's assertion of title. The statute (Code,

§ 2905) which makes a contract of conditional sale void or voidable against a creditor, or purchaser from one in actual possession under a conditional contract of that character, except where the agreement is in writing and duly recorded, has no application in such cases. The lien which the statute gives to the landlord upon property acquired by the tenant after he enters upon his term is not materially unlike the lien of a mortgage which provides that it shall cover after-acquired property of the mortgagor, and it is settled that such lien is subject to any condition affecting the title to the property in the mortgagor's hands. *Fosdick v. Schall*, 99 U. S. 235, 25 L. ed. 339; *Myer v. Western Car Co.* 102 U. S. 1, 26 L. ed. 59. It must be noted that this statement of the law is limited to cases where the property is purchased and brought upon the leased premises after the relation of landlord and tenant has been created; for if the tenant, when the lease is executed, is already in exercise of apparent ownership of the property, and the conditional sale is not in writing and recorded, the landlord in such case is a subsequent creditor, who, if without notice, may treat the condition as void. In cases where a chattel mortgage is given to secure the payment of the purchase price of property brought upon the premises during the tenant's term, it is true the tenant becomes owner of the title; but the passing of the title to him, and its encumbrance by mortgage to the vendor for the price, constitute but a single transaction, and while the landlord's lien attaches, it is subject to the mortgage. In other words, the law recognizes no interim between the transfer of title to the purchaser and the lien of the mortgage given in return, which will permit the landlord's lien to be interposed between them. These things are fairly illustrated in *Amundson v. Standard Printing & Mfg. Co.* 140 Iowa,

464, 118 N. W. 789, where there was both an agreement to give a mortgage and to suspend the passing of title until the contract of purchase had been carried out. In the cited case there was considerable delay after the property was taken upon the leased premises, before the transaction was closed, and it was held that the agreement that the title should not pass was sufficient to prevent the acquirement of any priority for the landlord's lien.

The judgment of the District Court deprives the plaintiff of no right he had under the statute, and it is affirmed.

Gaynor, Ch. J., and Preston and Stevens, JJ., concur.

Petition for rehearing denied.

NOTE.

The decision in the reported case (SNYDER v. COLLINS, ante, 283), to the effect that a landlord has no statutory lien upon the vendor's interest in property brought on the demised premises after the lease was executed, provided such property is merely held by the tenant under a conditional sale contract, is in accordance with the rule that the property of a third person is not subject to a landlord's lien for rent although it is upon the demised premises, which rule is indicative of one of the most important changes from the common law made by many of the statutes creating landlord's liens. This particular question is treated in IX. e, of the annotation beginning p. 300, post, on the general subject of "Subject-matter covered by landlord's statutory lien for rent."

S. H. COCHRAN, Appt.,

v.

JOSEPH CANTY.

Iowa Supreme Court—June 29, 1916.

(176 Iowa, 713, 158 N. W. 559.)

Landlord and tenant — lien for rent — when attaches.

1. Under a statute giving a landlord a lien for rent on all property of the tenant which has been used or kept on the premises during the term, the lien attaches immediately when the property comes upon the premises, as security for the entire rent agreed to be paid.

[See note on this question beginning on page 300.]

— lien for renewal term.

2. Property of the tenant on leased premises during one term is not subject to the landlord's lien for rent for a succeeding term under a new lease until such term begins, under a statute giving a lien for rent on property of the tenant used or kept on the premises during the term, and therefore, before the beginning of the new term, it may be sold free from any claim of the landlord for the rent of the new term.

Evidence—oral to prove promise to pay another's debt.

3. A promise by one purchasing goods from a tenant, upon which the landlord claims a lien for rent, that

he will pay the rent if the landlord will not attach the goods, cannot be proved by parol under a statute prohibiting such evidence of a contract wherein one person promises to answer for the debt, default, or miscarriage of another.

Contract—to pay another's debt—consideration.

4. A promise by one purchasing goods from a tenant, to pay the rent due the landlord in case the latter will not attach the property bought, is without consideration if the landlord had no lien on the goods at the time they were bought.

[See 25 R. C. L. 494, 495.]

APPEAL by plaintiff from a judgment of the District Court for Harrison County (Rockafellow, J.) in favor of defendant in an action brought to recover for the conversion of a stock of drugs and fixtures on which plaintiff claimed a landlord's lien for an unpaid balance of rent. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Cochran & Barrett, for appellant:

There was no time between the making and commencing of the new lease when a purchaser could legally buy and convert the property so kept and used on the premises, and thereby prevent the lien from attaching, especially where he had knowledge of the lease.

Rollins v. Proctor, 56 Iowa, 329, 9 N. W. 235.

The lien attaches as soon as the property is brought onto the premises. In the case at bar, it was there all the time.

Garner v. Cutting, 32 Iowa, 547; Grant v. Whitwell, 9 Iowa, 152; Carpenter v. Gillespie, 10 Iowa, 592; Martin v. Stearns, 52 Iowa, 345, 3 N. W. 92; Gilbert v. Greenbaum, 56 Iowa, 211, 9 N. W. 182.

The relation of landlord and tenant must first be created by contract before a statutory lien can exist, and the lien therefore relates to the date of the contract.

Phillips v. Maxwell, 1 Baxt. 31.

The sale was in bulk and was an unlawful sale. It was made to the defendant when he had full knowledge of the lease and lien, and he at once became liable in damages as a converter.

Foster v. Reid, 78 Iowa, 205, 16 Am. St. Rep. 437, 42 N. W. 647.

Defendant's subsequent promises to pay the plaintiff if his goods were not attached is a legal promise, not within the Statute of Frauds.

Clinton Nat. Bank v. Studemann, 74 Iowa, 104, 37 N. W. 112.

Mr. J. A. Murray, for appellee:

The "term" of a lease is the time during which the lease runs, or is to run, and not the time elapsing between the making of the lease and its termination.

Taylor v. Terry, 71 Cal. 46, 11 Pac. 813.

The lien does not attach to any property until the commencement of the lease.

Garner v. Cutting, 32 Iowa, 547; Martin v. Stearns, 52 Iowa, 345, 3 N. W. 92; Gilbert v. Greenbaum, 56 Iowa, 211, 9 N. W. 182.

9 A.L.R.—19.

Defendant was not a subtenant under the new lease.

Foster v. Reid, 78 Iowa, 205, 16 Am. St. Rep. 437, 42 N. W. 649.

The agreement set up in plaintiff's amendment is unenforceable under the Statute of Frauds.

Frohardt Bros. v. Duff, 156 Iowa, 144, 40 L.R.A.(N.S.) 242, 135 N. W. 609, Ann. Cas. 1915B, 254.

Gaynor, J., delivered the opinion of the court:

This action was originally brought to recover as for a wrongful conversion by the defendant of certain property, on which plaintiff claims to have a landlord's lien for rent. It appears that one J. H. Roberts was in the possession of certain premises, owned by the plaintiff, under a lease which terminated on the 15th day of October, 1912; that he had in his possession on said premises certain property amounting in value to about \$1,000, and this was subject to plaintiff's lien for rent under the lease ending October 15, 1912. On the 29th day of August, 1912, and before this lease terminated, and while Roberts was still in possession under the former lease, he and the plaintiff entered into an oral contract, by the terms of which the plaintiff leased to said Roberts the same premises, then occupied by him, for another year. By the terms of this oral agreement, the new lease was to commence on the 15th day of October, 1912, and terminate on the 15th day of October, 1913. The rental agreed upon was \$240, payable in monthly instalments of \$20 per month. Nothing further was then done between Roberts and the plaintiff touching the possession of the property, and Roberts continued, under his old lease, to occupy the building, and to conduct the business in which he was engaged, to wit, the drug business, in said building, until about the 7th or 20th of Septem-

ber (the evidence is in conflict on this), when Roberts sold his entire stock in said building to this defendant, and on the 12th day of October, 1912, the defendant moved the entire stock from the building, and the building, thereupon and thereafter, became vacant and unoccupied. Defendant knew of the making of this new lease at the time he purchased and removed the property from the building. Neither Roberts, nor the defendant, nor the goods were ever in the building during the term of the new lease. The action is brought against defendant Canty, to recover the amount of the rental accruing under this new lease, for the entire year. The action is brought on the theory that plaintiff had a lien upon the goods so purchased by the defendant, at the time they were purchased, for the entire rental to accrue under this new lease, and that the purchase and removal of the property by the defendant amounted to a conversion of property upon which plaintiff had a landlord's lien. We will not attempt to be accurate as to the amounts in figures, since this question must be settled upon the law of the case, whatever the amount may be. Our statute (Code 1897, § 2992) provides: "A landlord shall have a lien for his rent upon all crops grown upon the leased premises, and upon any other personal property of the tenant which has been used or kept thereon *during the term.*"

There is nothing in the record to indicate what the old lease was, whether oral or in writing, or for what term it had run, at the time this new lease was made on August 29, 1912; but it does appear that the old lease did not expire until the 15th day of October, 1912, and it does appear that the property in controversy was on the premises on the 29th day of August, 1912, and continued to be upon the premises until the 12th day of October, 1912. If, upon the making of the new lease on August 29th, to commence on the 15th day of October, 1912, the plaintiff acquired a lien upon the prop-

erty then on the premises, for the rental to accrue under the new lease, then the taking of this property by the defendant, and the converting of it to his own use, without satisfying the lien, left the defendant liable to plaintiff to the extent of plaintiff's lien upon the property so converted. But if the plaintiff did not acquire any lien by the making of the contract on the 29th day of August, for rent to accrue under the new lease, until the commencement of the term of the new lease, then the plaintiff had no lien upon the property at the time it was purchased by the defendant, and, having had no lien at the time, he is not in a position now to complain of the action of the defendant in purchasing and removing the property. All the rent under the prior lease was paid to October 15, 1912.

The determination of this case depends upon the construction to be given to the statute. It is true that it has been held by this court that a lien attaches to all property brought or used upon the premises during the term of the lease, immediately, and as security for the entire rent agreed to be paid. See *Martin v. Stearns*, 52 Iowa, 345, 3 N. W. 92; *Gilbert v. Greenbaum*, 56 Iowa, 211, 9 N. W. 182. There is no evidence that the making of the new lease was intended, or considered, as an extension of the old lease. It was a new and independent contract, entered into between the plaintiff and Roberts. The term under the new lease was to commence on the 15th day of October, 1912, and end on the 15th day of October, 1913, at a stipulated rental. Before the term provided for in this new lease commenced, Roberts sold the property to defendant, and the defendant, before the commencement of the term, removed the property from the premises. It was not on the premises at the time the term under the new lease commenced. The statute provides: "A lien for rent upon personal property used or kept on

Landlord and tenant—Lien for rent—when attaches.

the premises *during the term*." The lien is purely statutory; attaches because of the statute. Unless, therefore, a lien under the new lease attached to the goods on the premises before the 15th day of October, 1912,—that is, before the commencement of the term provided for in the new lease,—the plaintiff has no standing in this court upon this issue. This depends upon the construction to be given to the words, "during the term." This means, of course, during the term provided for in the lease. The word "term" as used in this statute, we think, has a definite legal meaning, and signifies the time covered by, or the duration of the estate created by, the lease. It also signifies, of course, the estate granted, and the interest that passes by it. See *Hurd v. Whitsett*, 4 Colo. 77-84; *Baldwin v. Thibadeau*, 28 Abb. N. C. 14, 17 N. Y. Supp. 532. In *Taylor v. Terry*, 71 Cal. 46, 11 Pac. 813, quoting from *Young v. Dake*, 5 N. Y. 463, 55 Am. Dec. 356, it is said: "The time between the making of the lease and its commencement in possession is no part of the term granted by it. The term is that period which is granted for the lessee or tenant to occupy and have possession of the premises. It is the estate or interest which he has in the land itself, by virtue of the lease, from the time it vests in possession."

We hold, therefore, that the *term* of the lease made on August 29, 1912, did not commence until the 15th day of October, 1912; that the property in question was never upon

the premises, kept, or used there, *during the term of this new lease*. It never, therefore, became subject to any lien under this lease. The defendant having no lien upon the property at the time it was sold by Roberts to the defendant, September 20, 1912, there was no conversion of any property on which plaintiff had a lien, at the time the property was removed by defendant, October 12th. In *Taylor* on

Landlord and Tenant, vol. 1, 9th ed. p. 13, § 15, we find the following: "The estate of a lessee for years is called a term, terminus, because its duration is limited and determined. It is perfected only by the entry of the lessee; for, before the time fixed for entry, the whole estate remains in the lessor, and the lessee has strictly no estate in the land, but merely a right thereto which is called an *inter esse termini*."

In *Wood on Landlord and Tenant*, vol. 1, 2d ed. § 60, the author says: "Every estate which must expire at a fixed period, by whatever words created, is an estate for years, and therefore commonly called a term."

At § 63 it is said: "The lease gives no possession; it only gives a right of possession; therefore, until entry is made by the lessee [under the lease], no possession is vested in him by his lease, and therefore he cannot bring an action of trespass before entry. A man makes a lease to J. S. to commence at the feast of St. Michael; lessee may grant, but he cannot have an action of trespass before entry."

As held in *Lee v. Cochran*, 157 Ala. 311, 47 So. 581: "Where a lease provided that it was for a term of five years, 1905 to 1909, inclusive, and gave the lessee an option to purchase at any time during his 'term' by paying \$1,280, the 'term' within which the option could be exercised was the period of five years between 1905 and 1909, inclusive."

On this branch of the case, we think the plaintiff must fail.

After the evidence was in, the plaintiff filed an amendment to his petition, as he says, to conform the pleadings to the proof. In this amendment, he alleged that he was absent from the city of Logan, where the property in question was situated, at the time the sale was made to the defendant; that, upon returning and learning that the sale had been made, he informed the defendant that he had a lien upon the property, so purchased by the defendant, for rent accruing from and

after October 15, 1912; that about the 1st of December, he told the defendant that he would sue Roberts and attach for rent the stock of goods purchased by the defendant, unless the rent was paid; that defendant said to plaintiff orally that, if he would not attach his goods or sue, he would pay the rent himself, if he could not get Roberts to do so; that in reliance upon this promise plaintiff did not attach the goods for the instalment of rent due; that later, when the instalment of rent fell due, and about the 1st of January, 1913, he again told the defendant that the rent was in arrears, and that he would have to sue and attach the defendant's goods (meaning the goods purchased by the defendant), unless he paid the rent, and the defendant then orally agreed that, if he would not sue and attach the goods, he would pay the rent, but he wanted time to see Roberts and see if he could not get the money from Roberts; that the plaintiff desisted from suing and attaching for the instalment then due, relying upon this oral promise; that later on, and about the time the lease expired, he again told the defendant that he would bring an action and attach the property if the rent was not all paid; that the defendant again orally agreed that if he would not sue and attach, and would give him a little time to see Roberts, he would get him (Roberts) to furnish the money, and if Roberts did not furnish the money, defendant would pay all the rent; that, in reliance upon this promise, plaintiff delayed bringing the action and attaching the goods until about ten days before this suit was brought, at which time defendant informed the plaintiff that he was afraid, if he paid the rent, he could not get it back from Roberts, and thereupon refused to perform his oral contract. To this defendant filed a general denial, setting up an estoppel under the Statute of Frauds. The testimony on this branch of the case is brief, and is not in conflict. Plain-

tiff testifies: "Soon after my return from the springs, I learned from some source that Mr. Canty had bought this stock. I called him to my office, and asked him if it were true that he had bought the stock, and he said he had. I said: 'I suppose you know I have a landlord's lien on that stock for the value or amount of my rent for the year, and of course I will hold you as a conversioneer of the stock, unless my rent is paid according to the lease.' He replied that he did not apprehend any danger about the rent being paid; that he thought Mr. Roberts would pay the rent, and, if he did not, he would. I told him I would keep him posted from time to time, and if Roberts got in arrears on the rent, I would let him know. I subsequently conversed with the defendant, and said: 'Joe, I have given you notice from time to time about Roberts being in arrears on the rent. Now the lease is ended, and I hold you responsible for my rent, and I will have to sue you for conversion of the stock unless you pay.' Defendant answered: 'All right, Mr. Cochran; don't bring any suit until I find out.' He told me afterwards that he supposed he would have to let it go ahead, as Mr. Roberts insisted on defending the case through him; that he would have to have it adjudicated in that way. I then proceeded with the case. I gave him two or three written notices of the fact that Roberts was not paying the rent, and I would hold him responsible for converting the goods." M. L. Barrett, witness for the plaintiff, testified: "I heard a conversation between Mr. Roberts and Mr. Cochran in December, 1912, about the rental. Mr. Roberts told Mr. Cochran he had a tenant who would take the building. Mr. Cochran told him that he would not consent to let him sublet the building, but said: 'If you can rent the building to some person for drug-store purposes, or something that will not conflict with the drug-store fixtures, I will consent that you sublet it, but

I will hold you personally for the rent during the term.' Mr. Cochran told him that he would not release his landlord's lien, and that he would still hold him (Roberts) responsible on his contract, and expect him to pay."

One Rogers testified: "Roberts was running the store, and was in possession of it September 23, 1912. Mr. Roberts told Mr. Canty before the goods were purchased that he had rented the building for a year. There was some talk between them as to who should pay the rent. Mr. Roberts said that he would take care of that; that Canty was to pay Mr. Roberts, and Mr. Roberts was to turn the rent over to the plaintiff."

This is all the testimony offered tending to support this second claim of the plaintiff, and is wholly insufficient for that purpose. The agreement under which plaintiff

seeks to hold the defendant cannot be proved in the manner in which it was

undertaken to be proved in this case. It violates § 4625 of the Code of 1897, which provides:

"Except when otherwise specially provided, no evidence of the following enumerated contracts is competent, unless it be in writing and signed by the party charged or by his authorized agent. . . ."

"3. Those wherein one person promises to answer for the debt, default, or miscarriage of another."

See *Frohardt Bros. v. Duff*, 156 Iowa, 144, 40 L.R.A. (N.S.) 242, 135 N. W. 609, Ann. Cas. 1915B, 254, which we think is a full answer to the contention of the defendant, under the record here made.

An examination of the proof shows that the allegations of the pleader were not sustained. There is nothing in this record tending to show that the defendant agreed to pay the rent if appellant would not sue or attach. The defendant had a right to sue Roberts, but, under our holding here, had no lien upon the property, and no right to a land-

lord's attachment against this property. It is not claimed that the sale to Canty was fraudulent. Further, there is no consideration for any promise made by Canty. Defendant was not liable to the plaintiff for anything at the time these conversations were had; nor

Contract—to pay another's debt—consideration.

was the property in the possession of the defendant subject to any lien of the plaintiff. Plaintiff could not have enforced any lien against the property in the hands of the defendant.

It must be borne in mind that the defendant had purchased, paid for, removed, and had these goods in his possession at the time these conversations were had. In the first conversation recited by the plaintiff, he told the defendant that he had a lien upon these goods for the rent; that he would hold him as converser. In this conversation, no mention was made of attachment or suit. The thought of the plaintiff was that he would hold the defendant liable as for conversion. Defendant replied that he did not apprehend any danger about the rent; that he thought Roberts would pay it; that if he did not, he would; that the defendant received no consideration for this promise, and the plaintiff surrendered no right which he had, in consideration of the promise. In the last conversation, plaintiff reasserted the same right, saying that he would sue him as for conversion of the stock, and the defendant said: "All right, but don't bring suit until I find out." He later told the plaintiff that he might proceed with the suit; and he did proceed with the suit.

Under the holding in the *Duff* Case, *supra*, this is insufficient to create a liability on the part of the defendant. Upon this branch of the case, the plaintiff, too, has failed for want of proof of the allegations upon which he predicates his right to recover.

We think the judgment of the

court below was right, and it is affirmed.

Evans, Ch. J., and Ladd and Salinger, JJ., concur.

NOTE.

The question which the reported case (*COCKRAN v. CANTY*, ante, 288), answers in the negative, namely,

whether a statute creating a landlord's lien for rent upon all property kept or used on the demised premises during the term subjects property on the premises during one term to a lien for rent during a subsequent independent term, is treated in subdivision IV. of the annotation beginning p. 300, post, which covers the general subject of "Subject-matter covered by landlord's statutory lien for rent."

LOUISVILLE GAYETY THEATER COMPANY, Appt.,

v.

H. C. RAGAN.

Kentucky Court of Appeals—January 30, 1920.

(— Ky. —, 217 S. W. 929.)

Landlord and tenant — lien on ticket receipts.

1. A statute giving a landlord a lien on the produce of the premises rented and other personal property of the tenant does not apply to the ticket receipts of a tenant operating a theater on the leased property.

[See note on this question beginning on page 300.]

Receiver — liability for lien lost by laches.

2. That a lien in favor of the landlord would have been available against a receiver, if asserted in time, does not create a personal obligation against the receiver if the landlord loses his lien by laches.

— priority of landlord.

3. A landlord has no common-law priority over general operating debts

of a business in the hands of a receiver.

[See 23 R. C. L. 114.]

— what are funds in hands of receiver.

4. Under a contract by amusement companies with a receiver operating a theater, by which they are to give performances for a percentage of the ticket receipts, the percentage belonging to the companies does not become the property of the receiver so as to become part of the fund in his hands for distribution among creditors.

APPEAL by intervening petitioner, in a receivership suit, from a judgment of the Chancery Branch, Second Division of the Circuit Court for Jefferson County, dismissing its petition filed to recover a balance alleged to be due for rent of premises leased for the operation of a receivership business. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. J. Verser Conner and A. B. Bensinger, for appellant:

The rent of premises used by a receiver in the operation of the receivership business, under his promise to pay rental at the rate of \$250 per week, is a proper expense of administration; and where the assets are insufficient to pay all the expense of ad-

ministration, said rent must be paid in preference to other expenses of administration.

Underhill, Land. & T. p. 1422; Stief v. Hart, 1 N. Y. 20; Bruckman's Estate, 195 Pa. 363, 45 Atl. 1078; Com. v. Kentucky Distilleries & Warehouse Co. 143 Ky. 314, 136 S. W. 1032; 34 Cyc. 352; High, Receivers, 809; Perrin

(— Ky. —, 217 S. W. 929.)

& S. Printing Co. v. Cook Hotel & Excursion Co. 118 Mo. App. 44, 93 S. W. 337; Link Belt Machinery Co. v. Hughes, 174 Ill. 155, 51 N. E. 179; Re Commercial Bulletin Co. 2 Woods, 220, Fed. Cas. No. 3,060.

Where the total funds coming to the hands of a receiver are insufficient for the payment of all expenses of administration, and there are no liens or special equities, all expenses of administration should share pro rata in the distribution of the funds of the receivership; and if the receiver pays some expenses in full and fails to pay the others in full, he is personally liable for the loss resulting from his failure to pay said expenses pro rata.

Pennsylvania Engineering Works v. New Castle Stamping Co. 259 Pa. 378, 103 Atl. 215; Nessler v. Industrial Land Development Co. 65 N. J. Eq. 491, 56 Atl. 711; Gutterson v. Lebanon Iron & Steel Co. 151 Fed. 72.

The receiver has no legal right to distribute the funds coming to his hands, except upon the order of the court, and if the receiver does make distribution of the funds coming to his hands without first obtaining the order of court, he will be liable to one for damage resulting from said distribution.

34 Cyc. 371; Johnson v. Gunter, 6 Bush, 534; Clark, Receivers, §§ 792, 822.

Messrs. Dallam, Farnsley, & Means, for appellant:

A receiver complying with all orders of court, which court accepted and approved his accounts, cannot be held personally liable by a landlord because the rent claim was not prorated with the other costs of administration paid by the receiver.

Smith, Receiverships, 203, 229; Alderson, Receivers, 330; High, Receivers, 270, 272.

A receiver acting in good faith cannot be held personally liable for errors in judgment.

Smith, Receiverships, 229; Alderson, Receivers, 330, 351; High, Receivers, 272; McNulta v. Lochridge, 141 U. S. 327, 35 L. ed. 796, 12 Sup. Ct. Rep. 11; Texas & P. R. Co. v. Cox, 145 U. S. 593, 36 L. ed. 829, 12 Sup. Ct. Rep. 905.

If a lien accrues in favor of a landlord against personal property, it is lost if it is not asserted within fifteen days after its removal from the premises.

High, Receivers, 281; Walsh v. Ray-

mond, 58 Conn. 251, 18 Am. St. Rep. 264, 20 Atl. 464.

Thomas, J., delivered the opinion of the court:

On January 26, 1917, the appellee, H. C. Ragan, was by the order of the Jefferson circuit court appointed receiver for Adger Amusement Company, a corporation, with a capital stock of \$2,000. The appointment was made pursuant to a motion made for that purpose in the suit of Charles Beute against the Adger Amusement Company and its other stockholders, which suit was filed to obtain the appointment of a receiver for the corporate defendant.

It was alleged in the petition that the corporation had been organized for the purpose of leasing and operating places of amusement, and that it at that time held a lease on the Gayety Theater in the city of Louisville, which would expire the following May, and that it had contracts with various amusement companies for performances to be given covering the period of the lease, from which profits would accrue for the benefit of the company, and that one of the defendants, and the principal stockholder in the corporation, Adger Wall, who had been managing the affairs of the defendant corporation, had abandoned it, and declined to further prosecute the business, and that, unless a receiver was appointed to operate the theater until the expiration of the lease, great loss would result not only to the corporation, but to the plaintiff, as a stockholder therein. Further allegations were made that Wall had mismanaged the affairs of the corporation, and had wrongfully appropriated some of its money to his personal use, and a receiver for the corporation was asked for the double purpose of carrying out its contract and to recover sums wrongfully appropriated by Wall.

The order appointing the appellee directed him to collect and preserve the assets of the corporation, to conduct its business of operating the theater, and to make such contracts

and arrangements as might be usual and proper for that purpose, but required him to first obtain the permission of the court in entering into contracts for performances. It also required him to make reports from time to time of his receipts and disbursements, which he did throughout the period of the five weeks which he operated the theater, which terminated on March 3, 1917.

On March 21, 1917, the appellant, Louisville Gayety Theater Company, which owned the building which the Amusement Company and the receiver operated, filed its intervening petition in the receivership suit, in which it alleged that the lease under which the Amusement Company was operating the building provided for a forfeiture upon the nonpayment of rent, and that at the time of the appointment of the receiver there was rent in arrears to the amount of \$3,000; that it gave notice of its intention to forfeit at or about the time of the appointment of appellee as receiver, and that he, subsequent to that time, leased the premises during the receivership at an agreed rental of \$250 per week; that he had operated the theater for five weeks and had paid only one week's rent, leaving a balance due appellant of \$1,000; that it had a superior lien upon the funds (which consisted entirely of proceeds from the sale of tickets) collected by the receiver (a) under the provisions of § 2317 of the Kentucky Statutes, but, if mistaken in this, then (b) it had under the common law "an equity for priority" which, it insisted, prevailed over other operating debts created by the receiver.

It was further alleged that the receiver had paid out all of the funds which came into his hands except \$353.53, and it asked that he be directed to pay it that sum, and that it obtain a judgment against him for the balance of its debt.

The questions raised were referred to the court's commissioner, and he reported that the gross receipts of the receiver from operat-

ing the theater amounted to \$7,974.42, and that there had been expended by him in conducting the receivership business the sum of \$7,620.90, leaving a balance in his hands of \$353.53. The commissioner found that the appellant had a lien upon the gross proceeds of the receivership, under the provisions of § 2317 of the Kentucky Statutes, superior to all other operating expenses, and recommended a judgment against appellee for the balance of appellant's debt after crediting it with its pro rata of the \$353.53, less some court costs, amounting to \$69.

Appellant moved the court to confirm the commissioner's report, while appellee filed exceptions to that part of it giving appellant a lien under the statute, or any priority over other creditors of the receiver. The court overruled the motion to confirm the report, and sustained the exceptions filed by appellee, and adjudged that the net balance of \$284.53 be prorated between other unpaid creditors whose debts amounted to \$220.33, and appellant on its \$1,000 debt, and, complaining of that judgment, the appellant prosecutes this appeal.

This case has one very distinguishing feature from all other receivership suits that have come under our notice. While on the face of the petition it was made to appear that the corporation whose affairs the court was asked to take charge of possessed some assets, the facts as disclosed by the testimony are that it did not possess 1 farthing's worth of property, either tangible or intangible. As it turned out, the court appointed a receiver to continue to operate a similar business to that which had been operated by the company for whom the receiver was appointed. He began with nothing and quit with less; and so the ordinary rules governing the distribution of funds of an insolvent in the hands of a receiver, as between general and preferred creditors, have no application here, because all of the debts are those

(— Ky. —, 217 S. W. 929.)

contracted by the receiver as a part of the necessary expenses of the receivership. The question then is: Does the law prefer one of those debts above another?

The statute relied on by appellant as giving such preference by lien, under appellant's contention (a), says: "A landlord shall have a superior lien on the produce of the farm or premises rented, on the fixtures, on the household furniture, and other personal property of the tenant, or undertenant, owned by him, after possession is taken under the lease; but such lien shall not be for more than one year's rent due or to become due, nor for any rent which has been due for more than eleven months. And if any such property be removed openly from the leased premises, and without fraudulent intent, and not returned, the landlord shall have a superior lien on the property so removed for fifteen days from the date of its removal, and may enforce his lien against the property wherever found."

It can hardly be said that the ticket receipts would be considered "produce" of the leased premises, nor could such receipts be classified as "fixtures" or "household furniture." It is insisted, however, that they were "personal property of the tenant," and the landlord's lien attached to the receipts immediately when paid by the patrons of the theater. We are convinced that this construction was never intended by

Landlord and
tenant—lien on
ticket receipts.

the legislature, but, on the contrary, by the use of the term

"personal property" in the statute it was meant only to include tangible personal property. If, however, we should be mistaken in this, the lien, if any, by the very terms of the act, existed for the benefit of the landlord for only fifteen days from the time of its removal from the premises, and if not attempted to be asserted within that time it was lost, so that, if we were to concede that the lien existed on the sum realized from the sale of tickets, and that it

was legally possible for appellant to assert it upon the money in the hands of others to whom it had been paid by the receiver, such attempted assertion was not made in this case, and it is now too late. The fact that a lien would have been available, if attempted to be asserted in time, would not create a personal obligation against the receiver if the landlord by his laches lost the lien; so that in no event is the appellant in a position, under the facts of this case, to claim as against the receiver a lien under the statute for its debt.

Receiver—
liability for lien
lost by laches.

The recent case of *Brown v. United States Trust Co. (People's Bank & T. Co. v. United States Trust Co.)* 185 Ky. 747, 8 A.L.R. 1142, 215 S. W. 815, relied on by appellant, does not announce a different doctrine. In that case the property was held by an executor under a lease which had been executed to his decedent, and the leased property was sublet to others, and the court held that the landlord had a lien under the statute upon the rent due from the sublessees, and that such rent was "produce of the leased premises," as contemplated by the statute. We are not disposed to extend the statute any further than was done in that case. If it should be held that the lien given by the statute attached to the gross receipts of any business which might be conducted in or upon the leased premises, the landlord would be given priority in all cases, under the theory that such receipts constituted "produce of the leased premises" within the contemplation of the statute, and the landlord might thus be enabled to collect his entire rent to the exclusion of all other operating expenses, including fees of officers of the court. We therefore conclude that, under the facts of this case, the appellant cannot claim the right to superiority under the lien provided in the section of the statute relied on.

Neither are we convinced of the soundness of the argument made

in contention (b) by appellant's counsel. In support of that contention counsel cite

—priority of
landlord.

Tiffany, Land. & T. § 320; 34 Cyc. 352; High, Receivers, 809; Perrin & S. Printing Co. v. Cook Hotel & Excursion Co. 118 Mo. App. 44, 93 S. W. 337 (an opinion by the St. Louis, Missouri, court of appeals) and Link Belt Machinery Co. v. Hughes, 174 Ill. 155, 51 N. E. 179, and in attempting to apply the doctrine of those authorities to the facts of this case say in their brief that the courts have "from time to time afforded to landlords various extraordinary remedies for the purpose of preferring their claims over that of other creditors. The decision of the lower court (in this case) is the first instance we have seen where the exactly opposite course has been taken, and the claims of all general creditors have been preferred to that of landlord."

The quotation from brief illustrates the misconstruction which counsel place upon those authorities; for in all of them the preference of the claim of the landlord over general creditors of the insolvent is dealt with, except in the case of Perrin & S. Printing Co. v. Cook Hotel & Excursion Co. In that case the landlord's claim was given superiority to operating debts, because and only because he held a contract lien upon the leased property executed by the insolvent before the receivership proceedings, and the court, after reciting the contract lien, said: "This stipulation has attracted our attention, because the rule is that a receiver takes the property of the insolvent debtor subject to all liens on it,"—and it was held that debts created by the receiver in operating the property were subject to the prior contract lien of the landlord. The suit involved a contest between the landlord and receivership creditors. No question between the latter class of creditors and the receiver was involved. We therefore conclude that the authorities relied on to sustain

the prior equity of appellant are insufficient for that purpose.

In this case, as has already appeared, the debts paid by the receiver were each and all of them necessary in operating the receivership and were contracted by him. The greater portion of the receipts was paid to the companies putting on the performances, which the record shows in many, if not all, instances, were under contracts whereby such companies were given a per cent of the gross ticket receipts, to be paid at the end of each performance. Other debts paid by the receiver were for lights, heat, advertisement in newspapers, janitors, ushers, and other necessary help, and also for orchestras at the performances. It is shown that all of the services for which payments were made were not only usual and customary, but necessary for the successful operation of a theater, some of which, at least, were as essential as was the leased building. It is not even contended that any payments were made by the receiver for unnecessary expenses. In such cases equity would necessarily require that, where the funds were insufficient to pay all of the operating expenses, there should be a pro rata between the receivership creditors, and, independent of any authority so holding, we would be inclined to so construe the rights of the parties under the facts of this case. But in the cases of Pennsylvania Engineering Works v. New Castle Stamping Co. 259 Pa. 378, 103 Atl. 215, Nesler v. Industrial Land Development Co. 65 N. J. Eq. 491, 56 Atl. 711, and Gutterson v. Lebanon Iron & Steel Co. (C. C.) 151 Fed. 72, the question as to the right of receivership creditors to participate in the distribution of funds was presented, and it was held that, when the funds were insufficient to pay all of them in full, there should be a pro rata between them, and necessarily it was held that the receiver had no right to prefer one of them above the others, and that, if he did so, he would be liable to the one discrim-

(— Ky. —, 217 S. W. 989.)

inated against. The court in the Pennsylvania case said: "In such case the debts can only be paid pro rata, and if paid in full the receiver will be personally liable."

In the New Jersey case the receiver, as he did in the Pennsylvania case, made the preference without any order of court (as was also done in this case), and the court said: "And where, as in this case, the fund in the receivers' hands is not sufficient to pay all the receivers' debts and their compensation, the distribution must be pro rata. They are all and equally debts or claims which should be paid by the trust funds, as expenses of the receivership, and, if the fund is not sufficient to pay all in full, then they must be paid pro rata."

We conclude, then, that the receiver, under the facts of this case, had no right to prefer one of his creditors above another, especially without an order of court to do so, and that he is liable to the appellant and other creditors discriminated against for their pro rata of the distributable fund.

At this point we are met with the question as to what constituted "the distributable fund" in the hands of the appellee. As above shown, it appears from the record that some of the companies who gave performances, if not all of them, did so under contracts for an agreed per cent of the gross ticket receipts, to be paid at the end of each performance, and the question recurs whether such per cent belonged to the receiver as assets in his hands, or whether it became the property of the company as soon as collected at the ticket office. We are inclined to the opinion that such per cent never became the property of the receivership, but, on the

contrary, that the company giving the performance under a contract for a percentage of the receipts became vested with the right to it as soon as the total amount of receipts was ascertained at the end of each performance, and that the contract percentage representing the sums paid to such companies performing under that character of contract, whether they were entered into by the receiver after his appointment, or by the corporation before such appointment, were not receivership assets, and that appellee was not guilty of a preference in paying them. By turning over to the company such per cent of the receipts, he was but giving to it that portion of them to which it was entitled under its contract. The arrangement created a relation resembling that of a partnership between the company and the receiver, the one agreeing to accept a stipulated per cent of the receipts, and the other the remainder. So that it was the duty of the court to ascertain the total amount paid by the receiver to the companies holding such contracts, and deduct that sum from the gross receipts, and then prorate the balance between the receivership creditors, including the appellant. The record not being in condition to enable us to do this, the case will be remanded for the court to ascertain the facts and to enter a judgment against appellee in favor of appellant as herein directed, taking into consideration its entire debt of \$1,250 and the payments which it has received, provided any sum is found to be due it under the indicated method of calculation.

Wherefore the judgment is reversed, with directions to set it aside and to enter one in conformity with this opinion.

-what are funds
in hands of
receiver.

ANNOTATION.

Subject-matter covered by landlord's statutory lien for rent.

- I. Introduction and scope, 300.
- II. As affected by location upon or use in connection with premises, 301.
- III. As affected by kind, character, or quality of property:
 - a. In general, 302.
 - b. Crops; agricultural products, 305.
- IV. As affected by time, 307.
- V. Property subject to execution, 310.
- VI. Property subject to distress, 312.
- VII. Choses in action, 313.
- VIII. Fixtures and improvements, 318.
- IX. Property of third persons:
 - a. In general, 314.
 - b. Partners and members of corporations, 317.
 - c. Subtenants, 317.
- IX.—continued.
 - d. Assignees of lease, 321.
 - e. Assignees for creditors, 322.
 - f. Conditional vendors, 322.
- X. Effect of removal or transfer of tenant's chattels:
 - a. In general, 322.
 - b. Mala fide and bona fide purchasers:
 - 1. Mala fides, 324.
 - 2. Bona fides, 325.
 - c. Sales in due course of business, 331.
- XI. Proceeds of tenant's property:
 - a. In general, 331.
 - b. Proceeds in custodia legis, 333.
 - c. Insurance money, 334.
- XII. Property subject to prior lien, 334.

I. Introduction and scope.

At common law, the only right of the landlord against the property of the tenant for arrears of rent was to seize by way of distress the chattels upon the demised premises, after which seizure he had a right analogous to a lien. It is clear, however, that apart from statute, actual seizure, or agreement the landlord had no lien for his rent. And at present the question is largely controlled by statutes. These statutes, though differing widely as to extent and other particulars, fall within three general classes; those which absolutely abolish distress forming one class, those which merely restate or modify the common-law remedy of distress forming another, and those which give the landlord a lien upon the property of the tenant forming the third. Statutes of the third class, which are the subject of this annotation, are unlike the remedy of distress, in that they neither change the ownership of the property nor put any restraint on the possession and use by the tenant, other than is necessary to the preservation of the lien. They have been enacted in many jurisdictions, among which may be mentioned: Alabama, Arizona, Arkansas, Colorado, District of Columbia, Florida, Georgia, Illi-

nois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Minnesota, Mississippi, Missouri, New Mexico, North Carolina, Oklahoma, Pennsylvania, Philippine Islands, Porto Rico, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Quebec. In Louisiana and other jurisdictions, the jurisprudence of which is mainly derived from the civil law, the civil-law terms, "privilege" and "pledge," which correspond to the common-law terms, "mortgage" and "lien," are used, the so-called "privilege" giving the lessor a tacit mortgage or lien. And these civil-law terms have been retained in the statutes. In fact, while the word "lien" was not known to the civil law, "lien" and "preference" are practically the same thing. However, no attempt has been made to collate or examine in detail these statutes, and consequently only such cases as construe the terms used are included herein. In fact the present annotation is confined strictly to a treatment of the cases construing statutes which create a so-called landlord's statutory lien, to the exclusion of adjudications construing the Distress Statutes, which merely restate or modify the landlord's common-law right of distress.

Likewise excluded are the cases

involving contract liens, that is, liens created by contract between the landlord and the tenant, as by stipulation in the lease or by separate instrument, and which are generally regarded either as equitable liens, or, in effect, as chattel mortgages.

As has often been stated, the property to which the statutory lien of a landlord for rent attaches depends upon the terms of the respective statutes, which in some cases are broad enough to include all of the tenant's property which is on the leased premises, while others merely specify certain chattels by name. In view of this dependency upon statutory construction, and the varying character or species of property involved in the individual cases, general rules cannot be drawn except in specific classes of cases.

It should be remembered, however, that the statutes creating liens for rent in favor of landlords, being in derogation of the common law, are generally somewhat strictly construed against the landlord.

II. As affected by location upon or use in connection with premises.

In connection with the decisions treated in this subdivision of the annotation, see also the next following subdivision (III. a), and the subdivisions relating to crops (III. b), execution (V.), distress (VI.), choses in action (VII.), and fixtures and improvements (VIII.).

Various terms have been used in Landlord's Lien Statutes to designate the location of property subject to the respective acts. For instance, the lien has been extended to chattels "belonging to," or the property "of," the tenant, which are "kept," "used," "placed," or "found," "on," "upon," or "in" the demised premises or building.

Generally speaking, it may be said that the statutes which designate the goods of a tenant subject to the lien by a general term, rather than by a specific name, extend the lien only to goods, etc., which enjoy the protection of the premises for the rent of which a lien is claimed. *Ex parte Barnes*

(1887) 84 Ala. 540, 4 So. 769; *Abraham v. Nicrósi* (1888) 87 Ala. 173, 6 So. 293; *McKleroy v. Cantey* (1891) 95 Ala. 295, 11 So. 258; *Andrews Mfg. Co. v. Porter* (1895) 112 Ala. 381, 20 So. 475; *Grant v. Whitwell* (1859) 9 Iowa, 152; *Van Patten v. Leonard* (1881) 55 Iowa, 520, 8 N. W. 334; *L. Luderbach Plumbing Co. v. Its Creditors* (1908) 121 La. 371, 46 So. 359; *Romero's Succession* (1915) 137 La. 236, 68 So. 433.

In *Andrews Mfg. Co. v. Porter* (1895) 112 Ala. 381, 20 So. 475, supra, the court recognized the fact that the statute literally gave a lien on all the goods, etc., belonging to the tenant, "whether ever in or on the premises, or not," but said that the lien attached only to such property of the tenant as had enjoyed the protection of the premises for which the rent was claimed. So, in Iowa, a statutory lien upon property of the tenant "which has been used on the premises during the term" applies only to property used upon and incident to the purposes for which the lease was obtained. *Grant v. Whitwell* (1859) 9 Iowa, 152; *Van Patten v. Leonard* (1881) 55 Iowa, 520, 8 N. W. 334.

And a mere fleeting use is insufficient. Thus, in *Trust Co. of N. A. v. Manhattan Trust Co.* (1896) 23 C. C. A. 30, 40 U. S. App. 641, 77 Fed. 82, affirming (1895) 68 Fed. 72, it was held that a statute giving a landlord a lien upon property "used" on leased premises did not apply where the use was a fleeting one, such as the temporary use by an interstate railroad train of a lease terminal or station.

And there is authority to the effect that goods or chattels, in order to be subject to the lien, must be actually used on the leased premises, and that it is not sufficient that they are used in connection with the business carried on thereon. Thus, where the requirement is that the property be "used on the premises," it has been held that it is insufficient to subject property to the lien that it was used in connection with the business carried on in or on the demised premises, "use upon the premises" being essential. *Van Patten v. Leonard* (Iowa) supra, holding

that delivery rigs used in connection with a grocery business carried on in the leased premises, but which, while they often stood in the street in front of the store, were never actually used on the premises, were not subject to the landlord's statutory lien.

So, it has been held that where a tenant rents a city square, vacant with the exception of a pavilion, to use as a pleasure resort, improvements erected on such square,—at least, such as were not in or connected with the pavilion,—were not subject to a landlord's lien, under a statute creating such a lien and making subject thereto all the property of the tenant in a rental building. *Rush v. Hendley* (1891) 4 Tex. App. Civ. Cas. (Willson) 299, 15 S. W. 201.

However, where the lease is of a building, and the statute creates a lien on the goods of the tenant "in" such building, it has been held that it is sufficient if the goods are on the premises, and that it is not necessary that they actually be used in the building. Thus, under a statute giving the landlord of a building a lien for rent on the goods of the tenant, the lien is not confined to goods "in" the building, but extends to goods kept on the premises and used generally in connection with the business conducted in the building. *Stephens v. Adams* (1890) 93 Ala. 117, 9 So. 529, holding that, where a building was leased as a hotel, the lien applied to animals, wagons, etc., not kept in the building, but which were kept on the premises and were used in connection with the hotel business. And under a statute creating a landlord's lien upon all of the property of the tenant situated in the residence during the term, it has been held that the use of the expression, "in the residence," does not confine the lien solely to property that may be contained within the dwelling house, but extends it to all property situated upon the premises, that the residence does not consist solely of the buildings which are occupied by the family, but embraces the other buildings and grounds used in connection therewith, and, therefore, that the lien attaches to a horse of the ten-

ant, kept on the demised premises. *York v. Carlisle* (1898) 19 Tex. Civ. App. 269, 46 S. W. 257. And again, applying the same statute, it was held in both *Bowser v. Cain Auto Co.* (1919) — Tex. Civ. App. —, 210 S. W. 554, and *West Furniture Co. v. Cason* (1919) — Tex. Civ. App. —, 218 S. W. 774, that a gasoline filling station was subject to a landlord's lien for rent of a building, where such station was located between the street curb and the sidewalk in front of the rented building, the use of such a station being appropriate to the use for which the building was rented, namely, the sale of automobile supplies. It was declared that the station was "(in" the building within the meaning of the statute.

III. As affected by kind, character, or quality of property.

a. In general.

See also the next preceding subdivision (II.), and the subdivision relating to crops (III. b), execution (V.), distress (VI.), choses in action (VII.), and fixtures and improvements (VIII.).

The phraseology of the respective statutes creating landlord's liens often varies materially with respect to the various kinds of property made subject to the lien, it having been variously referred to as "movables," "goods," "furniture," "effects," etc., "belonging to," or the property "of," the tenant.

In one line of cases, the decisions have turned upon the proper interpretation to be given the term "effects," as used in the statutes. For instance, under a statute creating a lien upon the "goods, furniture, and effects" belonging to the tenant of a building used for mercantile purposes, it has been held that the word "effects" must be construed in connection with "goods" and "furniture," and refers to property ejusdem generis, so that a mule and dray were exempt from the lien, although they were used in the tenant's mercantile business. *McKleroy v. Cantey* (1891) 95 Ala. 295, 11 So. 258. And that a statute creating a lien upon the goods, furniture, and effects of a tenant upon

or in the rented premises does not reach an immovable chattel real, such as a leasehold, see *First Nat. Bank v. Consolidated Electric Light Co.* (1892) 97 Ala. 465, 12 So. 71. In this case, the court said that the lien was upon the movable tangible property of the tenant, placed upon the rented premises during the term, that the rule *eiusdem generis* must be applied to "effects," and that it could not well imagine how a tenant could convey to and place upon the rented premises his leasehold interest in the rented premises. But it has also been held that a lessor of a sawmill, appurtenances, and premises has a lien under a statute creating a lien in favor of a landlord of any "storehouse, dwelling house, or other building," on the "goods, furniture, and effects belonging to the tenant" for his rent, on all logs brought upon the premises by the lessee, as well as the lumber into which they are sawed. *Mathers v. Barrow* (1918) — Ala. —, 80 So. 424. The court applied the rule that, under the statute as set out, the lien attaches to any property of the tenant which is brought upon the demised premises, though not kept within the building, provided it is used by the tenant in connection with his use of the building. In Louisiana, under a statute creating a privilege on "movable effects of the lessee which are found on the property leased," which right of privilege includes the furniture of the lessee and the merchandise contained in the house or apartment, if it be a store or shop, it was held that such term does not embrace slaves of the tenant. *Cox v. Myers* (1849) 4 La. Ann. 144. Nor does the Louisiana statute subject to the landlord's lien a buggy belonging to the tenant, but not found on the leased premises, nor used in the work carried on thereon. *Field v. Newburn* (1907) 91 Miss. 861, 45 So. 573. On the other hand, the lessor's privilege has been held to extend to horses and carts owned and kept by the lessee on the leased premises (*Bazin v. Segura* (1850) 5 La. Ann. 718), as well as to the assets of a banker occupying a

leased building (*Matthews v. Their Creditors* (1855) 10 La. Ann. 718).

Liens upon the tenant's chattels "upon," or which have been "used on," the premises, are upon the chattels in bulk, or the stock in mass, and not in detail. *Fowler v. Rapley* (1871) 15 Wall. (U. S.) 328, 21 L. ed. 35 (see also *Rose's Notes* to this case); *Grant v. Whitwell* (1859) 9 Iowa, 152; *Carpenter v. Gillespie* (1860) 10 Iowa, 592. However, a printing press purchased by the tenant and placed on the premises is within a statute giving a landlord a tacit lien upon the tenant's "personal chattels upon the premises." *Webb v. Sharp* (1871) 13 Wall. (U. S.) 14, 20 L. ed. 478. And the same has been held with regard to the furniture in a leased hotel. *Beall v. White* (1876) 94 U. S. 382, 24 L. ed. 173; *Bryan v. Sanderson* (1879) 3 MacArth. (D. C.) 431.

And Texas statutes creating landlords' liens "upon the property of the tenant hereinafter indicated, for any rent that may become due," and specifically mentioning "all the property of the tenant in" any rented "residence, or storehouse, or other building," which lien shall continue so long as the tenant shall occupy the rented premises, and for one month thereafter, have been held to apply to the goods of a merchant in a leased building. *Marsalis v. Pitman* (1887) 68 Tex. 624, 5 S. W. 404; *Ghio v. Shutt* (1890) 78 Tex. 375, 14 S. W. 860; *Needham Piano & Organ Co. v. Hollingsworth* (1897) — Tex. Civ. App. —, 40 S. W. 750, affirmed on other grounds in (1897) 91 Tex. 49, 40 S. W. 787.

Under a Florida statute providing that "all claims for rent shall be a lien on agricultural products raised on the land rented, and shall be superior to all other liens and claims, though of older date, and also a superior lien on all other property of the lessee" usually kept on the premises, etc., it has been held that the lien is not restricted to products of agricultural lands, but extends to all other nonexempt property of the lessee on any rented real estate. *Jones v. Fox* (1887) 23 Fla. 454, 2 So. 700, reaf-

firmed on subsequent appeal in (1890) 26 Fla. 276, 8 So. 449 (holding that goods in a rented store were subject to lien); *Hodges v. Cooksey* (1894) 33 Fla. 715, 24 L.R.A. 812, 15 So. 549 (holding that the lien attaches to all property of the lessee, not subject to exemption).

And in Iowa, under a statute creating a lien "upon all crops grown upon the demised premises, and upon any other personal property of the tenant which has been used on the premises during the term, and not exempt from execution," it has been held that the landlord's lien attaches to all personal property kept or used by the tenant upon the leased premises. *Grant v. Whitwell* (1859) 9 Iowa, 152, reaffirmed in *Carpenter v. Gillespie* (1860) 10 Iowa, 592; *Garner v. Cutting* (1871) 32 Iowa, 547; *Perry v. Waggoner* (1886) 68 Iowa, 403, 27 N. W. 292; *Becker v. Dalby* (1901) — Iowa, —, 86 N. W. 314. In *Grant v. Whitwell* (Iowa) *supra*, it was contended that the lessor of a business place had no lien on goods kept for sale, and not for use, and that the word "used" should be given a limited meaning and restricted to things which could be actually used, such as agricultural implements, etc., but the court held otherwise. Among other things, it said: "The defendants claim that the landlord has no lien on goods kept for sale, and not for use; that no demised premises are within the provisions of the statute, except farms or agricultural lands. Such a construction would, in our opinion, exclude from the benefit of the statute a class of persons most needed its aid. It not only unnecessarily limits the operation of language general in its terms, but it discriminates in favor of the tenant in towns, and against those upon agricultural lands—a discrimination both unwise and without precedent. . . . Besides the above suggestion by the defendants [lessees] that the lien is given only in the case of leases of farms, and does not exist in leases of houses and storerooms in towns, some argument is sought to be drawn from the use of certain terms in the statute.

. . . It is sought to give a peculiar force to the word 'used'—other property which has been 'used' on the premises during the term,—as if the lien were limited to other personal property which could be 'used,' in the limited sense, as agricultural implements are used. But we believe it was employed in a large sense, and as avoiding other terms which would either too much widen or restrict the application of the lien. The use intended is only that which is incident to the nature and purposes of the occupation of the premises, the object of the tenancy. In this sense, the cloths and goods of these merchant tailors were used for the purposes of sale, and for making up into garments for customers."

In Louisiana, a lessor of a house or shop has a statutory "privilege" in the nature of a lien for rent upon all goods or furniture found therein. *Ritchie v. White* (1822) 11 Mart. (La.) 239; *Hanna v. His Creditors* (1822) 12 Mart. (La.) 32. And in the case of predial estates, the landlord's right embraces everything that serves for the labors of the farm without reference to ownership. *Hynson v. Cordukes* (1869) 21 La. Ann. 553 (farm stock, utensils, etc.); *Johnson v. Tacneau* (1871) 23 La. Ann. 453 (animals, carts, farm implements, etc.).

In Colorado, under a statute providing that "the keeper of any hotel, tavern, or boarding house, or any person who rents furnished or unfurnished rooms, shall have a lien upon the baggage and furniture of his or her patrons, boarders, guests, or tenants, for such boarding, lodging, or rent," the keeper of a rooming house has a lien upon the furniture of his lodger (*Albers v. Turley* (1897) 10 Colo. App. 450, 51 Pac. 530), but the lessor of an office room used for business purposes has no lien upon the furniture of his tenant (*Morse v. Morrison* (1901) 16 Colo. App. 449, 66 Pac. 169). In the latter case, the court discussed the point under consideration as follows: "The contention is that the terms 'furnished and unfurnished rooms,' include all classes of rooms, for what-

ever purpose they may be rented. The all-embracing construction for which counsel contends would bring not only rooms used for lodging, but offices, storerooms, and even factories, within the purview of the statute. The lien upon furniture is given to the keeper of a hotel, tavern, or boarding house, and any person who rents furnished or unfurnished rooms. There is a well-established rule of construction that, where words of general import follow specific designations, the application of the general language is controlled by the specific. . . . The keeper of a hotel has the remedy of a lien against the guests stopping with him, and a boarding-house keeper against the boarders rooming in his house. Thus, in those cases, the particular classes of persons who are entitled to the lien are those who furnish lodging to their guests or patrons; and, in accordance with the rule, the general words, 'any person who rents furnished or unfurnished rooms,' must be construed as applicable to persons ejusdem generis, that is, to persons renting rooms for lodging purposes. They were not intended to include the owners of business houses, who rent their rooms solely for purposes of business. Store-rooms without counters or shelving, or offices without desks, safes, or chairs, are not the kind of unfurnished rooms contemplated by the statute."

b. Crops; agricultural products.

Under statutes creating a landlord's lien on crops or agricultural products grown on demised premises, the generally accepted rule is to the effect that the lien extends to the entire crop raised thereon, and that the landlord is not restricted to any particular portion of the crop.

Alabama.—Givens v. Easley (1850) 17 Ala. 385; J. C. Wilson & Son v. Curry (1907) 149 Ala. 368, 42 So. 753.

Arkansas.—Lema v. Johnson (1879) 35 Ark. 225.

Georgia.—Andrew v. Stewart (1888) 81 Ga. 53, 7 S. E. 169; Leonard v. Fields (1915) 143 Ga. 479, 85 S. E. 315; Madison Supply & Hardware Co. v. Richardson (1910) 8 Ga. App. 344, 9 A.L.R.—20.

69 S. E. 45; Long v. Clark (1915) 16 Ga. App. 355, 85 S. E. 358.

Illinois.—Thompson v. Mead (1873) 67 Ill. 395; Prettyman v. Unland (1875) 77 Ill. 206; Harvey v. Hampton (1903) 108 Ill. App. 501.

Kansas.—Knowles v. Sell (1889) 41 Kan. 171, 21 Pac. 102; Nessley v. Taylor (1901) 63 Kan. 674, 66 Pac. 993; Berry v. Berry (1898) 8 Kan. App. 584, 55 Pac. 348.

Mississippi.—Applewhite v. Nelms (1893) 71 Miss. 482, 14 So. 443.

Missouri.—Haseltine v. Ausherman (1885) 87 Mo. 410, on subsequent appeal in (1888) 29 Mo. App. 451; Garrouette v. White (1887) 92 Mo. 237, 4 S. W. 681.

North Carolina.—Montague v. Mial (1883) 89 N. C. 137; Boone v. Darden (1891) 109 N. C. 74, 13 S. E. 728.

Oklahoma.—DORSETT v. WATKINS (reported herewith) ante, 278.

South Carolina.—State v. Reeder (1892) 36 S. C. 497, 15 S. E. 544; Hamilton v. Blanton (1917) 107 S. C. 142, 92 S. E. 275.

Texas.—Wilkes v. Adler (1887) 68 Tex. 689, 5 S. W. 497; Edwards v. Anderson (1904) 36 Tex. Civ. App. 611, 82 S. W. 659. And see Williams v. King (1917) — Tex. Civ. App. —, 206 S. W. 106; Green v. Scales (1919) — Tex. Civ. App. —, 219 S. W. 274.

However, the statutes sometimes do limit the lien to less than all the crops, as was the case in the South Carolina Act of 1878 [16 Stat. at L. 411, § 5], which created a statutory lien for rent "to the extent of one third of all crops" raised on the demised premises. See Kennedy v. Reames (1881) 15 S. C. 548 (by later act, lien attaches "upon the crops," etc., generally).

A statute giving a landlord a lien upon the "crops" or the "agricultural products" of the leased premises, without mentioning any other property, does not include the general personal property of the tenant, so that the landlord has a statutory lien on the crops only. Morgan v. Campbell (1874) 22 Wall. (U. S.) 381, 22 L. ed. 796 (see also Rose's Notes to this case); Mills v. Pryor (1898) 65 Ark. 214, 45 S. W. 350; Herron v. Gill (1884) 112 Ill. 247; Felton v. Strong

(1890) 37 Ill. App. 58; *Richardson v. McLaurin* (1891) 69 Miss. 70, 12 So. 264. Such a statute "impliedly exempts all other property of the tenant" from the landlord's lien. *Mills v. Pryor* (1898) 65 Ark. 214, 45 S. W. 350, *supra*.

And under a statute creating a landlord's lien upon crops when the landlord reserves as rent an "interest" or "share" of the crop, it has been held that where the rent is made payable in money the landlord has no lien upon the crops grown on the demised premises. *Phillips v. Douglass* (1876) 53 Miss. 175.

Upon the question of a lien upon crops as affected by the extent to which the demised premises were used for that purpose, there is a divergence of conclusions. Thus, under a statute in effect giving a lien upon all or any portion of the crops grown upon any part of the demised premises, it has been held, in case of a lease under a single entire contract, of a farm consisting of a house in one township and land in another, separated by a public road, the house at a cash rental, and the farm lands for part of the crop, that the landlord had a lien upon the crop for the rent of the house and uncultivated lands, as well as for the particular part of the premises on which the crop was raised. *Thompson v. Mead* (1878) 67 Ill. 395. And in Mississippi it has been held that where a house is appurtenant to a farm so that both go to form a single and united tract of land, the landlord, under a statute creating a lien for rent on the agricultural products raised on the leased premises, has a lien upon crops so raised to secure the rent of the dwelling house as well as the rent of the arable lands. *Scroggins v. Foster* (1898) 76 Miss. 313, 24 So. 194. And under a statute providing that "any rent due for farming land shall be a lien on the crop growing or made on the premises," it has been held that where a farm which consisted of both pasture and cultivated lands was let under a single entire contract stipulating that the rent on the cultivated land was payable by a certain part of the crops and

that the rent on the pasture lands was to be a specified sum of money per acre, the landlord's lien for the rent due on the pasture lands extended to and could be enforced upon the crops grown on the cultivated portion of the farm. *DORSETT v. WATKINS* (reported herewith) ante, 278. This was upon the theory that the pasture lands were a necessary part of the farm, that the contract was entire, and that the landlord had a lien upon all the crops grown on the premises for all the rent. In reaching this conclusion, the court, among other things, said: "To hold, as contended by the plaintiff in error, that the landlord's lien for rent due for the pasture land can only be enforced against the products grown on that land, or that the rent due on the land cultivated to wheat or to cotton can only be collected from wheat or cotton produced on such land, would be too narrow a construction of the terms used therein. Pasture lands are just as essential to the farm as cultivated lands, and are equally as profitable to its successful operation. The horses used in cultivating the crops, and the cows that supply the table with necessary food, cannot be properly cared for without the pasture land. From the agreed statement of facts it appears that there was but one contract made between the landlord and the tenant, and under this contract the farm of 200 acres was leased, and the rental agreed upon. Inasmuch as the statute giving the lien to the landlord for the rent extends to all of the crops grown upon the leased premises, we conclude that the trial court was right in holding that the landlord's lien for the rent on the grazing land extended to and may be enforced against the crops grown upon the cultivated land embraced in the farm." But where separate parcels of land owned by one person are rented under separate agreements to the same tenant, the landlord, under a statute declaring a lien on crops grown on rented premises, has a lien on the crops grown on each of the parcels only for the rent of that parcel. *Nelson v. Webb* (1875) 54 Ala. 436;

Gittings v. Nelson (1877) 86 Ill. 591. And in *Baker v. Cotney* (1904) 142 Ala. 566, 38 So. 131, it was held that cotton raised on one piece of property could not be taken for the rent of another, but it does not appear whether or not the land on which such cotton was raised was also rented from the landlord claiming the lien. Under a statute giving a lien upon "crops grown, or growing, upon the homestead premises for rent," the lien is limited in its operation to crops grown on a homestead, and therefore a landlord of land not a homestead does not have a lien on a crop grown thereon. *Hoopes v. Brier* (1905) 9 Ariz. 154, 80 Pac. 327.

As to the extent of the lien as affected by the time when the crop upon which the lien is claimed was grown, see *infra*, IV.

IV. *As affected by time.*

In Iowa, where the landlord is given a lien on the property of the tenant "used on the premises during the term," and not exempt, the rule is that the lien attaches at the commencement of the term upon all nonexempt property brought upon the premises, for the rent to become due or that will accrue during the entire term. *Grant v. Whitwell* (1859) 9 Iowa, 152; *Garner v. Cutting* (1871) 32 Iowa, 547; *Martin v. Stearns* (1879) 52 Iowa, 345, 3 N. W. 92; *Gilbert v. Greenbaum* (1881) 56 Iowa, 211, 9 N. W. 182.

So, in Alabama, the lessor of a building under a statute giving a lien upon the goods, furniture, and effects belonging to the tenant has a lien for the rent of the entire term upon all property belonging to the tenant, which at any time during the term has been upon the premises. *Re Scruggs* (1913) 205 Fed. 673 (holding such to be the law in Alabama); *Scott v. Renfro* (1894) 106 Ala. 611, 14 So. 556; *Andrews Mfg. Co. v. Porter* (1895) 112 Ala. 381, 20 So. 475. In *Re Scruggs* (Fed.) *supra*, the court said that goods brought upon rented premises at any time during the existence of the lease are subject to the landlord's lien for rent for the whole or any part of the term. And where the statute gives to landlords a "lien

on the goods of their tenants," and the tenancy is continued beyond the original term, the lien attaches to goods brought on the premises after the expiration of such original term, and which remain there at the time the enforcement of the lien is sought. *Abraham v. Nicrosi* (1888) 87 Ala. 173, 6 So. 293. The court, in reaching this conclusion, applied the common-law rule of distress, namely, that where the tenant holds over after the term originally stipulated, the relation of landlord and tenant continues, and that the original term is enlarged so that the right to distrain for the rent of any part of the tenure still exists.

And under an Arizona statute creating a lien in favor of a landlord on all the nonexempt property of his tenant "placed upon or used on the leased premises until his rent shall be paid," the landlord's lien attaches for the entire term on all the property of the tenant placed or used on the leased premises at any time during the term, and subsists until all the rent for the full term has been paid. *Murphey v. Brown* (1909) 12 Ariz. 268, 100 Pac. 801. The court, in this connection, said: "To restate the question: Has the landlord, under this statute, protection for the payment of his rent from the moment his tenant's chattels are placed upon the leased premises, or does his protection begin only after the obligation for rent has matured? If the latter, then the landlord is but little aided by the statute; for he may obtain a lien by attachment for rent due. If the former, his protection is as complete as the value of the property upon the demised premises may make it. While courts must carefully refrain from extending beyond their expressed terms the effect of legislative enactments whereunder liens may be created, on the other hand, such statutes, being remedial in their nature, must be construed so liberally as to effectuate their palpable purposes. The purpose of this statute is manifestly to afford the landlord protection commensurate with the obligation assumed by his tenant. The statute prescribes how long the lien shall

endure—until the rent shall be paid—but does not prescribe when it shall attach. It seems inconsistent with the purpose of the enactment that the lien shall not attach until the obligation for rent is matured; else on the day before the month or year shall have expired, where rent is payable monthly or annually, the tenant may remove his chattels free from lien. Under such interpretation the statute is without much value. The other alternative is that the lien shall attach when the chattels are placed upon the premises, and shall subsist until the end of the term, and thereafter till all rent shall have been paid; for there appears no logical reason to assert that the lien shall attach at the beginning of the month, or of the year, for the rent for the ensuing month or year only, to reattach for the second month or second year upon the inception of that second period. The lien provided for is a continuous lien, and not a disjointed lien, nor a series of liens from month to month or year to year. The conclusion seems inevitable that the lien attaches for the entire term of the lease on all property of the tenant, placed upon or used on the leased premises, and subsists until all rent for the term has been paid.

On the other hand, in the District of Columbia, under a statute giving a landlord a tacit lien for rent upon the tenant's personal chattels on the demised premises, to commence with the tenancy and continue for three months after the rent is due, it has been held that the lien extends only to rent due or which has actually commenced to accrue, so that where monthly, quarterly, or annual periods for the payment of rent are provided, the lien attaches only to property of the tenant sufficient to satisfy the lien, for a period which has actually commenced to run, as distinguished from the full term of the lease. *The Richmond v. Cake* (1893) 1 App. D. C. 447. The court said: "The legislature could scarcely have intended to provide for the enforcement of a liability which is neither due nor has commenced at all to accrue. On the other

hand, it may well be assumed that Congress intended to protect the landlord in the enforcement of his security for rent which had commenced to accrue, but which had not become payable. Where, therefore, periods of payment have been provided in a lease, either monthly, quarterly, or annually, as is usual, and one of these periods has commenced to run, and the right of the landlord to his rent for that period, or to some proportional part of it, in any case in which apportionment would be proper, has become fixed and absolute, the legislature might well extend the provisions of this statute to the protection of that right. If this were not the intention of Congress, it would follow that, in the case of any lease, no matter how long its term was to extend, the landlord might on the very second day of the term, after the tenant has entered into possession, institute proceedings to sequester enough of the property of the tenant on the premises to pay the rent for five, ten, twenty, or ninety-nine years, whatever might be the duration of the term. Of course, we cannot admit for a moment that this was the intention of the law. And if this could not be done, neither can a suit be maintained for a period of time for which, under the express agreement of the parties, the rent has not commenced to accrue. We read the statute to mean cases in which the rent has actually commenced to accrue, but is not yet payable."

And where a statute merely gives a landlord a lien upon all property which has been used or kept on the demised premises during the term, the property to be subject to the lien must have been actually used or kept on the premises, during the term for the rent of which it is sought to be held. In other words, property on demised premises during one term cannot be held for the rent of a subsequent independent term. *COCHRAN v. CANTY* (reported herewith) ante, 288. It was held that property of a tenant which had been removed from the demised premises during one term could not be subjected to the rent of a subsequent independent term.

In Texas, under a statute (Tex. Rev. Stat. art. 3122a) creating a landlord's lien for the rent of any residence, storehouse, or other building, upon all the property of the tenant therein, which shall continue "so long as the tenant shall occupy the rented premises, and for one month thereafter," it has been held that no lien is fixed on a tenant's property for any rents that may possibly become due for another term, whether created by contract or by the tenant's holding over. *Hempstead Real Estate, Bldg. & Bkg. Asso. v. Cochran* (1884) 60 Tex. 620; *Marsalis v. Pitman* (1885) 68 Tex. 624, 5 S. W. 404. And in *Green v. Bear Bros.* 5 Tex. Law Rev. 597, it was held that a lien cannot extend beyond a year, even though the lease was for a term of years, but this case was overruled on this point in both *Marsalis v. Pitman* (1885) 68 Tex. 624, 5 S. W. 404, and *Livingstone v. Wright* (1887) 68 Tex. 706, 5 S. W. 407, wherein it was held that the lien attached for the full term. And *Johnson v. Hulett* (1909) 56 Tex. Civ. App. 11, 120 S. W. 257, follows the *Marsalis Case*. However, a proviso was later added to the Texas statute, whereby it is declared that the landlord's lien for rent to become due shall not continue or be enforced for a longer period than the current contract year. And it has been held that by the use of the term, "current contract year," the legislature intended to divide a tenancy for a term of years, so far as the lien is concerned, into a series of yearly contracts. *Allen v. Brunner* (1903) 33 Tex. Civ. App. 128, 75 S. W. 821; *Low v. Troy Laundry Machinery Co.* (1913) — Tex. Civ. App. —, 160 S. W. 136. In the *Brunner Case* the court discussed this question as follows: "As we understand, the effect of this article is to prevent a landlord from ever asserting a claim for more than one year's rent, to become due in the future; that is, no matter how many years may be covered by the rental contract, the lien can only be enforced for a period up to the end of the current contract year. It does not prevent the making of a lease for more than one year, but

it divides such a contract, as far as the lien is concerned, into a series of yearly contracts, and when the tenant has occupied the premises for any part of any of said series of years, the landlord has a lien for the balance of such year."

The extent of the lien, as affected by the time when a crop upon which the lien is claimed was grown, is one largely of express statutory construction.

For example, in some instances it has been provided by statute that the landlord's lien shall be upon the crops growing, or grown, upon the demised premises in any year, for rent that shall accrue for such year. See *Morgan v. Campbell* (1874) 22 Wall. (U. S.) 381, 22 L. ed. 796, construing § 8 of the Illinois Landlord & Tenant Statute (chap. 601, Gross's Stat. 412); *Mills v. Pryor* (1898) 65 Ark. 214, 45 S. W. 350, construing *Sandels & H. Dig.* (Ark.) § 4794; *Jacobson v. Atkins* (1912) 103 Ark. 91, 146 S. W. 133, construing *Kirby's Dig.* (Ark.) § 5032; *Uhl v. Dighton* (1860) 25 Ill. 154, construing Ill. Rev. Stat. 1845, chap. 60, § 8; *Miles v. James* (1865) 36 Ill. 399, holding, in construing the statute last cited, that, where a crop is grown partly in one year and partly in the next, the landlord has a lien thereon for the rest of both years; *Thompson v. Mead* (1873) 67 Ill. 395, construing the Illinois statute above cited; *Nelson v. First Nat. Bank* (1913) 184 Ill. App. 349; *Garrouette v. White* (1887) 92 Mo. 237, 4 S. W. 681, construing Mo. Rev. Stat. 1879, §§ 3083, 3091, 3095, and *Ballard v. Johnson* (1894) 114 N. C. 141, 19 S. E. 98. And see *O'Kelly v. Ferguson* (1897) 49 La. Ann. 1230, 22 So. 783. Such a statute, of course, does not give a lien for one year's rent upon crops grown in another year. It was expressly so held in *Prettyman v. Unland* (1875) 77 Ill. 206.

And in Texas it has been held that, while the statute creating a landlord's lien on the crops grown on demised premises does not in express terms restrict the lien to the crop raised during the year in which the rent accrues, yet "such is the proper construction

to be given the statute." *Walker v. Patterson* (1903) 33 Tex. Civ. App. 656, 77 S. W. 437. *Lasater v. Streetman* (1913) — Tex. Civ. App. —, 154 S. W. 657, follows and relies upon the decision in the *Walker* Case.

On the other hand, under the express provisions of the Alabama Code, § 3469, the lien of the landlord laps over from year to year for any balance due, so long as the tenancy continues. *Cockburn v. Watkins* (1884) 76 Ala. 486. And the same has been held under a later Alabama statute (Code, § 2705). *Bush v. Willis* (1900) 130 Ala. 395, 30 So. 443.

V. Property subject to execution.

It has been held, generally, that a landlord's lien, in the absence of statutory provision to the contrary, attaches to property of a tenant notwithstanding it may be exempt from execution. *Ex parte Barnes* (1887) 84 Ala. 540, 4 So. 769; *Davis v. Meyers* (1870) 41 Ga. 95 (holding that a landlord's lien is superior to the tenant's rights under the Georgia Homestead & Exemption Act); *Harrell v. Fagan* (1871) 43 Ga. 339 (holding that the crops raised by a tenant are subject to the landlord's lien, although they have been set apart as an exemption for the benefit of the family); *Keim v. Myers* (1909) 44 Ind. App. 299, 89 N. E. 373; *Hill v. George* (1858) 1 Head (Tenn.) 394 (holding that the landlord's lien is superior to the tenant's exemption from execution at the suit of his creditors, so that the lien attaches to such property); *Champion v. Shumate* (1897) 90 Tex. 597, 39 S. W. 128, 362, 40 S. W. 394 (holding that a landlord's lien is superior to the allowance in lieu of exempt property, in favor of the children of the insolvent tenant, the lien statute itself providing that the lien should be superior to all exemptions created by law); *Stokes v. Burney* (1893) 3 Tex. Civ. App. 219, 22 S. W. 126 (holding that a landlord's lien is superior either to exemption of personal property or an allowance made in lieu thereof). But, in connection with the above Texas cases, see *St. Louis Type Foundry v. Taylor* (1896)

— Tex. Civ. App. —, 35 S. W. 691, and *Harris v. Townley* (1913) — Tex. Civ. App. —, 161 S. W. 5, as set out *infra*, this subdivision.

This conclusion has been put upon the ground that the statute giving a lien to the landlord is an element of the contract of rental. *Ex parte Barnes* (1887) 84 Ala. 540, 4 So. 769. The theory has also been advanced that in the case of crops the claim for rent is in the nature of purchase money. *Harrell v. Fagan* (1871) 43 Ga. 339.

And under an Iowa statute creating a landlord's lien for rent "upon all crops grown upon the demised premises, and upon any other personal property of the tenant which has been used upon the premises during the term, and not exempt from execution," it has been held that the phrase, "not exempt from execution," refers only to "other personal property," and not to "crops grown upon the demised premises," so that no part of such crops is exempt from the lien. *Hipsley v. Price* (1897) 104 Iowa, 282, 73 N. W. 584; *Citizens' Sav. Bank v. Wood* (1907) 134 Iowa, 232, 111 N. W. 929. The reasoning in the *Hipsley* Case was as follows: "The reason upon which the lien provided for by the statute is grounded is that 'the use of the landlord's premises has contributed to the production, improvement, or maintenance of the property upon which the lien attaches.' That reason applies with especial force to crops raised upon the premises. Other personal property may derive little, if any, benefit from the premises, but crops raised thereon draw in large part their sustenance and the elements which are necessary to their growth from the soil, which is to some extent impoverished and made less productive by each successive crop which it yields. There is ample reason for not permitting the lien to attach to property which the tenant needs for the maintenance of himself and family, and to the production and preservation of which the leased premises have contributed little or nothing; but on what theory of reason or justice can it be said that the

lien should not attach to crops which could not have been produced but for the leased premises? It is quite clear that the general assembly intended to make a distinction between crops grown on leased premises and other personal property, and that the clause, 'not exempt from execution,' applies only to the property referred to in the sentence immediately preceding it, and not to the crops specified in the first sentence of the section. This interpretation is fully authorized by the language used, will give force to what we are satisfied was the legislative intent, and will do justice." And in *Bacon v. Carr* (1900) 112 Iowa, 193, 83 N. W. 957, it was held, generally, that the landlord has no lien upon exempt property, although left on the premises at the end of the term, it being impossible to regard such property as "kept or used" on the premises after the termination of the lease, within the meaning of the statute.

And, in Florida, the general rule has been applied to agricultural products raised on rented land, so that the constitutional exemption to the head of a family cannot be claimed by a tenant on such products, the theory being that the land in such a case is regarded as such a factor in the production of the crops as to subordinate the title of the tenant thereto to the superior lien given by statute for the use of the premises. *Hodges v. Cooksey* (1894) 33 Fla. 715, 24 L.R.A. 812, 15 So. 549. However, it was also held in this case that the statutory remedy for the enforcement of the lien is embraced within the phrase, "any process of law contained in the exemption article of the Florida Constitution of 1868, which provided that a certain amount of personal property "shall be exempt from forced sale under any process of law," so that the tenant could claim his constitutional exemption as the head of a family in any other of his property on the leased premises than agricultural products. In reaching this conclusion, the court distinguished between agricultural products and other property of the tenant, and overruled the landlord's

contention that the tenant waived his right to claim exemption by entering into the lease, and held that while the tenant could expressly waive the exemption, he did not do so by the mere fact of entering into the lease while the statute giving a lien was in force. In arguing that the legislature could not thus indirectly destroy the tenant's constitutional right of exemption, *Mabry, J.*, said: "If the legislature can declare a lien in favor of the landlord for his rent on all the property of his tenant other than agricultural products, and it follows that by entering into the rental contract alone the tenant thereby pledges his property to pay such claim, and waives his constitutional right of exemption therein, then it seems to us that the legislature can, by providing similar liens to secure the payment of other debts, avoid and annul not only the policy, but the plain provisions of the Constitution on the subject of exemptions. Food and raiment are as essential to life as a habitation and shelter, and we might find insurmountable difficulty in discriminating against the lien for one class of demands in favor of the other. The claim for rent was highly favored at the common law, but we are unable to discover any purpose in the Constitution to except this demand from those against which the exemptions provided for may be claimed. The Constitution exempts to the person entitled thereto, \$1,000 worth of personal property from forced sale under any process of law, and the legislature cannot indirectly deprive him of such right any more than it can directly do it." But there is authority to the effect that property of a tenant exempt from execution or forced sale is not subject to the lien of a landlord. Thus, in Kentucky, it has been held that property exempt from execution is also exempt from the landlord's statutory lien for rent. *Carden v. Dearing* (1892) 14 Ky. L. Rep. 78. And see *Porter v. Rice* (1910) — Ky. —, 128 S. W. 70. And in Louisiana it seems that the statutes which confer upon landlords certain rights as against their tenant's movables, expressly except certain speci-

fied exempted articles, and it has been held that such exceptions do not include things not enumerated. At least, in *Ross v. Rosenthal* (1904) 1 La. App. (Orleans) 203, it was held that a piano was not exempt, and the reason assigned was that pianos were not included in the exceptions. On the other hand, a wagon used by a teamster in making his living is a "tool or instrument," within the meaning of a statute expressly exempting the same from the landlord's privilege for rent. *Schwartz v. Dennis* (1916) 138 La. 848, 70 So. 857, Ann. Cas. 1917D, 94.

And in *St. Louis Type Foundry v. Taylor* (1896) — Tex. Civ. App. —, 35 S. W. 691, it was held that a printing press and a paper cutter used by a job printer as necessary to the carrying on of his business are within the meaning of a statute exempting from forced sale "all tools, apparatus, and books belonging to any trade or profession," so that a landlord's lien does not attach thereto, the theory being that such a lien does not cover property exempt from forced sale, although the statute creating the lien gives landlords a "preference lien upon all the property of the tenant" placed in a rented building. However, this decision makes no reference to the holding in the earlier case of *Stokes v. Barney* (1893) 3 Tex. Civ. App. 219, 22 S. W. 126 (set out supra, this subdivision), which reached a contrary conclusion, and which is supported by the later case of *Champion v. Shumate* (1897) 90 Tex. 597, 39 S. W. 128, 362, 40 S. W. 394 (also set out supra, this subdivision); but it does appear that in the Lien Statute under consideration in those cases it was expressly provided that the lien should be superior to all laws creating exemptions.

Again, in *Harris v. Townley* (1913) — Tex. Civ. App. —, 161 S. W. 5, a similar conclusion was reached upon a closely analogous state of facts. It also appears in *Harris v. Townley* (Tex.) supra, that by the express terms of Tex. Rev. Civ. Stat. 1911, art. 5490, the Landlord's Lien Statute was not intended to repeal the Exemption

Laws, wherefore a landlord has no lien on property of the tenant which is exempt from execution and forced sale.

And even under a statute which gives a landlord's lien upon all the property of the tenant on the demised premises, but expressly provides that the act shall not be construed as repealing or affecting the Exemption Statutes, it has been held that property of the tenant subject to exemption is bound by a judgment foreclosing a landlord's lien thereon, obtained through the failure of both the tenant and his vendee to urge the exemption as a defense. *York v. Carlisle* (1898) 19 Tex. Civ. App. 269, 46 S. W. 257.

Any chattel belonging to a tenant and found upon leased premises is a chattel "subject to execution" within the meaning of a statute imposing a lien upon such goods of the tenant upon the premises as are subject to execution, although a deed of trust of the same has been given by the tenant. *Webb v. Sharp* (1871) 13 Wall. (U. S.) 14, 20 L. ed. 478 (see also *Rose's Notes* to this case) (holding a printing press subject to lien, although the trust deed was given to secure the debt created by borrowing money to purchase the press); *Beall v. White* (1874) 94 U. S. 382, 24 L. ed. 173 (holding landlord's lien superior to a deed of trust of furniture in a leased hotel); *The Richmond v. Cake* (1893) 1 App. D. C. 447 (holding landlord's lien superior to trust deed of property "subject to execution for debt"). *Webb v. Sharp* (U. S.) supra, put this upon the theory that a deed of trust does not protect goods from sale by execution, the court saying that "when the law imposes the lien only upon such goods of the tenant upon the premises as are subject to execution, it means to exclude goods which are exempt from execution by some general or special law, such as those which a man is entitled to retain, against all executions, for the use of his family or the practice of his trade."

VI. Property subject to distress.

Under a statute giving a landlord a

lien upon such of the tenant's property as is liable to distress, a liquor license has been held not to be property subject to distress, and therefore not covered by the lien. *Re Myers* (1900) 102 Fed. 869.

And, in Pennsylvania, it has been held that a statute subjecting to the landlord's lien, "goods on the demised premises" and "liable to the distress of the landlord," included personal chattels of a subtenant, although he had paid his rent to the principal tenant. *McComb's Appeal* (1862) 43 Pa. 435. It has also been held that the lien covers a computing scale belonging to a third person, but used upon the demised premises by the tenant, under a contract of bailment. *Moneyweight Scale Co. v. Shedleski* (1913) 23 Pa. Dist. R. 37.

In Ontario, under a statute creating an independent landlord's lien for rent on goods of a tenant subject to distress, it has been held that a landlord has a lien upon all goods which, at common law, were subject to distress. *Re McCracken* (1879) 4 Ont. App. Rep. 487; *Lazier v. Henderson* (1898) 29 Ont. Rep. 673. And see *Miller v. Tew* (1909) 20 Ont. L. Rep. 77, 14 Ont. Week. Rep. 207, 1173.

VII. Choses in action.

It has been held that a statute creating a landlord's lien upon property of the tenant, "which has been used on the premises during the term," does not apply to "notes, drafts, duebills, accounts," etc., which arise out of a mercantile business carried on, on the demised premises. *Van Patten v. Leonard* (1881) 55 Iowa, 520, 8 N. W. 334. The court said that "this property was not used upon the premises in the sense contemplated" in the statute.

And where the goods of a tenant are discharged of the landlord's lien by a sale thereof in the usual course of trade, the lien is not transferred to the choses in action taken for the goods so sold. *McKleroy v. Cantey* (1891) 95 Ala. 295, 11 So. 258.

In Louisiana, under a statute creating a privilege as to the "movable effects of the lessee which are found

on the property leased," which right of privilege included the furniture of the lessee and the merchandise contained in the house or apartment, if it be a store or shop, it has been held that the lessor has a privilege on choses in action belonging to the lessee and found on the leased premises. *Matthews v. Their Creditors* (1855) 10 La. Ann. 718 (assets of banker including notes, etc.); *Stone's Succession* (1879) 31 La. Ann. 311 (promissory notes). In the *Matthews Case* it was said that the concluding clause of the statute (set out above) was illustrative rather than restrictive in character, so that the statute need not be confined in its application, to office furniture. However, it has also been held that a lessor has no lien or privilege, under the Louisiana statutes, upon a debt due to the lessee by a third person, except where the lessor has acquired such right by seizing the debt in the hands of the lessee, as by attachment or garnishment, etc. *Edwards v. Fairbanks* (1880) *Man. Unrep. Cas. (La.)* 53.

VIII. Fixtures and improvements.

Under some statutes, a landlord is expressly given an exclusive lien for rent upon fixtures placed on the demised premises by the tenant. See, for example, *Fisher v. Kollerts* (1855) 16 B. Mon. (Ky.) 398, which deals with Ky. Rev. Stat. art. 2, § 14.

And in Maine, under a statute creating a lien for rent upon "all buildings upon the premises while the rent accrues, . . . although other persons than the lessee may own the whole or a part thereof, and whether or not the land was leased for the purpose of erecting such buildings," it has been held that the lien attaches to a building from the time it is placed on the premises, and continues so long as it remains, and that the lien is enforceable against the building whenever land rent becomes due and payable, irrespective of the then ownership. *Union Water Power Co. v. Chabot* (1899) 93 Me. 339, 45 Atl. 30.

So, in Louisiana, where the tenant is, by express statutory provision, allowed to remove the additions, im-

provements, etc., which he has put upon the demised premises, it has been held that such provisions do not exempt such additions, etc., from the landlord's privilege on the tenant's movables for rent. *Davidson v. Fletcher* (1912) 130 La. 668, 58 So. 504. And in Louisiana it has been held that store fixtures left on the premises after the termination of the lease are subject to the landlord's privilege until the rent is paid. *Villere v. Shaw* (1901) 108 La. 71, 32 So. 196.

And, in Texas, it has been held that fixtures placed in a rented theater are subject to the landlord's statutory lien for rent, they remaining personal property under the terms of the contract. *McConnell v. Brick-Phillips Co.* (1913) — Tex. Civ. App. —, 156 S. W. 1133. No reference is made in this decision to the particular statute involved.

But where the statute merely gives a landlord of a building a lien on the goods of the tenant therein, it has been held that improvements made upon the leased premises, but not in or connected with the building, are not subject to the landlord's lien. *Rush v. Hendley* (1891) 4 Tex. App. Civ. Cas. (Willson) 299, 15 S. W. 201; *Meyer v. O'Dell* (1898) 18 Tex. Civ. App. 210, 44 S. W. 545. And in *Allen v. Houston Ice & Brewing Co.* (1906) 44 Tex. Civ. App. 125, 97 S. W. 1063, in construing the same provision, it was held that a lessor of a vacant lot had no lien for rent on a building erected thereon by the tenant with the consent of the landlord.

IX. Property of third persons.

a. In general.

Under a statute subjecting to a landlord's lien "goods on the demised premises" which are liable to the "distress of the landlord," it has been held that the property of a third person may be subjected to the landlord's lien, as, for instance, a computing scale bailed to the tenant by a third person for use on the demised premises. *Moneyweight Scale Co. v. Shedleski* (1913) 23 Pa. Dist. R. 37. This, of course, is but an application of the

common-law rule that all property on the demised premises was subject to distress.

And that, where a husband lawfully rents a hotel as agent for his wife, the furniture in the hotel is subject to the landlord's lien whether such furniture was the separate property of the wife or was community property, see *Biesenbach v. Key* (1885) 63 Tex. 79. However, it was also held in this case that the wife's separate estate would not be bound, if the rented property was not necessary for her, her children, or her separate estate.

And, in Louisiana, early statutes provided that, where a house is let chiefly for a store or shop, the landlord has a privilege as against "all" goods found on the premises, or which have been removed therefrom, provided he can prove their identity and provided he acts within a specified time after removal. This statute has been held to subject to the landlord's privilege goods held by a tenant on consignment for sale (*Ritchie v. White* (1822) 11 Mart. (La.) 239), as well as goods held for sale on commission (*Merrick v. La Hache* (1875) 27 La. Ann. 87). And, in Quebec, it has been held that a statute giving a landlord a privilege for rent on goods stored, or kept for deposit or sale in demised premises, applies to the goods of a third person, consigned to a tenant and kept for sale on the leased premises. *Jones v. Anderson* (1852) 2 Lower Can. Rep. 154. And see *Belanger v. Roy*, 2 Montreal Leg. N. 378, and *Thomas v. Coombe*, 7 Montreal Leg. N. 77, as cited in 18 Am. & Eng. Enc. Law, 2d ed. 338, note 4. But the right of a landlord to pursue goods of a third person after their removal, under a statute permitting a landlord to subject all goods on the demised premises, or which have been removed therefrom (within a specified time after removal), being a proceeding in rem, is personal to the landlord and cannot be exercised by his syndic. *Ritchie v. White* (La.) supra.

But where the statute creates the lien upon property "belonging to," or "of," the tenant, the landlord has no lien upon the property of third per-

sons although it may have been used by the tenant upon the demised premises during the term of the lease. It was so held in *Perry v. Waggoner* (1886) 68 Iowa, 403, 27 N. W. 292, where the court, in refuting the contention that furniture, etc., owned by the tenant's wife, but used in the rented building, a hotel, was subject to the landlord's statutory lien as property of the tenant, said: "As we understand the position of counsel for appellee [the landlord], it is that as the property was in the hotel when the lease was made, and was there for use by the tenant upon the premises during the term of the lease, and was so used, plaintiff has a lien upon it for the rent, regardless of whether the tenant was the actual owner of it or not, and this seems to have been the view adopted by the circuit court. But in our opinion the position is not sound. The lien given the landlord for the security of his rent is strictly statutory. It is created by § 2017 of the Code, which provides that 'a landlord shall have a lien for his rent upon all crops grown upon the demised premises, and upon any other personal property of the tenant which has been used upon the premises during the term.' There can be no question as to the extent of the right created by this section. It gives the landlord a lien upon all crops grown upon the demised premises, and upon all other personal property of the tenant which has been used upon them during the term; but this is the extent of his remedy. He has no lien upon the property of third parties, although it may have been used by the tenant upon the demised premises during the term of the lease." And again, in *Schurz v. McMenamy* (1891) 82 Iowa, 432, 48 N. W. 806, the personal property of the tenant's wife was held not subject to the landlord's lien for rent, the lease having been signed by the husband alone. And a similar ruling, based on the same ground, has been made in Texas, where the statute creates a lien upon the property of the tenant on the rented premises. *Davis v. Washington* (1898) 18 Tex. Civ. App. 67, 43 S.

W. 585. In *Johnson v. Douglass* (1882) 2 Mackey (D. C.) 36, it was held generally that under statutes which merely give a landlord a lien upon the goods "of the tenant," such a lien does not reach the goods of persons other than the tenant, which are on the demised premises.

So, in Texas, it has been held that a statute creating a landlord's lien upon the goods of the tenant on the demised premises does not apply to goods in the possession of a tenant on consignment, they not being goods "of" the tenant. *Needham Piano & Organ Co. v. Hollingsworth* (1897) — Tex. Civ. App. —, 40 S. W. 750, affirmed in (1897) 91 Tex. 49, 40 S. W. 787.

And in Kentucky it seems that the property of a third person cannot be subjected to the landlord's statutory lien. See *Sargent v. Farrar*, 11 Ky. Ops. 2, as cited in Cyc. Supp. (1914-18) p. 2078 (title Landlord and Tenant, p. 1257, note 43). But that articles actually sold to the tenant are subject to the landlord's lien, although they have not been paid for, see *Kloak Bros. v. Joseph* (1912) 150 Ky. 508, 150 S. W. 651.

In Alabama, it has been held that a landlord has no absolute lien, under a statute giving a lien upon goods "belonging" to his tenant, upon goods purchased by the tenant and brought upon the leased premises, where such purchase was the result of fraud and the seller had rescinded the contract of purchase before the landlord sought to enforce his lien. *Parker-Blake Co. v. Ladd* (1915) 14 Ala. App. 407, 70 So. 188.

Some jurisdictions have statutes which expressly provide that no property of any person other than the tenant shall be subject to a landlord's lien, although the same may be found upon the demised premises. See, for example, *Murphey v. Brown* (1909) 12 Ariz. 268, 100 Pac. 801, which quotes and construes Ariz. Civ. Code 1901, § 2695. And by the express provisions of Louisiana Rev. Civ. Code, art. 2708, movables of a third person are not subject to the landlord's privilege when they are "transiently or accidentally in the [leased] house, store,

or shop, such as the baggage of a traveler in an inn, merchandise sent to a workman to be made up or repaired, and effects lodged in the store of an auctioneer to be sold." In construing this statute it has been held that sugar and molasses manufactured by a tenant from raw material furnished by a third person for the purpose of manufacture were not subject to the landlord's privilege. *Coleman v. Fairbanks* (1876) 28 La. Ann. 93; *Strickle v. Masury* (1910) 7 La. App. (Orleans) 287 (holding that motion picture films rented to the principal lessee for use in his business on the demised premises were subject to the landlord's privilege, although they had been so rented for one night only). And that in Quebec, a civil-law jurisdiction, the landlord's privilege does not apply to the property of a third person, transiently or accidentally on the demised premises, see *Pearce v. Montreal* (1859) 3 Lower Can. Jur. 122 (piano temporarily on premises for concert, and not the property of the lessee); *McGreevy v. Gingros* (1877) 3 Quebec L. Rep. 196 (machinery not removed because frozen in ice); *Price v. Hall*, 12 Rev. Leg. (L. C.) 120 (holding, as is set out in 18 Am. & Eng. Enc. Law, 2d ed. 338, note 4, that lumber of a third person on the premises of a leased saw-mill for the purpose of being sawed is not subject to the landlord's lien); and *Thomas v. Coombe*, 7 Montreal Leg. N. 77, as set out in 18 Am. & Eng. Enc. Law, 2d ed. 338, note 4.

On the other hand, however, some statutes have extended the landlord's lien or privilege to the goods of third persons, when on the demised premises under certain conditions or circumstances.

Thus, Louisiana statutes which expressly applied to movables "belonging to third persons," when contained in the leased building "by their own consent, express or implied," have been held to subject the property of a third person, stored with the tenant on the demised premises, to the amount of the storage due. *Vairin v. Hunt* (1841) 18 La. 498; *Wallace v. Smith* (1853) 8 La. Ann. 374. And

the goods of a third person contained or stored in a leased house by their owner's consent are subject to the landlord's privilege, although they are so stored under a rent-free agreement, the owner in such a case not being regarded as an undertenant or sublessee within the meaning of a statutory provision in effect exempting the effects of an undertenant who owes no rent to the original lessee. *University Pub. Co. v. Piffet* (1882) 34 La. Ann. 602. And in *Goodrich v. Bodley* (1883) 35 La. Ann. 525, goods of a third person found in a leased store were held subject to the landlord's privilege, although they were on the premises on consignment for sale. And in the case of predial estates the landlord's privilege extends to animals, carts, and farm implements serving for the labors of the farm, although they were merely leased from a third person by the farm tenant. *Johnson v. Tacneau* (1871) 23 La. Ann. 453. A similar conclusion has been reached as to an iron safe owned by a third person, but placed on the demised premises with the owner's consent (*Twitty v. Clarke* (1859) 14 La. Ann. 508), and to articles of furniture belonging to a third person, but on the leased premises at the time of the seizure (*Bailey v. Quick* (1876) 28 La. Ann. 432). But the tenant's property must be exhausted before the subtenant's can be resorted to. *Marfese v. Nelson* (1913) 10 La. App. (Orleans) 288. And the provision of the Louisiana statute extending the landlord's privilege for a specified time after removal of the goods from the demised premises does not apply to the property of third persons. *Lesseps v. Ritcher* (1866) 18 La. Ann. 653 (holding that sugar and molasses belonging to a third person, but manufactured on the leased premises, were not subject to the landlord's privilege after its removal by the owner); *Hughes v. Caruthers* (1874) 26 La. Ann. 530; *Merrick v. La Hache* (1875) 27 La. Ann. 87 (pianos held by lessee for sale on commission); *Bailey v. Quick* (1876) 28 La. Ann. 432 (household furniture); *Lindheim v. Abbott* (1911) 8 La. App. (Orleans) 293 (household furniture);

Morris Bldg. & Land Improv. Asso. v. Vikol Min. Co. (1912) 9 La. App. (Orleans) 182.

In Quebec, a landlord's privilege has been held to extend to a piano leased by the tenant from a third person (*Willis v. Navert* (1896) *Rap. Jud. Quebec* 12 C. S. 280), a piano loaned to the tenant by a third person in the hope of his selling it (*McKercher v. Gervais* (1897) *Rap. Jud. Quebec* 12 C. S. 336), and a cart belonging to a third person, but voluntarily left on the rented premises for several months, especially where the landlord had no reason to know that it was not owned by the tenant (*Beaudry v. Lafleur* (1880) 24 *Lower Can. Jur.* 150). And see *Lévéillé v. Labelle* (1871) 16 *Lower Can. Jur.* 54. But for a holding to the effect that a statute creating a privilege upon the movable effects in leased premises does not apply to a piano brought upon premises by a person boarding with the tenant, and who owes nothing for board, at least where the landlord had notice of such ownership before the piano was brought on the premises, see *Foisy v. Houghton* (1897) *Rap. Jud. Quebec* 12 C. S. 521.

b. Partners and members of corporations.

The rule that there is no lien upon the property of third persons where the statute merely gives a lien on property "belonging to," or "of," the tenant, has been applied in the case of the individual property of a member of the lessee partnership, and a lien on such property denied. *Ward v. Walker* (1900) 111 *Iowa*, 611, 82 N. W. 1028. But this rule does not apply to the individual property of several individual lessees, as, for instance, where a lease is executed by two or more persons in their individual names and without any mention of the existence of a partnership between them, and such individual property is subject to the landlord's lien. *SNYDER v. COLLINS* (reported herewith) ante, 283.

And where a partner takes a lease, and the members of the partnership, as contemplated, subsequently incorporate and use the leased property for

corporate purposes, it has been held that the landlord has a lien upon the property of the members and the corporation, under a statute subjecting all the property of the tenant in a rented building to a lien for rent. *Ingram v. Lattimore* (1919) — *Tex. Civ. App.* —, 210 S. W. 297.

So, where the lessee is a partnership it has been held that the landlord's privilege extends to the individual property of the members thereof, which is upon the demised premises. *Hynson v. Cordukes* (1869) 21 *La. Ann.* 553.

And in *Henderson v. Meyers* (1893) 45 *La. Ann.* 791, 13 *So.* 191, under a statute creating a lien on the goods of a third person when on demised premises with such person's express or implied consent, where lessees organized a corporation without the consent of the landlord, and took over the business carried on by the partnership, it was held that the corporation was a third person, and that the goods on the premises were subject to the landlord's privilege, it not appearing that the corporation was an undertenant.

c. Subtenants.

Under a statute rendering "goods on the demised premises" which are "liable to the distress of the landlord subject to his lien for rent, it has been held that personal chattels of the subtenant found on the rented premises are subject to the landlord's lien, although the subtenant had paid his rent to the principal tenant,—at least, where the landlord does not recognize the subtenancy. *McComb's Appeal* (1862) 43 *Pa.* 435.

And statutes creating a landlord's lien on crops or agricultural products grown on demised premises have been held to render crops grown by a subtenant or undertenant subject to the lien of the original lessor.

Alabama.—*Givens v. Easley* (1850) 17 *Ala.* 385; *Agee v. Mayer* (1881) 71 *Ala.* 88; *Robinson v. Lehman* (1882) 72 *Ala.* 401; *Foster v. Goodwin* (1886) 82 *Ala.* 384, 2 *So.* 895; *Bain v. Wells* (1894) 107 *Ala.* 562, 19 *So.* 774.

Arkansas.—*Jacobson v. Atkins* (1912) 103 *Ark.* 91, 146 S. W. 133.

Georgia.—*Andrew v. Stewart* (1888) 81 Ga. 53, 7 S. E. 169; *Thompson v. Commercial Guano Co.* (1893) 93 Ga. 282, 20 S. E. 309; *Leonard v. Fields* (1915) 143 Ga. 479, 85 S. E. 315; *Nash v. Orr* (1911) 9 Ga. App. 33, 70 S. E. 194; *Long v. Clark* (1915) 16 Ga. App. 355, 85 S. E. 358; *Horton v. Union Store* (1917) 19 Ga. App. 184, 91 S. E. 214.

Illinois.—*Uhl v. Dighton* (1860) 25 Ill. 154.

Iowa.—*Houghton v. Bauer* (1886) 70 Iowa, 314, 30 N. W. 577; *Beck v. Minnesota & W. Grain Co.* (1906) 131 Iowa, 62, 7 L.R.A. (N.S.) 930, 107 N. W. 1032.

Kansas.—*Berry v. Berry* (1898) 8 Kan. App. 584, 55 Pac. 348.

Mississippi.—*Applewhite v. Nelms* (1893) 71 Miss. 482, 14 So. 443.

North Carolina.—*Montague v. Mial* (1883) 89 N. C. 137; *Boone v. Darden* (1891) 109 N. C. 74, 13 S. E. 728.

Texas.—*Forrest v. Durnell* (1894) 86 Tex. 647, 26 S. W. 481; *Stokes v. Burney* (1893) 3 Tex. Civ. App. 219, 22 S. W. 126; *Marrs v. Lumpkins* (1900) 22 Tex. Civ. App. 448, 54 S. W. 775; *Trout v. McQueen* (1901) — Tex. Civ. App. —, 62 S. W. 928; *Edwards v. Anderson* (1904) 36 Tex. Civ. App. 611, 82 S. W. 659.

In Iowa, this conclusion was based upon the ground that since the statute creates the lien upon "all crops grown upon the demised premises," and since the lien of the landlord is purely statutory, the test is merely whether the crops were grown upon the demised premises, and not whether they were grown by the tenant. *Houghton v. Bauer* (1886) 70 Iowa, 314, 30 N. W. 577. So, in North Carolina, in construing a statute creating a landlord's lien on "all crops raised" on the leased premises, the court, in *Montague v. Mial* (1883) 89 N. C. 137, said: "If parceled out to others, by subletting or otherwise, on terms consistent with the provisions of the lease, their crops are the lessee's crops for the purposes of securing the rent, and with the same rights and interest of the lessor in enforcing payment. The land and the crops to be grown cannot be freed from the conditions imposed by law,

nor can the lessor's rights be abridged by any subordinate contracts of the lessee. He can pass no better estate, nor confer any superior rights to the use of the land, than he possesses himself. If it were otherwise, the subletting in parts might defeat the security given under the statute, and render it inoperative. The subtenant's crop may be under a double lien, that of the owner of the land and that of his immediate lessor, but the former is paramount, and the rent due on the primary lease must be satisfied." And in Mississippi the decision has been based upon the fact that the statute creates a lien on "agricultural products" of the leased premises, "by whomsoever produced." *Applewhite v. Nelms* (Miss.) *supra*. And in Georgia it has been said that a landlord, in the absence of any contract to the contrary, may adopt a tenant of his tenant as his own, so as to render the crops raised by the latter subject to his lien for rent. *Nash v. Orr* (1911) 9 Ga. App. 33, 70 S. E. 194; *Long v. Clark* (1915) 16 Ga. App. 355, 85 S. E. 358.

At least, this is the rule as to crops where the landlord does not consent to the subletting, or ratify it. *Andrew v. Stewart* (1888) 81 Ga. 53, 7 S. E. 169; *Thompson v. Commercial Guano Co.* (1893) 93 Ga. 282, 20 S. E. 309; *Leonard v. Fields* (1915) 143 Ga. 479, 85 S. E. 315; *Long v. Clark* (1915) 16 Ga. App. 355, 85 S. E. 358; *Horton v. Union Store* (1917) 19 Ga. App. 184, 91 S. E. 214; *Forrest v. Durnell* (1894) 86 Tex. 647, 26 S. W. 481; *Stokes v. Burney* (1893) 3 Tex. Civ. App. 219, 22 S. W. 126 (statute prohibits subleasing without the consent of the landlord); *Edwards v. Anderson* (1904) 36 Tex. Civ. App. 611, 82 S. W. 659; *Lampson v. Nesbitt* (1863) 13 Lower Can. Rep. 365 (lease prohibited subletting without the owner's consent); *Arnoldi v. Grimard*, 5 Rev. Leg. (L. C.) 748, as cited in 18 Am. & Eng. Enc. Law, 2d ed. 338, note 4. In *Forrest v. Durnell* (Tex.) *supra*, the court discussed the right of a landlord as against a subtenant who rented without obtaining his consent, as follows: "No assignee of a lease or subten-

ant can be heard to say that he was ignorant of the terms on which the lessee held possession; nor can he be heard to say that it was his intention, without the landlord's consent, to deprive him of any right he would have had in or to the products of the rented premises if he had not entered upon and used the land. The statute informs them that they can acquire no right to use the premises without the landlord's consent, and of the further fact that the law gives him a lien on all the products of the land to secure the rent. Under such circumstances, whatever contract an assignee or undertenant may make with the original lessee, he must be understood impliedly to assume towards the lessor the relation of tenant, and to consent that the lien given by statute shall exist. A lessee cannot free himself or the products of leased premises from the lien given by statute, unless by contract with the lessor or payment of rent, and he certainly has no power to confer on any third person a right to use the land, freed from lien on its products. If the landlord consents, expressly or impliedly, to the occupation of his land by an assignor or undertenant, the relation of landlord and tenant necessarily exists between him and such person; for under the statute such holdings are illegal without such consent. If the consent of the landlord be not given, such assignees or subtenants, in so far as the landlord and his rights are concerned, must be treated simply as employees of the lessee. "The land and the crops to be grown cannot be freed from the conditions imposed by law, nor can the lessor's rights be abridged by any subordinate contract of the lessee. He can pass no better estate nor confer any superior right to the use of the land than he possesses himself. If it were otherwise, the subletting in parts might defeat the security given under the statute and render it inoperative."

In some Alabama cases it has been held that in such a case the lien applies to all the crops grown on the demised premises, so that the subtenant cannot complain that his share, rather than the tenant's, was seized to

satisfy the lien. *Givens v. Easley* (1850) 17 Ala. 385; *Robinson v. Lehman* (1882) 72 Ala. 401. In *Robinson v. Lehman* (Ala.) supra, in discussing the earlier case of *Givens v. Easley* (Ala.) supra, the court said: "There was not then, as there is now, a statutory provision requiring the landlord to exhaust the crops of the original lessee, before resorting to and subjecting the crops of the underlessee. The liability of the crop of the undertenant to pay the rent of the original lessee was purely and strictly statutory. For, by the common law, between the lessor and the tenant of his lessee there was neither privity of estate, nor of contract, and for the recovery of rent the lessor could maintain no action against the underlessee. When he paid rent to his immediate landlord, he was discharged from all liability. *Taylor, Land. & T.* 484. The purpose of the statute was not to fix upon the underlessee a personal liability for the rent owing by his immediate landlord, but the primary appropriation of all crops grown on the rented lands to the payment of the rent accruing for the current year, without regard to the ownership of the crops, or the agencies employed in producing them. The lessor had the option, now qualified by statute, to proceed and charge the crop of his own tenant, or of the undertenant, or to proceed and charge both crops indiscriminately. The option was given simply to secure to him the payment of the rent issuing out of the premises."

However, as is stated in *Robinson v. Lehman* (Ala.) supra, the later statutes change this rule and require that the property, if any, of the tenant in chief, be first exhausted, before resorting to that of the undertenant. And see the following additional cases which recognize this rule: *Agee v. Mayer* (1881) 71 Ala. 88; *Lehman v. Howze* (1882) 73 Ala. 302. In the *Agee* Case the court said that the (later) statutes are intended to require the crops (upon which the statute gave a lien) of the tenant in chief to be exhausted before proceeding against the crops of the undertenant.

And in Mississippi, proceeding upon the theory that a subtenant, by reason of the liability of his crop, occupies the relation of a surety for the rent due by the principal tenant, the courts have held that the subtenant, in an equitable proceeding, can compel the landlord first to resort to the crops of his tenant. *Applewhite v. Nelms* (1893) 71 Miss. 482, 14 So. 443.

And it has been held that the Quebec statute, limiting a subtenant's liability to the amount of rent owed by him at the time of the seizure by the landlord of his effects on the leased premises, does not apply where the original lease prohibited subletting without consent, and no such consent was obtained, and consequently that a subtenant cannot invoke its protection in such a case. *Hamilton v. Dwyer* (1899) Rap. Jud. Quebec 16 C. S. 469. And in Quebec it has been held that a subtenant who rents for the purpose of maintaining a house of prostitution, and places movables on the demised premises, stands in relation to the landlord in the position of a third person whose effects are upon the premises with his consent, and that such movable effects are subject to the landlord's statutory privilege for rent. *Montmarquette v. Berman* (1906) Rap. Jud. Quebec 29 C. S. 193.

And where the subtenant rents with the consent of the landlord, the Texas rule is that crops raised by the subtenant are subject to the landlord's lien, and that he cannot release the same by paying rent to the principal tenant. *Marrs v. Lumpkin* (1900) 22 Tex. Civ. App. 448, 54 S. W. 775. The court said: "The principal contention of appellants is that the written consent of the landlord Lumpkin, to Frazier, to sublet, and his waiver of the statute against subletting, was a waiver of his right of lien on the crop raised on the premises, and that he must look alone to Frazier for his rent. This contention cannot be sustained. The rule is the reverse of this contention. There was no waiver of rent; the waiver is only to sublet. The crops of the subtenants in such case would be subject to the landlord's lien for rent to the extent of his claim

against the original tenant. The payment of the rent, in such case, to the original tenant by the subtenants, would not release the crop from the landlord's lien. As was said by Chief Justice Stayton in *Forrest v. Durnell* (1894) 86 Tex. 651, 26 S. W. 481, the crop in such case may be under a double lien, to the original landlord and to the original tenant. When one rents from a tenant with the landlord's consent, he occupies the relation of tenant to the landlord and the original tenant. *Id.* If the subtenant in such case pay rent to the landlord, he would be entitled to a credit for the amount paid on the claim of the original tenant against him. *Id.* The subtenant can protect himself from payment of double rent, but not at the expense of the landlord." And this decision was approved and applied in the subsequent case of *Trout v. McQueen* (1901) — Tex. Civ. App. —, 62 S. W. 928. And to the same effect, with respect to the question of the effect of consent, is *Edwards v. Anderson* (1904) 36 Tex. Civ. App. 611, 82 S. W. 659.

In Alabama, by virtue of § 4747 of the Code of 1907, a landlord has a lien on the property of a subtenant for rent of the demised premises while occupied by him. See *Samuel Gans Co. v. Tyson* (1910) 170 Ala. 513, 54 So. 237; *Drinkard v. State* (1915) 12 Ala. App. 184, 68 So. 553. But this lien does not extend to rent to accrue against the tenant in chief after the term for which the subtenant has bound himself. *Samuel Gans Co. v. Tyson* (Ala.) *supra*.

Other jurisdictions also have statutes which have expressly extended a landlord's lien to the property of subtenants. See, for example: *Jones v. Fox* (1887) 23 Fla. 454, 2 So. 700, on subsequent appeal in (1890) 26 Fla. 276, 8 So. 449; *Hodges v. Cooksey* (1894) 33 Fla. 715, 24 L.R.A. 812, 15 So. 549, which construed Act March 11, 1879, chap. 3131, § 1; *Ruge v. Webb Press Co.* (1916) 71 Fla. 536, L.R.A. 1916F, 446, 71 So. 627, which construed Gen. Stat. 1906, § 2237, Comp. Laws 1914; *Garrouette v. White* (1887) 92 Mo. 237, 4 S. W. 681; *Hicks v. Mar-*

tin (1887) 25 Mo. App. 359, and Hulet v. Stockwell (1887) 27 Mo. App. 328, which construed Mo. Rev. Stat. 1879, §§ 3083, 3095; Williams v. Braden (1895) 63 Mo. App. 513, and Phillips v. Burrows (1896) 64 Mo. App. 351, which construed Mo. Rev. Stat. 1889, § 6388; Welch & Co. v. Central San Cristobal (1914) 7 Porto Rico Fed. Rep. 205, construing and applying Porto Rico Civ. Code, § 1454; Hamilton v. Blanton (1917) 107 S. C. 142, 92 S. E. 275, construing S. C. Civ. Code 1912, § 4162, which creates a lien for rent upon all the crops raised on leased premises "by the tenant or other person," and holding that the lien extended to and covered the share of a share cropper in a crop raised by the tenant and such share cropper; Rutledge v. Walton (1833) 4 Yerg. (Tenn.) 458, construing Tenn Act 1825, chap. 21 (Code, § 3539), and holding that the sublessee cannot defeat the landlord's lien by paying his rent to the principal tenant. And in Missouri, at least, the crops of the subtenant are subject to the landlord's lien only for rent accruing during such subtenant's term (Garrouette v. White (1887) 92 Mo. 237, 4 S. W. 681; Hicks v. Martin (1887) 25 Mo. App. 359), and to the extent of the premises held by such tenant (Hulet v. Stockwell (1887) 27 Mo. App. 328; Phillips v. Burrows (1896) 64 Mo. App. 351).

And in Louisiana, by express statutory provisions, the original lessor has a privilege acquired by operation of law as against the separate property of a subtenant, to the full extent of such subtenant's indebtedness for rent to the principal lessee, but only to that extent. Vairin v. Hunt (1841) 13 La. 498; Deslix v. Jone (1843) 6 Rob. (La.) 292; Wallace v. Smith (1853) 8 La. Ann. 374; Sanarens v. True (1870) 22 La. Ann. 181 (holding that the subtenant cannot be held for rent not yet due); Rosenthal v. Longley (1904) 1 La. App. (Orleans) 206 (holding that a boarder is an undertenant to the extent that he rents an apartment and keeps his own furniture, etc., therein); Tulane Improv. Co. v. W. B. Green Photo Supply Co. 9 A.L.R.—21.

(1909) 124 La. 619, 50 So. 601; Schultz v. Finegan (1910) 7 La. App. (Orleans) 415 (holding same as next preceding case, notwithstanding the fact that the sublessee may have given notes for his rent to the principal tenant); Lewis v. Levy (1912) 9 La. App. (Orleans) 136 (holding same as next preceding case); Marinoni v. Levy (1912) 9 La. App. (Orleans) 253 (holding same as Schultz v. Finegan (La.) supra); Franek v. Flynt (1913) 132 La. 827, 61 So. 390. And that this is the rule in Quebec, see Renaud v. Hood (1868) 12 Lower Can. Jur. 197.

And in Arkansas the statute limits the landlord's lien upon the crops grown by a subtenant to liability for rent of such lands as are occupied by him. Jacobson v. Atkins (1912) 103 Ark. 91, 146 S. W. 133.

Under the Kentucky Statute of 1811, which gave a landlord no exclusive lien on the property of his tenant or undertenant "except the same is the produce of the place rented," it has been held that the landlord's lien extended only to the immediate tenant's goods, and not to those of a subtenant. Craddock v. Riddlesbarger (1834) 2 Dana (Ky.) 205. (This statute, however, was impliedly repealed in 1828, and the lien extended to "all goods and chattels whatsoever, lying in or being on the tenement." See Burket v. Boude (1835) 3 Dana (Ky.) 209.)

d. Assignee of lease.

Under an assignment of a lease, as distinguished from a sublease, the assignee becomes a tenant of the landlord, and his property as fully subject to the landlord's lien as though he were the original lessee. Johnson v. Thompson (1914) 185 Ala. 666, 64 So. 554. And see Rogers v. Grigg (1895) — Tex. Civ. App. —, 29 S. W. 654.

And under Texas Rev. Stat. 1911, art. 5664, the lessor of pasture lands has a lien for rent on the cattle of an assignee of the lease, which are being pastured on the demised premises. Russell v. Old River Co. (1919) — Tex. Civ. App. —, 210 S. W. 705.

And in Florida, by Act March 11, 1879, chap. 3131, § 1 (Gen. Stat. 1906,

§ 2237, Comp. Laws 1914), the lien of a landlord was expressly extended to the property of the "assigns" of a tenant. See *Jones v. Fox* (1887) 23 Fla. 454, 2 So. 700, on subsequent appeal in (1890) 26 Fla. 276, 8 So. 449; *Hodges v. Cooksey* (1894) 33 Fla. 715, 24 L.R.A. 812, 15 So. 549; and *Rugé v. Webb Press Co.* (1916) 71 Fla. 536, L.R.A.1916F, 446, 71 So. 627.

However, the statutes may, and in at least one instance have, expressly confined the landlord's lien as against the assignee's property, to the period after his interest began. See *Meyer Bros. v. Gaertner* (Louisville Trust Co. v. Gaertner) (1899) 106 Ky. 481, 45 L.R.A. 513, 50 S. W. 971.

e. Assignee for creditors.

A landlord's lien is good as against goods in the hands of an assignee for creditors of the tenant. *McKleroy v. Cantey* (1891) 95 Ala. 295, 11 So. 258; *Murphey v. Brown* (1909) 12 Ariz. 268, 100 Pac. 801; *Allen v. Brunner* (1908) 33 Tex. Civ. App. 128, 75 S. W. 821; *Lazier v. Henderson* (1898) 29 Ont. Rep. 673. But this lien does not attach to the proceeds of a fire policy on goods destroyed while in the hands of the tenant's assignee for creditors. *Miller v. Tew* (1909) 20 Ont. L. Rep. 77, 14 Ont. Week. Rep. 207, 1173.

f. Conditional vendors.

A landlord having a lien upon the goods, chattels, and effects of the tenant has no absolute lien upon property held by the tenant under a conditional sale contract. *Bingham v. Vandegrift* (1890) 93 Ala. 283, 9 So. 280. And see *Michaud v. Guilbault* (1880) 6 Quebec L. Rep. 156.

Especially if the goods came into the possession of the tenant after the lease was executed, since in such a case the landlord cannot be regarded as having extended any credit to the tenant on the strength of his possession or apparent ownership of the property. *SNYDER v. COLLINS* (reported herewith) ante, 283; *Hubbell v. Davison* (1918) 184 Iowa, 131, 168 N. W. 137. In such a case the landlord merely succeeds to the rights of the tenant vendee. *Bingham v. Vandegrift* (Ala.) supra.

Of course, to have this result, the conditional sale contract must be valid and enforceable. For instance, in *Cohen & Co. v. Candler* (1887) 79 Ga. 427, 7 S. E. 160, it was held that a statute giving a landlord a lien for rent on the property of the debtor tenant "liable to levy and sale" did not protect property held by a tenant under a conditional sale contract, where such contract could not be enforced because not recorded as required by law. And in *Gartrell v. Clay* (1888) 81 Ga. 327, 7 S. E. 161, a similar conclusion was reached as to property held by a tenant under a conditional sale contract which was invalid because never executed and recorded, as required by law, and of which the landlord had no notice. Again in *Low v. Troy Laundry Machinery Co.* (1913) — Tex. Civ. App. —, 160 S. W. 136, which involved a lease for a term of years, it was held that a landlord had a lien good as against an unrecorded conditional sale of chattels to a tenant, but that where the contract was later recorded such superiority only applied to the current year's rent, in view of the fact that the Landlord's Lien Statute confined such a lien to the current year, and that as to rent for subsequent years the recorded conditional sale contract worked a superior lien.

X. Effect of removal or transfer of tenant's chattels.

a. In general.

The rule generally accepted is to the effect that, with certain exceptions subsequently noted (see *infra*, X. b, c), the property of a tenant is subject to his landlord's lien, notwithstanding it has been sold by the tenant or removed during the term of the lease.

United States.—*Re Scruggs* (1913) 205 Fed. 673.

Alabama.—*Governor v. Davis* (1852) 20 Ala. 366; *Lomax v. Le Grand & Co.* (1877) 60 Ala. 537; *Scaife v. Stovall* (1880) 67 Ala. 237; *Barnett v. Warren* (1886) 82 Ala. 557, 2 So. 457; *Weil v. McWhorter* (1891) 94 Ala. 540, 10 So. 131; *McKleroy v. Cantey* (1891) 95 Ala. 295, 11 So. 258; *Ehrman v.*

Oats (1898) 101 Ala. 604, 14 So. 361; Andrews Mfg. Co. v. Porter (1895) 112 Ala. 381, 20 So. 475; Foxworth v. Brown Bros. (1897) 120 Ala. 59, 24 So. 1; Bush v. Willis (1900) 130 Ala. 395, 30 So. 443.

Illinois.—Prettyman v. Unland (1875) 77 Ill. 206; Nelson v. First Nat. Bank (1913) 184 Ill. App. 349.

Indiana.—Kennard v. Harvey (1881) 80 Ind. 37; Campbell v. Bowen (1899) 22 Ind. App. 562, 54 N. E. 409.

Iowa.—Richardson Bros. v. Petersen (1882) 58 Iowa, 724, 13 N. W. 63; Staber v. Collins (1904) 124 Iowa, 543, 100 N. W. 527; Beck v. Minnesota & W. Grain Co. (1906) 131 Iowa, 62, 7 L.R.A.(N.S.) 930, 107 N. W. 1032; Overholser v. Christensen (1907) 133 Iowa, 129, 110 N. W. 321.

Kansas.—Scully v. Porter (1896) 57 Kan. 322, 46 Pac. 313.

South Carolina.—Hamilton v. Stubbs Co. (1916) 105 S. C. 157, 89 S. E. 554.

Tennessee.—Phillips v. Maxwell (1872) 1 Baxt. 25; Decker v. Rice (1917) 137 Tenn. 478, 194 S. W. 87.

Texas.—Wilkes v. Adler (1887) 68 Tex. 689, 5 S. W. 497; Irion v. Bexar County (1901) 26 Tex. Civ. App. 527, 63 S. W. 550; Farmers' Elevator Co. v. Advance Thresher Co. (1916) — Tex. Civ. App. —, 189 S. W. 1018; Green v. Scales (1919) — Tex. Civ. App. —, 219 S. W. 274.

This is especially true where the removal was merely for the purpose of preparing the goods for market, as cotton for ginning. Green v. Scales (Tex.) supra.

Some statutes also expressly extend the landlord's lien for a specified time after removal. For illustrative statutes, see Stone v. Bohm Bros. (1880) 79 Ky. 141, which construes Ky. Gen. Stat. chap. 66, art. 2, § 13; and Ritchie v. White (1822) 11 Mart. (La.) 239; Hanna v. His Creditors (1822) 12 Mart. (La.) 32; Robinson v. McCay (1829) 8 Mart. N. S. (La.) 106; Desban v. Pickett (1861) 16 La. Ann. 350; Haralson v. Boyle (1870) 22 La. Ann. 210; St. Charles Hotel Co. v. Tarbox (1871) 23 La. Ann. 715, and Langsdorf v. Le Gardeur (1875) 27 La. Ann. 363, all of which construe similar Louisiana statutes; Wilkes v. Ad-

ler (1887) 68 Tex. 689, 5 S. W. 497; York v. Carlisle (1898) 19 Tex. Civ. App. 269, 46 S. W. 257; Sexton Rice & Irrig. Co. v. Sexton (1907) 48 Tex. Civ. App. 190, 106 S. W. 728, and Farmers' Elevator Co. v. Advance Thresher Co. (1916) — Tex. Civ. App. —, 189 S. W. 1018, all of which construe similar Texas statutes. And see Holstein v. Knopf (1913) Rap. Jud. Quebec 44 C. S. 49, 10 D. L. R. 843, 19 Rev. Leg. 374, which construes Quebec Civ. Code, art. 1623. And by the Louisiana Act of 1886, art. 89, the privileges "granted by existing laws" as to other movables of tenants were extended to crops raised on the demised premises. A. Adler Realty Co. v. Bloch Bros. (1911) 9 La. App. (Orleans) 47.

Of course, under such statutes the lien or privilege of the lessor cannot be enforced as against the goods of the tenant, unless within the statutory period after removal. Langsdorf v. Le Gardeur (1875) 27 La. Ann. 363; Holstein v. Knopf (Quebec) supra.

Where the statutes do allow a lien against a purchaser in case of a removal, it is, of course, necessary that the property can be found and identified. Andrews Mfg. Co. v. Porter (1895) 112 Ala. 381, 20 So. 475; Decker v. Rice (1917) 137 Tenn. 478, 194 S. W. 87; Farmers' Elevator Co. v. Advance Thresher Co. (1916) — Tex. Civ. App. —, 189 S. W. 1018.

In Louisiana, under a statute having a proviso to the effect that the privilege is not destroyed if the removed goods continue to be the property of the lessee, and can be identified, the landlord's privilege cannot be destroyed by the removal of a tenant's goods by the personal representative (curator) of the latter's estate (Robinson v. McCay (1829) 8 Mart. N. S. (La.) 106), or by seizure by the sheriff (Haralson v. Boyle (1870) 22 La. Ann. 210); but is, of course, destroyed by the sale thereof after removal (Desban v. Pickett (1861) 16 La. Ann. 350; St. Charles Hotel Co. v. Tarbox (1871) 23 La. Ann. 715), provided, however, that the sale was not fraudulent (Worrell v. Vickers. (1878) 30 La. Ann. 202).

So it has been held that the provisions of the Philippine Civ. Code, art. 1922, ¶ 7, which create a preference for rent as to "personal property of the lessee existing on the estate leased, and on the fruits thereof," do not confer a statutory landlord's lien upon property of the tenant, which has been sold prior to the attempted enforcement of the lien. *Pena v. Mitchell* (1908) 9 Philippine, 587; *Macke v. Rubert* (1908) 11 Philippine, 480.

On the other hand, in Porto Rico, under the Civil Code, which gives the landlord a privilege for rent on the "personal property of the lessee existing on the estate leased, and on the fruits thereof," the mere fact that the goods of the tenant have passed into the hands of his receiver does not destroy the landlord's lien or privilege. *Welch & Co. v. Central San Cristobal* (1914) 7 Porto Rico Fed. Rep. 205.

And in Texas it has been held that, where a suit to foreclose a landlord's lien for rent on a printing plant is instituted before the plant is removed from the rented premises, such plant is subject to his lien, although sold under execution in favor of a creditor to the tenant, prior to the obtaining of a judgment foreclosing the lien for rent. *Irion v. Bexar County* (1901) 26 Tex. Civ. App. 527, 63 S. W. 550.

And to the general effect that a landlord does not lose his lien by removal from the premises, or seizure and sale of the tenant's goods by operation of law, are *Holdane v. Sumner* (1872) 15 Wall. (U. S.) 600, 21 L. ed. 254 (see also *Rose's Notes* to this case), and *Miles v. James* (1865) 36 Ill. 399. And see *Haralson v. Boyle* (1870) 22 La. Ann. 210.

In *Abraham v. Nicrosi* (1888) 87 Ala. 173, 6 So. 293, it was held that the landlord's lien upon goods which have been brought upon the premises after the expiration of the original term, but while the tenant is continuing in possession as such, is not defeated by a sale thereof to a third person,—at least, so long as the goods remain on the demised premises. And since the right to a landlord's lien,

under a statute creating a lien upon crops grown on demised premises, depends on the existence of the relation of landlord and tenant, such a lien does not attach to a crop sold before the tenancy began, but not removed until after the creation thereof. *Hadden v. Powell* (1850) 17 Ala. 314 (crop was sold while the tenant occupied the land under a contract of purchase, but was not removed until after the rescission of that contract and the creation of a tenancy).

b. Mala fide and bona fide purchasers.

1. Mala fides.

The general rule that removal or sale of a tenant's property does not destroy the landlord's lien is especially true where the goods were purchased from the tenant with knowledge, either active or constructive, of the landlord's lien.

Alabama.—*Dulany v. Dickerson* (1847) 12 Ala. 601; *Lomax v. Le Grand & Co.* (1877) 60 Ala. 537; *Scaife v. Stovall* (1880) 67 Ala. 237 (expressly so provided by early statute, and so held under later statutes which contained no express provision); *Robinson v. Lehman* (1882) 72 Ala. 401; *Weil v. McWhorter* (1891) 94 Ala. 540, 10 So. 131; *McKleroy v. Cantey* (1891) 95 Ala. 295, 11 So. 258; *Atkinson v. James* (1892) 96 Ala. 214, 10 So. 846; *Ehrman v. Oats* (1893) 101 Ala. 604, 14 So. 361; *Andrews Mfg. Co. v. Porter* (1895) 112 Ala. 381, 20 So. 475; *Foxworth v. Brown Bros.* (1897) 120 Ala. 59, 24 So. 1; *Bush v. Willis* (1900) 130 Ala. 395, 30 So. 443.

Arizona.—*Murphey v. Brown* (1909) 12 Ariz. 268, 100 Pac. 801.

Arkansas.—*Hunter v. Matthews* (1899) 67 Ark. 362, 55 S. W. 144; *Jacobson v. Atkins* (1912) 103 Ark. 91, 146 S. W. 133.

Illinois.—*Prettyman v. Unland* (1875) 77 Ill. 206; *Harvey v. Hampton* (1903) 108 Ill. App. 501.

Iowa.—*Staber v. Collins* (1904) 124 Iowa, 543, 100 N. W. 527.

Kansas.—*Scully v. Porter* (1896) 57 Kan. 322, 46 Pac. 313; *Maelzer v. Swan* (1907) 75 Kan. 496, 89 Pac. 1037.

Mississippi.—*Storm v. Green* (1875)

51 Miss. 103; *Dunn v. Kelly* (1880) 57 Miss. 825; *Cohn v. Smith* (1887) 64 Miss. 816, 2 So. 244.

Missouri.—*Mitchell v. Samford* (1910) 149 Mo. App. 72, 130 S. W. 99; *Dubach v. Dysart* (1914) 184 Mo. App. 702, 171 S. W. 597.

Tennessee.—*Phillips v. Maxwell* (1872) 1 Baxt. 25.

If the purchaser has knowledge of the landlord's lien, he may be regarded as purchasing subject to it. *Governor v. Davis* (1852) 20 Ala. 366; *Scaife v. Stovall* (1880) 67 Ala. 237; *Weil v. McWhorter* (1891) 94 Ala. 540, 10 So. 131. And it has been stated generally that the lien continues until the removed chattel passes into the possession of a purchaser without notice. *Lomax v. Le Grand & Co.* (1877) 60 Ala. 537.

It is not material that the goods were not sold until after removal, provided the purchaser, at the time, had at least constructive notice of the lien. *Atkinson v. James* (1892) 96 Ala. 214, 10 So. 846. The same has been held where the goods were purchased from the tenant while they were still upon the leased premises. *Scully v. Porter* (1896) 57 Kan. 322, 46 Pac. 313 (holding that one who purchases, from a tenant who he knows or ought to know is such, a crop in the tenant's possession before its removal from the demised premises, cannot be regarded as a bona fide purchaser, and saying that "so long as the property remains on the leased premises it affords notice to all who deal with the tenant").

And a secret and unlawful removal of a tenant's goods from demised premises by a third party does not prevent their being pursued into the hands of such third person. *Auld v. Laurent* (1864) 8 Lower Can. Jur. 146. And a tenant cannot remove his movables from the demised premises for the purpose of avoiding the landlord's privilege for rent, although he apparently has left enough to satisfy the same. *Vanier v. Bonenfant* (1915) Rap. Jud. Quebec 48 C. S. 363.

On the other hand, it has been held that, where the statute merely gives a "lien on the crop" raised on the leased premises, a priority of satisfaction

only is given, so that the landlord has no claim against a purchaser from the tenant, even though such purchaser had knowledge of the lien. *Bryan v. Buckholder* (1847) 8 Humph. (Tenn.) 561. The court said: "The Act of 1825, chap. 21, § 1, gives the landlord a lien on the crop, and declares that the debt for rent 'shall have precedence over all other debts' for three months after the rent shall fall due. By its plain meaning a priority of satisfaction only is given. . . . It may be true, as argued, that the objects of this statute will be defeated by unprincipled tenants; nevertheless, the courts can extend the remedy no further than the legislature has thought proper to go in the statute. It is impossible to devise a system of law that will always afford relief for injuries sustained by means of unprincipled men. And this is but one of the many instances where the party is without remedy." However, this imperfection of statute was subsequently remedied, and the landlord given a right to pursue the crop in accordance with the general rules. See *Phillips v. Maxwell* (1872) 1 Baxt. (Tenn.) 25, and *Decker v. Rice* (1917) 137 Tenn. 478, 194 S. W. 87, as set out in this subdivision.

2. *Bona fidee.*

One exception to the general rule discussed supra, X. a, is to the effect that, in the case of a sale of the tenant's goods, the landlord's statutory lien thereon for rent is not good as against a bona fide purchaser, without notice, either actual or constructive, of the lien, who has the goods in his possession.

United States.—*Webb v. Sharp* (1872) 13 Wall. 14, 20 L. ed. 478 (see also *Rose's Notes* to this case); *Re Scruggs* (1913) 205 Fed. 678.

Alabama.—*Governor v. Davis* (1852) 20 Ala. 366; *Barnett v. Warren* (1886) 82 Ala. 557, 2 So. 457; *Foxworth v. Brown Bros.* (1897) 120 Ala. 59, 24 So. 1; *Bush v. Willis* (1900) 130 Ala. 395, 30 So. 443; *Worthington v. Long* (1913) 9 Ala. App. 617, 64 So. 174.

Arizona.—*Murphey v. Brown* (1909) 12 Ariz. 268, 100 Pac. 801.

Arkansas.—*Hunter v. Matthews* (1899) 67 Ark. 362, 55 S. W. 144.

Georgia.—*Thornton v. Carver* (1888) 80 Ga. 397, 6 S. E. 915.

Iowa.—*Grant v. Whitwell* (1859) 9 Iowa, 152; *Nesbitt v. Bartlett* (1863) 14 Iowa, 485 (cow). But compare other Iowa cases as set out and quoted *infra*, this subdivision.

Kansas.—*Scully v. Porter* (1896) 57 Kan. 322, 46 Pac. 313; *Maelzer v. Swan* (1907) 75 Kan. 496, 89 Pac. 1037.

Kentucky.—*Stone v. Bohm Bros.* (1880) 79 Ky. 141; *Monarch v. Dean* (1882) 3 Ky. L. Rep. 757.

Mississippi.—*White v. Miazza-Woods Constr. Co.* (1920) — Miss. —, 84 So. 181.

Especially if the purchase was made after removal of the property by the tenant. *Scaife v. Stovall* (1880) 67 Ala. 237; *Worthington v. Long* (1913) 9 Ala. App. 617, 64 So. 174. In *Scaife v. Stovall* (Ala.) *supra*, the court discussed this question as follows: "Against every analogous right or lien springing up from the contract or relation of parties known to, recognized, and enforced by law, not the mere creature of a statute, a bona fide purchaser is protected. It may well be said, the law delights in his protection and regards it as a wise policy, founded in the demands of justice, promotive of commerce, to save him from mere charges or encumbrances of the ownership, of which he cannot, by any prescribed measure of diligence, acquire notice. Statutes are always read and construed in the light of the common law, and are not regarded as infringing upon its rules and principles, save so far as may be expressed, or fairly implied to give them full operation. . . . All that can be said is that the present statute is silent as to the persons in whose possession the crop may be levied on by attachment, leaving that question, if a controversy arises as to it, to be determined by the common law, and that law intervened for the protection of the bona fide purchaser, who has equal equity with the landlord, and the legal title attached to it."

And this, although the statute creat-

ing the lien broadly provides that it shall have preference "over any mortgage or other conveyance of" property made by the tenant or his agent. *Hunter v. Matthews* (1899) 67 Ark. 362, 55 S. W. 144. Nor does the fact that the statute creating the landlord's lien declares it superior to other liens render it superior to the rights of a bona fide purchaser. *Thornton v. Carver* (1888) 80 Ga. 397, 6 S. E. 915. The court said: "The statute simply makes this lien superior to other liens. But it does not operate upon the title; it does not say that this lien is superior to the title acquired by a bona fide purchaser. It is argued that it has always been the policy of the law to protect landlords; but it may be replied that the policy of the law, as we have shown, has always been to protect innocent purchasers also. Landlords generally are on or near the rented premises, and have better opportunities to look after their rights and interests than purchasers would ordinarily have if the latter were charged with notice of secret liens upon the property purchased."

And it has been held that a landlord's lien cannot be enforced against bona fide purchasers who take the property off the demised premises, even though the statute expressly provides that the landlord shall have a lien good for a specified time after removal. *Stone v. Bohm Bros.* (1880) 79 Ky. 141; *Monarch v. Dean* (1882) 3 Ky. L. Rep. 757. Especially if the statutory period has elapsed before the privilege of the lessor is sought to be enforced. *Haralson v. Boyle* (1870) 22 La. Ann. 210.

And it has been held that a landlord's lien on products raised on the demised premises does not apply to crops upon which a bona fide lien has been acquired by a third person, after the removal of such crops from the premises by the tenant. *Governor v. Davis* (1852) 20 Ala. 366. (In this case the tenant removed the crop from the demised premises and stored it in a warehouse, where an execution was levied upon it in ignorance of any right of the lessor to a lien.)

And in Washington, under a statute

giving a landlord a prior and preferred lien upon crops grown on demised premises for his rental, to be asserted by filing a claim therefor, it has been held that such priority and preference depend upon notice, the lien being a special one requiring the exercise of an option and the filing of a claim of the same, so that in the absence of recording it will not operate to defeat purchasers in good faith. In other words, notice does not, as in some states, arise out of the tenancy, but by the assertion and filing of a claim of lien. *Chute v. Brown* (1918) 103 Wash. 364, 174 Pac. 438.

But in a number of jurisdictions it has been held that a landlord may, in certain instances, enforce his lien, even against a bona fide purchaser for value.

Thus, in Illinois, it has been held that if the goods of the tenant upon which the landlord had a lien can be found and identified, such goods are still subject to the lien, although they have passed into the hands of a bona fide purchaser for value. In other words, the landlord can follow the goods and seize the same whenever found, provided they can be identified. *Finney v. Harding* (1891) 136 Ill. 573, 12 L.R.A. 605, 27 N. E. 289, reversing (1889) 32 Ill. App. 98.

And in Iowa it has been held that goods used by a tenant, or crops grown on leased premises and not such as are held for sale in the usual course of trade, are subject to the landlord's statutory lien, notwithstanding they are in the hands of a bona fide purchaser for value, the Iowa Landlord's Lien Statute providing no protection for persons having no notice thereof. *Richardson Bros. v. Petersen* (1882) 58 Iowa, 724, 13 N. W. 63 (cow); *Holden v. Cox* (1883) 60 Iowa, 449, 15 N. W. 269 (crops); *Thompson v. Anderson* (1892) 86 Iowa, 703, 53 N. W. 418 (live stock used upon the demised premises for the purpose of being fed and improved in the usual way of stock raising, as distinguished from stock kept for sale only, on premises rented for such purpose); *Evans v. Collins* (1895) 94 Iowa, 432, 62 N. W. 810 (crops); *Blake*

v. Counselman (1895) 95 Iowa, 219, 63 N. W. 679 (crops); *Boyd v. Stipp* (1911) 151 Iowa, 276, 131 N. W. 222 (crops); *Hodges v. Trans-Mississippi Grain Co.* (1913) 161 Iowa, 496, 143 N. W. 501 (crops). In the *Hodges Case*, the court, referring to the contention that the purchaser was an innocent one, without notice of the landlord's lien, said: "This fact is not controlling, even if it were true." And in the *Richardson Case* the court said: "The lien given by the statute is a charge upon the property of the tenant specified, to secure the rent due under the lease. It attaches to the property and cannot be defeated by the sale or removal thereof. If it could be defeated in that way at the option of the tenant, the security would be worthless, and the purpose of the statute to protect the landlord would be defeated. The vendor of personal property transfers the title and interest he holds therein, subject to liens recognized by the law. This rule prevails in all cases except those wherein a purchaser, without notice, is protected by statute, as under the Registry Laws. If a statute creating a lien provides for no protection in favor of persons having no notice thereof, property subject thereto cannot be transferred, free of the lien, on the ground that the purchaser has no notice of its existence. Unless these principles be recognized, the lien conferred by the statute above quoted would fail to give protection to the landlord." And in *Holden v. Cox* (1883) 60 Iowa, 449, 15 N. W. 269, supra, the court distinguished *Grant v. Whitwell* (1859) 9 Iowa, 152, and *Nesbitt v. Bartlett* (1863) 14 Iowa, 485, supra, this subdivision, which reached a contrary conclusion, and limited the application of the rule that a landlord cannot enforce his statutory lien against a bona fide purchaser from the tenant. It said: "Section 2017 of the Code provides that 'the landlord shall have a lien for his rent upon all crops grown upon the demised premises.' This provision would, of course, be sufficient to enable the landlord to follow the crop into the hands of a person who was a

mere trespasser, but the defendant contends that it is not sufficient to enable the landlord to follow the crop into the hands of a purchaser. His argument is that the tenant must, in the nature of the case, be allowed to market his crop, and, if so, that he must be allowed to give a good title. In support of his proposition, he cites *Grant v. Whitwell* and *Nesbitt v. Bartlett* (Iowa) *supra*. It is not easy, we think, to lay down any general rule which shall clearly distinguish between and reconcile all the decisions which have been made upon the subject of the landlord's lien. In *Grant v. Whitwell*, it was held that, while a stock of goods kept merely for sale upon the demised premises is kept for use within the meaning of the statute, and so is subject to a lien in favor of the landlord, yet such lien does not follow the goods sold in the ordinary course of trade. Such ruling seemed to be necessary to avoid the absurdity of supposing that the legislature intended that the landlord should be allowed to assert his lien upon goods thus sold. The doubt, if any, arises upon the construction given the word used, as including the meaning 'kept for sale.' But the decision has been too long acquiesced in to justify now any serious criticism. Besides, we think that no great practical difficulty has ever resulted directly from it. The difficulty, if any, has been to resist the application of the logic in cases of a somewhat different character. In *Nesbitt v. Bartlett*, the question was as to whether a landlord's lien upon a tenant's cow follows the cow when sold, and it was held that it did not. The cow, it was thought, could not be presumed to be kept solely for use, but partly for sale, and being so kept it was thought that the case came under *Grant v. Whitwell*. The attempt is now to apply the doctrine to crops, and we are asked to hold that, as crops are kept for sale, they may be sold and the landlord's lien be devested by the sale. Yet, if we so hold, the statute will have but little practical operation. The landlord's right would be reduced to the right to seize his tenant's crops in his

hands, or to pursue them as against a trespasser; and we cannot think that that was the intention. The decision in *Grant v. Whitwell* was based upon the idea that the lien rested upon the stock as a mass. Where goods are sold in the ordinary course of trade, they are sold with the view to replenishment. The stock as a mass is preserved, and the lien holder suffers no detriment. The same thing may be said, with some slight propriety, at least, of the mass of live stock with which the agriculturalist stocks his farm. Sales may be made, but the proper conduct of a farm requires the continuity of the mass. With annual crops it is different. Each year's sales and consumption may properly enough exhaust the mass. Wright, J., in *Nesbitt v. Bartlett*, quotes from the opinion in *Grant v. Whitwell* so much as expresses the idea that the lien is upon the stock in mass, and we are allowed to infer that this principle was deemed applicable in *Nesbitt v. Bartlett*, and sufficient to justify the decision. We can hardly think that the court intended to go so far as to hold that a landlord has no lien that is enforceable against a purchaser, upon anything which a tenant keeps upon the premises for sale. Something is said, to be sure, about the flexibility that should be given the rule. But the idea, and the language used, seem to be derived from *Grant v. Whitwell*, and we do not think that we should be justified in carrying the doctrine of flexibility much farther than the court did in that case. We certainly cannot give full scope to it, and hold that a landlord's lien is to be enforced only when it is wholly consistent with the tenant's convenience. Whether a court can take notice that there are different degrees of convenience, and whether it would be possible to lay down any reliable rule by which a distinction could be drawn between the different degrees of convenience, we need not determine. The sale in this case was of 500 bushels of corn. Whether the mass from which the sale was made was large or small, the corn sold was a substantial part of the mass, and if the landlord's lien is

not to be respected in this case, then a landlord has no lien upon his tenant's crops as against a purchaser."

So, in Texas, under a statute expressly creating a landlord's lien for rent upon crops grown on demised premises, and impliedly and substantially providing that the lien shall hold the crop so long as it remains on the premises, and in case of removal until the 1st day of January after its maturity, or for a specified time, it has been held that any purchaser of the crop before the 1st of January next succeeding its maturity, or during the specified statutory period, takes it until that date subject to the lien, even though he was a purchaser in good faith and in actual ignorance of the lien. *Mathews v. Burke* (1870) 32 Tex. 419, construing Paschal's Dig. arts. 5027-5037, which extended the lien until January 1st after maturity; *American Cotton Co. v. Phillips* (1902) 31 Tex. Civ. App. 79, 71 S. W. 320, construing a statute extending the landlord's lien for thirty days after removal of the crop from the demised premises; *Ingraham v. Rich* (1911) — Tex. Civ. App. —, 136 S. W. 549 (same as preceding case); *Farmers' Elevator Co. v. Advance Thresher Co.* (1916) — Tex. Civ. App. —, 189 S. W. 1018 (same). In the *Mathews* Case, the court said: "Whoever purchased it previous to the 1st of January, 1868, held it in trust for the payment of the rent due the landlord. Good faith and innocence, and ignorance of the statutory lien in this or any other similar case, forms no defense to the purchaser. The statutes of the state inform all persons that a lien exists upon all products and crops of a rented place for the payment of the rent till the 1st day of January succeeding the raising the crop, and these same statutes bid all purchasers of cotton to beware how they purchase till that time. It is not our province to decide upon the hardness of a statute in its application to a particular case, or to pronounce it good or bad, but simply to say what the statutes provide in a given state of things."

Again, in Texas, under a statute giving a landlord a preference lien

upon all the property of the tenant on the premises during the term, and for one month after removal, it has been held that one who buys property subject to the landlord's lien, from a tenant, within the statutory period after removal thereof from the premises and before the levy of a warrant seeking the enforcement of the lien, but after service of citation in a suit therefor, takes subject to any judgment that may be rendered against the tenant, although at the time of purchase he had no actual knowledge that proceedings had been instituted to foreclose the landlord's lien. *York v. Carlisle* (1898) 19 Tex. Civ. App. 269, 46 S. W. 257. The court said: "The lien given by the statute in favor of the landlord attaches by operation of law to the property of the tenant situated upon the rented premises, and for one month after its removal therefrom. The institution of the suit to enforce this lien put in motion the remedy provided by the statute, to subject the property of the tenant which was upon the rented premises to the satisfaction of the demand due the landlord for rent; and after the institution of the suit,—at least, after the service of the citation upon the tenant,—such property would be in *lis pendens*, and a purchaser from the tenant during that time would acquire his right subject to the judgment that may finally be rendered against his vendor. It is the policy of the law to keep the subject-matter of litigation within the power of the court, so that effect may be given to the decree that may be finally entered. Otherwise, rights that may exist, and for the enforcement of which the suit is brought, may be defeated by successive alienations or the intermeddling of third parties. Of course, it is true that the pending suit is only notice of the matters which appear upon the face of the pleadings, and may be litigated, and a purchaser *pendente lite* can only be affected by an action pending concerning the property purchased. Now, the statute, in terms, gives the landlord a lien upon all the property of the tenant upon the rented premises, or which has been removed

therefrom within one month before suit, and a purchaser from the tenant, in the nature of things, must know that when a suit is instituted to foreclose the lien the property of the tenant, so situated upon the premises, may be brought into litigation; and that under the terms of the statute a distress warrant may be finally levied upon it, and that, unless some valid defense is interposed by the tenant, it may be subjected to the satisfaction of the final judgment that may be rendered in favor of the landlord. It is true the distress warrant, at the time the appellee purchased, had not been levied upon the animal in question, but the claim asserted by the appellant, together with the citation, was information of the fact that the landlord was seeking to assert and foreclose the lien against the property of the tenant, which was or had been upon the rented premises. This was notice sufficient that the right of lien as to such property would be litigated, and the subsequent levy of the distress warrant upon the identical property in controversy was simply additional means resorted to, to bring it within the custody of the law. The lien existed by force of the statute, and the distress warrant was the means employed to preserve it."

And in Tennessee, by virtue of a statutory provision permitting enforcement of a landlord's lien against his tenant's crop "in whosoever hands it may be," the landlord may pursue and enforce his lien on the crops of his tenant, even though they be in the hands of a purchaser without notice of the lien; but the contrary is the case where he attempts to reach the proceeds. *Phillips v. Maxwell* (1872) 1 Baxt. (Tenn.) 25; *Decker v. Rice* (1917) 137 Tenn. 478, 194 S. W. 87.

And in Mississippi, under a statute giving a landlord a lien on agricultural products, and making it a penal offense to remove any part of the crop from the demised premises until the lien is discharged, it has been held that a crop which had been removed and then sold might be followed and seized, the same as property subject to

a judgment, even as against a bona fide purchaser. *Westmoreland v. Wooten* (1876) 51 Miss. 825, as affected by the decision on a subsequent appeal in (1879) 56 Miss. 422; *Henry v. Davis* (1882) 60 Miss. 212; *Fitzgerald v. Fowlkes* (1882) 60 Miss. 270; *Newman v. Bank of Greenville* (1889) 66 Miss. 323, 5 So. 753 (expressly holding that the lien is good as against a bona fide purchaser for value); *Warren v. Jones* (1892) 70 Miss. 202, 14 So. 25 (holding that knowledge or notice of the tenancy is not material upon the question of the liability of the purchaser); *Appelwhite v. Nelms* (1893) 71 Miss. 482, 14 So. 443 (holding that in equity the purchaser from the principal tenant must be proceeded against before the crop of a subtenant can be subjected); *Millsaps v. Tate* (1897) 75 Miss. 150, 21 So. 663 (holding that "notice or want of notice" are of "no force in determining the liability of the purchaser"); *Ball v. Sledge* (1903) 82 Miss. 749, 100 Am. St. Rep. 654, 35 So. 447; *W. L. Robinson Co. v. Weathersby* (1911) 101 Miss. 724, 57 So. 983 (holding that the lien can be enforced against a bona fide purchaser). And see *Eason v. Johnson* (1891) 69 Miss. 371, 12 So. 446, and *Scarborough v. Lucas* (1918) 119 Miss. 128, 80 So. 521. In *Millsaps v. Tote* (1897) 75 Miss. 150, 21 So. 663, supra, the court said: "Liability attaches in such a case because of the wrongful acquisition of the property by a purchaser while it was subject under our statute to the landlord's lien." But a statute rendering a purchaser of a crop from a tenant liable to the landlord's lien has no extraterritorial effect, so that a purchaser outside of the jurisdiction cannot be subjected to the lien. *Ibid.*; *Ball v. Sledge* (1903) 82 Miss. 749, 100 Am. St. Rep. 654, 35 So. 447.

In Indiana, North Carolina, and South Carolina, the rule seems to be that a purchaser of a crop from a tenant is bound to take notice of the landlord's statutory lien, and that the purchaser cannot obtain a better title to the crop than the tenant had. See *Kennard v. Harvey* (1881) 80 Ind. 37; *Campbell v. Bowen* (1899) 22 Ind.

App. 562, 54 N. E. 409; *Keim v. Myers* (1909) 44 Ind. App. 299, 89 N. E. 373; *Belcher v. Grimsley* (1883) 88 N. C. 88, and *Hamilton v. Stubbs Co.* (1916) 105 S. C. 157, 89 S. E. 554. In *Belcher v. Grimsley* (1883) 88 N. C. 88, supra, the court said that the fact that the purchaser had no notice of the landlord's claim could not impair it, as the question was one of title, and the tenant could convey no better right to the property than he himself possessed. In other words, that "the principle 'caveat emptor'" applied with full force.

a. Sales in due course of business.

It is conceded by practically all, if not all, of the courts which have passed upon the question that, if the goods of a tenant have been sold by him in "the ordinary course of trade," they are not subject to the landlord's lien, such a case being regarded as forming an exception to the general rule discussed supra, X. a. The following decisions support this exception: *Webb v. Sharp* (1872) 13 Wall. (U. S.) 14, 20 L. ed. 478; *Fowler v. Rapley* (1872) 15 Wall. (U. S.) 328, 21 L. ed. 35 (see also *Rose's Notes* to this case); *Beall v. White* (1877) 94 U. S. 382, 24 L. ed. 173; *Weil v. McWhorter* (1891) 94 Ala. 540, 10 So. 131; *McKleroy v. Cantey* (1891) 95 Ala. 295, 11 So. 258; *Burgin v. Marx* (1909) 158 Ala. 633, 48 So. 348 (automobile manufactured by the tenant on the leased premises and sold in the regular course of trade); *The Richmond v. Cake* (1898) 1 App. D. C. 447; *Grant v. Whitwell* (1858) 9 Iowa, 152; *Carpenter v. Gillespie* (1860) 10 Iowa, 592; *Freeman v. Collier Racket Co.* (1906) 44 Tex. Civ. App. 177, 105 S. W. 1129, affirmed in (1907) 100 Tex. 475, 101 S. W. 202 (provision to this effect incorporated in statute). At least, where it was kept for sale and the premises were leased for that purpose. *Thompson v. Anderson* (1892) 86 Iowa, 703, 53 N. W. 418, holding that live stock kept solely for sale was not subject to a landlord's lien, sought to be enforced after sale and delivery thereof to a bona fide purchaser, and distinguishing such stock from that held

by a tenant for the purpose of being fed and improved in the usual way of stock raising.

In *Webb v. Sharp* (U. S.) supra, it was said that "otherwise business could not be safely carried on." And the reasoning assigned in *Grant v. Whitwell* (1859) 9 Iowa, 152, is to the effect that when the landlord leases his building to one of whose business he knows the very essence is that of selling, and whose purpose in leasing was that he might sell, the landlord gives his consent to the departure of the goods in the ordinary course and manner of trade.

This rule, however, has been held subject to the proviso that the goods are duly delivered and do not remain on the premises. *Fowler v. Rapley* (1872) 15 Wall. (U. S.) 328, 21 L. ed. 35 (see also *Rose's Notes* to this case).

And the sale by a tenant of a stock of goods in bulk or mass, not made in the ordinary course of trade on the premises, does not displace the landlord's lien. *Marsalis v. Pitman* (1887) 68 Tex. 624, 5 S. W. 404. At least, where the goods are not removed from the premises. *Fowler v. Rapley* (U. S.) supra, holding that the stock held by the purchaser in mass from a tenant, of an ice and lumber business, was subject to a landlord's lien where it still remained on the demised premises. So it has been held that where a large stock of merchandise was sold out in job lots by one engaged in the retail trade for the announced purpose of going out of business, such sale was not in the regular course of business, so that the landlord of the merchant could still subject such goods to the satisfaction of his lien. *Freeman v. Collier Racket & Co.* (1906) 44 Tex. Civ. App. 177, 105 S. W. 1129, affirmed in (1907) 100 Tex. 475, 101 S. W. 202.

XI. Proceeds of tenant's property.

a. In general.

It has been said in connection with the question whether a landlord's lien attaches to the proceeds from a sale of the tenant's property that the lien ordinarily does not follow or attach to

the proceeds of a sale or conversion of personal property. *Hartwig v. Iles* (1906) 131 Iowa, 501, 109 N. W. 18; *Kean v. Rogers* (1908) — Iowa, —, 118 N. W. 515; *Sternberger v. McSween* (1880) 14 S. C. 35; *Kennedy v. Reames* (1881) 15 S. C. 548; *Estes v. McKinney* (1897) — Tex. Civ. App. —, 43 S. W. 556; *Newman v. Ward* (1898) — Tex. Civ. App. —, 46 S. W. 868; *Farmers' Elevator Co. v. Advance Thresher Co.* (1916) — Tex. Civ. App. —, 189 S. W. 1018. And see *Poulin v. St. Germain* (1900) Rap. Jud. Quebec 11 B. R. 353, wherein it was held that a landlord's statutory privilege does not apply to the proceeds of a sale of his tenant's hotel license.

For instance, in *Kean v. Rogers* (1908) — Iowa, —, 118 N. W. 515, supra, the court, in discussing the right of a landlord to a statutory lien upon the proceeds of sale of the tenant's property, said: "When the property was sold, the statutory action for the enforcement of a landlord's lien could no longer be prosecuted. The property to which alone the lien had attached had passed to the purchaser, freed therefrom. There is no such thing as a statutory landlord's lien upon money, even though it be derived from the sale of property which is subject to such lien."

In fact it would seem, according to some of these authorities, that for the landlord's lien to follow and attach to the proceeds of the goods in the hands of a purchaser would require clear statutory provision to that effect. *Sternberger v. McSween* (1880) 14 S. C. 35; *Kennedy v. Reames* (1881) 15 S. C. 548; *Estes v. McKinney* (1897) — Tex. Civ. App. —, 43 S. W. 556. In the South Carolina cases the theory is that, since the landlord had no lien at common law, such a lien is entirely the creature of statute, so that the courts cannot sanction rights or supply remedies beyond those afforded by the statutes.

Applying this rule denying a landlord a lien as against the proceeds of property, it has been held that a statute which merely provides that a landlord leasing lands for agricultural purposes shall have a lien for rent to

the extent of one third of all crops raised on his lands does not invest the lienor with such an interest in crops grown on demised premises as would subject thereto an innocent purchaser who had disposed of the purchased crop. *Sternberger v. McSween* and *Kennedy v. Reames* (S. C.) supra.

And in Tennessee, while the landlord may pursue his tenant's crop in the hands of an innocent purchaser for value, he has no such right as to the proceeds, so that in the latter case he cannot recover. *Phillips v. Maxwell* (1872) 1 Baxt. (Tenn.) 25.

Likewise, in Texas, it has been held that a statute giving a landlord a lien on crops raised on rented lands, which lien it is provided shall continue in force while the products remain on the premises, and for one month thereafter, does not give a landlord a lien on the proceeds arising from a voluntary sale of a crop by a tenant, and in the hands of the purchaser. *Estes v. McKinney* (1897) — Tex. Civ. App. —, 43 S. W. 556; *Newman v. Ward* (1898) — Tex. Civ. App. —, 46 S. W. 868; *Farmers' Elevator Co. v. Advance Thresher Co.* (1916) — Tex. Civ. App. —, 189 S. W. 1018.

And the terms "produce" and "personal property," as used in a statute giving a landlord a superior lien on the produce of the rented premises, and on the fixtures, furniture, and other personal property of the tenant, have been held not to give the lessor of a theater a lien on the proceeds of tickets sold by the lessee. *LOUISVILLE GAYETY THEATER CO. v. RAGAN* (reported herewith) ante, 294. This was upon the theory that the ticket receipts not only could not be regarded as "produce of the leased premises," but that the term "personal property," as used in the statute, included only tangible personal property. But that a landlord, under a statute giving a lien on the "produce" of leased premises, has a lien on income derived by the lessee from the rented premises, see *Brown v. United States Trust Co. (People's Bank & T. Co. v. United States Trust Co.)* (1919) 185 Ky. 747, 8 A.L.R. 1142, 215 S. W. 815, as set

out and limited in the LOUISVILLE GAYETY THEATER CO. CASE.

Of course, the proceeds of property which was not subject to a landlord's lien are not covered by such a lien. See *Re Myers* (1900) 102 Fed. 869 (holding that the proceeds of a tenant's liquor license, which itself was not subject to the landlord's lien, because not subject to distress (see *supra*, VI.), was not reached by the lien); *McKleroy v. Cantey* (1891) 95 Ala. 295, 11 So. 258 (holding that the proceeds of choses in action taken upon the sale of goods in the usual course of trade could not be reached); and *Edwards v. Fairbanks* (1880) *Man. Unrep. Cas. (La.)* 53 (holding that the proceeds of a debt due the lessee were not subject to the landlord's privilege).

And where the proceeds of a tenant's property have been paid over to the tenant, and he has in turn paid them over to a third person by equitable assignment, it has been held that the landlord cannot subject them to a statutory lien for rent. *Hove v. Stanhope State Bank* (1908) 138 Iowa, 39, 115 N. W. 476; *Jones v. Stevens* (1892) — *Miss.* —, 12 So. 446.

In seeming conflict with the above-stated rule that a landlord has no lien on the proceeds of a sale of the tenant's goods, it has been held in a number of cases, and without reference to statutory provision, that the proceeds of a sale of a tenant's chattels grown or used on the demised premises are subject to the landlord's lien. *Barnett v. Warren* (1886) 82 Ala. 557, 2 So. 457; *Ehrman v. Oats* (1893) 101 Ala. 604, 14 So. 361; *Davis v. Meyers* (1870) 41 Ga. 95. And this, whether the proceeds be in the hands of the tenant, or in the hands of a third person to whom the money has been paid over, and who has notice that it is the proceeds of property on which the landlord had a lien. *Ehrman v. Oats* (1893) 101 Ala. 604, 14 So. 361. And this is the rule in Mississippi as to "agricultural products," although the purchaser had no knowledge that rent was due and unpaid. *Eason v. Johnson* (1891) 69 Miss. 371, 12 So. 446. And see *Warren v. Jones*

(1892) 70 Miss. 202, 14 So. 25, holding that lack of knowledge or notice to the purchaser of the existence of the tenancy does not affect the question of the liability of the purchaser.

And in some statutes it has been expressly provided that the landlord's lien may be enforced against the proceeds of property removed from the demised premises and sold by the tenant. See, for example, the Alabama statute (Code 1876, §§ 3467-3478) as set out and construed in *Scaife v. Stovall* (1880) 67 Ala. 237. And see *Sullivan v. Koy* (1907) 5 La. App. (Orleans) 37, for a statute relating to "movables" in general, and *A. Adler Realty Co. v. Bloch Bros.* (1911) 9 La. App. (Orleans) 47, for a statute which extended existing privileges so as to include crops. Another illustration is afforded by Oklahoma Comp. Laws 1909, § 4100, which, however, requires notice upon the part of the purchaser of the lien, either actual or constructive, which statute is set out and applied in *Butler v. Corey* (1913) 35 Okla. 471, 130 Pac. 137. Construing the Louisiana statutes which expressly extend the landlord's privilege to the proceeds of "movables," it has been held that the term "movables" does not include an unexpired lease, and consequently that the proceeds of a sale thereof are not subject to the landlord's privilege. *Brunner Mercantile Co. v. Rodgin* (1912) 130 La. 358, 57 So. 1004. And even where the proceeds of the tenant's movables are declared subject to the landlord's statutory right, they are not so subject if they cannot be specified as the specific and identical fund,—at least, where one of the conditions of the creating statute is that the goods "can be identified." *Sullivan v. Kay* (La.) *supra*. Where the property of a tenant is seized it must be exhausted before resort can be had to the proceeds of a subtenant's property, which was also seized on the demised premises, although the statute creates a privilege as to both. *Marfese v. Nelson* (1913) 10 La. App. (Orleans) 288.

b. Proceeds in custodia legis.

Where goods of a tenant are subject to a landlord's lien, the latter's

rights are not cut off by removal and sale of the property under process of law set in motion by a third person, but the privilege attaches to the proceeds of the property in the officer's hands. *Holdane v. Sumner* (1872) 15 Wall. (U. S.) 600, 21 L. ed. 254; *Gibson v. Gautier* (1881) 1 Mackey (D. C.) 35; *Cochran v. Waits, J. & Co.* (1906) 127 Ga. 93, 56 S. E. 241; *I. M. Scott & Co. v. Ward* (1918) 21 Ga. App. 535, 94 S. E. 863.

In fact, the generally accepted rule is that the proceeds of a tenant's property in the hands of a court or its officers are subject to the lien of the landlord. *Lemay v. Johnson* (1879) 35 Ark. 225 (proceeds of crop sold by receiver appointed by court); *Bryan v. Sanderson* (1879) 3 MacArth. (D. C.) 431 (proceeds of furniture in leased hotel sold pursuant to court order); *Gilbert v. Greenbaum* (1881) 56 Iowa, 211, 9 N. W. 182 (stock of merchandise sold pursuant to court order); *Monarch v. Dean*, 11 Ky. Ops. 596, as set out in Cyc. Supp. (1914-18) p. 2078 (title Landlord and Tenant, p. 1258, note 54); *Ghio v. Shutt* (1890) 78 Tex. 375, 14 S. W. 860 (stock of goods seized and sold under attachment).

And in Louisiana, where the statutes give a landlord a privilege for rent as against property on the demised premises, or which has been removed therefrom if exercised within a specified time after removal, it has been held that such privilege extends to the proceeds of a tenant's goods removed and sold by the personal representative or curator of his estate. *Robinson v. McCay* (1829) 8 Mart. N. S. (La.) 106. And the same has been held as to the proceeds of a tenant's movables in the hands of the trustee in bankruptcy of the tenant. *I. Trager Co. v. Cavaroc Co.* (1909) 123 La. 319, 48 So. 949, quoted and approved in *Hyman v. Hibernia Bank & T. Co.* (1919) 144 La. 1074, 81 So. 718.

And under similar provisions in the Porto Rico Civ. Code, it has been held that the landlord's privilege or lien follows the proceeds of the tenant's goods and crops in the hands of his receiver. *Welch & Co. v. Central*

San Cristobal (1914) 7 Porto Rico Fed. Rep. 205.

And where a landlord's lien is good as against property assigned for the benefit of creditors, it is good against the proceeds of such property in the hands of the assignee. *McKleroy v. Canteley* (1891) 95 Ala. 295, 11 So. 258.

c. Insurance money.

In jurisdictions where the lien of a landlord for rent upon the goods of the tenant is lost by their destruction, a landlord has no lien upon insurance money collected upon the destruction of his tenant's goods by fire. *Re Reis* (1876) 3 Woods, 18 Fed. Cas. No. 11,684.

Likewise, in Quebec, it has been held that a landlord has no statutory privilege for rent against money in the hands of an insurance company, and which represents the loss by fire of goods of a tenant destroyed while on the demised premises. *Vaughan v. Pelletier* (1898) Rap. Jud. Quebec 15 C. S. 123.

And in Ontario, under a statute creating a landlord's lien for rent upon any property of a tenant which at common law was subject to distress, it has been held that such lien does not attach to insurance money on a tenant's goods destroyed while in the hands of his assignee for creditors. *Miller v. Tew* (1909) 20 Ont. L. Rep. 77, 14 Ont. Week. Rep. 207, 1173.

XII. Property subject to prior lien.

Under statutes giving a lien upon all property of a lessee usually kept on the demised premises, which shall be superior to any lien acquired subsequent to the bringing of such property on the premises, it has been held that the landlord's lien is inferior to that of another where the latter was acquired either prior to the bringing of the property in question upon the leased premises, or prior to the commencement of the tenancy under the lease, and, therefore, that the landlord's lien did not attach absolutely to such property. *Ruge v. Webb Press Co.* (1916) 71 Fla. 536, L.R.A.1916F, 446, 71 So. 627; *Kloak Bros. & Co. v. Joseph* (1912) 150 Ky. 508, 150 S. W. 651. And in Kentucky, under a sim-

ilar statutory provision, it has been held that a landlord's lien for a present term does not attach to property brought on the premises during a prior term, and then mortgaged to a third person. *Lyons v. Deppen* (1890) 90 Ky. 305, 14 S. W. 279.

And in Iowa it has been held that a lien created by mortgage upon goods used in a hotel, which was executed before the contract for the lease of the building was entered into, was superior to the landlord's lien for rent so that he could not subject such property thereto. *Rand v. Barrett* (1885) 66 Iowa, 731, 24 N. W. 530.

So, in Texas, where a tenant from month to month, on the day the lease was made, executed to a third person a mortgage upon a soda fountain to be used in his business on the rented premises, it was held that the landlord's lien for rent for a subsequent month did not attach to the fountain. *Brackenridge v. Millan* (1891) 81 Tex. 17, 16 S. W. 555.

And a recorded mortgage upon after-acquired property has been held to constitute a prior lien on goods as against one subsequently renting property to the mortgagor, under a statute giving a lien for rent on any personal property of the tenant used on the premises. *Manhattan Trust Co. v. Sioux City & N. R. Co.* (1895) 68 Fed. 72, affirmed in (1896) 23 C. C. A. 30, 40 U. S. App. 641, 77 Fed. 82.

On the other hand, it has been held that a landlord's lien is superior to that of a mortgagee of the crops to be grown during the term, although the mortgage was given before the beginning of such term. *Hamilton v. Maas* (1884) 77 Ala. 283; *Leslie v. Hinson* (1887) 88 Ala. 266, 3 So. 442.

So, it has been held that a landlord's lien which attaches to the personal chattels of the tenant when brought on the premises cannot be affected by a prior trust deed, purporting to include all such chattels as the tenants might thereafter, but during the term of the lease, bring or leave on the leased premises, in substitution, removal, or addition to those chattels already there, such a deed being utterly inconsistent with the statutory rights of the landlord. *Beall v. White* (1877) 94 U. S. 382, 24 L. ed. 173.

And in Georgia, a landlord's special statutory lien for rent upon the crops grown on the rented premises is superior to older common-law judgments. In fact, it is superior to all liens except liens for taxes. *Cochran v. Waits* (1906) 127 Ga. 93, 56 S. E. 241.

And where a chattel mortgage is ineffectual because not recorded as required by law, the landlord's lien attaches to property held by his tenant under such a mortgage, although the mortgage was executed before the chattels were placed on the leased premises. *Berkey & G. Furniture Co. v. Sherman Hotel Co.* (1891) 81 Tex. 135, 16 S. W. 807.

And the fact that a third person has a lien on a part of the goods of a tenant on leased premises does not compel the landlord, who has a superior lien, to resort first to the goods of the tenant not affected by the other lien. *Needham Piano & Organ Co. v. Hollingsworth* (1897) — Tex. Civ. App. —, 40 S. W. 750, affirmed on other grounds in (1897) 91 Tex. 49, 40 S. W. 787. G. J. C.

OMER ZELL, Appt.,
v.
STATE OF INDIANA.

Indiana Supreme Court — April 23, 1920.

(— Ind. —, 127 N. E. 1.)

Rape — statutory — effect of subsequent marriage.

1. Subsequent marriage with the victim is no defense to a prosecution for statutory rape.

[See note on this question beginning on page 339.]

Trial — instructions in statutory rape — sufficiency.

2. Failure of an instruction in a prosecution for statutory rape to embody as an element of guilt the fact that the victim was under statutory age is not error if guilt was made to depend upon carnal knowledge under the circumstances set forth in the affidavit, and the affidavit charged that she was under such age.

— effect of right to fix punishment.

3. A statement in an instruction in a prosecution for statutory rape that it is immaterial whether the victim consented or not does not exclude the right of the jury to take such matter into consideration in fixing the punishment, and therefore is not erroneous as tending to mislead on that point.

— refusal to instruct as to consequences of verdict.

4. It is not error in a prosecution for statutory rape to refuse an instruction that the court has no power to suspend sentence, although failure to do so may result in a general verdict instead of a fixing of the punishment by the jury.

[See 14 R. C. L. 761.]

Evidence — reputation for peace — prosecution for statutory rape.

5. Evidence of defendant's general reputation for peace and quietude is not admissible in a prosecution for statutory rape, effected with consent of the victim.

[See 22 R. C. L. 1220.]

APPEAL by defendant from a conviction of the Circuit Court for Howard County (Overton, J.) convicting him of statutory rape. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Overson & Maning and B. C. Moon for appellant.

Messrs. Ele Stansbury, Attorney General, and Edward M. White, for the State:

While defendant's general reputation for morality might be considered by the jury in fixing his punishment as well as determining his guilt, his reputation for peace and quietude was not admissible for such purpose. It would be as to his guilt where he accomplished his purpose by force.

State v. Lee, 22 Minn. 407, 21 Am. Rep. 769, 2 Am. Crim. Rep. 61; Conners v. State, 47 Wis. 523, 2 N. W. 1143; Hardtke v. State, 67 Wis. 552, 80 N. W. 723, 7 Am. Crim. Rep. 577; Hogan v. State, 36 Wis. 226; State v. Sprague, 64 N. J. L. 419, 45 Atl. 788; Horton v. State, 84 Miss. 473, 36 So. 1033; Hall v. State, 132 Ind.

317, 31 N. E. 536; Carr v. State, 135 Ind. 1, 20 L.R.A. 863, 41 Am. St. Rep. 408, 34 N. E. 533, 9 Am. Crim. Rep. 80; Walker v. State, 136 Ind. 663, 36 N. E. 356; Hundley v. State, 173 Ind. 684, 91 N. E. 225.

When the verdict is clearly right on the evidence, a cause will not be reversed for errors in instructions given.

Mason v. State, 170 Ind. 195, 83 N. E. 613; Sanderson v. State, 169 Ind. 301, 82 N. E. 525; Sharp v. State, — Ind. —, 123 N. E. 161.

If defendant had sexual intercourse with Dorothy Smith, a female child, under sixteen years of age at the time of the intercourse, it was immaterial whether she consented to such intercourse or not, for such a child is incapable of giving her consent.

Heath v. State, 173 Ind. 296, 90 N. E. 310, 21 Ann. Cas. 1056; Murphy v. State, 120 Ind. 115, 22 N. E. 106. The fact that defendant married Dorothy Smith after committing rape upon her constituted no defense to the crime of rape.

State v. Newcomer, 59 Kan. 668, 54 Pac. 685; Re Lewis, 67 Kan. 562, 63 L.R.A. 281, 100 Am. St. Rep. 479, 73 Pac. 77; Henneger v. Lomas, 145 Ind. 287, 32 L.R.A. 848, 44 N. E. 462.

Jurors are not entitled to be instructed as to the consequences of their verdict, if for or against a defendant, or whether such defendant has a right to appeal; the court may in his discretion give such an instruction, and the error, if any, is harmless.

Keller v. Strasburger, 90 N. Y. 379; Com. v. Harris, 168 Pa. 619, 32 Atl. 92; Re Darrow, 175 Ind. 44, 92 N. E. 363; Stout v. State, 90 Ind. 1; Copenhagen v. State, 160 Ind. 540, 67 N. E. 453.

Townsend, Ch. J., delivered the opinion of the court:

Appellant was charged under § 2250, Burns's Anno. Stat. 1914, with unlawfully having carnal knowledge of a female child under sixteen years of age. A jury returned a verdict of guilty, and found his age to be eighteen years.

The questions arise on motion for a new trial:

(1) Error in giving and refusing certain instructions.

(2) Error in excluding certain evidence.

The affidavit fixes the date of the crime as February 11, 1917. To make understandable the discussion of the questions involved, it will be necessary to take a cursory view of the evidence in the case. The evidence shows that appellant was seventeen years old on that date, and that prosecuting witness was fifteen years old. Prosecuting witness became sixteen years old the following May, and appellant eighteen years old the following October. Appellant testified that he was in company with the prosecuting witness three times, and that each time they had sexual intercourse. Prosecuting witness testified that they

9 A.L.R.—22.

were in company three times, and that they had sexual intercourse twice. So far as the evidence discloses, their relations were mutually agreeable. Prosecuting witness lived at home. She was one of five children. Both of her parents were living. She disclosed to no one her relations with appellant until about June 30, 1917, when her mother discovered that she was pregnant. In the month of August, 1917, at the solicitation of the prosecuting witness's father, mother, sister, and brother, appellant married the prosecuting witness. On the day of the marriage, he was at work on a farm, and left his work and went to the county seat to be married, and returned to his work that afternoon. On the evening of the day following, he went to the home of his wife's parents, where his wife was, and remained there that night. The following morning he drove away, and shortly thereafter sold his horse and buggy, drew his money out of the bank, and bought a ticket to Roanoke, Virginia. He did not leave the train at Roanoke, but paid his fare on to Troutville, Virginia, and remained there about six months, until he was brought back by the deputy sheriff of Howard county, Indiana, to answer the charge in this case. Before he left for Virginia, he did not disclose to anyone that he was going away; he did not write to his wife, or let anyone know where he was.

The evidence shows that the prosecuting witness was perhaps more mature than the average girl of fifteen, and it nowhere appears that she was disinclined to sustain the relations that she did to appellant at the time charged in the affidavit and previously thereto.

Appellant complains of the court's instruction No. 2, because it told the jury that if they believed beyond a reasonable doubt that defendant had carnal knowledge of prosecuting witness at the time and place, and in the manner and under the circumstances, set forth in the affidavit, they should find him guilty of rape.

The complaint about this instruction is that it, as appellant's counsel say, does not embody the element that the prosecuting witness was under the age of sixteen years. There is no merit in this contention because it will be observed that the instruction confines itself to what is set forth in the affidavit. The affidavit charged that he did on February 11, 1917, carnally know the prosecuting witness, who was under the age of sixteen years, to wit, fifteen years of age.

**Trial—
instructions in
statutory rape
—sufficiency.**

Appellant next complains of the court's instruction No. 3 which is as follows: "If you, and each of you, are satisfied of the guilt of this defendant, as charged in the indictment, that at the time and place and in the manner charged in this affidavit, this defendant had carnal knowledge of _____ (prosecuting witness), a female child under the age of sixteen years, then you should find the defendant guilty as charged. *And it is immaterial, if you find she was under sixteen years of age, whether she consented to said acts or not; whether she made any outcry or resistance.* Under the law of this state a female child under the age of sixteen years is incapable of giving her consent to the act of sexual intercourse. This provision of the law is for her protection, because of her age."

The italicized words in the above instruction are the ones criticized by appellant's counsel. They claim that by these words the court excluded from the minds of the jury the right to take into consideration the mutually agreeable and voluntary relations between appellant and the prosecuting witness in mitigating the punishment. In other words, because the jury had power to fine appellant and fix his imprisonment in the county jail, on account of his minority, that by this instruction the court told them that

it was immaterial as to the punishment. This instruction is not open to any such interpretation, and it is very obvious that it would not be so understood by the jury. By it the court was defining for the jury the corpus of the crime, and telling them that the crime was complete, even though the prosecuting witness consented to, and voluntarily performed, the act.

**—effect of right
to fix punish-
ment.**

Other instructions of the court told the jury that they had a right to fix the punishment of appellant by assessing the fine and confining him in the county jail for a period to be determined by them, under § 2146, Burns's Anno. Stat. 1914.

Appellant's counsel next claim error in the court's instruction No. 5, which is as follows: "The court instructs the jury that if it finds from the evidence beyond a reasonable doubt that the defendant carnally knew _____ (prosecuting witness) at a time before she was sixteen years of age, in Howard county, in the state of Indiana, then the fact, if it be a fact, that the defendant afterwards married _____ (prosecuting witness) would be no defense to the crime of rape as charged in the affidavit in this cause."

They base this claim on the case of *State v. Otis*, 135 Ind. 267, 269, 21 L.R.A. 733, 34 N. E. 955, where this court said: "In case of seduction under promise of marriage, we think there can be little doubt that the subsequent marriage of the parties is a bar to further prosecution for the crime committed."

Whatever may be said of the reasoning in that case, it has no application here, and it may well be doubted that it would have application in a case of seduction of one under the statutory age of consent. The court did not err in the above instruction.

**Rape—statutory
—effect of subse-
quent marriage.**

It is next claimed that the court erred in refusing to instruct the jury that the court had no power to suspend sentence and parole appel-

lant under § 2174, Burns's Anno. Stat. 1914; rape being one of the crimes excepted from the operation of this section of this statute. The exact point is that, had the court told the jurors of the consequence of a general verdict, they would have been more inclined to substitute a fine and jail sentence under § 2146, Burns's Anno. Stat. 1914. It has never been held in this state that a party may, as of right, require a court to instruct upon the consequence of a verdict. In fact, just the opposite is the rule. *Coppenhaver v. State*, 160 Ind. 540, 551, 67 N. E. 453.

—refusal to
instruct as to
consequences
of verdict.

different were this a case where appellant accomplished his purpose by force and violence, and he disputed that he was the identical person who committed the offense. Instructions on the law must be rationally applicable to the evidence in the particular case. The court did not err in excluding this evidence.

Evidence—
reputation for
peace—prosecu-
tion for
statutory rape.

Appellant was permitted, in this case, to prove his general reputation for morality. He then offered to prove his general reputation for peace and quietude, which was refused. His counsel claim that this was error, because assault and battery is included within the charge of rape. Now it will be observed that the testimony given, both by appellant and the prosecuting witness, as to their acts of intimacy, shows that those acts were mutually agreeable. So far as the evidence in this case is concerned, assault and battery becomes a mere legal fiction. The question here sought to be raised by appellant's counsel would be entirely

Counsel for appellant complain bitterly of the severity of the punishment to be inflicted in such a case, under the verdict returned by the jury. The errors in this case are the errors of the appellant himself, and counsel's complaint about the severity of the law is met by the bad faith of the appellant in his conduct after his marriage to the prosecuting witness. Had he shown good faith in his solemn engagements of marriage, he would have been protected from the rigor of the law, not only by a jury, but also by the sound discretion of the prosecuting attorney. We think this protection would have prevailed even against the malice of any individual in the community.

Judgment of the trial court is affirmed.

Petition for rehearing denied June 25, 1920.

ANNOTATION.

Subsequent marriage as bar to prosecution for rape.

The general rule apart from statute is that the subsequent marriage of the parties is no bar to a prosecution for rape. *ZELL v. STATE* (reported herewith) ante, 336; *State v. Newcomer* (1898) 59 Kan. 668, 54 Pac. 685; *State v. Falsetta* (1906) 43 Wash. 159, 86 Pac. 168, 10 Ann. Cas. 177.

In all the cases found the girl upon whom the rape was committed was under the statutory age of consent, but the rule would undoubtedly likewise apply where the victim was over such age, since such case would seem to be equally within the reason for the rule

given in *State v. Newcomer* (1898) 59 Kan. 668, 54 Pac. 685, where—in answer to the argument in behalf of the defendant that the evil consequences of the unlawful act had been averted by the subsequent marriage; that when the parties to the act voluntarily in good faith enter into the marriage relation, the offense is condoned; and that the welfare of the parties and their offspring requires, and the interest of the public will be best subserved by, ending the prosecution—the court said: "The difficulty with this contention is that the law does

not provide that the offense may be expiated by marriage or condoned by the injured female. Her consent to the sexual act constitutes no defense, and neither her forgiveness, nor anything which either or both will do, will take away the criminal quality of the act, or relieve the defendant from the consequences of the same. The principle of condonation which obtains in divorce cases where civil rights are involved has no application in prosecutions brought at the instance of the state for the protection of the public and to punish a violation of the law."

But while the subsequent marriage of the parties is no bar in law, it would probably have some effect in actual practice on the prosecution of the accused, as stated by the court in

State v. Newcomer, Kan. supra, as follows: "It is true, as stated, that society approves the act of the defendant when he endeavors to make amends for the wrong done the injured female, by marrying her, and usually a good-faith marriage between the parties to the wrong prevents or terminates a prosecution; but the statute which defines the offense and declares punishment therefor makes no such provision. If the defendant has acted in good faith in marrying the girl, and honestly desires to perform the marital obligations resting upon him, . . . it may constitute a strong appeal to the prosecution to discontinue the same, or to the governor for the exercise of executive clemency, but as the law stands, it furnishes no defense to the charge brought against the defendant." G. V. I.

WAGNER TRADING COMPANY, Resp't.,
v.
BATTERY PARK NATIONAL BANK, Appt.

New York Court of Appeals — January 20, 1920.

(228 N. Y. 87, 126 N. E. 347.)

Bank — deposit of corporation paper to credit of president — liability.

1. A bank which accepts checks payable to a corporation for deposit to the personal account of its president merely upon his indorsement as president, without ascertaining his authority to make the indorsement, acts at its peril.

[See note on this question beginning on page 346.]

— duty to account to corporation.

2. A bank which credits to the personal account of the president of a corporation, checks payable to the corporation and indorsed by him without authority, is liable to account to the corporation for the proceeds of the checks notwithstanding it had paid out the funds upon the checks of the depositor.

Corporation — authority of president to indorse checks.

3. General authority given the president of a corporation to indorse its checks for corporate purposes does not authorize him to indorse them to

his own order and appropriate the money to his personal use.

Evidence — of negligence of corporation — action to recover funds.

4. In an action by a corporation to recover from a bank the proceeds of checks payable to its order and indorsed by its president and deposited to his individual account, evidence is not admissible to show that the directors of the corporation neglected to audit or balance its books or take other action which would have disclosed the president's misappropriation of the funds.

APPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, First Department, affirming a judgment of a Trial Term Part II., for New York County (Newburger, J.), in favor of plaintiff, and from an order denying a new trial, in an action brought to recover the proceeds of certain checks drawn to plaintiff's order, which were alleged to have been converted by the defendant bank. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Francis E. Neagle and Eugene Congleton, with Messrs. Rounds, Hatch, Dillingham, & Debevoise, for appellant.

Christopher J. Wagner, as president of the plaintiff corporation and as general manager of its affairs, had implied authority to indorse and transfer its checks and give title to his indorsees.

Howland v. Myer, 3 N. Y. 290; Hiawatha Iron Co. v. John Strange Paper Co. 106 Wis. 111, 81 N. W. 1034; 1 Daniel, Neg. Inst. § 394; 1 Randolph, Com. Paper, § 368, p. 622; 2 Thomp. Corp. § 1474; Merchants' Nat. Bank v. Citizens' Gaslight Co. 159 Mass. 505, 38 Am. St. Rep. 453, 34 N. E. 1083; Iowa Nat. Bank v. Sherman, 17 S. D. 396, 106 Am. St. Rep. 778, 97 N. W. 12; Jones v. Stoddart, 8 Idaho, 210, 67 Pac. 650; Merrill v. Hurley, 6 S. D. 592, 55 Am. St. Rep. 859, 62 N. W. 958; Mann v. Second Nat. Bank, 34 Kan. 746, 10 Pac. 150; American Exch. Nat. Bank v. Oregon Pottery Co. 55 Fed. 265; Citizens Nat. Bank v. Wintler, 14 Wash. 553, 53 Am. St. Rep. 890, 45 Pac. 38; Martin v. Niagara Falls Paper Mfg. Co. 122 N. Y. 165, 25 N. E. 303.

The form of the checks mentioned in the complaint and their indorsement were not sufficient to charge the defendant with bad faith in receiving the checks and paying out the proceeds.

Daniel, Neg. Inst. 1913 ed. p. 899, § 776; Crawford, Neg. Inst. Law, 1916 ed. p. 102; Cheever v. Pittsburgh, S. & L. E. R. Co. 150 N. Y. 66, 34 L.R.A. 69, 55 Am. St. Rep. 646, 44 N. E. 701; Carlisle v. Norris, 215 N. Y. 400, 109 N. E. 564, Ann. Cas. 1917A, 429; Bischoff v. Yorkville Bank, 218 N. Y. 112, L.R.A.1916F, 1059, 112 N. E. 759; Third Nat. Bank v. Merchants' Nat. Bank, 76 Hun, 480, 27 N. Y. Supp. 1070; Ward v. City Trust Co. 192 N. Y. 61, 84 N. E. 585.

Evidence showing estoppel and negligence on the part of plaintiff was admissible.

Martin v. Niagara Falls Paper Mfg. Co. 122 N. Y. 175, 25 N. E. 303; Standard Steam Specialty Co. v. Corn Exch. Bank, 220 N. Y. 478, L.R.A.1918B, 575, 116 N. E. 386; Phillips v. Mercantile Nat. Bank, 140 N. Y. 556, 23 L.R.A. 584, 37 Am. St. Rep. 596, 35 N. E. 982; New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30; City Nat. Bank v. National Park Bank, 32 Hun, 110; Martin v. Webb, 110 U. S. 7, 28 L. ed. 49, 3 Sup. Ct. Rep. 428; Morgan v. United States Mortg. & T. Co. 208 N. Y. 218, L.R.A. 1915D, 741, 101 N. E. 871, Ann. Cas. 1914D, 462; Pratt v. Union Nat. Bank, 79 N. J. L. 122, 75 Atl. 313; Leather Mfr's Nat. Bank v. Morgan, 117 U. S. 96, 107, 108, 29 L. ed. 811, 816, 6 Sup. Ct. Rep. 657; Hardy v. Chesapeake Bank, 51 Md. 562, 34 Am. Rep. 325; Third Nat. Bank v. Merchants' Nat. Bank, 76 Hun, 478, 27 N. Y. Supp. 1070.

Messrs. Cullom & Rinke, for respondent.

No interest in the checks was transferred to the defendant by the unauthorized indorsement and delivery thereof, and, by its acts, defendant became liable to plaintiff for the value thereof.

Ward v. City Trust Co. 192 N. Y. 61, 84 N. E. 585; Schmidt v. Garfield Nat. Bank, 64 Hun, 298, 19 N. Y. Supp. 252, affirmed in 188 N. Y. 631, 33 N. E. 1084; Rochester & C. Turnp. Road Co. v. Paviour, 164 N. Y. 281, 52 L.R.A. 790, 58 N. E. 114; Cheever v. Pittsburgh, S. & L. E. R. Co. 150 N. Y. 67, 34 L.R.A. 69, 55 Am. St. Rep. 646, 44 N. E. 701; E. Moch Co. v. Security Bank, 176 App. Div. 842, 163 N. Y. Supp. 277, affirmed in 225 N. Y. 723, 122 N. E. 879; Porges v. United States Mortg. & T. Co. 203 N. Y. 181, 96 N. E. 424; Robinson v. Chemical Nat. Bank, 86 N. Y. 404; Comstock v. Hier, 73 N. Y. 275, 29 Am. Rep. 142; Silver v. Krellman, 89 App. Div. 363, 85 N. Y. Supp. 945; Niagara Woolen Co. v. Pacific Bank, 141 App. Div. 265, 126 N. Y. Supp. 890; Havana C. R. Co. v. Knickerbocker Trust Co. 198 N. Y. 422, L.R.A.1915B, 720, 92 N. E. 12; Gerard v. McCormick, 130 N. Y. 261, 14 L.R.A.

234, 29 N. E. 115; *Sims v. United States Trust Co.* 103 N. Y. 472, 9 N. E. 605; *Squire v. Ordemann*, 194 N. Y. 394, 87 N. E. 435; *Union Nat. Bank v. Underhill*, 102 N. Y. 336, 7 N. E. 293; *Hitchings v. St. Louis, N. O. & O. C. & Transp. Co.* 68 Hun, 33, 22 N. Y. Supp. 719; *Triplett v. Fauver*, 103 Va. 123, 48 S. E. 875.

The form of the checks and the indorsements thereon clearly indicate that the same were corporate property, and constituted actual notice to defendant of Wagner's misappropriation.

Re American Cigar Lighter Co. 177 Misc. 643, 138 N. Y. Supp. 455; *Ward v. City Trust Co.* 192 N. Y. 61, 84 N. E. 585; *Wilson v. Metropolitan Elev. R. Co.* 120 N. Y. 145, 17 Am. St. Rep. 625, 24 N. E. 384; *Cheever v. Pittsburgh, S. & L. E. R. Co.* 150 N. Y. 66, 34 L.R.A. 69, 55 Am. St. Rep. 646, 44 N. E. 701; *Fidelity & D. Co. v. Queens County Trust Co.* 226 N. Y. 233, 123 N. E. 370.

The defenses of negligence and estoppel are wholly without merit.

Jewett v. Miller, 10 N. Y. 402, 61 Am. Dec. 751; *New York Rubber Co. v. Rothery*, 107 N. Y. 310, 1 Am. St. Rep. 822, 14 N. E. 269; *Continental Securities Co. v. Belmont*, 206 N. Y. 18, 51 L.R.A. (N.S.) 112, 99 N. E. 138, Ann. Cas. 1914A, 777; *Pollitz v. Wabash R. Co.* 207 N. Y. 127, 100 N. E. 721; *Ward v. City Trust Co.* 192 N. Y. 73, 84 N. E. 585; *Fidelity & D. Co. v. Queens County Trust Co.* 226 N. Y. 225, 123 N. E. 370; *Schmidt v. Garfield Nat. Bank*, 64 Hun, 298, 19 N. Y. Supp. 252, affirmed in 138 N. Y. 631, 33 N. E. 1084.

Elkus, J., delivered the opinion of the court:

The plaintiff is a New York corporation. It was incorporated in April, 1910, at which time it acquired all the assets and business formerly conducted by one Christopher J. Wagner, who became its president, which office he held during the time of all the transactions here in question. Wagner also acquired 180 shares of the total 400 shares of the capital stock of the Wagner Trading Company at the time of its incorporation.

Section 4 of article 3 of plaintiff's by-laws provides: "The treasurer shall have the care and custody of all the funds and securities of the

corporation and shall deposit the same in the name of the corporation in such bank, banks, or trust companies as the directors may elect. He may sign checks, drafts or orders for the payment of money, but all checks and notes of the corporation signed by him shall be countersigned by such persons as may be designated for that purpose by the board of directors."

By article 3, § 2, of the by-laws, the president was authorized to sign and execute contracts in the name of the company when authorized to do so by the board of directors, and also to sign checks, drafts, and orders for the payment of money, but all checks and notes of the corporation signed by him shall also be countersigned by persons designated for that purpose by the board of directors.

In pursuance of this by-law, on April 7, 1910, the board of directors adopted a resolution, providing that checks might be signed by the president, vice president, secretary, or treasurer, but that such checks shall be countersigned by one Leggett or one Sloane, or by any officer of the corporation.

The plaintiff had its bank account with the Chatham & Phoenix Bank, but had no account with the defendant or any other bank.

A portion of the plaintiff's business was exporting merchandise to South America. Drafts were drawn by the plaintiff on the South American customer, and sent to the Bank of New York for collection, and in some cases advances were made by the Bank of New York upon these drafts while in process of collection. The proceeds of these drafts were paid and some advances thereon were made by cashier's checks of the Bank of New York to the order of Wagner Trading Company. These checks, to the number of fifteen were indorsed, "Wagner Trading Company, C. J. Wagner, Pres.," the signature of "C. J. Wagner" being in the handwriting of C. J. Wagner, the president of the plaintiff corporation, the remainder of the indorse-

ment being a rubber stamp impression. The first of these checks was dated May 17, 1915, and indorsed May 25, 1915. The last check was dated October 30, 1916, and indorsed October 31, 1916.

It is stipulated that no part of the "proceeds of said checks, to wit, \$14,117.29, has been received by the plaintiff except the sum of \$85.37."

C. J. Wagner had a personal account with the defendant. In this account he deposited, among others, thirty-six checks, representing salary paid to him by the plaintiff between February 2, 1914, and April 3, 1916. These checks were drawn on the Chatham & Phoenix National Bank to the order of "C. J. Wagner," signed "Wagner Trading Company, C. J. Wagner, Pres." On the left margin of the check appears in print "Wagner Trading Company . . . Countersigned," with the signature in ink of W. H. Leggett, Jr., above the word "Countersigned." These checks were indorsed by C. J. Wagner, and collected through the New York clearing house in the usual course of banking business. This statement shows the relation of the parties.

Wagner, having indorsed the fifteen checks made payable by the Bank of New York to the Wagner Trading Company, in the manner described, deposited them to the credit of his personal account with the defendant, which collected the proceeds in the usual course of banking, and held same for Wagner, and as his agent "paid out the proceeds thereof on the personal checks of Christopher J. Wagner," to use the exact words of the stipulation of the parties. The action is for conversion.

The facts showing the conversion are complete. Wagner had authority to indorse the checks, although no by-law or resolution is in evidence to that effect, but only for the purposes of the corporation's business, and not to transfer the checks to himself personally or for his personal use. The defendant endeavored to prove estoppel and negli-

gence of the plaintiff. The trial court rightly excluded all such evidence. The plaintiff had no relations with and owed no special duty to the defendant. It was not a depositor of the defendant. When the defendant accepted the deposit of Wagner and became his banking agent, the defendant was in complete control of its relations with Wagner. It could, to safely protect itself in its dealings with Wagner, inquire as to his relations with the plaintiff, the authority he possessed, and could insist upon an examination of the plaintiff's by-laws and minutes if it thought that necessary to protect itself. When it accepted the checks payable to the plaintiff and indorsed by Wagner as president of the plaintiff for deposit to the account of Wagner

Bank—deposit of corporation paper to credit of president—liability.

himself, it did so at its peril to ascertain whether Wagner had authority to indorse them and by his indorsement transfer the money to be paid thereon to his personal account. *Cheever v. Pittsburgh, S. & L. E. R. Co.* 150 N. Y. 59, 34 L.R.A. 69, 55 Am. St. Rep. 646, 44 N. E. 701; *Ward v. City Trust Co.* 192 N. Y. 61, 71, 84 N. E. 585. If Wagner had no such authority, title to the money in question never passed to the defendant, and if it received it, it did so without authority, and must

—duty to account to corporation.

account and make payment to the owner. *Schmidt v. Garfield Nat. Bank*, 64 Hun, 298, 19 N. Y. Supp. 252, affirmed in 138 N. Y. 631, 33 N. E. 1084; *Sims v. United States Trust Co.* 103 N. Y. 472, 9 N. E. 605; *Fidelity & D. Co. v. Queens County Trust Co.* 226 N. Y. 225, 233, 123 N. E. 370.

The transaction and decision are not affected by the fact that, relying upon the funds it supposed were deposited by Wagner, the defendant paid out funds upon Wagner's personal check drawn upon it. To do so would be to charge the plaintiff because of transactions with which it had no connection.

The rule governing this case is well stated in *Standard Steam Specialty Co. v. Corn Exch. Bank*, 220 N. Y. 478, 481, L.R.A.1918B, 575, 116 N. E. 387, where Pound, J., says:

"Any person taking checks made payable to a corporation which can act only by agents does so at his peril, and must abide by the consequences if the agent who indorses the same is without authority, unless the corporation is negligent . . . or is otherwise precluded by its conduct from setting up such lack of authority in the agent. . . .

"If the original indorsement was authorized, the diversion of the funds after indorsement would not make it a forgery; but, if the original indorsement was unauthorized, parties dealing with the wrongdoer and innocent parties alike were bound to know the lack of the agent's authority to convey title away from the true owner to anyone."

Assuming, as we do, that Wagner had general authority to indorse checks for the plaintiff's corporate purposes, clearly this does not authorize him to indorse checks to his own order and appropriate the money to his own personal use, and the nature of this transaction was such as to warn defendant that the checks were being diverted from usual business channels.

A case in point, and far stronger for the defendant than the case at bar, is that of *Clafin v. Farmers' & Citizens' Bank*, 25 N. Y. 293. There checks were drawn by the president of the defendant bank personally, to the order of third persons, and such checks were certified by the said president as good. The payees parted with full value. There this court held, although the purchaser of the checks paid their full face for them and acted in good faith, that the plaintiffs could not recover and the president had no power to accept his own drafts or checks in behalf of the bank. It was a palpable excess

of authority, and any person taking the paper was bound to inquire as to the power of the agent so to contract. The court said: "No business man of common intelligence could take these checks in good faith, and without suspicion or notice of this fraud." (p. 299.)

The defendant also claims error because the court excluded evidence tending to show that the plaintiff's officers by an examination or audit of its books and records could have discovered Wagner's defalcations, and that the failure so to do was gross negligence; also that an inspection of the stubs and draft books of the plaintiff would have revealed to the plaintiff's officers that the drafts, the proceeds of which were represented by the checks in suit, were long overdue, and that statements of account, sent by the Bank of New York to the plaintiff, showed that the drafts had been paid. The defendant also sought to show that the books of the plaintiff had not been balanced during all the time within which Wagner had deposited the checks in suit to his individual account, and asked questions tending to show that the directors of the plaintiff never held a meeting. The defendant relies upon *Martin v. Niagara Falls Paper Mfg. Co.* 122 N. Y. 165, 25 N. E. 303, as authority for this claim.

In that case it appeared that the Niagara Falls Paper Manufacturing Company, a New York corporation, executed a mortgage, which was given as collateral and continuing security for the payment of all promissory notes made by it to the Manufacturers' & Traders' Bank. The plaintiff produced six promissory notes, aggregating \$60,000, all payable to the order of L. C. Woodruff and purporting to be made by the Niagara Falls Paper Manufacturing Company, by Lauren C. Woodruff, president, and indorsed by the payee, and all of the signatures and indorsements were in the handwriting of Woodruff. The notes in question were discounted by the bank pursuant to a written agree-

Corporation—
authority of
president to
indorse checks.

ment between the company and the bank, by which Woodruff's authority, as president, to bind the company, was expressly stated, and it was also provided that the notes and drafts were conclusively deemed for the benefit of the company, and it was liable for all such paper held by the bank. The agreement was executed by Woodruff, as president, on behalf of the company, pursuant to a resolution passed at a meeting of the trustees voted for by Woodruff and his daughter, who were the only trustees, and held all the stock of the corporation.

It was upon such evidence that this court held in that case that the company made itself liable for the debt to the bank, and that it was entirely competent for the stockholders of the corporation, no rights of creditors intervening and no fraud being claimed, to ratify Woodruff's acts and bind the corporation for the payment of the debt.

It was further shown in that case that there was no knowledge of the proceeds being used for Woodruff's benefit, and, as Judge Brown said in that opinion (p. 173): "The facts of the case do not bring it within the rule which puts upon a holder of a promissory note or other corporate obligation the burden of proving by direct evidence that it was issued pursuant to a vote of the trustees, or for a corporate debt, or that the corporation received the consideration, in order to establish a corporate liability."

It appeared in that case that the company kept no bank account of its own; its banking business was done through the account of Woodruff, and in that account was deposited indiscriminately the money received by the company and by Woodruff, and from it were paid, on Woodruff's individual checks, substantially all the debts and liabilities of the corporation. It will thus be seen that the facts there were entirely different. The nature of the business carried on by the plaintiff herein did not raise the presumption

that it was part of the president's duty to indorse checks and deposit them to his own personal account.

The trial court excluded the testimony offered upon the theory that the action was for money belonging to the plaintiff, and that it had been traced into the possession of the defendant. The defendant's counsel acquiesced in this theory of the case, and admitted upon the trial that he knew of no case where the claim of negligence could be maintained where there was no contractual relation such as a depositor has with a bank.

The courts are careful to guard the interests of commerce and to protect and strengthen its great medium, commercial paper, but they are also careful to defeat titles taken in bad faith or with knowledge, actual or imputed, which amounts to bad faith. *Clafin v. Farmers' & Citizens Bank*, 25 N. Y. 293; *Rochester & C. Turnp. Road Co. v. Paviour*, 164 N. Y. 281, 52 L.R.A. 790, 58 N. E. 114; *E. Moch Co. v. Security Bank*, 225 N. Y. 723, 122 N. E. 879; *Robinson v. Chemical Nat. Bank*, 86 N. Y. 404; *Sprights v. Hawley*, 39 N. Y. 441, 100 Am. Dec. 452.

The evidence offered was immaterial as to this tort-feasor and his agent, and would not have influenced the verdict. Wagner, having no authority to indorse in behalf of the corporation for the purpose of applying the proceeds of these checks to his own account, could not transfer any greater right than he possessed to his agent for collection, the bank. *Porges v. United States Mortg. & T. Co.* 203 N. Y. 181, 96 N. E. 424. There was no offer of proof of express ratification by the plaintiff, with full knowledge of the facts.

I am therefore in favor of affirmance of the judgment, with costs.

Hiscock, Ch. J., and Hogan, Cardozo, Pound, McLaughlin, and Andrews, JJ., concur.

Evidence—of negligence of corporation—action to recover funds.

ANNOTATION.

Liability of bank which credits paper payable to a corporation to the personal credit of corporate officer who indorsed it, and pays out the proceeds on the latter's personal checks.

It is not in general intended to include cases where the indorsing officer had no authority to indorse at all.

The courts are not agreed upon this subject. It would seem that the form of the paper should be sufficient notice to the collecting bank to put it on its inquiry as to the right and authority of the indorsing officer.

It will be seen that it is held in the reported case (*WAGNER TRADING CO. v. BATTERY PARK NAT. BANK*, ante, 340) that a bank which credits to the individual account of the president of a corporation checks drawn to the order of such corporation, indorsed with its name by such president, and pays out the proceeds of such checks on the president's personal checks, converts the corporation's property and is liable to it therefor.

In *Niagara Woolen Co. v. Pacific Bank* (1910) 141 App. Div. 265, 126 N. Y. Supp. 890, the plaintiff corporation recovered from the defendant bank the proceeds of checks drawn to the plaintiff's order, indorsed in blank in the plaintiff's name by P. H. as president and deposited by P. H. in the defendant bank to the credit of P. H. & Son, which was the name under which P. H. did business. The plaintiff kept its bank account in another bank. It appears that P. H. had no authority to indorse the plaintiff's name on checks, but the court said as to this: "The questions about the regularity of these indorsements and the power of the president to indorse I do not think were at all material, as the plaintiff, by commencing this action to charge the defendant with the amount collected upon these checks, necessarily ratified the indorsement and the act of Philip Horowitz in obtaining payment of the checks, its right to recover being solely based upon the fact that the defendant, having accepted these checks and collected them, received the plain-

tiff's money, for which the defendant was bound to account."

In *Knoxville Water Co. v. East Tennessee Nat. Bank* (1910) 123 Tenn. 364, 131 S. W. 447, an action in equity, the cashier of the plaintiff indorsed checks drawn to its order in its name as cashier and deposited them to his individual credit in the defendant bank (which was not the plaintiff's bank), and drew out the proceeds on his personal checks. It appears that he had no authority to indorse these checks except in the name of the treasurer with a rubber stamp. In holding that the indorsement was not within the apparent scope of his authority as cashier, the court said: "Having concluded that Martin was without either actual or apparent authority to indorse these checks, it is useless to further pursue this branch of the case. On the question of apparent authority, however, we wish to say that these deposits by Martin seem to us irregular and unusual, and they should have aroused the suspicion of the bank when made. For an employee to bring his employer's bills receivable to a bank with which the latter has no business relations, for the employee there to indorse them in his employer's name, and for the employee to ask that such bills or checks be placed to his individual credit—such transactions seem to us to be so out of line with, and contrary to, the usual course of business, that they should have served to put the bank on sharp inquiry. We think this is true, whether the employee so offering such checks be president, manager, treasurer, or any other officer or agent of an employing corporation. And we think a bank, which under these circumstances accepts such a deposit to the individual credit of an employee, subject to his individual check and disposition in this way, has little ground upon which to urge that such an employee was thus act-

ing within the apparent scope of his authority."

The contrary result was reached in *Santa Marina Co. v. Canadian Bank* (1918) 165 C. C. A. 611, 254 Fed. 391, certiorari denied in (1919) 250 U. S. 643, 63 L. ed. 1186, 39 Sup. Ct. Rep. 493. In that case the corporation sued in equity to recover of the defendant bank as its trustee for the proceeds of checks drawn to the corporation's order and indorsed in its name by Hooper, its secretary, and deposited by him to his individual credit with the defendant, which was not the plaintiff's bank. It was held that the plaintiff could not recover (except that as a portion of the total had been appropriated by the bank to its depositor's overdrafts and had been allowed to the plaintiff by the trial court, and as to this there had been no appeal, the question as to such portion was not before the appellate court). The court stated that it was necessary for the plaintiff to allege that the secretary, without the knowledge and consent of the plaintiff, had indorsed the checks in the name of the plaintiff and deposited them to his credit with the defendant, and that the defendant, well knowing that said checks and the moneys they represented were the property of the plaintiff, placed the same to the personal account of the secretary, and that these allegations were made and denied. The court said: "There is no evidence that defendant had any notice that the checks deposited by Hooper were not his property, and there is no evidence of bad faith on the part of the defendant in the transaction. Upon the controlling question in the case plaintiff has therefore failed to furnish the proof required to sustain the action. . . . The plaintiff, through mistaken confidence in Hooper, gave him authority as its secretary to indorse checks without restriction, which made the wrong possible in these transactions, and under the rule of equitable estoppel it cannot recover." The lower court took the view that the bank, in receiving the checks for the private account of the secretary, was at once apprised

of the fact that the transaction was essentially irregular, that it would have been liable in a suit at law for conversion of the money, that it was put upon notice that the money was the property of the plaintiff and that the secretary held it as the plaintiff's trustee, and said: "In this spirit, in the absence of any information coming to it that such payment constituted a misappropriation of plaintiff's property, it had a right to assume that any moneys drawn from the fund represented by the check delivered to it and made payable to some third person would be intended by Hooper, and in fact be used, in complete recognition of the trust created by the deposit to his own account. As to any moneys, however, which he paid to defendant bank itself, in satisfaction of his own obligations, the bank indubitably knew that such payment constituted a violation of the trust, and by the same token knew that it was participating in the fruits of such violation. There can be no doubt, then, as to moneys paid by Hooper to the defendant bank, the bank would be liable to plaintiff in equity, at least to the extent that such moneys so paid were taken from the trust fund."

In *Gate City Bldg. & L. Asso. v. National Bank* (1894) 126 Mo. 82, 27 L.R.A. 401, 47 Am. St. Rep. 633, 28 S. W. 633, it was held that the plaintiff could not recover of the defendant the proceeds of a check alleged to have been misappropriated by the plaintiff's secretary with the connivance of the defendant. It appeared that the secretary indorsed a check drawn to the plaintiff in the plaintiff's name, by himself secretary, and deposited it to his own individual credit with the defendant bank, with which the plaintiff also had an account, and later drew out the money on his individual check. There was evidence, however, tending to show that such secretary, without any objection by the plaintiff, had often deposited its paper in the same way, and it was held that there was no evidence tending to prove that the bank did not act in perfect good faith.

In *Buckley v. Lincoln Trust Co.*

(1911) 72 Misc. 218, 181 N. Y. Supp. 105, it was held that, where inquiry by the bank would have disclosed resolutions of a company authorizing its manager to use "certain checks"

to reimburse himself, the company could not recover of the bank, although in fact the use made by the manager was unauthorized.

B. B. B.

ARTHUR STANLEY

v.

INHABITANTS OF THE TOWN OF SANGERVILLE et al.

Maine Supreme Judicial Court — March 10, 1920.

(— Me. —, 109 Atl. 189.)

Libel — liability of town for.

1. A town is liable in damages for libel in charging one with theft in a complaint for recovery of damages for carrying away a culvert belonging to the town in its corporate capacity.

[See note on this question beginning on page 351.]

Town — liability for governmental act.

2. No action lies against a town for what is done by it as a political body and as part of the administration of the government.

[See 26 R. C. L. 805.]

— liability in corporate capacity.

3. In its corporate capacity as the owner of property held for its benefit and advantage, the rights and liabilities of a town are measured strictly by the laws which determine all private rights and liabilities and under the same conditions as a private corporation.

Trial — motion to dismiss — confinement to record.

4. In considering a motion to dismiss an action the court is concerned only with the record as presented.

— consideration of bill of exceptions.

5. Offers of proof recited in a bill of exceptions cannot be considered on motion to dismiss an action.

Pleading — motion to dismiss as demurrer.

6. A motion to dismiss the action cannot be used interchangeably with a demurrer.

Corporation — liability for libel.

7. A corporation is liable in damages for publication of a libel.

[See 17 R. C. L. 382.]

EXCEPTIONS by plaintiff to rulings of the Supreme Judicial Court for Piscataquis County, at law, made during the trial of an action brought to recover damages for an alleged libel which resulted in a dismissal of the action. *Sustained.*

The facts are stated in the opinion of the court.

Messrs. C. W. Hayes and Hudson & Hudson, for plaintiff:

An action for libel will lie against defendants.

McLaughlin v. Cowley, 127 Mass. 316; Union Mut. L. Ins. Co. v. Thomas, 28 C. C. A. 96, 48 U. S. App. 575, 83 Fed. 803; Sherwood v. Powell, 61 Minn. 479, 29 L.R.A. 153, 52 Am. St. Rep. 614, 63 N. W. 1103; Monroe v. H. Weston Lumber Co. 49 La. Ann. 594, 21 So. 742; Harlow v. Carroll, 6

App. D. C. 128; Fairbanks v. Stanley, 18 Me. 296; Shattuck v. Bill, 142 Mass. 56, 7 N. E. 39; Citizens' Gas & E. Co. v. Black, 95 Ohio St. 42, L.R.A.1917D, 559, 115 N. E. 495; Roemer v. Jacob Schmidt Brewing Co. L.R.A.1916E, 771, and note, 132 Minn. 399, 157 N. W. 640; Case v. Steel Coal Co. 162 Ky. 68, L.R.A.1915D, 867, 171 S. W. 993; Libby v. Portland, 105 Me. 372, 26 L.R.A. (N.S.) 141, 74 Atl. 805, 18 Ann. Cas. 547; Moulton v. Scarborough, 71 Me.

(— Me. —, 109 Atl. 189.)

287, 36 Am. Rep. 308; Keeley v. Portland, 100 Me. 260, 61 Atl. 180, 18 Am. Neg. Rep. 440; Hill v. Boston, 122 Mass. 344, 23 Am. Rep. 332.

Messrs. J. S. Williams and W. R. Pattangall, for defendant:

The taking of the culvert by plaintiff was, under the circumstances of the case, larceny.

State v. Brewington, 2 Boyce (Del.) 71, 78 Atl. 402; Canton Nat. Bank v. American Bonding & T. Co. 111 Md. 41, 78 Atl. 684, 18 Ann. Cas. 820; State v. Rigall, 169 Mo. 659, 70 S. W. 150, 14 Am. Crim. Rep. 339; State v. Hawkins, 8 Port. (Ala.) 461, 33 Am. Dec. 294; State v. Moore, 101 Mo. 316, 14 S. W. 182; State v. Coombs, 55 Me. 477, 92 Am. Dec. 610; State v. Stevenson, 91 Me. 107, 39 Atl. 471; Com. v. King, 202 Mass. 379, 88 N. E. 454.

Agency is not a justification for committing larceny.

Clark, Crim. Law, 3d ed. 136; People v. Richmond, 29 Cal. 414; Com. v. Hadley, 11 Met. 66; 1 Clark & M. Crimes, § 195; 1 Whart. Crim. Law, 11th ed. § 376; State v. Hull, 34 Conn. 132; State v. Sutton, 10 R. I. 159; State v. Potter, 42 Vt. 495; State v. Bugbee, 22 Vt. 32; State v. Bell, 5 Port. (Ala.) 865; Allyn v. State, 21 Neb. 593, 33 N. W. 212; Kliffeld v. State, 4 How. (Miss.) 304; Com. v. Bottom, 140 Ky. 212, 130 S. W. 1091; Com. v. Kolb, 13 Pa. Super. Ct. 347; State v. Chauvin, 231 Mo. 31, 132 S. W. 243, Ann. Cas. 1912A, 992; State v. Bryant, 14 Mo. 340.

The report was qualifiedly privileged.

Newell, Slander & Libel, 8d ed. p. 476; Odgers, Libel & Slander, 4th ed. p. 264; Trebilcock v. Anderson, 117 Mich. 39, 75 N. W. 129; Wachsmuth v. Merchants' Nat. Bank, 96 Mich. 427, 21 L.R.A. 278, 56 N. W. 9; Spalding v. Vilas, 161 U. S. 483, 40 L. ed. 780, 16 Sup. Ct. Rep. 631; Bradford v. Clark, 90 Me. 298, 38 Atl. 229; Smith v. Higgins, 16 Gray, 251; Shattuck v. Allen, 4 Gray, 540; Howland v. Flood, 160 Mass. 509, 36 N. E. 482; Everest v. McKenny, 195 Mich. 649, L.R.A. 1917D, 784, 162 N. W. 277.

The report was made without malice. Pierce v. Rodliff, 95 Me. 346, 50 Atl. 32; Pease v. Bamford, 96 Me. 23, 51 Atl. 234; Howland v. Flood, 160 Mass. 509, 36 N. E. 482; Lancey v. Bryant, 30 Me. 466; Shattuck v. Allen, 4 Gray, 540; Bradford v. Clark, 90 Me. 298, 38 Atl. 229; Smith v. Higgins, 16 Gray,

251; Sweeney v. Higgins, 117 Me. 415, 104 Atl. 791; Kent v. Bongartz, 15 R. I. 72, 2 Am. St. Rep. 870, 22 Atl. 1023.

Morrill, J., delivered the opinion of the court:

In his writ the plaintiff alleges that the inhabitants of the town of Sangerville and one John S. Williams did write and publish a libel imputing to the plaintiff the crime of larceny, in a writ brought by the inhabitants of said Sangerville against the plaintiff. The alleged libelous language is contained in the declaration of that writ, which in the present writ is set out as follows: "In a plea of trespass, for that the said defendant [meaning the plaintiff, Arthur Stanley] at said Sangerville, with force and arms, took, carried away, and stole one Armco metal culvert of the property, goods, and chattels of the said plaintiff [meaning the said inhabitants of Sangerville] of the value of \$50, and disposed of the same to his own use."

The plaintiff further alleges that the word "stole" was not pertinent to the issue in said action, and was inserted in said writ maliciously and in bad faith; he also alleges that the defendants delivered the libel to the clerk of the court to which the writ was returnable, there to be made a public record forever.

The inhabitants of Sangerville filed a motion to dismiss the action against them for the reason "that said action is based on an alleged libel, and that no action for damages for libel lies against a town or the inhabitants thereof in their corporate capacity." The presiding justice sustained the motion. To this ruling the plaintiff has exceptions.

The dual capacity of New England towns as municipal corporations, in the absence of special legislation, is firmly established, and has been recognized for many years (Libby v. Portland, 105 Me. 370, 26 L.R.A.(N.S.) 141, 74 Atl. 805, 18 Ann. Cas. 547; Eastman v. Meredith, 36 N. H. 284, 72 Am. Dec. 302; Oliver v. Worcester, 102 Mass. 499, 3 Am. Rep. 485), and the same dual capacity has been recognized else-

where (*Bailey v. New York*, 3 Hill, 531, 38 Am. Dec. 669).

In their governmental capacity, as political subdivisions of the state, they discharge certain public duties imposed upon them by the legislature; and for the better discharge of those duties the inhabitants meet in town meeting for the choice of officers, for action upon reports of such officers, or committees, for the transaction of the necessary business connected with the discharge of the public duties imposed, and for the discussion of public affairs. The town upon such occasions acts in a legislative capacity and as a political body, and no action lies against a

Town—liability for governmental act.

town for what is done by it as a political body and as a part of the administration of the government. Thus it was held in *Howland v. Maynard*, 159 Mass. 434, 21 L.R.A. 500, 38 Am. St. Rep. 445, 34 N. E. 515, a case relied upon by counsel for the inhabitants of Sangerville, that the town was not liable to an action for an alleged libel contained in the report of a committee appointed by the town, which report was accepted by the town at a town meeting regularly called, and printed and circulated in accordance with a vote passed at said meeting.

But, to use the language of this court in *Libby v. Portland*, supra, "the municipality as proprietor is not to be confounded with the municipality as legislator or custodian for the public welfare." The distinction was clearly stated in the oft-cited case of *Small v. Danville*, 51 Me. 359: "The several towns in this state sustain the twofold character of corporations and political divisions. So far as they may own and manage property, make contracts, sue and be sued, they are corporations; but, in matters pertaining to the preservation of the public health and peace, the making and repairing of highways and bridges, the support of the poor, and the assessment and collection of taxes, they are

political divisions, established and designed the better to enable the inhabitants to exercise and enjoy portions of the political power of the state."

In its corporate capacity as the owner of property held for its profit and advantage, the rights and liabilities of the town are measured strictly by the laws which determine all private rights and liabilities, and under the same conditions as a private corporation. *Libby v. Portland*, supra; *Oliver v. Worcester*, 102 Mass. 489, 500, 3 Am. Rep. 485; *Woodward v. Livermore Falls Water Dist.* 116 Me. 86, 91, L.R.A. 1917D, 678, 100 Atl. 317. The maxim of "respondeat superior" may apply to them. 4 Dill. Mun. Corp. 5th ed. § 1655 (974).

—liability in corporate capacity.

It does not appear in the writ that the culvert in question was acquired by the town, or was in any way necessary, for the performance of a public duty, or was held in any governmental capacity; nor does it appear that in bringing the trespass action the town was acting in its governmental capacity. Upon the face of the pleadings the inhabitants of the town of Sangerville in bringing the trespass suit were simply asserting their title to an article of property, which the town unquestionably had the right to own (*Libby v. Portland*, supra), and were seeking to recover damages of the present plaintiff for taking and carrying it away. The right to sue is one of the powers of a corporation.

Libel—liability of town for.

It should be observed that in considering the motion to dismiss we are only concerned with the record as presented. *Richardson v. Wood*, 113 Me. 330, 93 Atl. 836. With the offers of proof recited in the bill of exceptions we have no concern, nor can a motion to dismiss be used inter-

Trial—motion to dismiss—confinement to record.

—consideration of bill of exceptions.

changeably with a demurrer. Littlefield v. Maine C. R. Co. 104 Me. 126, 71 Atl. 657. The precise question for decision, then, is whether, as stated in the motion, an action for damages for libel lies against a town or against the inhabitants thereof in their corporate capacity.

We think that such an action may be maintained. It has been asserted with much wealth of argument that a corporation, being a mere legal entity, is incapable of malice, and that an action in which malice is a necessary element cannot be maintained against the corporation, but should be instituted against the natural persons concerned in the wrong. But a corporation is liable in damages for the publication of a libel, as for other torts. "The result of the cases is that for acts done by the agents of a corporation, either in contractu or in delicto, in the course of its business, and of their employment, the

Corporation—
liability for
libel.

corporation is responsible, as an individual is responsible under similar circumstances." Philadelphia, W. & B. R. Co. v. Quigley, 21 How. 202, 16 L. ed. 73; Maynard v. Fireman's Fund Ins. Co. 34 Cal. 48, 91 Am. Dec. 672; Fogg v. Boston & L. R. Corp. 148 Mass. 513, 12 Am. St. Rep. 583, 20 N. E. 109. The above are actions for libel, and actions against corporations for newspaper libel are frequently found in the reports. In Reed v. Home Sav. Bank, 130 Mass. 443, 39 Am. Rep. 468, a mutual savings bank of the type common in this state was held responsible in an action of malicious prosecution, "the malice of its authorized agents being imputable to the corporation."

We have before us no question of evidence, but simply the question whether, if the proof is sufficient, the action will lie against the town or its inhabitants in their corporate capacity, and upon the authorities cited we think that the question must be answered in the affirmative.

Exceptions sustained.

Motion to dismiss overruled.

ANNOTATION.

Liability of town or municipality for libel or slander.

The court in the reported case STANLEY v. SANGERVILLE, ante, 348) recognizes, and applies to the liability of a town for libel, a distinction between its public or governmental, and its corporate or private, capacity, which is very generally recognized and applied in determining the liability of municipalities for torts. The court is at pains to point out that, upon the showing before it, there was nothing to disclose that the culvert was required by the town, or was in any way necessary, for the performance of a public duty, or was held in any public capacity, or that in bringing the action upon the declaration in which the alleged libel was predicated the town was acting in its governmental capacity.

In Howland v. Maynard (1893) 159 Mass. 434, 21 L.R.A. 500, 38 Am. St.

Rep. 445, 34 N. E. 515, holding that a town could not be made subject to an action for libel in a report of an investigating committee as to the manner in which a contract with the town for the construction of waterworks had been performed, which report was read in a town meeting and published, the court said: "Towns are instituted, in this state and New England generally, for political purposes. They are created for convenience in the administration of the government. . . . They are given such powers as are necessary to carry into effect the purposes for which they are organized. Their powers are special and limited, because the purposes for which they are established are circumscribed. So far as the duties imposed upon them are purely public, and common to all

towns, such as the maintenance of police, health, schools, and highways, for instance, they are not liable for an injury caused to anyone through neglect in their performance, except in cases where a remedy is expressly given by statute. . . . But there are many matters upon which they act that are of local concern, and which, though public in the sense that they are for the general benefit of all of the inhabitants of the particular town, are special to the inhabitants of that town. Such are waterworks, gas or electric lighting, free baths, the maintenance of main drains and common sewers, and other similar things. Upon all these matters, those which are common to all towns and those which may be called special and local, towns may act at meetings regularly called according to law. All things relating to them are or properly may be subject to the action and consideration of the voters of the town duly assembled in town meeting; and whatever is done at such a meeting is done in a legislative capacity, and not in any sense by it as a political body, or quasi private corporation, whatever may be the subject that is acted upon. The town may, at such meetings, act through committees, as the legislature does, and may accept or reject, in whole or in part, or recommit or modify in any manner, the reports of its committees. When the reports are finally acted on by the town, they become part of the doings of the meetings at which such action took place. The town may print and publish them in whole or in part, as the general court prints and publishes its proceedings. The town meeting is a political body, like the general court. No statute gives a right of action against a town to any individual who may be referred to in a vote of the town, or in any report of a committee accepted by it, in a manner which, if it were done by a private person, would be libelous; and no action lies on general principles, because what is done by the town is done by it in such a case as a political body and as a part of the administration of the government. To hold that

an action of libel could be maintained against the defendant under the circumstances set out in this case would be to hold, in effect, that any party who felt himself aggrieved by any statement in the record of any city council in this state could maintain an action for libel against the city. . . . Moreover, it would seriously impair the freedom of investigation which is often required in the proper conduct of municipal affairs if cities and towns were to be subjected to the liability of actions for libel."

It will be observed that the foregoing quotation presents a somewhat unusual aspect of the distinction under discussion, in that it refers all acts and proceedings of a town meeting or its committees to the governmental capacity of the town, regardless of whether their subject in other respects pertains to the governmental or to the corporate capacity of the town. From that point of view, it is obvious that the fact that the report in question related to the matter of waterworks, the maintenance of which was of local concern and pertained to the corporate, as distinguished from the governmental, capacity, did not render the town liable. In most of the cases where the distinction has been drawn, in actions involving torts other than libel or slander, the liability of the municipality has not been predicated upon the act of the legislative body, but upon the act or conduct of some subordinate branch or department of the municipality; and the result of the distinction has usually been made to turn upon the question whether that branch or department pertained to the governmental or to the private capacity of the corporation. A different result would probably have been reached in the *Howland Case* if the libelous statements had been made by a water commissioner or other subordinate officer of the town, assuming that he was acting within the scope of his authority.

In the reported case (*STANLEY v. SANGERVILLE*, ante, 348) a town was held liable, upon the ground that it was acting in its corporate capacity, for a libel consisting of a charge of

larceny against the defendant in a plea of trespass for the alleged conversion by him of property of the town.

In *Covington County v. Stevens* (1919) 256 Fed. 328, holding that a county was not liable for libel because of charges of corruption and fraud against an architect, employed by the county board of revenue to build a new courthouse, set out in the allegations of the bill in a suit instituted by the county against such architect and others, the court said: "A county is a governmental subdivision of the state, with very limited and strictly defined powers. No county has been given the authority to commit a libel, nor given the power to authorize anyone to commit a libel for it. It is a character of tort for which a county cannot be held."

The English rule seems to make the liability of a municipal corporation for libel or slander depend upon the question whether or not the municipal officer or employee uttering the defamatory words was acting within the scope of his employment, the municipality being liable if he was, and not liable if he was not. *Glasgow v. Lorimer* [1911] A. C. (Eng.) 209, 80 L. J. P. C. N. S. 175, 104 L. T. N. S. 354, 55 Sol. Jo. 363, 48 Scot. L. R. 399, 21 Ann. Cas. 341, holding that a municipal corporation was not liable for slander in respect to a charge of forgery of a tax receipt, made by its tax collector, against the wife of a ratepayer, upon the ground that such col-

lector was not acting within the scope of his employment in making such charge.

And in *McLay v. Bruce County* (1887) 14 Ont. Rep. 398, it was held that an action for libel will lie against a municipal corporation. The court discussed this point as though there were no distinction on this question between a municipal corporation and an ordinary corporation, and the question of the scope of employment was not mentioned, and could not be raised, as the libel was published by the defendant's authority. The libel in this case consisted of statements in a petition by a county to the lieutenant governor of the province for the appointment of a commissioner to inquire into the conduct of the registrar of deeds of the county, with a view to his dismissal, charging him with defrauding the county out of large sums of the public money, and with other malfeasances in office; and the libel consisted, further, in the printing and publication of such charges, and the evidence taken thereunder, in pamphlets and in the minutes of the county council, circulated throughout the county.

In the *Howland Case* the court said, in reference to the English and Canadian cases called to its attention, that such cases manifestly threw no light on the question in this country, because of the difference between English and American municipalities.

G. V. I.

MILAN BANK, Appt.,

v.

HENRY RICHMOND et al., Respts.

Missouri Supreme Court (Division No. 2) — December 4, 1919.

(— Mo. —, 217 S. W. 74.)

Estoppel — to question validity of sale — receiving proceeds.

One who receives a portion of the purchase price of real estate to apply on a judgment against the vendor cannot subsequently question the validity of the sale as in alleged fraud of his rights on other indebtedness existing at the time of sale.

[See note on this question beginning on page 538.]

9 A.L.R.—23.

APPEAL by plaintiff from a judgment of the Circuit Court for Sullivan County (Lamb, J.) in favor of defendants in a suit brought to set aside certain deeds for alleged fraud. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Messrs. J. P. Painter and E. B. Fields, for appellant:

Actual (as contradistinguished from constructive) fraud, participated in by both grantor and grantee, will vitiate a conveyance as to subsequent as well as to existing creditors.

Cole v. Cole, 231 Mo. 260, 132 S. W. 734.

Anything which satisfies the mind and conscience of the existence of fraud is sufficient.

Massey v. Young, 73 Mo. 260; *Burgert v. Borchert*, 59 Mo. 80; *State use of Erhardt v. Estel*, 6 Mo. App. 6; *Groschke v. Bordenheimer*, 15 Mo. App. 353; *Frederick v. Allgaier*, 88 Mo. 598; *Gordon v. Ismay*, 55 Mo. App. 323; *Martin v. Estes*, 132 Mo. 402, 28 S. W. 65, 34 S. W. 53; *Howard v. Zweigart*, — Mo. —, 197 S. W. 46.

Want of consideration or insufficiency of consideration for a sale of land or other property by a debtor is always an element of fraud.

Childers v. Pickenpaugh, 219 Mo. 376, 118 S. W. 453; *Commercial Bank v. Vollrath*, 135 Mo. App. 63, 115 S. W. 510; *Jones v. Hogan*, 135 Mo. App. 347, 116 S. W. 21, 211 Mo. 45, 109 S. W. 641; *Kennedy v. Duncan*, 157 Mo. App. 212, 137 S. W. 299; *Johnson v. Mason*, 178 Mo. App. 109, 163 S. W. 260; *Lionberger v. Baker*, 88 Mo. 447; *Gentry v. Field*, 143 Mo. 399, 45 S. W. 286.

Where both the grantor and grantee of land intend to defraud the creditors of the grantor, the conveyance should be set aside regardless of the adequacy of the consideration.

Aull v. Gaffin, 234 Mo. 171, 136 S. W. 343; *Burgert v. Borchert*, 59 Mo. 80; *McDonald v. Hoover*, 142 Mo. 484, 44 S. W. 334.

Mr. D. M. Wilson, for respondents Morris et al.:

He who comes into equity must come with clean hands.

Modern Morse Shoe Club v. Stewart, 242 Mo. 421, 146 S. W. 1157; *Robinson v. Siple*, 129 Mo. 208, 31 S. W. 788; *Jarrett v. Morton*, 44 Mo. 275.

Only judgment creditors who have exhausted their legal remedies, and after the return of execution not satisfied, may maintain suits in equity to

set aside fraudulent conveyances against insolvent debtors.

Brown v. McKown, 265 Mo. 320, 176 S. W. 1043.

However clear Henry Richmond's fraud may be, the conveyance to Morris cannot be declared fraudulent unless he knew of Richmond's intent to defraud the bank, and participated in it.

Ryan v. Young, 79 Mo. 30; *Farmers' Bank v. Worthington*, 145 Mo. 91, 46 S. W. 745; *Dougherty v. Cooper*, 77 Mo. 528.

White, J., filed the following opinion:

In the circuit court of Grundy county, September 29, 1913, the plaintiff in this case recovered judgment against defendant Henry Richmond in the sum of \$12,999.68—the amount of a note for \$7,000 executed September 14, 1905, and interest. On March 26, 1914, plaintiff filed his petition in this case in the circuit court of Sullivan county for the purpose of enforcing the payment of said judgment against 280 acres of land in Sullivan county, formerly owned by the defendant Richmond and conveyed by him to defendant Morris, and by defendant Morris conveyed to defendant Meeks, it is claimed in fraud of the plaintiff. The cause was tried, and judgment rendered September 11, 1915, in favor of defendants, and plaintiff appealed to this court.

The salient facts leading up to the filing of the present suit are as follows:

On September 14, 1905, W. H. Richmond, son of defendant Henry Richmond, was indebted to the Milan Bank, plaintiff herein, on two notes, one for \$7,000, and one for \$3,280, with the defendant Henry Richmond as his surety. Other persons also were sureties on the \$7,000 note. The incidents connected with the placing of this indebtedness are unimportant for our purpose here. Soon afterwards suit was brought on the \$3,280 note, and

judgment obtained against the defendant Henry Richmond, his son having fled the country at the time, it appears, a fugitive from justice. September 20, 1905, six days after the notes were signed, an attachment suit was brought by the plaintiff bank on the \$7,000 note. Four hundred acres of land, including the land in controversy here, were attached; also the land of other defendants, sureties on the note. On January 3, 1916, this attachment suit was dismissed by the plaintiff. On the 16th day of January another attachment suit was brought on the same note, and the same land was attached.

On the 11th day of January, 1916, eight days after the dismissal of the first attachment suit, and three days before the second, the defendant Henry Richmond sold the 280 acres of land in controversy to defendant Morris for \$20 per acre, the total price amounting to \$5,600, which was paid in cash, and conveyance was made to Morris. Something like a year later Morris sold and conveyed the land to defendant Meeks for \$7,000.

The second attachment suit was sent on change of venue to Macon county, where it was tried, and judgment rendered in favor of the defendant Richmond. The case was appealed to this court, was reversed and remanded, and is reported in 235 Mo. 532, 139 S. W. 352. That case was again tried in the Macon county circuit court January 13, 1912, and at the close of the defendant's evidence the plaintiff took a nonsuit, and the attachment was dissolved. On the same day a third suit on the same note was brought in the Sullivan county circuit court, and the same 400 acres of land were attached. This suit was taken on change of venue to Grundy county. There a peculiar proceeding was had. One of the sureties on the note, Amon Richmond, had been adjudged insane, and was represented by defendant in the suit by a guardian. On motion of the guardian he was granted a separate trial. The trial proceeded against the defend-

ant Henry Richmond, and judgment was rendered September 29, 1913, as stated.

In order to support its position that a fraudulent purpose attended the sale of Richmond's property, of which defendants Morris and Meeks had notice, plaintiff offered evidence attempting to show that when the conveyance by Richmond to Morris was made, eight days after the first attachment suit was brought and three days before the second, Morris knew of the existence of the \$7,000 note and of the suit on it; that about the same time Richmond sold the remainder of the land, 120 acres, to his son Jesse Richmond; that he sold his personal property, including sheep and cattle, to other persons at the same time; and that Morris knew he was making disposition of his other property. It was further shown that the defendant Richmond, of the proceeds of the land, gave his wife nearly \$2,200, and gave his daughter various sums of money.

It was also shown by appellant that Morris was not a land buyer; he was seventy years old, too old to farm; that the trade was suggested to him and accepted by him on very brief notice, without looking at the land. Other facts of that character were proven to indicate the improbability of his caring to purchase the farm on his own account. He borrowed the entire \$5,600 to pay for the land from the First National Bank. One Ike Guinn, president of the bank, and one Johnson, a saloon keeper, who was a director of the bank, were sureties on his note, and there seemed to be an effort on the part of plaintiff to connect the officers of the bank with the deal.

On the other hand, the defendant Morris testified that he was worth about \$8,000 at the time; that he had \$2,000 stock in the First National Bank and about \$800 in cash; so that the loaning of that amount of money to him was not so extraordinary.

Evidence also was offered by plaintiff to show that the land, 280

acres, was worth from \$30 to \$40 an acre. Eight witnesses swore to values varying between those sums, all or nearly all of whom, however, had some connection with the plaintiff bank.

Eleven witnesses sworn on behalf of defendant put the value of the land at from \$17 to \$25 per acre, a majority of them placing it at \$20 per acre, or at from \$20 to \$25 an acre.

Appellant showed that the \$7,000 note was not due at the time the first suit was brought on it nor at the time it was dismissed on the 3d day of January, 1906, and attempted to show that Morris knew it at the time he bought, and knew that the second suit was instituted the day after the note fell due.

Morris testified that he did not know that the suit on the \$7,000 note was dismissed, because it was not due; that he had been over the land a few times a good while ago; that when the trade was first suggested to him he said he would give \$20 an acre for it, provided he could get the money. It was then that Johnson and Guinn agreed to see that he got the money and went on his note at the bank. He also stated that he would buy if it showed up all right. He knew there was a judgment for \$3,280 against the land in favor of the Milan Bank, which would have to be paid, and he had seen in the papers that a suit brought by the bank against Richmond had been dismissed "with leave to draw the note." He consulted an attorney before closing the deal and inquired whether Richmond could dispose of his property without being hampered in any way. He was told by his attorney who examined the record that it was all right. He explained that he did not understand the land had been attached. He only knew a suit had been brought and had heard that a suit was dismissed. His attorney said something to the effect that the suit might be instituted again. It was shown by plaintiff that when

Meeks bought the land from Morris he took a bond from Morris to protect his title. This, however, was after the land was attached in the second suit, and that suit was then pending.

When the trade was closed between Morris and Richmond, Morris drew his check for \$3,400.77, payable to the circuit clerk, in payment of the judgment and interest which the Milan Bank held against Richmond, and gave his check for the balance, \$2,199.23, to Richmond. The clerk retained the costs out of the amount paid to him, about \$40, and paid the balance to the bank.

The plaintiff's case is made out, so far as Morris is concerned, upon the testimony of Morris. His deposition was taken February 6, 1906, in the case of Milan Bank v. Richmond, probably when that suit was first brought. The plaintiff offered that deposition in evidence. His testimony given on a trial of the case of Milan Bank v. Henry Richmond, September 17, 1907, was also read in evidence by the plaintiff. His deposition was taken in the present case April 22, 1915, and that deposition was offered in evidence by the plaintiff. In each of these statements where Morris testified at wide intervals, extending from 1906 to 1915, he told substantially the same story and made substantially the same explanations in regard to the transaction. The three statements differ from each other only in unimportant details and in some points of recollection as to the sequence of events of matters not important. It seems from his testimony that he was served with a garnishment after the second attachment suit was brought. After he acquired the land he says he looked into the matter further, and learned most of what he knew about Richmond's condition. The evidence tends to show that he did not know Richmond was insolvent at the time he bought the land from him, nor that Richmond was giving property away to his wife and son.

Estoppel—
to question
validity of sale
—receiving
proceeds.

The plaintiff has placed itself in a position such that it cannot now question the validity of the sale of the property by Richmond to Morris. When the sale was made the plaintiff bank received of the purchase money \$3,400—more than three fifths of the total purchase price. It is not contended anywhere that the officers of the bank did not know exactly where the purchase money came from. The weight of the evidence supported a finding that the land was sold for its full value. The plaintiff's judgment was a first lien on the land. The conveyance by Richmond could not be made so as to invest Morris with title without the payment of that judgment. The purchase money was paid through the clerk of the court, just as it would have been if the plaintiff bank had caused the sale to be made under execution; that is to say, the payment of the plaintiff's judgment was in effect a forced payment. The entire disposition of the proceeds was exactly the same as if the plaintiff had caused execution to be levied and had the land sold, because in that case the surplus would have been paid to Richmond, defendant, as it was paid to him. Three days after receiving the proceeds of that sale the bank brought its suit by attachment, on the ground that the sale was fraudulent. Subsequent suits, including the present one, proceeded upon the same theory. Thus plaintiff attempts to avoid a sale of which it obtained the proceeds. It will be noted that the plaintiff bank, by its petition here, seeks to have its judgment, \$12,000 and over, made a lien against this land. The amount is more than enough to absorb the entire present value of the land. It appears also that Morris, the purchaser, was served with a garnishment in that proceeding, probably to reach the surplus proceeds which he paid to Richmond. This is not clear in the record, but it is inferable from what does appear.

The principle applicable to this is

sometimes referred to as estoppel and is sometimes called ratification.

"Where one having the right to accept or reject a transaction takes and retains benefits thereunder, he becomes bound by the transaction and cannot avoid its obligation or effect by taking a position inconsistent therewith." 16 Cyc. 787; 9 C. J. 1198, 1199.

It was said by this court in the case of *Austin v. Loring*, 63 Mo. 19, loc. cit. 22: "No person will be allowed to adopt that part of a transaction which is favorable to him, and reject the rest to the injury of those from whom he derived the benefit. When those who are entitled to avoid a sale adopt and ratify it, equity will estop them from afterwards setting it aside."

That was said where a defendant in execution, knowing of a defect in the service on him, stood by and permitted his land to be sold in satisfaction of his debt and demanded and received the surplus proceeds. "By his action he ratified the sale," and estopped himself from laying any claim to the land.

In the case of *Chase v. Williams*, 74 Mo. 429, suit was brought for the purpose of setting aside a sale under a deed of trust and redeeming the property on the ground that the sheriff, acting as trustee, had no authority to sell. The circuit court found the issues in favor of the defendant, and plaintiffs appealed, but in the meantime procured an order for the surplus proceeds of the sale to be paid to them. It was held on appeal that, by filing the motion and procuring an order to have the proceeds of the sale paid, the plaintiffs had ratified the sale, and therefore would not be heard on appeal to question its validity. 74 Mo. loc. cit. 437.

Boogher v. Frazier, 99 Mo. 325, loc. cit. 330, 12 S. W. 885, is where a deed of trust securing three notes was foreclosed by sale at the instance of the owner of two of the notes. The owner of the third note sued the trustee, the cestui que trust, and the purchaser at the trustee's sale for the proceeds of the

sale, and recovered judgment against them for the amount of his debt. Having failed to collect all of his judgment, he brought suit in which he claimed that the sale was void and passed no title. He was estopped to deny the validity of the trustee's sale as against the purchaser. That case is very similar in principle to the present case. Here the plaintiff had its security (a judgment lien) on the land for the greater part of the land's value. The land was sold for its full value, and plaintiff obtained full payment of its judgment out of the proceeds. It could not, therefore, question the validity of the sale as against the purchaser of the land. Having collected one judgment from a sale of the land, it could not cause its resale to satisfy another judgment on the ground that the first sale was invalid.

Where tenants in common on a partition sale receive the proceeds due them as partitioners, they cannot afterwards question the validity of the sale. *Hector v. Mann*, 225 Mo. loc. cit. 245, 248, 124 S. W. 1109. See also as pertinent to the point under consideration, *Proctor v. Nance*, 220 Mo. 104, loc. cit. 115, 132 Am. St. Rep. 555, 119 S. W. 409, holding that, where a landowner takes the surplus money arising from the sale of his land for taxes, he ratifies the tax sale and is es-

topped to deny its validity. To the same effect in principle are; *Lawson v. Cunningham*, 275 Mo. 128, 204 S. W. 1105; *Sebree v. Cassville & W. R. Co.* — Mo. —, 212 S. W. 11, loc. cit. 16; *Cape Girardeau & T. B. Terminal R. Co. v. Southern Illinois & M. Bridge Co.* 215 Mo. 286, loc. cit. 296, 114 S. W. 1084; *Nanson v. Jacob*, 93 Mo. 331, loc. cit. 346, 3 Am. St. Rep. 531, 6 S. W. 246; *State v. Citizens' State Bank*, 274 Mo. loc. cit. 73, 202 S. W. 382; *Henderson v. Koenig*, 192 Mo. loc. cit. 716, 91 S. W. 88; *Platt v. Francis*, 247 Mo. loc. cit. 310, 152 S. W. 332; *Hayes v. Manning*, 263 Mo. loc. cit. 46, 172 S. W. 897.

At the time of the sale the bank had a right to bring its attachment suit and seek to subject the equity of Richmond to the discharge of its other note. It did not do that then, but stood by and saw the title pass and took the first proceeds of the sale in satisfaction of its judgment; that is, it elected to ratify the sale.

With this view of the case it is unnecessary to consider the other proposition presented in the briefs.

The judgment is affirmed.

Railey and Mozley, CC., concur.

Per Curiam:

The foregoing opinion by *White, C.*, is adopted as the opinion of the court.

All the Judges concur.

ANNOTATION.

Creditor's receipt of proceeds of conveyance or transfer by debtor as estopping him to claim that conveyance or transfer was fraudulent.

Fraudulent transfer generally.

A creditor who receives any of the proceeds of his debtor's fraudulent transfer or conveyance, with full knowledge of the facts, is estopped to claim that such transfer or conveyance was fraudulent.

Alabama.—*Butler v. O'Brien* (1843) 5 Ala. 316.

Arkansas.—*Millington v. Hill* (1886) 47 Ark. 301, 1 S. W. 547; *Bowden v. Spellman* (1894) 59 Ark. 251, 27 S. W. 602.

Connecticut.—Compare *Wadsworth v. Marsh* (1834) 9 Conn. 481.

Minnesota.—*Lemay v. Bibeau* (1858) 2 Minn. 291, Gil. 251.

Missouri.—*Torreyson v. Turnbaugh* (1904) 105 Mo. App. 439, 79 S. W. 1002. And see the reported case (*MILAN BANK v. RICHMOND*, ante, 353). Compare *Martin v. Johnson* (1886) 23 Mo. App. 96.

Pennsylvania.—*Furness v. Ewing* (1846) 2 Pa. St. 479.

Tennessee.—Cunningham v. Campbell (1878) 3 Tenn. Ch. 708.

Canada.—Wood v. Reesor (1895) 22 Ont. App. Rep. 57. See also Young v. Ward (1897) 24 Ont. App. Rep. 147.

A creditor who knowingly acquiesces in a fraudulent sale of property, and accepts part of the price paid by the purchaser for the property, is precluded from thereafter impeaching the sale as fraudulent. *Torreyson v. Turnbaugh* (1904) 105 Mo. App. 439, 79 S. W. 1002.

The same rule was announced in *Millington v. Hill* (Ark.) *supra*, the court saying: "A conveyance to defraud creditors is good as between the parties and their privies, although it may be avoided by the creditors of the fraudulent grantor. If the creditors condone the fraud, the grantee's title is good against all comers, and when any creditor, with knowledge of the wrong that has been done him, makes his election to take from the grantee the purchase price agreed to be paid for the land, his conduct is, in effect, an affirmation of the sale and a waiver of the right to complain of the fraud."

The foregoing case was followed in *Bowden v. Spellman* (Ark.) *supra*, wherein it was held that where creditors, with knowledge of a fraudulent sale, accepted notes given for the purchase price of the goods bought, their conduct was, in effect, an affirmation of the sale and a condonation of the fraud; and if they wished to disaffirm the fraudulent sale, they should, within a reasonable time after discovering the fraud, have returned or offered to return the notes.

In *Butler v. O'Brien* (Ala.) *supra*, it was held that a creditor who received from his debtor, in part payment of the debt, a note which was given to the debtor in payment for goods sold, was estopped to claim that the sale was fraudulent if he knew at the time he received the note that it was given in payment for the property sold, or, not having such knowledge at the time he received the note, if he ascertained the fact afterwards, but retained the note.

The same principle was announced

in *Cunningham v. Campbell* (Tenn.) *supra*, wherein it appeared that the note of a third person was given in part payment for the purchase price of property fraudulently conveyed. The court said: "The complainant may, therefore, elect to take the property or the note, not both. If he take the property, the note will be surrendered to the grantee; and if he take the note, the sale will be validated to the extent of the consideration thus paid, and in toto so far as the complainant is concerned. For that would be the effect of taking the note with full knowledge of the facts."

Lemay v. Bibeau (Minn.) *supra*, was a suit in the nature of a creditor's bill to set aside a conveyance of real estate. The defendant contended that inasmuch as the complainant had instituted supplementary proceedings against the purchaser to compel him to pay over an unpaid balance of the purchase price, and had, as a result of such proceedings, received the amount of this balance, he was estopped from contesting the legality of the conveyance. This contention was upheld, the court saying: "There can be no doubt but that a conveyance of real estate in due form, even if made with the intent to defraud creditors, is good as between the parties and privies, and can only be avoided by a creditor of the fraudulent grantor. . . . And the creditor may have his election either to confirm the conveyance, or attempt to avoid it, but he cannot do both. He cannot receive a benefit under the conveyance, and then turn round and claim that the conveyance is fraudulent and void; and it is held that, by receiving a benefit under the conveyance claimed to be fraudulent, he thereby affirms it, so as to be estopped from setting up fraud or other facts in avoidance of it."

In *Furness v. Ewing* (1846) 2 Pa. St. 479, it was held that a debtor's assignment to his son, in consideration of maintenance and an annuity, although originally void as to creditors, was ratified by the creditors, who took the outstanding arrears of the annuity at the father's death as a part of

their dividends, under an assignment by the father for the benefit of his creditors.

In *Young v. Ward* (1897) 24 Ont. App. Rep. 147, it was said, obiter, that a wife who had obtained a decree for alimony fully adopted an alleged fraudulent conveyance made by her husband by obtaining garnishment orders against the purchaser, for the payment to her of money due on a mortgage given by the purchaser to the seller.

But it was held in *Martin v. Johnson* (1886) 23 Mo. App. 96, that a creditor was not estopped from claiming that a sale was fraudulent simply because he accepted two notes given by the buyer in payment for the goods sold, where there was nothing on the face of the notes to indicate that the buyer ever owned them, and where the evidence showed that the creditor accepted them in the ordinary course of business, without knowledge as to the circumstances under which the notes were transferred from the buyer to the seller. So in *Wadsworth v. Marsh* (1834) 9 Conn. 481, wherein it appeared that, after a debtor fraudulently conveyed property, a creditor brought a foreign attachment proceeding against the buyer and secured thereon a sum of money due to the debtor as part of the purchase price, it was held that the receipt of this money did not estop the creditor from showing that the sale was fraudulent.

Assignment for benefit of creditors.

Similarly, where a creditor accepts a dividend under an assignment for the benefit of creditors, he is precluded from attacking the assignment as fraudulent.

Alabama.—*White v. Banks* (1852) 21 Ala. 705, 56 Am. Dec. 283. Compare *Crutchfield v. Hudson* (1853) 23 Ala. 393.

Maine.—Compare *Vose v. Holcomb* (1850) 31 Me. 407.

Maryland.—*Moale v. Buchanan* (1840) 11 Gill. & J. 314.

Minnesota.—*Scott v. Edes* (1859) 3 Minn. 377, Gil. 271.

Missouri.—*Gutzwiller v. Lackman* (1856) 23 Mo. 168.

Pennsylvania.—*Adlum v. Yard* (1829) 1 Rawle, 163, 18 Am. Dec. 608.

Canada.—*Wood v. Reesor* (1895) 22 Ont. App. Rep. 57.

In *Gutzwiller v. Lackman* (1856) 23 Mo. 168, it was said: "Though an assignment be in its nature calculated to delay creditors, and therefore voidable, yet if a creditor take a dividend under it he cannot afterwards question its validity."

So, in *Wood v. Reesor* (1895) 22 Ont. App. Rep. 57, Osler, J. A., said: "The receipt of a dividend under an assignment which is void or voidable for any reason against creditors will estop the creditors who accept it from contesting the validity of the assignment."

In *White v. Banks* (1852) 21 Ala. 705, 56 Am. Dec. 283, the court said: "The deed is only fraudulent as to creditors, but is capable of confirmation by them; and it is clearly deducible from the authorities of this state, as well as of other states, that after the deed has been executed, and the creditors who assented to its provisions have been paid from the effects assigned, the transaction, as to them, will not be disturbed." But in *Crutchfield v. Hudson* (1853) 23 Ala. 393, it was said: "The position assumed by plaintiffs in error that Hudson could not assail the deed in trust for fraud, because he was one of the creditors secured by it, and had received a pro rata share of the proceeds of the sale of the property conveyed by it, we do not consider tenable. It seems he was secured to some small amount, and received his pro rata share. That circumstance may have been proper to go to the jury for what it was worth, on the question of the bona fides of that deed, but the act of receiving his pro rata share worked no estoppel upon Hudson."

If the creditor has no knowledge at the time he accepts the dividends that the assignment was fraudulent, but acquires such knowledge thereafter, he must return the benefits he received. *Scott v. Edes* (1859) 3 Minn. 377, Gil. 271.

However, in *Vose v. Holcomb* (1850) 31 Me. 407, it was held that

a creditor who received dividends under an assignment was not estopped from claiming that the assignment was fraudulent. The decision in that case was based on the fact that the

assignment, contrary to statute, required the creditors to release all their claims, and that a release by a creditor, although he received dividends, was void. W. F. F.

MRS. ANNIE RALEY et al., Appts.,

v.

A. J. HODGES et al.

Louisiana Supreme Court — February 2, 1920.

(Nickerson v. Hodges, — La. —, 84 So. 37.)

Case — liability for practical joke.

The perpetration of a practical joke causing humiliation and mental suffering, such as leading the victim to believe that he had found a pot of gold and to open it in a conspicuous place, when it contained only dirt and stones, entitles him to substantial damages.

[See note on this question beginning on page 364.]

(Sommerville and O'Niell, JJ., dissent.)

APPEAL by plaintiffs from a judgment of the Judicial District Court for the Parish of Webster (Sandlin, J.) in favor of defendants in a suit brought to recover damages for injuries alleged to have been caused by malicious deception and conspiracy of defendants. *Reversed.*

The facts are stated in the opinion of the court.

Mr. L. K. Watkins for appellants.

Messrs. Drew & Drew for appellees.

Dawkins, J., delivered the opinion of the court:

Miss Carrie E. Nickerson brought this suit against H. R. Hayes, William or "Bud" Baker, John W. Smith, Mrs. Fannie Smith, Miss Minnie Smith, A. J. Hodges, G. G. Gatling, R. M. Coyle, Sam P. D. Coyle, and Dr. Charles Coyle, claiming \$15,000 as damages, alleged to have been caused in the form of financial outlay, loss in business, mental and physical suffering, humiliation, and injury to reputation and social standing, all growing out of an alleged malicious deception and conspiracy with respect to the finding of a supposed pot of gold. Subsequent to the filing of the petition, and before the trial, the said Miss Nickerson died, and her legal heirs, some ten in number, were made parties plaintiff, and now prosecute this suit.

All of the defendants, save and except Miss Minnie Smith, William or "Bud" Baker, and H. R. Hayes, filed, in effect, a general denial, denying any knowledge of or connection with the matters out of which the alleged damages arose. These three defendants filed a joint answer, in which, after denying the injuries charged, or that there was any malicious or unlawful intent, admitted that they had fixed up an old copper bucket or pot, filled with dirt and rocks, and had buried it at a point where the said Miss Carrie Nickerson and her helpers would likely dig in search of an imaginary pot of gold; that she and her said associates had been, for several months, digging over the property of defendant John W. Smith, on information obtained from a negro fortune teller in the city of Shreveport, and boarding at the home of the said Smith, father of the said Minnie Smith, without paying there-

for, and generally acting in such a manner as to make themselves nuisances to the community; that the course adopted by these three defendants was for the purpose of convincing the explorers of their folly; that it was intended as a practical joke, and succeeded in accomplishing the purpose mentioned.

For some reason the case was allowed to remain on the docket of the lower court for more than three years before being tried, when it was finally submitted to a jury, and resulted in a verdict in favor of the defendants. After an unsuccessful motion for a new trial, the plaintiffs prosecuted this appeal.

Miss Nickerson was a kinswoman of Burton and Lawson Deck, the exact degree of relationship not being fully shown by the record, and there had been in the family a tradition that these two gentlemen, who died many years ago, had, prior to their deaths, buried a large amount of gold coin on the place now owned by the defendant John W. Smith, or on another near by. She was employed by the California Perfume Company to solicit orders for their wares in the towns, villages, etc., in Webster and other parishes, and on the occasion of a visit to the city of Shreveport seems to have interviewed a negro fortune teller, who told her that her said relatives had buried the gold, and gave her what purported to be a map or plat showing its location on the property of Smith. Thereafter, with the help of some three or four other persons, principally relatives, and one Bushong, she spent several months digging, at intervals, around the house and on the premises of Smith, who seems to have extended them a cordial welcome, and to have permitted them to dig almost without limit as to time and place, and in addition boarded the fortune hunters, while so engaged, without charge. We assume that this was due perhaps to the fact that he, too, had a slight hope that they might find something, and he was to receive a part thereof for his concessions. At any rate, the diggers pursued their

course with such persistence, and at such lengths, digging around the roots of shade trees, the pillars of his house, etc., until finally his daughter, the said Minnie Smith, William or "Bud" Baker, and H. R. Hayes conceived the idea of themselves providing a "pot of gold" for the explorers to find. Accordingly they obtained an old copper kettle or bucket, filled it with rocks and wet dirt, and buried it in an old chimney seat on the adjoining place, where the searchers had been or were intending to also prospect for the supposed treasure. Two lids or tops were placed on the pot, the first being fastened down with hay wire; then a note was written by Hayes, dated, according to some, July 1, 1884, and, as to others, 1784, directing whoever should find the pot not to open it for three days, and to notify all the heirs. This note was wrapped in tin, placed between the first and second lids, and the latter was also securely fastened down with hay wire. This took place sometime toward the latter part of March, and, according to these three defendants, was to have been an April fool; but plans miscarried somewhat, and the proper opportunity for the "find" did not present itself until April 14th. On that day Miss Nickerson and her associates were searching and digging near the point where the pot had been buried, when one Grady Hayes, a brother of H. R. Hayes, following directions from the latter, and apparently helping the explorers to hunt for the gold, dug up the pot and gave the alarm. All of those in the vicinity, of course, rushed to the spot, those who were "in" on the secret being apparently as much excited as the rest, and after some discussion it was decided to remove the lid. When this was done, the note was discovered, and H. R. Hayes advised Miss Nickerson that he thought it proper that its directions should be carried out, and that the bank at Cotton Valley, a few miles distant, was the best place to deposit the "gold" for safe-keeping, until the delays could run and the heirs be

notified, as requested. Following this suggestion, the pot was placed in a gunny sack, tied up, and taken to the bank for deposit. Defendant Gatling was the cashier of the bank, but refused to give a receipt for the deposit as a "pot of gold," because, as he insisted, he did not know what it contained.

As might have been supposed, it did not take long for the news to spread that Miss Nickerson and her associates in the search for fortune, had found a pot of gold, and the discussion and interest in the matter became so general that defendant A. J. Hodges, vice president of the bank, went over from his place of business in Cotton Valley to the bank, and he and Gatling, after talking the matter over, decided to examine the pot, so that in event it did contain gold proper precautions to guard the bank might be taken, pending the return of Miss Nickerson and the appearance of those who might claim the fortune. These two undid the wire sufficiently to peep into the pot, and discovered that it apparently contained only dirt. They then replaced the lid and held their tongues until the reappearance of Miss Nickerson. However, the secret leaked out from other sources that the whole matter was a joke, and this information, too, became pretty well distributed.

After depositing the pot in the bank, Miss Nickerson went to Minden, Louisiana, and induced Judge R. C. Drew to agree to accompany her to Cotton Valley on the following Monday (the deposit at the bank having been made on Saturday), for the purpose of seeing that the ceremonies surrounding the opening of the treasure were properly conducted. Judge Drew swears that he had heard in some way that the matter was a joke, and so informed Miss Nickerson, warning her not to place too much faith in the idea that she was about to come into a fortune, but that finally, because of his friendly relations with and kindly feeling toward her, he consented and did go, mainly to gratify her wishes in the premises. Some half a dozen

other relatives of Burton and Lawson Deck were notified, and either accompanied or preceded Miss Nickerson to Cotton Valley.

With the stage thus set, the parties all appeared at the bank on Monday morning at about 11 o'clock, and among the number were H. R. Hayes, one of the defendants, who seems to have been one of the guiding spirits in the scheme, and one Bushong—the latter, we infer, from intimations thrown out by witnesses in the record, being at the time either an avowed or supposed suitor of Miss Nickerson's. Judge Drew, as the spokesman for the party, approached Gatling and informed him that it was desired that the pot be produced for the purpose of opening and examining the contents for the benefit of those thus assembled. The testimony of the witnesses varies a little as to just when the storm began; some say, as soon as the sack was brought out. Miss Nickerson discovered that the string was tied near the top, instead of down low around the pot, and immediately commenced to shout that she had been robbed; others insist that she was calm until the package was opened and the mocking earth and stones met her view. Be that as it may, she flew into a rage, threw the lid of the pot at Gatling, and for some reason, not clearly explained, turned the force of her wrath upon Hayes to such an extent that he appealed for protection, and Bushong, with another, held her arms to prevent further violence.

Miss Nickerson was a maiden nearing the age of forty-five years, and some twenty years before had been an inmate of an insane asylum, to the knowledge of those who had thus deceived her. She was energetic and self-supporting in her chosen line of employment, as a soap drummer, until she met the colored fortune teller who gave her the "information" which she evidently firmly believed would ultimately enable her to find the fortune which the family tradition told her had been left hidden by her deceased relatives. The conspirators, no

doubt, merely intended what they did as a practical joke, and had no wilful intention of doing the lady any injury. However, the results were quite serious indeed, and the mental suffering and humiliation must have been quite unbearable, to say nothing of the disappointment and conviction, which she carried to her grave some two years later, that she had been robbed.

If Miss Nickerson were still living, we should be disposed to award her damages in a substantial sum, to compensate her for the wrong thus done; but as to the present plaintiffs, her legal heirs, we think that a judgment of \$500 will reasonably serve the ends of justice. R. C. C. art. 2315.

The evidence fails to connect any

of the defendants with the conspiracy, so as to render them liable, save and except H. R. Hayes, William or "Bud" Baker, and Miss Minnie Smith; hence the judgment will be awarded against these only.

For the reason assigned, the judgment appealed from is annulled and reversed, and it is now ordered and decreed that the plaintiffs do have and recover judgment against the defendants H. R. Hayes, William or "Bud" Baker, and Miss Minnie Smith, in the full sum of \$500, and as to the other defendants the demands are rejected; the defendants so cast to pay all costs.

Sommerville and O'Niell, JJ., dissent.

Petition for rehearing denied, March 1, 1920.

ANNOTATION.

Right of victim of practical joke to recover against its perpetrator.

It has been said that at common law there was a cause of action whenever one person did damage to another wilfully and intentionally, without just cause or excuse, and the general statement is familiar that wherever there is a wrong there is a remedy. 26 R. C. L. p. 757. Accordingly it has been held, in the few cases passing on the question, that the perpetrator, of a practical joke is answerable in damages for the injuries sustained by the victim. Thus, in the reported case (RALEY v. HODGES, ante, 361) the evidence showed that the original plaintiff had been informed by a fortune teller that gold had been buried by her relatives on the premises of a third person. Thereafter, with the help of several other persons, the plaintiff spent several months digging around the premises named by the fortune teller. While this search was in progress, the defendants conceived the idea of burying an old copper kettle filled with rocks and wet dirt, and this idea was carried out, a note being attached which gave specific instructions as to when and under what circumstances the kettle was to be

opened. The scheme, planned as a joke by the defendants, was carried out, and the plaintiff, was both chagrined and humiliated with the outcome of her treasure quest, instituted suit to recover damages alleged to have been caused in the form of financial outlay, loss in business, mental and physical suffering, humiliation, and injury to reputation and social standing. The court holds that, while the defendants merely intended what they did as a practical joke, the results were serious, and those connected with the conspiracy were liable for the resulting injury.

An analogous case is *Parker v. Enslow* (1882) 102 Ill. 272, 40 Am. Rep. 588, which was an action brought on a promissory note which was given to the plaintiff by the defendant, as a compromise and settlement of an alleged cause of action which the plaintiff claimed to have against the defendant. It appeared that the plaintiff was accustomed to fill his pipe from a box of smoking tobacco kept on a counter by the defendant in his store. The defendant, by way of a joke, mixed gunpowder with the tobacco.

co, and the plaintiff, filling his pipe therefrom, was injured by the explosion. In sustaining a recovery, the court said: "The putting of powder in smoking tobacco, whether a mere thoughtless act for the purpose of amusement, or a malicious act with an intention of doing harm, was necessarily extremely dangerous in its tendency, and cannot be excused. Even if appellee had been taking the tobacco as a trespasser, this was not justifiable as a measure of prevention."

In *Wartman v. Swindell* (1892) 54 N. J. L. 589, 18 L.R.A. 44, 25 Atl. 356, the evidence showed that the defendant removed the lines from the plaintiff's horse to prevent the plaintiff's clerk from driving home. In an action of tort for the conversion, the defendant relied on the defense that the act he performed was by way of a joke. The trial court dismissed the case at

the completion of the plaintiff's case, on the defendant's tender of the property. In holding the dismissal to be erroneous, the court said: "The trial judge acted upon the idea that the conduct of the defendant was intended as a joke, and that the matter involved was too insignificant to claim the attention of the court. If the defendant relied upon the fact that he removed the lines by way of a joke, it was a question for the jury to decide whether the parties had been perpetrating practical jokes upon each other in such a way that the defendant had a right to believe that the plaintiff would accept this act as a joke. That question could not legally be taken from the jury and settled by the court, nor, in my judgment, was the maxim 'de minimis non curat lex' applicable to this case." E. C. B.

STATE OF WASHINGTON, Respt.,

v.

C. GORHAM, Appt.

Washington Supreme Court (Dept. No. 2)—March 19, 1920.

(— Wash. —, 188 Pac. 457.)

Municipal corporation — violation of ordinance — liability of sheriff.

A deputy sheriff in pursuit of one for the arrest of whom, on a felony charge, he has a warrant, is not liable to prosecution for violating the speed ordinances of a municipality unless he abuses his privilege in that regard.

[See note on this question beginning on page 367.]

APPEAL by defendant from a judgment of the Superior Court for Spokane County (Oswald, J.) convicting him of violation of the speed ordinances of the city of Hillyard. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Joseph B. Lindsley and Fred J. Cunningham, for appellant:

The ordinance of the city of Hillyard is invalid because it conflicts with the state law relating to motor vehicles.

Re Sic, 73 Cal. 142, 14 Pac. 405.

The sheriff is given such power of the county as he may deem necessary to carry out his duties.

State ex rel. Thompson v. Reichman,

135 Tenn. 653, 188 S. W. 225, Ann. Cas. 1918B, 889.

The sheriff has the right to exceed the speed limits when in his judgment it is necessary to carry out his official duties.

State v. Sheppard, 64 Minn. 287, 36 L.R.A. 305, 67 N. W. 62.

The ordinance of the city of Hillyard under which defendant was arrested is not only repugnant to the

Constitution and the state law, but it is unreasonable.

Ibid.; *Kansas City v. McDonald*, 60 Kan. 481, 45 L.R.A. 429, 57 Pac. 123, 6 Am. Neg. Rep. 67.

Mr. C. C. Upton for the State.

Fullerton, J., delivered the opinion of the court:

The appellant was convicted of a violation of the speed ordinances of the city of Hillyard. The facts are stipulated and are, in substance, these: The city named lies within and forms a part of the county of Spokane. The appellant is a duly appointed, qualified, and acting deputy sheriff of such county. On June 3, 1919, a charge of grand larceny was preferred against one William Agnew, and a warrant issued for his arrest. This warrant was given to the appellant for execution. The specific charge was the larceny of an automobile, and on inquiry the appellant was informed by a police officer of the city of Spokane that the accused had been seen on that day, on the downtown streets of the city, driving an automobile bearing the license number of the stolen automobile. Upon further inquiry, the officer found a young man who knew the accused, and who stated to the officer that he had seen the accused only a few moments before that time, driving an automobile "at a good rate of speed" toward the city of Hillyard, on the main highway leading from the city of Spokane to that city. The officer immediately took up the pursuit of the accused on a motorcycle, and in passing through the city of Hillyard rode the motorcycle at a greater rate of speed than its ordinances permitted.

In this court the appellant makes two principal contentions: First, that the ordinances which the appellant is accused of violating are invalid, because in conflict with the statutes of the state; and, second, that a sheriff is exempt from the operation of city ordinances regulating the speed at which a motor vehicle may be driven, when he is in the pursuit of a person accused of felony, for whose arrest he has a

warrant. The conclusion we have reached on the second contention makes it unnecessary to discuss the first.

The sheriff is made, by statute, the chief executive officer and conservator of the peace of the county. By statute also, it is made his duty to keep the public peace and to arrest and confine all persons who commit violations of the law, and especially is it made his duty to execute all process issued to him by a court of justice. His duties in these respects are public duties, necessary to the safety of the state and its people, and necessary for the preservation of public and private property. In the performance of these duties the sheriff has many privileges not accorded to a private individual, and statutes and ordinances directed against the individual do not generally apply to him when so performing them, especially where their enforcement would hamper and hinder performance.

That the enforcement of statutory or ordinance provisions limiting the speed at which a motor-propelled vehicle shall be driven over a public highway, against a peace officer, would have a tendency to hamper him in the performance of his official duties, can hardly be doubted. The case in hand affords an illustration. Here the felon was fleeing with a stolen automobile. Naturally he would pay but little regard to the minor offense of exceeding the speed limit. And if the sheriff must confine himself to that limit, pursuit in the manner adopted would have been useless, since the felon could not have been overtaken. The rule contended for would also hinder the public peace officer in enforcing the statutes regulating traffic upon the state highways. These statutes contain somewhat stringent regulations as to the speed a motor-propelled vehicle may be driven over them, and contain no exception in favor of the peace officers whose duty it is made to enforce them. If these officers may not pursue and overtake one violating the regulations, without them-

selves becoming amenable to the penalties imposed by them, the old remedy of hue and cry is not available in such instances, and many offenders who are now brought to answer will escape.

It is not meant to be asserted, of course, that there are no restrictions upon the speed a sheriff or a peace officer may travel in the pursuit of a fleeing criminal. Such officers may abuse their privileges in this respect as well as in others, and must

Municipal
corporation—
violation of
ordinance—
liability of
sheriff.

answer for such abuse. What is meant to be said is that the statutory regulations as to

speed do not apply to them, and that for an abuse of their privileges in this respect they must answer in the manner they are required to answer for other abuses of privilege.

The diligence of counsel has not brought to our attention any case where the precise question presented has been determined. Courts generally hold, however, in the somewhat analogous instance of a fire department responding to an alarm of fire, that ordinances regulating the limit of speed which a vehicle may be driven over the

streets are inapplicable. *Farley v. New York*, 152 N. Y. 222, 57 Am. St. Rep. 511, 46 N. E. 506; *Hubert v. Granzow*, 131 Minn. 361, 155 N. W. 204, Ann. Cas. 1917D, 563; *Kansas City v. McDonald*, 60 Kan. 481, 45 L.R.A. 429, 57 Pac. 123, 6 Am. Neg. Rep. 67; *Devine v. Chicago*, 172 Ill. App. 246.

In *State v. Burton*, 41 R. I. 303, L.R.A.1918F, 559, 103 Atl. 962, it was held that a member of the United States Naval Reserve Force, on duty as a despatch driver, was not amenable to the speed laws of the state while on his way to deliver a message, at the command of his superior officer, which that officer deemed urgent. The case was rested on principle of public necessity, and in this sense is applicable to the question presented here. A contrary case is *Keevil v. Ponsford*, — Tex. Civ. App. —, 173 S. W. 518.

Our conclusion is that the trial court erred in adjudging the officer guilty of the offense charged. Its judgment will therefore be reversed, and the cause remanded, with instruction to discharge the appellant.

Holcomb, Ch. J., and Tolman, Bridges, and Mount, JJ., concur.

ANNOTATION.

Criminal or penal responsibility of public officer or employee for violating speed regulation.

- I. In general, 367.
- II. Fire department, 367.
- III. Peace officers, 368.
- IV. Ambulances, 368.
- V. War Department, 368.

I. In general.

This note does not, of course, include cases where a speed regulation expressly excepts from its operation public officers or employees.

As a general rule public officers or employees cannot be subjected to a criminal prosecution for violation of speed regulations while in the discharge of duties in which speed is essential to their efficient performance. *State v. Sheppard* (1896) 64 Minn.

287, 36 L.R.A. 305, 67 N. W. 62; *State v. Burton* (1918) 41 R. I. 303, L.R.A. 1918F, 559, 103 Atl. 962; *STATE v. GORHAM* (reported herewith) ante, 365; *Cooper v. Hawkins* (1903) 73 L. J. K. B. N. S. (Eng.) 113, [1904] 2 K. B. 164, 89 L. T. N. S. 476, 52 Week. Rep. 233, 68 J. P. 25, 19 Times L. R. 620.

II. Fire department.

This rule is applicable to the fire department. Thus, it was held in *State v. Sheppard* (1896) 64 Minn. 287, 36 L.R.A. 305, 67 N. W. 62, that an ordinance prohibiting driving upon the street at a greater rate of speed than 6 miles an hour was unreasonable and invalid as to members of a

salvage corps responding to an alarm of fire sent to their station from the headquarters of the city fire department, and that therefore they were improperly convicted of violating such ordinance.

And in *People v. Mahoney* (1909) 65 Misc. 449, 121 N. Y. Supp. 898, reversing a conviction of a superintendent of a fire alarm telegraph bureau for violating a traffic ordinance in passing to the left of a blockade of vehicles, in going to repair wires broken by a storm, when there was just about daylight enough to get the line closed in before night so that signals could be transmitted to the fire companies, the court said that any regulation or ordinance which requires an officer of a fire department on an emergency job, or in the discharge of functions vitally connected with public safety, to wait behind a vehicle, when there is a perfectly clear and safe passage to the left of it, would be plainly unreasonable.

III. Peace officers.

The general rule above given also applies to peace officers in the pursuit of fleeing criminals. Thus, a deputy sheriff cannot be prosecuted for exceeding the speed limit in pursuing, on a motorcycle, an automobile thief. *STATE v. GORHAM* (reported herewith) ante, 365.

IV. Ambulances.

The reason underlying the general rule would seem to require its application also to the drivers of ambulances of municipal or state hospitals, in emergency calls, but in *People v. Little* (1891) 86 Mich. 125, 48 N. W. 693, the only case found upon this point, an ambulance driver was convicted of violating a speed ordinance, and the court said that the public interests do not demand that, in order to afford prompt relief to one person requiring the use of an ambulance, other persons may be run down and injured by the fast and reckless rate of speed of the ambulance in going to the assistance of the person injured. This case, however, was distinguished in *State v. Sheppard* (1896) 64 Minn. 287, 36 L.R.A. 305, 67 N. W. 62, supra,

in the following words: "We do not consider the case of *People v. Little* (Mich.) supra, as opposed to these views. The defendant there was the driver of an ambulance belonging to a private hospital, we judge. He drove at the rate of 12 miles an hour, and, colliding with another vehicle, injured the driver thereof. Upon being arrested for violating an ordinance similar to the one at bar, his defense was that the provision restricting the rate of speed to 6 miles an hour did not apply to ambulances, principally because, by a subsequent ordinance, all ambulances and other vehicles used for the transportation of sick or wounded persons and animals had been given the right of way over all other vehicles. No special rights, privileges, or authority had been conferred upon ambulance drivers by statute; nor had they been recognized by law as engaged in a public duty or service; nor was it shown that at the time of the collision the ambulance was being driven in response to a call, or that it was conveying a patient whose case was emergent. The court simply held that ambulances were within the terms of the ordinance, and no reason existed why they should not be included within its scope, and further, that the ordinance had not been modified by the later one, giving to ambulances the right of way over other vehicles."

V. War Department.

The general rule set out above is also applicable to the War Department. Thus, it is held in *State v. Burton* (1918) 41 R. I. 303, L.R.A.1918F, 559, 103 Atl. 962, that a member of the United States Naval Reserve Force, on duty as a despatch bearer, is not subject to state speed laws when traveling on a public highway, under orders of his superior officer, in time of war, to proceed with all possible despatch in the performance of a duty assigned him. The reason given for this holding is that the rules established by the general assembly regulating the use of the highways of the state are subordinate to the exigencies of military operations by the Federal government in time of war.

And it was held in *Cooper v. Hawkins* (1903) 73 L. J. K. B. N. S. (Eng.) 113, [1904] 2 K. B. 164, 89 L. T. N. S. 475, 52 Week. Rep. 233, 68 J. P. 25, 19 Times L. R. 620, that an engine driver in the employ of the War Department could not be prosecuted for running his locomotive, the property of the Crown, at an unlawful rate of

speed in order to deliver coal to a balloon factory within the time required by the orders of his superior officer, upon the ground that the speed regulation was not binding on the Crown, because it was not mentioned therein, either expressly or by necessary implication. G. V. I.

J. H. GORDON, Respt.,

v.

W. C. MARBURGER et al.

W. J. AUMILLER, Intervener, Appt.

Washington Supreme Court (Dept. No. 1)—January 19, 1920.

(Gordon v. Aumiller, — Wash. —, 187 Pac. 354.)

Partnership — farming — power of partner to borrow money.

1. One member of a nontrading partnership organized to raise and market a crop off from leased land has no implied authority to borrow money and give a chattel mortgage upon the crop for its security.

[See note on this question beginning on page 372.]

Notice — of rights of partner.

2. One drawing a lease of land upon which two are to raise a crop in partnership cannot plead ignorance of the rights of the other partner upon tak-

ing from one of them, only a few weeks later, a mortgage upon the crop to secure money lent to the mortgagor.

[See 20 R. C. L. 854.]

APPEAL by intervener from a judgment of the Superior Court for Yakima County (Taylor, J.) dismissing his complaint in intervention in an action brought for an accounting of partnership affairs and for the appointment of a receiver. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. James O. Cull and E. B. Preble for appellant.

Messrs. Snively & Bounds for respondent.

Parker, J., delivered the opinion of the court:

The plaintiff, Gordon, commenced this action in the superior court for Yakima county against the defendant Marburger, seeking an accounting of their partnership affairs and the appointment of a receiver to take charge of their partnership property, pending the settlement of their differences. The Growers' Service Company was made a de-

fendant, because the remaining partnership property, consisting of potatoes, was stored in its warehouse. Arthur Karr was by the court appointed receiver, and by order of the court sold the potatoes stored in the service company's warehouse. The proceeds of the sale, after paying the storage charges and the expenses of the sale, amounted to \$525. In the meantime W. J. Aumiller filed in the receivership proceedings his complaint in intervention, seeking to have his claim, amounting to \$300, established as a claim against the

potatoes and the proceeds of the sale thereof. The case came on for trial upon the merits as to the accounting controversy between Gordon and Marburger, and also as to the claim of lien made by Aumiller against the potatoes and the proceeds thereof. Judgment was rendered, decreeing Gordon to be entitled to the whole of the proceeds of the sale of the potatoes, after the payment of the receivership expenses, by reason of Marburger's appropriation of other property of the partnership. It was also adjudged that the relief prayed for by Aumiller be denied, and his complaint in intervention be dismissed. From this disposition of the cause, Aumiller has appealed to this court.

The controlling facts touching Aumiller's claim against the potatoes and the proceeds of the sale thereof may be summarized as follows: On April 10, 1917, Marburger and Gordon entered into a partnership agreement, looking to the raising of potatoes during the crop season of 1917 on a certain 10-acre tract of land in Yakima county, owned by Henry Pagel. Marburger was to do the work and superintend it, in so far as labor was concerned, while Gordon was to furnish all money necessary for seed, for carrying on the work, for harvesting the potatoes, and for marketing the same. On April 30th, Gordon having furnished money therefor, Marburger paid Pagel \$170 for the rent of the land, taking his receipt therefor, which receipt stated that the payment was for rent of the land until March, 1918, specifically described it, and that the payment was made by W. C. Marburger and J. H. Gordon. This receipt was all in typewriting, including its date of April 30, 1917, and was written by Aumiller at the request of Marburger. Gordon furnished sums from time to time, from April to January, inclusive, in compliance with the partnership agreement, amounting in the aggregate to \$1,370. These several sums seem to have been paid out by Gordon partly direct for labor and supplies, and partly to Mar-

burger, so he could pay the expenses of the partnership. The evidence is all but conclusive that this \$1,370 was considerably more in amount than sufficient to pay all legitimate expenses incident to the production and marketing of the crop. While Gordon did not have the general superintendence of the farming and the raising of the crop, he visited the land at least once a month during the whole of the season from the planting to the harvesting, and did a small amount of work upon the crop. After the potatoes were harvested, a part of them were disposed of by Marburger, and a part stored in the warehouse of the Growers' Service Company, in the name of Marburger & Gordon. This was done by Marburger; the receipts therefor being issued in the name of Marburger & Gordon, and delivered to him by the Growers' Service Company. Marburger never accounted to Gordon for the portion of the potatoes disposed of by him, nor did he account to Aumiller for any portion thereof. It is plain that there was no effort or intention whatever on the part of Gordon to conceal the partnership relation existing between them from the public.

On June 12, 1917, Marburger borrowed from Aumiller \$150, executing and delivering to Aumiller his note therefor, payable January 1, 1918. He at the same time executed and delivered to Aumiller a chattel mortgage upon the growing crop of potatoes, to secure the payment of this note. This was done by Marburger individually in his own name. Thereafter, on November 1st, Marburger again borrowed from Aumiller \$50, executing his promissory note therefor, payable thirty days after date. No written security was given accompanying this note, but it was orally agreed between them that it be treated as being secured by the chattel mortgage already given. Thereafter, on January 12, 1918, Marburger again borrowed from Aumiller \$100, no written evidence of any security accompanying this note, but Marburger promising that

he would deliver to Aumiller the receipts issued by the Growers' Service Company, evidencing the storage of the potatoes in its warehouse. A few days thereafter Marburger delivered four of such receipts to Aumiller, but without any indorsement thereon of any nature.

No contention is here made against the judgment of the trial court, in so far as it awards the proceeds of the sale of the potatoes here involved to Gordon as against Marburger, so we proceed upon the assumption that the fund is the property of Gordon, as between those two. It is conceded that the business relation between them was that of a nontrading partnership, and that Marburger's power to contract debts and encumber the partnership property was limited accordingly. In *Snively v. Matheson*, 12 Wash. 88, 50 Am. St. Rep. 877, 40 Pac. 628, Judge Dunbar, reviewing the law touching the power of one partner of a nontrading partnership to bind the other partners, or the partnership property to the detriment of the other partners, speaking for the court, said: "The presumption is that one partner has no power to bind the other partners. Hence, before recovery can be obtained upon a contract entered into by one partner in a nontrading partnership against the other partners, it must be affirmatively shown by the party attempting to bind the noncontracting partners either that the authority to bind was conferred by the articles of incorporation, or that authority had been specially conferred, or that it had been the custom of such partnership to recognize this right to such an extent as would give innocent dealers a right to rely upon the custom."

It was also recognized as the law in that decision that, in the doing of acts ordinarily necessary to be done by one partner, in the performance of partnership duties assigned to such partner, he can bind the other partners and their interest in the partnership property. It is plain, however, that in this partnership

Marburger had no duties to perform in the partnership business rendering it at all necessary for him to borrow

Partnership—
farming—power
of partner to
borrow money.

money to further the partnership interests, nor was there any custom of dealing by either of the partners, touching the partnership business, in the least suggesting that Marburger was authorized to borrow money for the partnership, or encumber its property. The contentions of counsel for Marburger are rested upon the theory that Gordon was a silent or dormant partner, and that Aumiller was warranted in dealing with Marburger upon the assumption that he was the sole owner of the potatoes. It is true that Aumiller testified in substance that he had no notice of Gordon's interest in the potatoes until after he had made all of the three loans to Marburger. It is hard to believe that Aumiller was wholly ignorant of Gordon's interest in the potatoes, in view of the fact that Aumiller prepared the rent receipt evidencing the leasing of the land to both Marburger and Gordon for the raising of these potatoes. The chattel mortgage given by Marburger to Aumiller to secure the first loan of \$150 described the crop of potatoes as being then growing upon the same land, describing it, and referring to it as belonging to Henry Pagel, which mortgage was executed on June 12th, only one month and twelve days after Aumiller had prepared the rent receipt for Marburger. Surely this ought to be held to be sufficient to at least put Aumiller upon inquiry as to the probability of Gordon being interested in the potatoes. This significant fact, together with the fact that Gordon made no effort to conceal, and did no act tending to conceal, the existence of the partnership relation between him and Marburger, and the fact that this was purely a nontrading partnership, we think, compels the conclusion that in no event can Aumiller at this time be heard to say, as against the rights of Gordon, that he was led to believe that Marburger was the sole

owner of the potatoes, with absolute right to borrow money and secure the payment of the same by encumbering them. Our decisions in *Tilden v. Pederson*, 88 Wash. 254, 152 Pac. 1021, and *Woody v. Wagner*, 89 Wash. 429, 154 Pac. 819, lend support to this conclusion, though we do not cite these decisions as being exactly in point.

Some contention is made in behalf of *Aumiller*, rested upon § 8359, Rem. Code, relating to limited partnerships. our recent decision in *Han-*

son v. Roesch, 104 Wash. 257, 176 Pac. 349, and the fact that there were no articles of limited partnership filed in the county auditor's office, evidencing the partnership relation of *Marburger* and *Gordon*. This is not a partnership such as is mentioned in, and the recording of the articles of which is contemplated by, § 8359, for it is not a partnership "for the transaction of mercantile, mechanical, or manufacturing business."

The judgment is affirmed.

Holcomb, Ch. J., and *Main*, *Mackintosh*, and *Mitchell*, JJ., concur.

ANNOTATION.

Authority of member of farming partnership to execute negotiable paper.

General rule.

It is well established that a member of a nontrading or noncommercial partnership has no power to execute negotiable paper in the firm name, unless it is the common custom or usage, or is necessary for the transaction of business of the firm, or unless other facts are shown to exist, sufficient to warrant the conclusion that the acting partner had been invested by his co-partners with the requisite authority, or that the firm has ratified the act by receiving the benefit of it. 20 R. C. L. 900. A partnership for the purpose of working land or raising crops being a nontrading partnership, the general rule naturally follows that a member of such a firm has no implied authority to bind the firm by the execution of negotiable paper.

Alabama.—*McCrary v. Slaughter* (1877) 58 Ala. 230.

Colorado.—*Tanner v. Hyde* (1892) 2 Colo. App. 443, 31 Pac. 344.

Illinois.—*Ulery v. Ginrich* (1871) 57 Ill. 533.

Kentucky.—*Cooper v. Nelson* (1891) 12 Ky. L. Rep. 890.

Louisiana.—*Benton v. Roberts* (1849) 4 La. Ann. 216.

Mississippi.—*Davis v. Richardson* (1871) 45 Miss. 499, 7 Am. Rep. 732; *Prince v. Crawford* (1874) 50 Miss. 344.

New York.—*Hunt v. Chapin* (1872) 6 Lans. 139.

Washington.—See the reported case (*GORDON v. MARBURGER*, ante, 369).

England.—*Greenslade v. Dower* (1828) 7 Barn. & C. 635, 108 Eng. Reprint, 860, 1 Mann. & R. 640, 6 L. J. K. B. 155, 31 Revised Rep. 272.

In *Walker v. Walker* (1894) 66 Vt. 285, it was held that "one member of a farming partnership, pure and simple, has no authority implied by law to bind the firm by a negotiable promissory note, concerning the consideration of which nothing appears."

In *Georgia*, it is provided by statute (Code, § 1904) that every partner has the right to execute any writing or bond in the course of the business, and all partners are bound by the acts of any one, within the legitimate business of the partnership. Therefore, a partner in a farming partnership may bind the firm of which he is a member, by giving a note for supplies to be used in carrying on the business. *Selman v. Brown* (1886) 78 Ga. 332.

Application of rule.

Greenslade v. Dower (Eng.) supra, apparently the earliest case on the subject, was an action of *assumpsit* against the defendants as acceptors of several bills of exchange, payable at six and twelve months, drawn by one *Willoughby* and indorsed by him to

the plaintiff. It appeared on the trial that the defendant Coleman purchased of Willoughby the lease of a farm, and also certain stock, crops, fixtures, etc., on the farm, the price to be paid in bills at three months. A written agreement to that effect was entered into by Willoughby and Coleman, and immediately thereafter the defendant Dower became a party to the agreement, with Coleman. Subsequently Dower, without the knowledge or consent of Coleman, accepted the bills in suit for himself and Coleman, for a part of the price of the lease and property thus purchased of Willoughby. It was argued for the plaintiff that the defendants were partners in carrying on the farm, and, the bills having been accepted for a debt due from the firm, the acceptance by one partner for the firm bound both partners. It was held that, this being a nontrading partnership, Dower had no authority to accept the bills for Coleman, although drawn for a firm debt, and that Coleman was not liable on such acceptance. Holroyd, J., said: "I am of opinion that the nonsuit was right. Dower had no authority in law to accept these bills for the original purchase of the stock on the farm. The transaction was not a matter of trade, and did not warrant the acceptance without express authority."

In *McCrary v. Slaughter* (1877) 58 Ala. 230, the defendant was a member of a partnership for planting and cultivating land, and it was held that, the business being noncommercial, there was no implied authority on the part of the other member to bind the defendant on a promissory note given for the purchase price of three mules.

So, in *Tanner v. Hyde* (1892) 2 Colo. App. 443, 31 Pac. 344, the defendant was a member of a partnership for the purpose of running and operating a farm, and while engaged in this undertaking the other members of the firm bought a harvester, and gave in payment a promissory note bearing the names of all the partners. The court held that the defendant was not liable on the note, saying: "Nothing is more clearly settled in the law than that one partner in a nontrading partnership cannot bind

his partner by a note unless he has express authority to execute it, or the execution is necessary to the transaction of the partnership business, or there be proof of some custom in that class of trading from which the law implies the authority."

In *Ulery v. Ginrich* (1871) 57 Ill. 533, it appeared that the appellant was a partner in a farming enterprise, and his copartner gave the firm's promissory note for money borrowed from the plaintiff Ginrich, a part of which money was applied to the payment of debts of the firm, and the remainder applied to the copartner's private account. It was held that the appellant was not bound by the act of his copartner, and was not liable on the note, the court saying: "In ordinary commercial partnerships each partner has undoubted authority to buy and sell goods belonging to or for the use of the partnership, or ordinary business thereof; each partner may pledge the partnership property, or borrow money for partnership purposes, and draw, negotiate, accept, or indorse bills of exchange and promissory notes and checks, and other negotiable securities, or any other acts which are incident or appropriate to such trade or business, according to the common course and usages of such trade and business; but the same rule does not always prevail in all other sorts of partnerships, or in such as are of a special and peculiar nature. Thus, if a partnership is organized for mining or for farming purposes, the directors or active agents thereof will not, as incident thereto, possess a power to draw or accept bills, or to draw or indorse notes for the company. In such cases there must be some proof that an express authority is given for this purpose, or that it is implied by the usages of the business or the ordinary exigencies and objects thereof. Story, Partn. §§ 102, 126; 3 Collyer, Partn. chap. 1, § 2, p. 269." However, it should be noted that in that case the partners had expressly agreed that neither of them should have authority to execute notes or other evidences of indebtedness in the name of the partnership.

In *Cooper v. Nelson* (1891) 12 Ky.

L. Rep. 890, it appeared that the defendants were members of a farming partnership, and one of them, without the knowledge of the other, borrowed money for his own individual use, and not for partnership purposes, signing the firm name to bills of exchange. It was held that there was no implied authority by which the one partner could so bind the other, and that in the absence of any proof that the money was borrowed in the necessary course of the firm's business, or that borrowing money was the usage and custom of that particular branch of the business, or that the partner who borrowed the money had express authority from the other, the firm was not liable.

In *Benton v. Roberts* (1849) 4 La. Ann. 216, where one of the members of a planting partnership executed a note in the firm name without express authority from the other member, obtained the signature of the plaintiff as surety, and, after discounting the note, applied the proceeds to the use of the firm, it was held that the plaintiff, who had paid the note as surety, could not recover against the partner who did not sign the note.

In *Davis v. Richardson* (1871) 45 Miss. 499, 7 Am. Rep. 732, wherein the defendants in error sought to enforce an agricultural lien against the plaintiffs in error, it appeared that the latter were partners in the production of crops, and it was held that, it being a nontrading partnership, one member

thereof had no authority to bind the other by borrowing money and executing promissory notes, mortgages, or other securities, unless it was necessary for the business, and the transaction was usual and ordinary in such a business.

In *Prince v. Crawford* (1874) 50 Miss. 344, it was held that where one member of a planting partnership gives the firm note without the express authority of the other member, the partner who does not sign is not bound by the act of his copartner, since in noncommercial partnerships neither partner has the implied right to bind the other, except by express authority, or unless such authority can be inferred from the usage and custom of the business.

In *Hunt v. Chapin* (1872) 6 Lans. (N. Y.) 139, it appeared that the defendant was in partnership with another in the mercantile business, but at the same time they were conducting a cotton plantation by a separate and distinct agreement. The court held that the latter was a nontrading partnership, and the defendant was not liable on a promissory note given by his copartner.

In the reported case (*GORDON v. MARBURGER*, ante, 369) it is held that one member of a partnership, formed for the purpose of growing potatoes, cannot bind the partnership by making a promissory note and giving as security therefor a chattel mortgage on the growing crop. R. G. R.

JESSIE E. CROUCH, Respt.,

v.

IRVING W. RINGER et al., Appts.

Washington Supreme Court (Dept. No. 2) — April 5, 1920.

(— Wash. —, 188 Pac. 782.)

Assault — ejection of customer from store.

1. The proprietor of a place of business to which the public are invited generally may request one making a disturbance to leave, and upon non-compliance may use such force as is necessary to eject the disturber.

[See note on this question beginning on page 379.]

License — to patron of store — withdrawal.

2. A warning by a storekeeper over the telephone, in response to a complaint by a customer, that her trade is no longer desired, is a withdrawal of

her general invitation to enter the store.

Case — rudeness to customer.

3. Rudeness of a storekeeper to a customer and lack of consideration of him are not actionable.

APPEAL by defendants from a judgment of the Superior Court for King County (Allen, J.) in favor of plaintiff in an action brought to recover damages for an alleged assault by the defendant store manager. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Roberts & Skeel, for appellants:

Defendants had a right to request the plaintiff to leave the store, and to use sufficient force to eject her.

Howell v. Winters, 58 Wash. 436, 108 Pac. 1077; Austin v. Metropolitan L. Ins. Co. 106 Wash. 371, 6 A.L.R. 1061, 180 Pac. 134.

Ringer & Mueller are not liable under the law in any event.

2 Hilliard, Torts, 524; Wright v. Wilcox, 19 Wend. 345, 32 Am. Dec. 507; Linck v. Matheson, 63 Wash. 596, 116 Pac. 282; Williams v. Pullman Palace Car Co. 40 La. Ann. 87, 8 Am. St. Rep. 517, 3 So. 631; Chase v. Knabel, 46 Wash. 488, 12 L.R.A. (N.S.) 1155, 90 Pac. 642; Fairbanks v. Boston Storage Warehouse Co. 189 Mass. 419, 13 L.R.A. (N.S.) 422, 109 Am. St. Rep. 646, 75 N. E. 737; Goodlow v. Memphis & C. R. Co. 107 Ala. 233, 29 L.R.A. 729, 54 Am. St. Rep. 67, 18 So. 166; Stephenson v. Southern P. Co. 93 Cal. 558, 15 L.R.A. 475, 27 Am. St. Rep. 224, 29 Pac. 234; Brown v. Boston Ice Co. 178 Mass. 108, 86 Am. St. Rep. 470, 59 N. E. 644; Baker v. Kinsey, 38 Cal. 631, 99 Am. Dec. 439; Johanson v. Pioneer Fuel Co. 72 Minn. 405, 75 N. W. 719, 4 Am. Neg. Rep. 409; Smith v. Memphis & A. C. Packet Co. — Tenn. —, 1 S. W. 104; Palos Coal & Coke Co. v. Benson, 145 Ala. 664, 39 So. 727; Meehan v. Morewood, 52 Hun. 566, 5 N. Y. Supp. 710, affirmed in 126 N. Y. 667, 27 N. E. 854; Benton v. James Hill Mfg. Co. 26 R. I. 192, 58 Atl. 664, 17 Am. Neg. Rep. 128.

Messrs. Gay & Griffin, for respondents:

Defendants Ringer & Mueller are liable.

2 R. C. L. 573; Chase v. Kinabel, 46 Wash. 484, 12 L.R.A. (N.S.) 1155, 90 Pac. 642; Linck v. Matheson, 63 Wash. 596, 116 Pac. 282; Cunningham v. Seattle Electric R. & P. Co. 3 Wash. 471, 28 Pac. 745; Dixon v. Northern

P. R. Co. 37 Wash. 310, 68 L.R.A. 895, 107 Am. St. Rep. 810, 79 Pac. 943, 2 Ann. Cas. 620; Beilke v. Carroll, 51 Wash. 395, 22 L.R.A. (N.S.) 527, 130 Am. St. Rep. 1103, 98 Pac. 1119; George v. Carstens Packing Co. 91 Wash. 637, 158 Pac. 529; De Leon v. Doyhof Fish Products Co. 104 Wash. 337, 176 Pac. 355; Ecuyer v. New York L. Ins. Co. 107 Wash. 411, 181 Pac. 871, 107 Wash. 423, 186 Pac. 327.

The servant may go beyond the strict line of his duty, and authority will not relieve the employer.

Tillar v. Reynolds, 96 Ark. 358, 30 L.R.A. (N.S.) 1043, 131 S. W. 969; Bergman v. Hendrickson, 106 Wis. 434, 30 Am. St. Rep. 47, 82 N. W. 304; Rogahn v. Moore Mfg. & Foundry Co. 79 Wis. 573, 48 N. W. 669; McDonald v. Franchere Bros. 102 Iowa, 496, 71 N. W. 427; Schmidt v. Vanderveer, 110 App. Div. 758, 97 N. Y. Supp. 441; Letts v. Hoboken R. Warehouse & S. S. Connecting Co. 70 N. J. L. 358, 57 Atl. 392.

Even where the master owes no duty to the person injured, the authority to use force may be implied from the nature of the employment, so as to render the master liable, even though the servant go beyond the necessity of the situation and use more force than is necessary.

Winoker v. Warfield, 136 Ga. 742, 71 S. E. 105; West Jersey & S. R. Co. v. Welsh, 62 N. J. L. 655, 72 Am. St. Rep. 659, 42 Atl. 736, 5 Am. Neg. Rep. 660; Exposition Cotton Mills v. Sanders, 143 Ga. 593, 85 S. E. 747; Fields v. Lancaster Cotton Mills, 77 S. C. 546, 11 L.R.A. (N.S.) 822, 122 Am. St. Rep. 593, 58 S. E. 608; Memphis Street R. Co. v. Stratton, 131 Tenn. 620, L.R.A. 1915E, 704, 176 S. W. 105.

Ringer & Mueller are liable because they ratified and adopted the act of Pavlik.

Cunningham v. Seattle Electric R. & P. Co. 3 Wash. 471, 28 Pac. 745.

Tolman, J., delivered the opinion of the court:

Respondent, as plaintiff, brought this action against the appellants Ringer & Mueller, as proprietors, and against appellant Pavlik, as manager, of the Pacific Meat Company, alleging that, while in the store owned and conducted by appellants on lawful business, she was assaulted by appellant Pavlik. From a judgment for \$200 in favor of respondent and against all three of the appellants, after a trial before the court sitting without a jury, this appeal is prosecuted.

The facts, so far as necessary to be stated here, as we gather them from the record, are substantially as follows: Respondent testified in chief to the effect that she ordered a pound of fish by telephone from appellant's store; that when her order came she paid for it and unwrapped the parcel, and the odor from the fish was such that she did not want it; that she telephoned to the store and said, "The fish is not fresh; I do not want it," and was answered, "All right; bring it back;" and that immediately a man's voice sounded over the telephone, and after she had repeated her complaint he said: "We don't want your trade, and you need not come here any more." Respondent thereupon in person went to the store with the fish for the purpose of returning it, gave the fish to the cashier with the remark that it was not fresh, received back the 20 cents she had paid for it, and thereupon the manager, Pavlik, who was standing near, said: "We don't want any more of your trade. We would like to have you keep away from this store."

She further testified as follows:

I didn't say anything for a moment; I was so amazed, and then I said to him that the fish was not fresh, that I had returned it, and that was not any reason to practically order me out of the store, because I had brought it back. I brought it back within practically two hours

after he sold it to me. . . . He spoke in a loud, ugly tone, and said to me repeatedly: "You can keep out of this store." . . . I then said, "I will not leave this store until I get ready, and I will come here to trade if I choose." I said, "I have a perfect right to return anything that is not good, and this is not good to eat," and I said, "I should have sent it to the health department; I regret now that I did not." He then said, "If you don't get out of this store, I will put you out; I will throw you out." That was the expression, and I am not accustomed to having anyone speak to me in that way. . . . I stepped toward him then. His voice was loud.

Q. Were other people in the store?

A. There were not very many people in the store at that time.

Q. Were there other people, customers, there?

A. Yes; there were a few.

Q. Go on.

A. And I stepped nearer to him, because I spoke quietly, and I said—I told him not to dare to touch me, not to put his hands on me; that I would not leave the store until I was ready; I had done nothing to be ordered from a place like that; I was never spoken so to in my life.

Q. Then what did he do?

A. He caught me by both hands and pushed me backwards. One of his hands was covered with the grease from the meat and blood.

Q. Where did he grab hold of you?

A. On both arms.

Q. And did he put you out of the store?

A. He didn't push me out of the door. He pushed me back quite a way; I don't know how far. . . .

Q. After he pushed you, did you go out?

A. No; not immediately.

Q. Well, did you go out?

A. Afterwards I did; yes.

Q. How soon afterwards?

A. About five minutes afterwards. . . .

Upon cross-examination respondent further testified:

His attack upon me certainly occurred in less than ten minutes after I was there, because I refused to leave; I refused to turn and run, and I refused to go backward at his order.

Q. Yes; you said that you absolutely refused to go out of the store, and you absolutely refused to go backward.

A. Yes, sir; he had no occasion to do that.

Q. And you said here in answer to Judge Gay, "I would not have stepped back there for anything?"

A. And I would not have done it.

Q. You say now you would not have stepped back there?

A. Yes.

Q. And you say now, "I also stepped toward him?"

A. He was speaking in a very loud, ugly tone so that Mr. Keene could hear him, this postman who is a witness, and I stepped near enough to him to speak quietly, because I don't shout and I don't yell; I stepped near enough to him to speak quietly, only for that.

Q. When Mr. Pavlik finished his telephone conversation, after he had told her to give the lady the money back, didn't he go back through that little aisle, and back behind the block and go to work?

A. I don't remember exactly that; he was very near me all the time, and talking.

Q. Yes; because you kept following him.

A. No; I didn't keep following him; I stepped toward him to say that I would not be ordered from the store, and to say that the fish was not fresh.

Q. You followed him back there where—

A. No; I did not.

Q. —where no patron of the store or the public has any right to be, didn't you?

A. No; I stepped toward the counter; he stepped behind the counter, and I stepped toward it.

Q. I say he went behind the counter and went to his work.

A. I had a right to step to the counter, did I not?

Mr. Keene, produced as a witness on the part of respondent, whose testimony bears the impression of fairness, described what he saw as follows:

Q. Now, Mr. Keene, what was it on that day that first attracted your attention?

A. Well, there was—when I came in there was rather loud talk; there seemed to be a kind of mutual misunderstanding among a couple of them.

Q. Who was it apparently?

A. A lady and a gentleman. They were strangers to me.

Q. They were strangers to you?

A. Yes. . . . Well, I could identify the lady, but I couldn't identify the man. . . . The lady was talking very rapidly, and—

Mr. Roberts: The lady, you say, was?

A. Yes; she was talking rapidly, but not very loud. I didn't understand what she said. . . . I don't remember anything that the lady said. He was telling her to leave the place and not come back; that they didn't want her trade. I heard him speak to the cashier and tell her to return the money. This has been some time ago, Mr. Gay, and I don't remember all these things distinctly.

Q. What did you next hear? Did she get her money? Did you see her get her money apparently?

A. Apparently; yes. I am not positive.

Q. Then what did you hear, and what took place, and what did you see?

A. I didn't watch them continuously. I was in a hurry, and wanted to get an order myself. The next that I remember, he told her repeatedly to leave the place, and the next thing that I remember I turned around, and they were just about in this position (indicating), and he had taken her by the arm or shoulder and shoved her toward—in this direction. . . . Yes; toward the

door, but they were about in this position at that time.

Q. And he shoved her toward the door. In what manner did he shove her?

A. Well he took her either by the arm or shoulder with his right hand, this way. He had her by the arm or shoulder, and shoved her that way.

Q. Was it apparently in anger, or how, what way? What was his manner and attitude?

A. Oh, yes; he was angry.

Q. How was he talking as to loudness, and the like?

A. Well, he was talking in a rather emphatic, angry tone.

Q. Was it loudness?

A. Well, rather loud; yes.

Q. How was she talking? Could you distinguish anything she said, or was she talking low?

A. She was talking low, but she was talking all the time, and very fast.

Q. Talking all the time?

A. And rather excited.

Q. Somewhat excited?

A. Yes.

On cross-examination Mr. Keene testified:

Q. Now, then, the conversation that you heard evidently was at the very beginning, because you say it was at the time when they told her to give her her money back?

A. Yes.

Q. Then Mr. Pavlik went back, didn't he?

A. Yes; he went back.

Q. And she followed him down to a point, you say, here about where you marked, opposite the block there?

A. I didn't watch them continuously.

Q. No; but you saw her down there opposite the block?

A. I thought the incident was closed, and he went back.

Q. You thought it was all closed when he went back?

A. He walked clear back around in here (indicating).

Q. Yes.

A. But the next time I saw them

they were in this position, right here. . . . He himself walked back here, and I thought the incident was closed, and was attending to my own business, getting my own order up here.

Q. So you don't know where she may have gone in the meantime; all that you know is that she was here opposite the north end of that block when that incident occurred?

A. Where I saw it; yes.

Q. But he asked her to leave the store first up here by the counter?

A. Yes.

Q. And he asked her several times?

A. Yes.

Q. Instead of leaving the store she went back the other way?

A. Yes.

There was much other testimony relating to the issue of whether or not respondent had been in the habit of returning meats previously purchased, and she admits that she had done so on one occasion not long before, and relating also to appellants' version of the affair, and other details not now necessary to be considered, as well as testimony regarding the effect which the episode had on the health of respondent, but enough has been quoted, we think, to show clearly respondent's attitude at the time of the trouble. Before she went to the store she was advised that appellants no longer wanted her patronage and were displeased with her complaint, which they believed, and which the evidence overwhelmingly shows, was a groundless one, and had she any desire to avoid the altercation she would have quietly returned the fish, taken her money, and departed, instead of which she showed a decidedly defiant and aggressive attitude, and we think provoked what followed. It may be that appellant Pavlik was not as polite and considerate as he should have been, but that did not justify respondent in provoking the altercation in the presence of appellants' customers, and pursuing the matter to the point where her forcible ejection

seemed the only course left open. The warning in advance that she was

License—to patron of store—withdrawal. no longer desired as a customer was a withdrawal of the

general invitation which she, in common with the public, theretofore had to enter appellants' place of business, and she came on the limited invitation to return the fish and receive back her money. Her own testimony shows that if she had then departed as she should have done she would have suffered nothing beyond a little

Case—rudeness to customer. rudeness and lack of consideration,

which would not have been actionable. We think this rudeness did not warrant respondent in remaining in appellants' place of business, knowing that her invitation had been withdrawn and there attempt-

ing to justify herself in the manner shown.

The law is well settled that the proprietor of a place of business to which the public is invited generally may request one making a disturbance to leave, and upon noncompliance Assault—ejection of customer from store. may use such force as is necessary to eject the disturber. *Howell v. Winters*, 58 Wash. 436, 108 Pac. 1077; *Austin v. Metropolitan L. Ins. Co.* 106 Wash 371, 6 A.L.R. 1061, 180 Pac. 134.

The facts here shown would have justified such an ejection.

The judgment reversed, with directions to dismiss the action.

Holcomb, Ch. J., and Fullerton, Bridges, and Mount, JJ., concur.

Petition for rehearing denied.

ANNOTATION.

Right to eject customer from store.

It seems to be well settled that, although the general public have an implied license to enter a retail store, the proprietor is at liberty to revoke this license at any time as to any individual, and to eject such individual from the store if he refuses to leave when requested to do so.

Delaware.—*McDermott v. Kennedy* (1833) 1 Harr. 143.

Illinois.—*Woodman v. Howell* (1867) 45 Ill. 367, 92 Am. Dec. 221; *Brebach v. Johnson* (1896) 62 Ill. App. 131; *People v. Root* (1912) 170 Ill. App. 608.

Louisiana.—*Hingle v. Myers* (1914) 135 La. 383, 65 So. 549.

Maryland.—*Sellman v. Wheeler* (1902) 95 Md. 751, 54 Atl. 512.

Missouri.—*State v. Reed* (1900) 154 Mo. 122, 55 S. W. 278; *Morris v. Whyte* (1900) 158 Mo. 20, 57 S. W. 1037.

Vermont.—*Watrous v. Steel* (1829) 4 Vt. 629, 24 Am. Dec. 648.

Washington.—*Howell v. Winters* (1910) 58 Wash. 436, 108 Pac. 1077; *CROUCH v. RINGER* (reported herewith) ante, 374.

Wisconsin.—*Raefeldt v. Koenig*

(1913) 152 Wis. 459, L.R.A.1918E, 1052, 140 N. W. 56.

Thus, in *Watrous v. Steel* (Vt.) supra, an action for assault and battery in which it appeared that the defendant, who was one of the owners of a bookstore into which the plaintiff had entered with the consent of the other owner, had forcibly endeavored to expel the plaintiff for calling the defendant a liar and using other opprobrious language, the court said: "It is a well-settled principle that the occupant of any house, store, or other building has a legal right to control it, and to admit whom he pleases to enter and remain there, and that he has also a right to expel anyone from the room or building who abuses the privilege which has been thus given him; and if the occupant finds it necessary, in the exercise of his lawful rights, to lay hands on him to expel him, he can legally justify the assault."

The same rule is laid down in *Woodman v. Howell* (Ill.) supra, a case not strictly in point as it arose over the ejection of the plaintiff from the office

of the defendant's employer, the court saying: "We are aware of no rule which authorizes one man to go into or upon the premises of another, even if it be his business office or mercantile house, workshop, factory, or other place of business, when the owner shall have forbidden him. The fact that he has devoted it to such purposes does not transfer the title to the public, or give others the right to use and occupy it, or deprive him of his control over it. The very fact that a professional man, or a merchant, or other person opens an office to transact business with and for the public, no doubt, is a tacit invitation to all persons having business with him, and a permission to others to enter, unless forbidden. But he does not lose his control over it, or the right to prevent whom he pleases to enter, and to require any or all persons to depart after they have once entered."

And in *People v. Root* (Ill.) *supra*, which also arose over an ejection from an office, the court says: "One has no right to go into or upon the premises of another, whether it is a business office, store, workshop, factory, or other place of business, when the owner has forbidden him to do so. When a person enters the premises of another, and is requested to depart and refuses so to do, the owner may eject him without incurring liability, providing he uses no more force than is reasonably necessary for that purpose."

In *McDermott v. Kennedy* (1833) 1 Harr. (Del.) 143, where it appears that while the defendant was in the plaintiff's store a dispute arose between them, and thereupon the plaintiff ordered defendant to leave the store, and upon his refusal took hold of him to put him out, the court, apparently puts stores upon the same basis, so far as this question is concerned, as residences, and says: "If a man orders another out of his house, he is bound to go; and if he refuses, the owner or occupant of a house has a right to put him out, and to use the force necessary for that purpose."

Although, in most of the cases in which this question has been con-

sidered, the ejection followed some sort of disorderly conduct on the part of the person ejected, and such misconduct is sometimes referred to as authorizing the proprietor's action, the right to eject does not seem to be limited to such cases.

Thus, it is said in *Morris v. Whyte* (1900) 158 Mo. 20, 57 S. W. 1037, an action for assault and battery by the proprietor of a store, committed upon one who had entered the store upon a matter of business: "Defendant had a right to order the plaintiff to leave his premises, whether he had good reasons for so doing or not, and it was the duty of the plaintiff to go."

And in *State v. Reed* (1900) 154 Mo. 122, 55 S. W. 278, the court says: "There is no doubt that an owner of a storehouse or premises may order another, whether a trespasser or intruder, or not, to leave the premises or storehouse which such owner occupies, although no provocation whatever be offered, and may enforce such order by all appropriate means and force, and a fortiori may he do so when provocation occurs, whether slight or great."

The more serious question in cases of this character is as to the propriety of the particular steps taken or the degree of force used in effecting the ejection. The general rule is that the proprietor may, where the customer refuses to leave upon request, use such force, and only such, as is reasonably necessary to accomplish the expulsion.

Besides the expressions in accord with this rule which are to be found in the various statements quoted *supra*, and in *CROUCH v. RINGER* (reported herewith) *ante*, 374, it is said in *Morris v. Whyte* (1900) 158 Mo. 20, 57 S. W. 1037, *supra*, referring to the right of the defendant to compel the plaintiff to obey his order to leave the store, "Defendant had the right to use all the force necessary, short of killing him."

While, in *Howell v. Winters* (1910) 58 Wash. 436, 108 Pac. 1077, which was an action for an assault alleged to have been made by the proprietor of a store upon one who had entered

the store for the purpose of returning goods, the court approves the charge of the trial court to the effect that the proprietor had the right to request the customer to depart, but the fact that she did not comply with the request would not justify him in making an assault, although he might, after proper request, use sufficient force to put her out of the store.

And in *Brebach v. Johnson* (1896) 62 Ill. App. 131, where the proprietor of a butcher shop put out of the shop one who had entered it while under the influence of liquor, and there conducted himself in an improper and disorderly manner, judgment for damages against the proprietor was affirmed, on the ground that it was a question for the jury, under the evidence, as to whether excessive force had been used, the court holding that, while the proprietor had the right to use such force as was reasonable and necessary, he would be liable if he used greater force, or followed up the person ejected and assaulted him after his removal.

So, in *Raefeldt v. Koenig* (1913) 152 Wis. 459, L.R.A.1918E, 1052, 140 N. W. 56, a directed verdict against the storekeeper was reversed where the evidence was conflicting, but the defendant testified that the plaintiff had intruded behind the counter and was helping herself to goods, and that upon her refusal to desist he merely laid his hand upon her and led her from the store, the court holding that such action on his part would not constitute an assault, and that it was for the jury to say whether any assault had actually been committed.

In *Republic Iron & Steel Co. v. Self* (1915) 192 Ala. 403, L.R.A.1915F, 516, 68 So. 328, it is held that the proprietor of a store is not liable for the use of abusive words by a clerk to a customer, including an order to "get out of the store," where such words were not accompanied by an assault, and the customer was not actually ejected from the store.

Of course, a greater degree of force may be used where the person sought to be ejected violently resists or assaults the proprietor.

So, it is held in *Hingle v. Myers* (1914) 135 La. 383, 65 So. 549, that the proprietor of a store in which was located a postoffice, of which he was postmaster, could not be held liable for striking with an ax handle and fracturing the skull of one who was causing disorder in the store, and had been ordered to leave, where the blow which caused the injury was delivered to prevent an assault by the person injured.

And in *State v. Reed* (1900) 154 Mo. 122, 55 S. W. 278, *supra*, it is held that the proprietor of a store, if assaulted therein, may rely on the building as his castle, from which he need not retreat, but may stand his ground and employ such force, short of inflicting death on his opponent, as may be necessary to expel him from the building.

A merchant may not, however, purposely provoke a disturbance with a customer, and then make use of his proprietorship as an excuse for an unnecessary assault in ejecting him.

So, it is said in *Watrous v. Steel* (1829) 4 Vt. 629, 24 Am. Dec. 648, *supra*: "No man can invite or permit another to enter his dwelling for the purpose of abusing or assaulting him; and if a person enter lawfully, the owner or occupier is not permitted to irritate or insult him for the purpose of having an occasion to abuse him, or as an excuse for assaulting him."

And in *Sellman v. Wheeler* (1902) 95 Md. 751, 54 Atl. 512, where the plaintiff claimed to have entered a store kept by the defendants, in which was also the postoffice, of which one of the defendants was postmaster, for the purpose of inquiring about a car which he had ordered, and that while there one of the defendants said that he was "a damn liar and thief" and directed the other defendant, who was the postmaster, to throw him out, which he thereupon did, and the defense was based upon the theory that the postmaster, in ejecting the plaintiff, was acting in his official capacity and as authorized by the postal laws and regulations, and was, therefore, liable only if undue force was used,

while the other defendant could be liable in no event, the court approved the instruction given below, which left it for the jury to say, from all the evidence, whether the plaintiff was ejected without undue violence in a bona fide attempt by the postmaster to exercise his lawful authority, or whether the defendants intended from the

first to commit a wrong, and held that if the jury believed the plaintiff's story the defendants were jointly liable.

Nor has a merchant a right to strike one who is proceeding in an orderly manner to obey the order to leave the store. *Norris v. Whyte* (1900) 158 Mo. 20, 57 S. W. 1037. M. A. L.

TRADERS' NATIONAL BANK of Tullahoma
v.
FIRST NATIONAL BANK of McMinnville, Appt.,

Tennessee Supreme Court — February 7, 1920.

(— Tenn. —, 217 S. W. 977.)

Check — acceptance — mailing draft in payment.

A bank which merely places in the mail a draft in payment of a check upon its customer does not accept the check so as to become liable upon it in case the drawer's account is overdrawn, if, within twenty-four hours, it secures a return of the letter containing the draft from the mail, under the postal regulations.

[See note on this question beginning on page 386.]

APPEAL by defendant from a decree of the Chancery Court for Warren County (Stewart, J.) in favor of complainant in an action brought to recover the amount of a check drawn on the defendant bank and forwarded by complainant to it for collection. *Reversed.*

The facts are stated in the opinion of the court.

Mr. John L. Willis, for appellant:

Defendant had the right to stop the delivery of the check on the Chicago bank under the principle of the doctrine of stoppage in transitu.

2 Kent, Com. 542, 543; 1 Parsons, Bills & Notes, 6th ed. 600; Muller v. Pondir, 55 N. Y. 325, 14 Am. Rep. 259.

There was no acceptance of the check by notification.

First Nat. Bank v. First Nat. Bank, 127 Tenn. 215, 154 S. W. 965.

There was no acceptance of the check completed by delivery.

First Nat. Bank v. First Nat. Bank, 127 Tenn. 205, 154 S. W. 965.

Defendant had the right to stop the payment of the check before it had been received and paid or certified by his bank.

Pease v. State Nat. Bank, 114 Tenn. 694, 88 S. W. 172; Knaffl v. Knoxville Bkg. & T. Co. 130 Tenn. 336, L.R.A. 1915D, 402, 170 S. W. 476; Akin, v.

Jones, 93 Tenn. 366, 25 L.R.A. 523, 42 Am. St. Rep. 921, 27 S. W. 669; Elyria Sav. & Bkg. Co. v. Walker Bin Co. 92 Ohio St. 406, L.R.A. 1916D, 433, 111 N. E. 147, Ann. Cas. 1917D, 1055; Ballen v. Bank of Kremlin, 37 Okla. 112, 44 L.R.A. (N.S.) 621, 130 Pac. 539.

An acceptance may be revoked.

German Nat. Bank v. Farmers' Deposit Nat. Bank, 118 Pa. 294, 12 Atl. 303; Guthrie Nat. Bank v. Gill, 6 Okla. 560, 54 Pac. 434.

Messrs. Campbell & Davidson, for appellee:

When the payee of the check in question indorsed it and deposited it to the credit of its account with complainant bank, which gave the payee credit on its account for the full amount of said check, the title to said check became vested in complainant bank.

Wasson v. Lamb, 120 Ind. 514, 6 L.R.A. 191, 16 Am. St. Rep. 342, 22 N.

(— Tenn. —, 217 S. W. 977.)

R. 729; Security Nat. Bank v. Old Nat. Bank, 154 C. C. A. 1, 241 Fed. 6; Burton v. United States, 196 U. S. 283, 49 L. ed. 482, 25 Sup. Ct. Rep. 243.

Defendant bank, as to the check in question, was the collecting agent of complainant bank as well as the drawer.

First Nat. Bank v. First Nat. Bank, 127 Tenn. 213, 154 S. W. 965; Security Nat. Bank v. Old Nat. Bank, 154 C. C. A. 1, 241 Fed. 9.

Defendant, having received the check from complainant for collection and remittance, and thereby becoming the agent of the remitting bank, is estopped to deny the title of its principal to the check.

21 R. C. L. 861; 3 R. C. L. 614, 636.

Defendant bank, as drawer, accepted said check when it marked it paid, issued to complainant's order Chicago exchange covering it, entered upon its draft register the date of the issuance of the draft on Chicago, its amount, to whom payable and for what purpose, and issued and mailed the draft to complainant.

First Nat. Bank v. First Nat. Bank, 127 Tenn. 216, 154 S. W. 965; Kirkman v. Bank of America, 2 Coldw. 402; Maloney v. Bewley, 10 Heisk. 647; 3 R. C. L. 880; Barrett v. Dodge, 16 R. I. 740, 27 Am. St. Rep. 777, 19 Atl. 530; National Bank v. American Exch. Bank, 151 Mo. 333, 74 Am. St. Rep. 527, 52 S. W. 265.

Defendant bank paid the check in question when it marked it paid, issued a draft or check on a Chicago bank covering the amount of the same, and mailed it to the complainant.

Consolidated Nat. Bank v. First Nat. Bank, 129 App. Div. 538, 114 N. Y. Supp. 310; Bartley v. State, 53 Neb. 338, 73 N. W. 744; Canterbury v. Bank of Sparta, 91 Wis. 53, 30 L.R.A. 845, 51 Am. St. Rep. 870, 64 N. W. 311; Bryan v. First Nat. Bank, 205 Pa. 11, 54 Atl. 480; American Nat. Bank v. Miller, 229 U. S. 517, 57 L. ed. 1310, 33 Sup. Ct. Rep. 883; Security Nat. Bank v. Old Nat. Bank, 154 C. C. A. 1, 241 Fed. 9; Hayden v. Chemical Nat. Bank, 28 C. C. A. 548, 55 U. S. App. 420, 84 Fed. 877; Burr v. Beckler, 264 Ill. 230, L.R.A. 1916A, 1049, 106 N. E. 206, Ann. Cas. 1915D, 1132; Trego v. Cunningham, 267 Ill. 376, 108 N. E. 350; Chapman v. Mills & Gibb, 241 Fed. 717.

Defendant, acting as collecting agent for complainant, cannot recall

from the mail a draft covering proceeds of a check sent to it by complainant for collection and remittance.

Kirkman v. Bank of America, 2 Coldw. 402; Security Nat. Bank v. Old Nat. Bank, 154 C. C. A. 1, 241 Fed. 8; Burr v. Beckler, 264 Ill. 230, L.R.A. 1916A, 1054, 106 N. E. 206, Ann. Cas. 1915D, 1132; Hayden v. Chemical Nat. Bank, 28 C. C. A. 548, 55 U. S. App. 420, 84 Fed. 877; Chapman v. Mills & Gibb, 241 Fed. 717; 3 R. C. L. 860; Morse, Banks & Bkg. § 449.

Even if by honoring the check in question the defendant had permitted the drawers of the check to overdraw their account, this, in and of itself, would not have been a criminal offense.

First Nat. Bank v. First Nat. Bank, 127 Tenn. 218, 154 S. W. 965; United States v. Heinze, 161 Fed. 425; United States v. Steinman, 97 C. C. A. 271, 172 Fed. 913; United States v. Britton, 107 U. S. 655, 27 L. ed. 520, 2 Sup. Ct. Rep. 512; United States v. Northway, 120 U. S. 327, 30 L. ed. 664, 7 Sup. Ct. Rep. 580.

Green, J., delivered the opinion of the court:

On June 10, 1917, Montgomery & Bouldin bought from the Harbin Produce Company the stock and business of the latter concern at McMinnville, Tennessee. In payment Montgomery & Bouldin gave their check for \$1,285, drawn on the First National Bank of McMinnville. On the next day, June 11, 1917, the Harbin Produce Company deposited this check in the Traders' National Bank at Tullahoma, Tennessee, requesting of that bank that the check be sent direct to McMinnville for collection. The check was sent direct, and reached the First National Bank of McMinnville on the same day. The check arrived after the usual clearing hours, and it was not charged on that day to the account of Montgomery & Bouldin. No entry respecting the check in the nature of a charge to the drawers was made on the books of the bank. Some employee of the bank, however, on the afternoon upon which the check came in, placed it on a pointed file and drew to the order of the Traders' National Bank the First National Bank's draft upon

the latter's correspondent at Chicago for \$1,285. This draft on Chicago was put in an envelop addressed to the Traders' National Bank at Tullahoma, and placed in the mail on the same evening.

A few days previously Montgomery & Bouldin had deposited to their credit in the First National Bank of McMinnville certain checks drawn in their favor on out-of-town banks by this same Harbin Produce Company. On the evening of June 11th, or on the morning of June 12th, after the First National Bank of McMinnville had mailed the draft on Chicago to the Traders' National Bank of Tullahoma, the First National Bank of McMinnville learned that the Harbin Produce Company's checks, previously credited to the account of Montgomery & Bouldin as aforesaid, had been protested. As a result of this the account of Montgomery & Bouldin at the First National Bank would show a considerable overdraft.

The First National Bank of McMinnville then called up the Traders' National Bank of Tullahoma over the telephone, and asked that the Chicago draft remitted on the day before be returned when it reached Tullahoma, but received no satisfactory reply.

The McMinnville bank, the defendant, then took the matter up with the postoffice at McMinnville, and had its letter to the Tullahoma Bank, the complainant, intercepted in the mail and returned, so that the Chicago draft never in fact reached the complainant. The \$1,285 check was returned to it.

The Harbin Produce Company failed in a few days thereafter. Other facts appear upon which the complainant relies to establish fraud and collusion between the Harbin Produce Company and the complainant; but these need not be noticed, since the decision of the case will not turn upon the question of any fraudulent practice upon the defendant bank.

Upon this state of facts the chancellor held the defendant bank liable to the complainant bank in the sum

of \$1,285, the amount of the Montgomery & Bouldin check, from which decree the defendant has appealed to this court.

This case is similar to that of *First Nat. Bank v. First Nat. Bank*, 127 Tenn. 205, 154 S. W. 965, and is controlled by the latter case, except in one feature.

In *First Nat. Bank v. First Nat. Bank*, supra, certain checks drawn on a Sparta bank were deposited in a Murfreesboro bank and sent to the drawee bank for payment. The checks reached the Sparta bank in the afternoon, and were stamped "Paid" and placed on a file or hook for cancellation. At the time the checks reached the Sparta bank the drawer had not sufficient funds to meet them. The drawer was frequently making deposits, and it was assumed that a deposit would be made during the afternoon or the next morning sufficient to make the checks good. No such deposit having been made, on the next day the Sparta bank took the checks off of the cancellation hook, erased the "Paid" stamp, protested them, and returned them to the forwarding bank. No entry respecting these checks was made on the books of the Sparta bank.

Suit was brought by the Murfreesboro bank against the Sparta bank to recover the amount of these checks, on the theory that by the course of conduct above stated the Sparta bank had accepted the checks for payment and was liable therefor. This contention was denied by this court and the suit dismissed.

The court quoted the definition of acceptance from the Negotiable Instrument Law (chapter 94 of the Acts of 1899), likened checks to bills of exchange, and held that under such circumstances the drawee bank had twenty-four hours in which to accept or reject the checks, and said: "We hold there can be no acceptance upon the part of the drawee, receiving remittances from a distance, and acting in the dual capacity of collecting agent of the holder and as agent of the drawer to pay, until and unless the transaction

is completed by a delivery to the remitting bank in due course, or a notification to someone entitled to be notified." *First Nat. Bank v. First Nat. Bank*, supra.

The court had previously, in the opinion, stated that acceptance in the Negotiable Instrument Law "means an acceptance completed by delivery or notification," and had recognized the fact that delivery might be made by a proper entry on the books of the drawee bank. The delivery referred to was, of course, delivery of the proceeds of the checks; the checks having been sent for payment, and not for certification.

From a consideration of *First Nat. Bank v. First Nat. Bank*, supra, it appears that none of the things done by the defendant bank in the case before us render it liable to the complainant, unless it be the drawing and mailing to the complainant of defendant's draft on Chicago. The complainant insists that by mailing this draft the defendant completed acceptance or payment of the Montgomery & Bouldin check, and was thereafter precluded from denying responsibility on this account. Numerous authorities are cited for this position by the complainant, among them *Kirkman v. Bank of America*, 2 Coldw. 397; *Canterbury v. Bank of Sparta*, 91 Wis. 53, 30 L.R.A. 845, 51 Am. St. Rep. 870, 64 N. W. 311; *Security Nat. Bank v. Old Nat. Bank*, 154 C. C. A. 1, 241 Fed. 9; *Chapman v. Mills & Gibb* (D. C.) 241 Fed. 717.

These cases, in so far as they deal with similar circumstances, proceed on the theory that a delivery is completed when the subject of delivery is posted in the mail.

The test of delivery, as noted in our cases, is the power of the grantor of a deed or maker of a note to recall the same. Has he parted with dominion and control over it? If so, there has been a delivery. *Brevard v. Neely*, 2 Sneed, 164; *Kirkman v. Bank of America*, supra. The same test is recognized in the cases from other jurisdictions just above referred to.

9 A.L.R.—25.

Heretofore it has been assumed that when a letter was posted it was beyond the control of the sender, and became the property of the addressee as soon as put in the mail. 13 C. J. 302. We think all the cases relied on by the complainant are based on this supposition.

If a letter, when posted, can be regarded as beyond the control of the sender, then it may well be concluded that delivery of its contents to the addressee has been perfected.

By the United States Postoffice Regulations (1913) §§ 552, 553, a change has been made as to rights of the parties. The writer or sender may now apply for a letter which is put in the mail, and when it is properly identified, the postmaster must return it to him, or telegraph to the office of the addressee, whose postmaster must return it to the postoffice where mailed, if it has not been delivered. 13 C. J. 302.

The author of the article on Contracts in Corpus Juris in this connection says: "The question, then, will arise whether a change in the regulations of the postoffice can affect the law that the acceptance is final when the letter is dropped in the postoffice. It seems that it does." 13 C. J. 303.

As authority for the last statement, reference is made to *Ex parte Cote*, L. R. 9 Ch. 27.

In *Ex parte Cote*, supra, a banker in Lyons, France, indorsed bills of exchange to a merchant in London, and mailed them in the postoffice at Lyons. Before the mail left Lyons, the banker received a telegram which induced him to undertake to recover the bills of exchange from the mail. Under the postal regulations of France, the sender of a letter was entitled to recover it from the mail, if he made due application and complied with certain formalities before the letter left the office at which it was posted. The Lyons banker undertook to comply with these formalities, and the letter was set aside for him. As a matter of fact he did not regain possession of the bills of exchange, by reason of some mistake, and later, in a suit

respecting the bills of exchange, which had been forwarded, the question arose as to whether there was a delivery thereof to the addressee of the letter. It was contended that such a delivery was effected by the posting of the letter at Lyons. The English court of appeal in chancery held that there was no delivery. Mellish, L. J., said:

"In order to make the property in the bills pass, it is not sufficient to indorse them; they must be delivered to the indorsee, or to the agent of the indorsee. If the indorser delivers them to his own agent, he can recover them; if to the agent of the indorsee, he cannot recover them.

"The question therefore arises, of which party the postoffice is the agent. In this country, where the sender of a letter cannot get it returned after it has been posted, if the indorsee of a bill authorizes the indorser to send the bill through the postoffice, the bill, as soon as it is posted, becomes the property of the indorsee. But according to the regulations of the French postoffice, a person who posts a letter may get it back on complying with certain forms at any time before the letter has left the town where it is posted. I am inclined to think that the effect of that rule is that the postoffice is the agent of the sender of the letter until it leaves the town, and that the indorsement of the bills contained in

it is not complete till the letter is despatched from the town."

This authority seems to us well reasoned, and, extending it slightly, it covers the case before us. If delivery is not complete until one had lost control of the subject-matter of the delivery, then it was not completed here, since, under the postal regulations, the defendant bank was

Check—acceptance—mailing draft in payment.

entitled to reclaim this letter from the mail before it reached the complainant. We may also, as did the English court, regard the postoffice as the agent of the sender, and, under our postal regulations and the facts of this case, until the letter was delivered to the addressee.

In ordinary cases we will adhere to the old rule that the mailing of a letter amounts to a delivery of its contents to the person to whom it is addressed. This, however, is subject to the power of the person sending the letter to recover it from the mails, under the postal regulations of 1913. Such a delivery is, therefore, subject to be defeated by the proper exercise of such power.

For the reasons stated, we are of opinion that the complainant is not entitled to recover herein, and the decree of the Chancellor will be reversed, and this bill dismissed.

Petition for rehearing denied.

ANNOTATION.

Withdrawal of, or right to withdraw, letter from mail as affecting consummation of contract.

There is, perhaps, ground for a distinction between the question presented in the reported case (*TRADERS' NAT BANK v. FIRST NAT BANK*) ante, 382, as to whether there has been an acceptance of a check or draft under the Negotiable Instruments Law when the letter containing the acceptance is deposited in the mail but is withdrawn under postal regulations, before delivery, and the question presented in ordinary contracts whether the depositing of a letter of accept-

ance in the mail, where this mode of acceptance is authorized, completes the contract. It is not clear, however, that the *TRADERS' NAT. BANK CASE* turns on any such distinction. And, regarding it as raising the question whether an acceptance is completed, in ordinary cases, on the placing of a letter of acceptance in the mail, if the letter is withdrawn before delivery, it presents a question which has received little attention, it appears, in the courts. Since 1887, at least, post-

al regulations have permitted withdrawal, under certain conditions, of letters from the mail. Notwithstanding such permission, the courts, apparently without consideration of the effect of the right of withdrawal, have, in many cases decided in recent years, held that the acceptance was completed at the time the letter of acceptance was deposited in the mail, where this mode of acceptance was authorized. It does not appear that the postal regulations of 1913 made any substantial change with respect to the right of withdrawing letters from the mail. In view of the fact that the letter of acceptance when deposited in the mail is not beyond the control of the sender, the better view would seem to be that the acceptance is not completed at the time of the posting of the letter, whether it is in fact withdrawn or not. If the view is taken that the acceptance is completed at the time of the posting of the letter but that it is subject to be defeated by the withdrawal of the letter from the mail by the sender, it seems clear that the latter is given a substantial advantage over the offerer, in that he has an option to accept or not, during the time the letter is in transit, while the offerer, during this time, is absolutely bound. This would appear clearly to violate the well-settled rule of contracts that both parties to the contract or neither must be bound. This difficulty might be obviated by the adoption of a rule that the acceptance was completed at the time of the posting of the letter, whether there was or was not a withdrawal from the mail by the sender. And this rule would not disturb the apparently settled doctrine of consummation of a contract by the posting of a letter of acceptance when this mode of acceptance is authorized. There seems, however, to be an objection from a practical view point to this rule, in view of the fact that the sender has the right, under the postal regulations, to withdraw the letter from the mail. In ordinary cases the offerer would be unaware that a letter of acceptance had been sent, if it had been withdrawn from the mail, and the acceptor would have an advantage in being

able to bind the offerer by the posting of a letter and then by withdrawing it from the mail practically defeat the acceptance by destroying the evidence of it. But if the view is taken that the acceptance is completed in ordinary cases at the time the letter of acceptance is posted, the court should apparently hold that the withdrawal of the letter from the mail does not affect this acceptance.

The case of *Ex parte Cote* (1873) L. R. 9 Ch. (Eng.) 27, 43 L. J. Bankr. N. S. 19, 29 L. T. N. S. 598, 22 Week. Rep. 39, which supports the conclusion in the reported case (*TRADERS' NAT. BANK CASE*) is sufficiently set out therein, the question here being whether there had been a delivery of bills of exchange.

This conclusion is supported also by the case of *Buehler v. Galt* (1889) 35 Ill. App. 225, decided under earlier postal regulations permitting withdrawal of letters from the mail. It was said that the principle that the title to a check not mailed at the request of the payee remains in the sender during transmission compelled the assumption that the postoffice should be regarded as the agent of the sender, and that this assumption was supported further by the fact that the postal regulations permitted the sender of the letter to stop its transmission and recall it before delivery. And so, where it did not appear that the mailing of a certified check was on the request of the payee, and the check later appeared in the possession of the maker, it was held that there had been no delivery, and it would be presumed that the check was regained from the mail in a lawful manner. The court said that it was bound to notice judicially the postoffice regulations authorizing the sender of a letter to stop its transmission at any point before it reached the hands of the person to whom it was addressed, and regain it, upon complying with certain conditions; that these regulations went far to support the assumption that the postoffice should be regarded as the agent of the sender, and to establish the proposition that the delivery of a letter into the hands of postal authorities was

not, in all cases, to be regarded as a delivery to the one to whom it was addressed. The court cited *Ex parte Cote* (Eng.) *supra*, with the statement that the effect of a somewhat similar regulation of the French postoffice was held in England to constitute the postoffice the agent of the sender, till the point was reached after which the sender could not regain the letter from the postal authorities.

Where the parties to the alleged contract resided in different towns, but the offer was not communicated by mail but by an agent personally, it was held in *Scottish-American Mortg. Co. v. Davis* (1903) 96 Tex. 504, 97 Am. St. Rep. 932, 74 S. W. 17, that there was no implied authority to accept the offer by mail except by actual delivery of the acceptance, and that, therefore, a letter of acceptance, though deposited in the postoffice, was subject to the control of the sender until delivery to the addressee, and the sender had a right to withdraw the acceptance, which he did in this case by intercepting the letter by telegram to the postmaster at destination, who returned it to him. This case was followed in *Flowers v. Sovereign Camp, W. W.* (1905) 40 Tex. Civ. App. 593, 90 S. W. 526, which lays down the rule as well settled that in the absence of agreement, express or implied, that the mails may be used as a means of acceptance of the terms of an offer, the one employing such means constitutes it his agent, and the acceptance is subject to recall at any time prior to actual delivery.

And the question whether a debt was subject to garnishment where the debtor had mailed his check to the creditor to pay the debt, but had the right to withdraw the letter inclosing the check from the mail, was passed on in *Watt-Hurley-Holmes-Hardware Co. v. Day* (1907) 1 Ga. App. 646, 57 S. E. 1033. In that case the letter was placed in the mail about an hour before the service of summons of garnishment, and remained there about two hours after such service, and under the postal regulations the sender could have recalled the letter and obtained it from the postoffice by proper application. It was held that, since

it did not appear that the check was mailed by direction of the creditor, the title thereto was in the sender until it was delivered to the payee-creditor, and that since the sender of the check, under the postoffice regulations, had the right to withdraw it from the mail, the debt was subject to garnishment.

In *Chapman v. Mills* (1917) 241 Fed. 715, affirmed without opinion in (1918) 162 C. C. A. 661, 250 Fed. 1018, which is cited in the reported case (*TRADERS' NAT. BANK CASE*, ante, 382), it was held that the right of a bank to offset against an indebtedness to it, checks indorsed to it by the debtor, for which a receiver had been appointed while the checks were in transit, was not affected by the regulations of the Postoffice Department, whereby, under certain circumstances, the Department in its discretion might decide to return a mailed communication to the sender, since the intention of the latter at the time of the mailing was permanently to relinquish possession of the checks, and it had taken no steps to reclaim them from the mail.

The general view that there is no completed contract so long as the acceptance is not placed beyond the power of the acceptor is supported by such cases as *Trounstin v. Sellers* (1886) 35 Kan. 447, 11 Pac. 441, on facts not within the scope of the annotation, it being said that where parties are distant, and the contract is to be made by correspondence, the writing of a letter or telegram containing a notice of acceptance is not of itself sufficient to complete a contract, but in such a case the act must involve an irrevocable element, and the letter must be placed in the mail, or the telegram deposited in the office for transmission, and thus placed beyond the power or control of the sender, before the assent becomes effectual to consummate a contract.

The doctrine that the right of stoppage in transitu applies to commercial paper sent through the mail, in case of the intervening insolvency of the payee, is recognized in *Gregg v. Bi-Metallic Bank* (1900) 14 Colo. App. 251, 59 Pac. 852. See also on this

point, *Muller v. Pondir* (1873) 55 N. Y. 325, 14 Am. Rep. 259.

There are several decisions holding that an acceptance duly deposited in the mail is effective, although the acceptor intercepts the letter of acceptance and secures its return before it has reached the addressee.

Thus, in *Farmers' Guaranty State Bank v. Burrus Mill & Elevator Co.* (1918) — Tex. Civ. App. —, 207 S. W. 400, where a bank, pursuant to authorization by the drawee of a draft received by the bank in the mails, mailed its own draft in payment, and later intercepted the letter by wiring to the postmaster at destination, and obtained the return of the letter without delivery to the addressee, it was held that there had been an irrevocable acceptance when the letter was mailed. The court followed the rule that the mailing of a letter of acceptance, properly stamped and addressed, completes the contract, and made no reference to postal regulations permitting withdrawal of the letter from the mail.

The same result was reached in *Canterbury v. Bank of Sparta* (1895) 91 Wis. 53, 30 L.R.A. 845, 51 Am. St. Rep. 870, 64 N. W. 311. It was held that a bank which, at its customer's request, mailed its own draft to his creditor in payment of the creditor's draft on him, could not defeat the creditor's right to the draft by intercepting it in the mail, although the bank extended credit for the amount of the draft to its customer, in ignorance of the fact that he was insolvent. The mailing of the letter by the bank inclosing the draft was held to be a delivery of it to the payee, although, by telephoning, the sender of the letter succeeded in withdrawing it from the postoffice at destination. The

court said that while the bank retained the actual or constructive possession of its own draft, it could undoubtedly withhold its application in payment of the other draft; but that if, by sending its draft by mail, it parted with such possession and vested the title to the draft in the drawee, then manifestly it lost all authority to take the same from the mail; and that the mailing of the letter inclosing the draft was in legal effect a delivery of the draft.

An interesting case which has a bearing on the present subject, though not directly in point, is *Dunmore v. Alexander* (1830) 9 Sc. Sess. Cas. 1st series, 190, where one desiring to employ a servant, having obtained an offer through the mail from a servant about whom she had inquired, replied by mail making the engagement, and the next day wrote another letter canceling the first, both letters being received by the servant at the same time; and it was held that no contract was consummated.

Although the case is not in point on the facts, attention is called to the statement made arguendo by Bramwell, L. J., in *Household F. & C. Acci. Ins. Co. v. Grant* (1879) L. R. 4 Exch. Div. 216, 6 Eng. Rul. Cas. 115, that an acceptance "is revocable when sent by post, not that the letter can be got back, but its arrival might be anticipated by a letter by hand, or telegram, and there is no case to show that such anticipation would not prevent the letter from binding. It would be a most alarming thing to say that it would,—that a letter honestly, but mistakenly, written and posted, might bind the writer if, hours before its arrival, he informed the person addressed that it was coming, but was wrong and recalled." R. E. H.

STATE OF IOWA

v.

C. C. TAFT COMPANY, Appt.

Iowa Supreme Court — May 7, 1918.

(183 Iowa, 548, 167 N. W. 467.)

Commerce — seizure in original packages.

Unbroken packages of cigarettes received in interstate commerce become subject to seizure under state laws the moment they go into possession of a dealer who intends to open them and sell the contents in the ordinary course of business.

[See note on this question beginning on page 400.]

(Salinger and Gaynor, JJ., dissent.)

APPEAL by defendant from a judgment of the District Court for Polk County (Hutchinson, J.) ordering condemnation and destruction of a quantity of cigarettes in original packages seized by the sheriff in a proceeding against the defendant. *Affirmed.*

Statement by Preston, Ch. J.:

A search warrant was issued under the authority of the district court of Polk county, directed to the sheriff, under which, on April 28, 1917, he seized a quantity of cigarettes. The defendant, appellant, appeared and claimed the ownership of the property, and asked the release of the same on the ground that the cigarettes were contained in the original package, and had not lost their identity as interstate commerce, and therefore not subject to seizure under the state law. After a hearing, the court ordered the condemnation and destruction of the property, and rendered judgment for costs against defendant. Defendant appeals. *Affirmed.*

Messrs. Dunshee, Haines, & Brody and Charles F. Maxwell, for appellant:

Articles of interstate commerce contained in the usual and ordinary packages of interstate commerce do not lose their character as such, until they have been commingled with the goods of the state, either by the sale of the package or by the breaking thereof.

Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; Low v. Austin, 13 Wall. 29, 20 L. ed. 517; Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters.

Com. Rep. 36, 10 Sup. Ct. Rep. 681; Rhodes v. Iowa, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664; Vance v. W. A. Vandercook Co. 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674; Schollenberger v. Pennsylvania, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; McGregor v. Cone, 104 Iowa, 465, 39 L.R.A. 484, 65 Am. St. Rep. 522, 73 N. W. 1041; State v. Eckenrode, 148 Iowa, 173, 127 N. W. 56.

The intent of the owner with reference to the future disposition of goods does not change the status of the property.

Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475.

Messrs. H. M. Harner, Attorney General, and L. C. Davidson, Assistant Attorney General, for the State:

Goods which have reached their destination after shipment from another state, though they may be still in "original packages," may be taxed by the state, provided no discrimination is made between domestic and nondomestic goods.

Woodruff v. Parham, 8 Wall. 123, 19 L. ed. 382; American Steel & Wire Co. v. Speed, 192 U. S. 500, 48 L. ed. 538, 24 Sup. Ct. Rep. 365; Brown v. Houston, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091; Pittsburg & S. Coal Co. v. Bates, 156 U. S. 577, 39 L. ed. 538, 5 Inters. Com. Rep. 30, 15 Sup. Ct. Rep. 415; May v. New Orleans, 178 U. S. 496, 44 L. ed. 1165, 20 Sup. Ct. Rep. 976; Cook v. Marshall

County, 196 U. S. 261, 49 L. ed. 471, 25 Sup. Ct. Rep. 233; Hodge v. Muscatine County, 196 U. S. 276, 49 L. ed. 477, 25 Sup. Ct. Rep. 237; Savage v. Jones, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715.

By admitting that it intends to break up and then to distribute and sell the contents of the original packages, the defendant has lost its right to claim for these packages the protection of the commerce clause in the Federal Constitution.

State v. Intoxicating Liquors, 65 Me. 556; Wasserboehr v. Boulrier, 84 Me. 169, 30 Am. St. Rep. 344, 24 Atl. 808; Cook v. Marshall County, 196 U. S. 261-271, 49 L. ed. 471-475, 25 Sup. Ct. Rep. 233; 7 Cyc. 431.

Preston, Ch. J., delivered the opinion of the court:

As to part of the cigarettes seized and described in the return of the search warrant, no claim was made by any person, and such were found by the court to be subject to condemnation and destruction. There is no contention as to such part of the property.

On the trial it was stipulated as follows:

It is hereby stipulated between the parties, the attorney general representing the state of Iowa and the counsel for the claimants, that twenty-seven cases of cigarettes, that is, three cases of 10,000 cigarettes each, Omars, 14 cases 5,000 cigarettes each, Camels, 7 cases 5,000 cigarettes each, Fatimas, 1 case 25,000 cigarettes, Nebos, and two cases containing an assorted lot of Egyptian Deities, plain and cork, Murads, Egyptian Luxuries, Moguls, plain and cork, the contents of each case being made up of cartons containing small boxes of individual cigarettes now in the possession of the sheriff of Polk county, are the original packages shipped to the claimant in the ordinary course of interstate commerce from outside the state of Iowa, and at the time the same were seized the same were in an unbroken condition and in the same condition as handled in the ordinary course of interstate commerce and were the usual and ordinary packages of interstate commerce. It is further

stipulated that the said cases were kept by the claimant with the intention, as its business demanded, to open the same and remove the contents therefrom and to sell the cigarettes to its customers at retail and wholesale within the state of Iowa, and for the further purpose of placing the same in retail stores owned by the corporation in the city of Des Moines for sale at retail in broken packages. It is further stipulated that the said packages and cases were seized at the claimant's wholesale place of business in the city of Des Moines. It is further stipulated and agreed that the custom as above described had been the method of handling the business for at least a year, and that the certain broken packages in the possession of the sheriff are not in the original package as they were received in the course of trade, and that these cigarettes were being kept in retail stores for sale.

Thereupon claimant moved for an order directing the sheriff to return the property, which motion is as follows: "Upon the facts stipulated the claimant moves the court to make and enter an order directing the sheriff of Polk county to return and deliver over all of the original packages described in the foregoing stipulation, for the reason that the state of Iowa is without power under the Federal Constitution to authorize the seizure of goods shipped in the course of interstate commerce in original packages, and such goods have not become a part of the property of the state."

1. Appellant's first contention is that articles of interstate commerce, contained in the usual and ordinary packages of interstate commerce, do not lose their character as such until they have in some manner been commingled with the goods of the state. They cite *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678; *Low v. Austin*, 13 Wall. 29, 20 L. ed. 517; *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Rhodes v. Iowa*, 170 U. S. 412, 42 L. ed. 1088,

18 Sup. Ct. Rep. 664; *Vance v. W. A. Vandercook Co.* 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; *McGregor v. Cone*, 104 Iowa, 465, 39 L.R.A. 484, 65 Am. St. Rep. 522, 73 N. W. 1041; *State v. Eckenrode*, 148 Iowa, 173, 127 N. W. 56. They contend, too, that the intent of the owner with reference to the future disposition of goods does not change the status of the property, and that therefore §§ 5006 and 5007a of the Code are unconstitutional in so far as they affect interstate commerce.

Some of the cases cited are liquor cases decided before the enactment of the Wilson Bill (Act Cong. Aug. 8, 1890, chap. 728, 26 Stat. at L. 313, Comp. Stat. § 8738, 4 Fed. Stat. Anno. 2d ed. p. 585), and like legislation, the principles of which are followed in the other cited cases. The language used in the cases is in regard to the point being decided in each particular case, and it is claimed that these principles are applicable to the instant case. There is no particular difficulty with the rule, and we do not understand counsel to differ materially in regard to the rule as applied to the facts in the cases cited.

Appellee cites the following provisions of the Federal Constitution, which they say are involved to some extent in this action:

"The Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Constitution of the United States, art. 1, § 8, ¶ 3.

"The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." Amendment 9.

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." Amendment 10.

They contend that goods which

have reached their destination after shipment from another state, though they may be still in original packages, may be taxed by the state, provided no discrimination is made between domestic and nondomestic goods, citing: *Woodruff v. Farnham*, 8 Wall. 123, 19 L. ed. 382; *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 48 L. ed. 538, 24 Sup. Ct. Rep. 365; *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1096; *Pittsburg & S. Coal Co. v. Bates*, 156 U. S. 577, 39 L. ed. 538, 15 Sup. Ct. Rep. 415, 5 Inters. Com. Rep. 30; *May v. New Orleans*, 178 U. S. 496, 44 L. ed. 1165, 20 Sup. Ct. Rep. 976; *Cook v. Marshall County*, 196 U. S. 261, 49 L. ed. 471, 25 Sup. Ct. Rep. 233; *Hodge v. Muscatine County*, 196 U. S. 276, 49 L. ed. 477, 25 Sup. Ct. Rep. 237. And, further, that the Supreme Court of the United States has shown a disposition to uphold the police power of the state, even where original packages are involved, citing on this: *Plumley v. Massachusetts*, 155 U. S. 461, 39 L. ed. 223, 15 Sup. Ct. Rep. 154, 5 Inters. Com. Rep. 590; *Cook v. Marshall County*, 196 U. S. 261, 49 L. ed. 471, 25 Sup. Ct. Rep. 233; *Savage v. Jones*, 225 U. S. 501, 525, 56 L. ed. 1182, 1191, 32 Sup. Ct. Rep. 15; *Hennington v. Georgia*, 163 U. S. 299, 317, 41 L. ed. 166, 173, 16 Sup. Ct. Rep. 1086. And that a state may, in the exercise of its police powers, impose inspection restrictions which affect interstate commerce, citing again: *Savage v. Jones*, 225 U. S. 501, 525, 56 L. ed. 1182, 1191, 32 Sup. Ct. Rep. 715.

We are not disposed to review the cases cited, or discuss the propositions so far advanced, for the reason that it is stated by appellant that the sole issue in this case is as to whether or not the original packages of cigarettes had lost their identity as articles of interstate commerce, and were therefore subject to seizure and destruction under the state law by reason of the fact that the appellant, at the time of seizure, held the cigarettes with in-

tent thereafter to break the packages and offer the contents for sale within the state in violation of § 5006 of the statute, under the conceded facts shown by the stipulation; and this is the point most strongly relied upon by appellee.

Counsel for appellant say that they have failed to discover any case which has arisen under a state of facts like those in the instant case, but they claim that the case of *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475, sustains the principle they are contending for. They concede, however, that the proposition there considered was not with reference to the effect of an intent in transforming articles of interstate commerce into domestic property, but, on the contrary, the question was as to the effect of the intent of the owner to transform domestic property into an article of interstate commerce. The facts of that case, stated as may be, are, substantially, that Coe had cut and piled certain logs upon the banks of a stream for the purpose and with the intent of transporting them from the state of New Hampshire into the state of Maine. The defendant, the town of Errol, caused the logs to be assessed under the authority of the state law. The logs had not been actually started in the course of transportation to another state, or delivered to a carrier for such transportation. The action was brought to set aside the assessment and to exempt the property on the ground that it was within the protection of the interstate commerce clause of the Federal Constitution. The inquiry, as stated by the court in the course of the opinion, was as to whether the owner's state of mind in relation to the goods—that is, his intent to export them, and his partial preparation to do so—exempts them from taxation. The court further stated that there must be a point of time when they ceased to be governed exclusively by the domestic law, and began to be governed and protected by the national law of commercial regulation, and

that moment seems to be a legitimate one for this purpose, in which they commence their final movement for transportation from the state of their origin to that of their destination; that when the products of the farm or forest are collected, and brought in from the surrounding country to a town or station serving as an entrepôt for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the state to the state of their destination, or have started on their ultimate passage to that state. Until then, it is reasonable to regard them as not only within the state of their origin, but as a part of the general mass of property in that state, subject to its jurisdiction, and liable to taxation therein, not taxed by reason of their being intended for exportation, but taxed, without any discrimination, in the usual way and manner in which such property is taxed in the state. Continuing, the court said: "What we have already said, however, in relation to the products of a state intended for exportation to another state, will indicate the view which seems to us the sound one on that subject, namely, that such goods do not cease to be part of the general mass of property in the state, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another state, or have been started upon such transportation in a continuous route or journey."

The court says that until the property is actually started it may be sold or otherwise disposed of within the state. In that case there was the intention alone, and the property had not started on the transportation. The case only holds that the right of a state to tax property originating within it continues until such property is actually started upon its interstate transporta-

tion. Mere intent is not enough, but the intention must concur with an act of transportation in order to terminate the jurisdiction of the state. This is not inconsistent with our holding that when property which has been in course of interstate transportation comes to rest in the hands of its owner, and there is the intent of the owner to break the original packages and to sell the same then and there, would be inconsistent with a claim that the transportation has not ceased, or that the ultimate destination has not been reached. The intent of the owner and his act in holding the property at rest both concur. Under the stipulated facts of the instant case, the property would be a part of the general mass of property in the state at its destination when, as here, the transportation had entirely ended, and defendants intended to break the packages and sell their contents, contrary to the laws of Iowa. The stipulation shows not only that it was the intention of appellant to open the original packages, as its business demanded, and remove the contents therefrom, and sell the cigarettes to its customers at retail and wholesale within the state of Iowa, and for the purpose of placing the same in retail stores owned by the plaintiff, for sale at retail in broken packages, but that such had been appellant's custom and method of handling the business for at least a year, and that the broken packages in the possession of the sheriff are not in the original packages as they were received in the course of trade, and were being kept in retail stores for sale. The property had been delivered to the importer, appellant. There is no claim, and there could not be under the stipulation upon which the case was tried, that the original packages were being held for further transportation to any point of original or ultimate destination, or that they were being held for sale only in the form in which they were received. Any such intention is expressly disclaimed by the stipulated facts.

Counsel quote from Shakespeare: as we recall there is a passage somewhere that if a man lusteth he is already guilty, or something to that effect.

Counsel for appellant argue that a mere intent may be changed. But it has not been changed. The presumption is that the intent will continue, and it did continue, and existed at the time the packages were seized. Appellee cites on this proposition: *State v. Intoxicating Liquors*, 65 Me. 556; *Wasserboehr v. Boulier*, 84 Me. 165-169, 30 Am. St. Rep. 344, 24 Atl. 808; *Cook v. Marshall County*, 196 U. S. 261-271, 49 L. ed. 471-475, 25 Sup. Ct. Rep. 233; 7 Cyc. 431. The *Intoxicating Liquors Case* seems to be in point. There the defendant had imported liquors into the state of Maine, which were in the original and unbroken packages when seized. The jury was instructed that if Blackwell had them in his possession for the purpose of breaking the packages, and with the intent to sell them in quantities less than an imported package, by breaking them, the liquors would be liable to forfeiture. The court said (65 Me. at page 558): "The precise point at which the Federal authority ceases and that of the state begins has been defined in general terms by the Supreme Court of the United States. By these decisions it is declared that while a sale of the goods imported is the general object of importation, and the right of sale is an inseparable incident thereto, still this incidental right is limited to a sale by the importer himself, and in the original package. And when by any act of the importer the thing imported has become a component part of the general mass of property in the state—as when the original package has been broken up for use or for retail by the importer, and also when the commodity has passed from his hands into the hands of a purchaser—it has then lost its distinctive character as an import and has become subject to the laws of the state. *Brown v. Maryland*, 12

Wheat. 419, 6 L. ed. 678; License Cases, 5 How. 504, 574, 12 L. ed. 256, 288. To the same effect are *Pierce v. State*, 13 N. H. 536, 581, and *State v. Robinson*, 49 Me. 285. A sale in the original package only being authorized by the Federal statute, the breaking and selling in a less quantity is without that authority, and is within the prohibition of the state law; and a fixed intent that the package shall be broken and sold must place the liquors in the same category. It would hardly be considered reasonable that the Federal law should protect property until an actual unauthorized sale were completed, when the intent to make such a sale is avowed. Such 'aid and comfort' to violators of the internal regulations of a state is not within the spirit of the regulations of foreign commerce. . . . We do not perceive any material difference in the two rulings made at nisi prius. The intent to break and sell is the same in each,—a customer only being wanted in each. Whether a purchaser ever calls or not is immaterial,—the intent to sell whenever an opportunity occurs being the material fact which works the forfeiture."

That case was cited with approval in the *Wasserboehr Case*.

It is our conclusion that, since the defendant has admitted that it intends to break these packages from time to time and sell the contents to retailers, or distribute the contents among its own retail stores, these packages have ceased to be articles of interstate commerce, and have lost their distinctive character as such.

We conclude that the judgment of the District Court was right, and it is therefore affirmed.

Ladd, Weaver, Evans, and Stevens, JJ., concur.

Salinger, J., dissenting:

It is agreed there was a time when the appellant had the right to sell the cigarettes seized in this proceeding in the original packages in

which it had imported them; conceded that at one time no law of this state gave the right to seize these goods, and this for the reason that they were protected by the interstate commerce clause of the Federal Constitution. See *State v. Eckenrode*, 148 Iowa, 173, 127 N. W. 56; *McGregor v. Cone*, 104 Iowa, 465, 39 L.R.A. 484, 65 Am. St. Rep. 522, 73 N. W. 1041; *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 689; *Low v. Austin*, 13 Wall. 29, 20 L. ed. 517. This immunity still exists, unless the importer has done something which empowers this court to declare that these goods are no longer in interstate commerce. But one thing is asserted to have worked this change. The majority opinion conceded there is no change unless it be effected because "the appellant at the time of the seizure held the cigarettes with intent thereafter to break the packages and offer the contents for sale within the state in violation of § 5006b of the statute."

As an abstraction, an unexecuted intention accomplishes nothing and changes nothing. In Shakespeare's words, speaking of an unknown sin, naked intention is "as a thought unspoken." The most perfectly formed plan to murder does not threaten the liberty of the intending murderer so long as what exists rests merely in unexecuted purpose. A white house remains white despite a completely formed intention to paint it red. As an abstraction, then, these cigarettes did not lose their status as being articles in interstate commerce, though their owner confesses an intention to do something later which, when done, will deprive these goods of that status. But, of course, the law can make the entertaining of a specific intent a material thing. Statute may decree that whether liquors may be seized shall depend upon the intent with which they are kept. But this presupposes power to deal with the liquors. The Federal law creates the immunity. If the Federal law does not take away its protection because of the naked

Commerce—
seizure in
original
packages.

intention to sell in broken packages, an express state statute that the immunity shall end when such intent is formed would be void. What is true of an express statute to that effect is equally true of a decision to that effect on part of a state court of last resort. So, while I agree that *State v. Intoxicating Liquors*, 65 Me. 556, does hold that intention may change a status created by Federal law, such holding is not controlling. It is surely no stronger than a statute declaring the same thing. When we come to terminating a protection created by Federal law we must look for a warrant to Federal law alone.

I am of opinion that the Supreme Court of the United States has spoken in terms of exclusion on this point; that it has affirmatively declared what alone will remove the protection of the commerce clause, and that as intention is not mentioned, under the rule that what is expressed excludes what is not named, the effect of it is a holding that intention will not remove this protection. But it is not necessary to rely wholly upon this rule of construction, or upon implication. It seems to me *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475, expressly holds that intent will not change the relation of property to being in interstate commerce. True, the *Errol* Case declares what will put property under the protection of the commerce clause. But that does not change the principle involved, and what is there held is just as applicable when the question is whether intent will remove the protection of the commerce clause. If intent to do what will give property the Federal protection does not effect such protection, then an intent to do what, if done, will take property out of interstate commerce, cannot destroy the protection. If the *Errol* Case settles that an intent to put goods into interstate commerce will not oust the dominion of the state over property, it is not given to me to understand why this does not as well settle that no mere intention to do what, if done, will

restore the dominion of the state, is operative to restore such dominion. As well say that, though an intention to leave this state will not destroy the right to vote therein, then an intention to live in the state gives the right to vote therein. The *Errol* Case over and again declares it is dealing with what will create a status. It defines over and again what acts will put property within the protection of the commerce clause and so end the dominion of the state. It decides nothing except whether intent can change a status.

It is quite adventitious that the decision was invoked by a question of whether the state of New Hampshire might tax certain property. Whether it might so tax was a mere vehicle. Surely, the holding on the effect of mere intent would have been the same if, instead of whether property might be taxed by the state, the question had been whether the state might seize and condemn that property. The decision does not make tax law. It does not hold what it does because the collection of a tax is involved, but because specified facts do not make the commerce clause operative, and therefore maintain a status which authorizes state taxation. The vitals of the decision are not that goods may be taxed, but that this may be done because intention, short of execution, does not put goods into interstate commerce and so change the power of a state to tax. Suppose an attempt to collect a poll tax and a defense that the state may not collect it because the defendant intends to remove. I take it a decision that the defendant must pay, while deciding that one is liable for a poll tax, would hardly be classed as one making tax law, and all would agree that the decision was not poll tax law but "intent" law. The decision would not be a precedent on tax law as such. It would be cited only for ruling on whether an intent is effective to destroy an existing condition with reference to tax laws, or with reference to anything else, where it becomes material to determine the

power of intent to affect status. This, and just this, is the effect of the Errol Case. In my opinion it controls this case, and we should hold that the cigarettes seized are still within the protection of Federal law.

Gaynor, J., concurs in this dissent.

Petition for rehearing denied. Dismissed by the Supreme Court of the United States, March 15, 1920 (U. S. Adv. Ops. 1919-20, p. 410), — U. S. —, 64 L. ed. —, 40 Sup. Ct. Rep. 345.

NOTE.

The effect which an unexecuted intention to break up an original package has as withdrawing the goods from interstate commerce does not seem to have been considered in any

case other than the reported case (STATE v. C. C. TAFT Co. ante, 390).

Many of the cases, however, dealing with the original-package doctrine, have stated the rule broadly enough to negative the idea that a mere unexecuted intention is sufficient to bring the goods within the operation of state laws. See cases cited in the opinion in the reported case. These cases have not, however, expressly considered the effect of an unexecuted intention. A writ of error from the decision of the Iowa court in the reported case (STATE v. C. C. TAFT Co.) was taken to the Supreme Court of the United States, and this was dismissed by the latter court for want of jurisdiction upon the authority of the Act of September 6, 1916 (39 Stat. at L. 726, 727, chap. 448, Comp. Stat. §§ 1207, 1228a, Fed. Stat. Anno. Supp. 1918, pp. 411, 422), § 6.

ROYAL INDEMNITY COMPANY, Appt.,

v.

SOPHIE K. SANGOR et al., Respts.

Wisconsin Supreme Court — October 23, 1917.

(166 Wis. 148, 164 N. W. 821.)

Judgment — payment induced by fraud — recovery.

1. That a judgment, obtained against a surety company by a fraudulent conspiracy to induce it to insure performance of a contract by an insolvent contractor, and take judgment against the surety upon his default and divide the proceeds, has been paid, does not prevent the maintenance of an action to recover such payment when the fraud is discovered.

[See note on this question beginning on page 400.]

— payment — money not due — effect.

2. Money paid under a judgment rendered by a court having jurisdiction cannot be recovered simply because it is afterwards discovered that it was not due.

[See 2 R. C. L. 790; 21 R. C. L. 761.]

Assumpsit — money paid on judgment obtained by fraud.

3. Under a statutory provision giving an action for redress of any wrong, money paid under a judgment may be recovered where the judgment was ob-

tained by a conspiracy to induce a surety company to insure performance by an insolvent building contractor, sue upon the bond upon the contractor's default, and divide the proceeds of the recovery.

Action — character — law or equity.

4. An action to recover a money judgment for damages is one at law.

Equity — when available for remedy.

5. There can be no resort to equity when an action at law will furnish complete and adequate relief.

[See 10 R. C. L. 273.]

APPEAL by plaintiff from an order of the Circuit Court for Milwaukee County (Turner, J.) sustaining a demurrer to the complaint in an action brought to recover damages for alleged fraud, deceit, and conspiracy of defendants. *Reversed.*

Statement by Winslow, Ch. J.:

This is an appeal from an order sustaining a general demurrer to the complaint, the substance of which complaint is as follows: The plaintiff is an insurance company which underwrites surety and casualty risks. Certain of the defendants, owning city lots in Milwaukee on which they proposed to erect buildings which would cost, as projected, more than \$30,000, arranged with one of the defendants who was a building contractor, known to be irresponsible and insolvent, that he should contract to build the same for \$20,000, and agreed that they would obtain from the plaintiff surety bonds of \$20,000 insuring the performance of such contract, by falsely representing to plaintiff's agent that the contractor was financially responsible, and concealing the facts as to the actual cost of the building and the secret agreement with the contractor; that the contractor should proceed to construct the buildings as far as his means would permit, and then abandon his contract, and the owners would thereupon enforce said surety bonds and collect their damages of the insurance company, and pay the contractor one half the profits derived from the arrangement; that this fraudulent scheme was fully carried out; that the plaintiff was thus fraudulently induced to execute surety undertakings in the sum of \$20,000; that the contractor defaulted; that, as the result of an action thereafter brought by the owners upon the said surety bonds, the plaintiff, by reason of said false representations and conspiracy, and in ignorance of the real facts, consented that judgment for \$5,500 be taken against it, paid said judgment, and did not discover the facts as to said fraud until after such payment. Upon these facts the plaintiff asks for vacation of the judgment and to recover its damages.

Mr Paul D. Durant, for appellant:

Where a judgment is admitted to have been just and equitable at the time it was rendered, but its enforcement has become inequitable because of circumstances occurring after its rendition, the proper proceeding for relief is on the foot of the judgment, whether the aggrieved party was a party to the original action or not.

Stein v. Benedict, 83 Wis. 603, 53 N. W. 891; Zinc Carbonate Co. v. First Nat. Bank, 103 Wis. 125, 74 Am. St. Rep. 845, 79 N. W. 229; Jackson Mill. Co. v. Scott, 130 Wis. 267, 110 N. W. 184; Yates v. Yates, 157 Wis. 219, 147 N. W. 60; Gimbel v. Wehr, 165 Wis. 1, 160 N. W. 1080.

On the other hand, where the integrity of a judgment as rendered is challenged as being based upon fraud in the subject of the action, or fraud in the proceedings leading up to its entry, then the proper proceeding is by an independent action.

Stowell v. Eldred, 26 Wis. 504; Boring v. Ott, 138 Wis. 260, 19 L.R.A. (N.S.) 1080, 119 N. W. 865; Laun v. Kipp, 155 Wis. 347, 5 A.L.R. 655, 145 N. W. 183.

In assuming jurisdiction in such independent action, a court in the exercise of its powers acts in personam against the guilty party, preventing him from using the unconscionable judgment to defeat the injured party's rights. While it does not destroy the former judgment, it nullifies it in effect, by tying the hands of the guilty party, so that the former judgment remains good in form but valueless and harmless in fact.

Balch v. Beach, 119 Wis. 77, 95 N. W. 132; Boring v. Ott, 138 Wis. 260, 19 L.R.A. (N.S.) 1080, 119 N. W. 865; Zohrlaut v. Mengelberg, 158 Wis. 392, 148 N. W. 314, 149 N. W. 280; Washburn Land Co. v. White River Lumber Co. 165 Wis. 112, 161 N. W. 547.

The court having jurisdiction to deal with the fraud inherent in the Richter contract and bond may deal with the whole situation as disclosed in the supplemental complaint, including the Sophie K. Sangor judgment.

Gullickson v. Madson, 87 Wis. 19, 57 N. W. 965; 1 Pom. Eq. Jur. §§ 180,

243; Meyer v. Garthwaite, 92 Wis. 576, 66 N. W. 704.

Mr. A. W. Richter for respondents.

Winslow, Ch. J., delivered the opinion of the court:

The fraudulent scheme set forth in the complaint is quite remarkable, but by no means incredible. If it can be proven by that quantum of clear, convincing, and satisfactory evidence which the law requires in such cases (Boring v. Ott, 138 Wis. 260, 19 L.R.A. (N.S.) 1080, 119 N. W. 865), it would be a reproach to the law if the wrong inflicted by it could not be redressed. The respondents claim that there can be no recovery, because the former judgment in the action on the bonds is *res judicata* of all questions set out in the complaint herein, and that such judgment cannot be set aside, or even attacked, in the present action.

The doctrine of the conclusive effect of a judgment upon all questions litigated or involved in the action is very well understood, and needs no discussion here. Equally familiar is the general rule that money paid under a judgment rendered by a court having jurisdiction

cannot be recovered back simply because it is afterwards discovered that it was not due. Were the rule otherwise, litigation and relitigation of the same questions would have no end. But neither of these principles controls here. The facts alleged present an elaborate and successful scheme to defraud the plaintiff, not a mere showing that there has been money paid which was not really due.

If this scheme had proceeded only so far as the judgment, and had been discovered before payment of the money, there would have been no question, under our decisions, of the power and duty of the court to halt it, and coerce the conspirators, by forbidding them to utilize their ill-gotten judgment. *Stowell v. Eldred*, 26 Wis. 504; *Balch v. Beach*, 119 Wis. 77, 95 N. W. 132; *Boring v. Ott*, *supra*; *Laun v. Kipp*, 155 Wis. 347, 5 A.L.R. 655, 145 N. W. 183. In all

these cases the judgment existed, just as here, and it was allowed to remain untouched; but the parties obtaining it were prevented from using it. It is said that this is as far as a court of justice can go, and that when the judgment has been paid, though paid in ignorance of the fraud, the court's power of redressing the wrong *ipso facto* ceases.

The argument does not appeal to the mind seeking to —payment induced by fraud— recovery.

make the courts what they were intended to be, namely, a place for the doing of justice, rather than a place for applying the rules of a game. It seems to offer a prize to the most able rogue; it says to the wrongdoer: If you can successfully conceal your fraud until you have obtained the money, the law will view the matter with complacency; but if you are so unskilful that you cannot keep your scheme dark until the judgment has been collected, the law will step in.

No good reason is perceived why any such distinction should be drawn. The judgment is just as much *res judicata* in one case as the other. If, in the cases above cited, justice could be done by simply coercing the party, there is no logical reason why justice cannot be done by coercing the parties in such a case as is here alleged; the judgment in both cases being allowed to remain of record untouched. One might enter upon an extended discussion here of the powers of a court of equity, the functions and limitations of the bill of review, and the artificial rules which abounded prior to, and even since, the adoption of the Code; but it would serve no good purpose. Much of this lore is now of interest only to the historian or the seeker after legal curios.

Our Code gives an action for "the redress . . . of a wrong." Wis. Stat. 1915, § 2595. If the allegations of the complaint be true, a great wrong has been committed here. The provisions of § 2832, Wis. Stat. 1915, have no application. It is not meant by this that the mere presence of fraud will prevent the

obtaining of relief under that section, provided the conditions named in the section be present, but merely that the purpose of that section is to afford relief from the effect of mistakes, accidents, and inadvertences, and not to provide a means of recovering damages against conspirators for a successful fraud. A civil action against the conspirators is

**Assumpsit—
money paid on
judgment
obtained by
fraud.**

therefore the remedy under the Code. Whether that action be an action in equity or an action at law is of no importance under the present practice, except for the fact that the state Constitution (§ 5, art. 1) guarantees to a litigant the right to a jury trial in all cases "at law;" hence it is necessary to determine whether the present action be an ac-

tion at law or in equity, in order to determine the proper method of trial.

In our judgment, it is clearly an action at law. The only relief obtainable or appropriate is a money judgment for damages. This is the characteristic judgment in an action at law.

Action—character—law or equity.

Hence it follows necessarily that an action at law furnishes complete and adequate relief, and when that is the case there is no excuse for resorting to equity, because the equitable action only lies when there is no adequate remedy at law. This is fundamental.

Equity—when available for remedy.

Order reversed, and action remanded, with directions to overrule the demurrers to the complaint.

ANNOTATION.

Right to recover back in an action at law money paid upon an existing judgment, procured by or grounded on fraud or mistake.

It will be seen that it is held in the reported case (*ROYAL INDEMNITY CO. v. SANGOR*, ante, 397) that the plaintiff, having consented to the entry of a judgment and having paid that judgment, could bring an action at law to recover back the money paid, on the ground that the judgment was based upon fraud, although the judgment had not been set aside before the action was brought. The court reverses an order of the court below sustaining a general demurrer to the complaint in which the plaintiff asks for vacation of the said judgment and for damages. It will be noticed that the court points out that, in cited cases restraining the use of a judgment, the judgment remained untouched, and that it states: "The only relief obtainable or appropriate is a money judgment for damages. . . . Hence, it follows necessarily that an action at law furnishes complete and adequate relief, and when that is the case there is no excuse for resorting to equity." If this decision means that the original judgment remains un-

touched, it is at least not in accord with the usual practice.

In *De Medina v. Grove* (1846) 10 Q. B. 170, 116 Eng. Reprint, 67. the plaintiff brought an action for money had and received to recover an excess of money levied upon an execution, on the ground that the judgment had been partially satisfied and that the execution, though for less than the amount recovered, was for more than was actually remaining due. In ordering a nonsuit the court said: "We are clearly of opinion that this action is not maintainable, and that the entire or partial validity of a judgment, good upon the face of it, cannot be inquired into in this form of action; and that the only remedy in such a case is by application to the equitable jurisdiction of the court, or to a court of equity. If such an action as the present would lie, great inconsistency might follow. The court might refuse, upon application, to interfere with the judgment or execution, and yet, if such an action could be brought, the defendant in the original action might recover the money

levied, and so defeat both judgment and execution. If there was any fraud in the case, that might be a ground for the interference of the court to set aside the judgment or the execution; but, whilst both remain unreversed, it would be contrary to principle to reverse them in effect by an action to recover back the amount levied. No case was cited, nor are we aware of any that could be cited, to warrant such a proceeding; and we are therefore of opinion that the rule should be absolute for a nonsuit."

There is, however, at least one case where an action for money had and received was sustained to recover back money paid upon an existing judgment, founded upon a mistake. Thus in *Lazell v. Miller* (1818) 15 Mass. 207, the defendant, having recovered a judgment against A, levied execution against A's undivided share of certain real property; thereafter he recovered judgment against the plaintiff, who was tenant in common with A, for a share of the rents and profits collected by the plaintiff, which judgment the plaintiff satisfied.

Thereafter the defendant's judgment against A was reversed upon error. It was held that the plaintiff was entitled to recover of the defendant, in an action for money had and received, the amount of the judgment recovered by the defendant against the plaintiff for the said rents and profits, although that judgment had not been reversed. The court said: "But the defendant objects that the judgment under which he received the money is still in full force, and that it is not competent to the plaintiff now to go into the merits of that judgment, or again to try that action. . . . He has it not in his power to reverse that judgment by writ of error. Having a legal right to the money which he now demands, it would not be right to turn him over to his petition for a review. By awarding him the money he paid under a mistake of the facts, we do not violate any principle. The judgment was right, nor does the present action impeach it; but the defendant has no right, from posterior circumstances, to retain the proceeds of it."

B. B. B.

JOHN GRANT LYMAN, alias Henry H. Howe, alias A. C. Brown, Appt.,
v.

STATE OF MARYLAND.

Maryland Court of Appeals—February 18, 1920.

(— Md. —, 109 Atl. 548.)

Forgery — use of fictitious name.

1. The offense of forgery may exist even though the name used be an assumed or fictitious one, when it is shown that it was used with intent to defraud.

[See note on this question beginning on page 407.]

Indictment — forgery by use of fictitious name — necessary allegations.

2. An indictment for forgery in the use of a fictitious name need not disclose the facts and circumstances under which the fictitious name was placed upon the paper.

False pretenses — passing of worthless check.

3. A prosecution under a general statute for false pretenses in passing
9 A.L.R.—26.

a worthless check is not prevented by the enactment of a statute declaring that one passing such check shall be deemed to have obtained the proceeds thereof by a false pretense and making the giving of such check prima facie evidence of intent to defraud.

Evidence — forgery — other similar acts.

4. In a prosecution for false pretenses in obtaining property by means of a worthless check, evidence is ad-

missible of the giving of similar checks to other persons at about the time of the offense alleged, as tending to show intent to defraud and a

scheme to obtain goods wherever and from whomsoever possible by means of false checks.

[See 11 R. C. L. 867.]

APPEAL by defendant from a judgment of the Criminal Court of Baltimore City (Heuisler, J.) convicting him of forgery or obtaining money by false pretenses. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. Albert S. J. Owens for appellant.

Messrs. Albert C. Ritchie, Attorney General, Ogle Marbury, Assistant Attorney General, and Harry W. Nice for the State.

Pattison, J., delivered the opinion of the court:

The indictment upon which the appellant, John Grant Lyman, was tried and convicted in the criminal court of Baltimore city and sentenced to the Maryland penitentiary for the term of ten years, consists of three counts. It was charged in the first "that John Grant Lyman, otherwise called Henry H. Howe, otherwise called A. O. Brown, . . . feloniously did falsely make, forge, and counterfeit, and cause and procure to be falsely made, forged, and counterfeited, and willingly aid and assist in falsely making, forging, altering, and counterfeiting, a certain bill of exchange, to wit, a certain check, of tenor, purport, and effect following, to wit:

"No. 25.

Baltimore, Md., Dec. 7, 1918.

"A. O. Brown, Investments.
\$188.85.

"Pay to the order of G. W. Robertson one hundred eighty-eight $\frac{85}{100}$ dollars.

"To the American Bank, Philadelphia, Pa.

"A. O. Brown.

—with intent then and there to defraud," etc.

He was charged in the second count with uttering said check, and in the third with unlawfully obtaining from the party therein named, by a certain false pretense, bonds issued and granted by the United States government.

In response to a demand therefor as to the false pretense intended to

be given in evidence under the third count of the indictment, the state filed the following bill of particulars: "That the said false pretense consisted in the representation that a certain written paper given to Guy W. Robertson on the 7th day of December, in the year of our Lord nineteen hundred and eighteen, in the city of Baltimore, state of Maryland, by May Shade, who was then and there the agent of the said John Grant Lyman, which said written paper is as follows:

"No. 25.

Baltimore, Md., Dec. 7, 1918.

"A. O. Brown, Investments.
\$188.85.

"Pay to the order of G. W. Robertson one hundred eighty-eight $\frac{85}{100}$ dollars.

"To the American Bank, Philadelphia, Pa.

"A. O. Brown.

—was then and there a good and genuine check for the payment of \$188.85 current money, and which the said John Grant Lyman then and there well knew to be worthless and of no value, the said written paper having been signed in blank by the said John Grant Lyman under the name of A. O. Brown, and the blanks afterwards filled in by the said May Shade in accordance with directions given by the said John Grant Lyman."

Exceptions filed to the bill of particulars were overruled. A demurrer was entered to the first and second counts of the indictment, and a motion was filed to quash the third count. The demurrer, as well as the motion to quash, was overruled; whereupon the appellant pleaded not guilty, and the case proceeded to trial. In the course of the trial a

number of exceptions were taken to the rulings of the court upon the admission of evidence, and at the conclusion of the evidence the defendant asked that the state be required to elect upon which count or counts it desired to ask conviction. This motion being overruled, an exception to the court's rulings thereon was taken.

The chief question presented by this appeal is upon the ruling of the court on the demurrer to the first and second counts of the indictment.

The statute of this state (§ 41 of article 27 of vol. 3 of the Code), upon the offense of forgery, provides that "any person who shall falsely make, forge, or counterfeit, or cause or procure to be falsely made, forged or counterfeited, or willingly aid or assist in falsely making, forging, altering or counterfeiting any . . . bill of exchange . . . with intention to defraud any person whomsoever, or shall utter or publish as true any false, forged, altered or counterfeited . . . bill of exchange . . . shall be deemed a felon, and on being convicted thereof shall be sentenced to the penitentiary for not less than one nor more than ten years."

It will be seen by a comparison of the statute with the first and second counts of the indictment that the forgery therein charged is in the language of the statute. The true name of the defendant, as charged in the indictment, is John Grant Lyman, while the name "A. O. Brown" appearing to the check was an assumed name, used by the defendant in his alleged purpose or intent to defraud.

The contention is made that, as the defendant used an assumed or fictitious name, not the name of another person, the offense of forgery was not committed. This question, though decided by the English courts and other courts of this country, has never been before this court so far as we have been able to discover, but by the great weight of authority both in England and this country it is now, we think, well set-

tled that the offense of forgery may exist even though the name used be an assumed or fictitious one, when it is shown that it was used with the intention to defraud. *Rex v. Sheppard*, 1 Leach, C. L. 226, 2 East, P. C. 967, Russ. & R. C. C. 169; *Rex v. Whiley*, Russ. & R. C. C. 90; *Rex v. Marshall*, Russ. & R. C. C. 75; *Rex v. Francis*, Russ. & R. C. C. 209; *Rex v. Bolland*, 1 Leach, C. L. 83; 2 East, P. C. 958; *Rex v. Taylor*, 1 Leach, C. L. 214, 2 East, P. C. 690; *Whart. Crim. Law*, § 659; *Com. v. Costello*, 120 Mass. 370; *State v. Wheeler*, 20 Or. 192, 10 L.R.A. 779, 23 Am. St. Rep. 119, 25 Pac. 394; 13 Am. & Eng. Enc. Law, 2d ed. 1088; *State v. Kelliher*, 49 Or. 77, 88 Pac. 867; *Maloney v. State*, 91 Ark. 485, 134 Am. St. Rep. 83, 121 S. W. 728, 18 Ann. Cas. 480; *Harmon v. Old Detroit Nat. Bank*, 153 Mich. 73, 17 L.R.A.(N.S.) 514, 126 Am. St. Rep. 467, 116 N. W. 617; *United States v. Turner*, 7 Pet. 132, 8 L. ed. 633; 12 R. C. L. 151.

In the early case of *Rex v. Sheppard*, supra, the defendant bought silverware of the prosecutor, and in payment therefor gave to him a draft indorsed with the name of "H. Turner, Esq.," his true name being Sheppard. The prosecutor testified that he gave credit to the prisoner, not to the draft, the prisoner being a stranger to him. The jury found the prisoner guilty, and on a case reserved on the question whether it could amount to the crime of forgery, as the prosecutor had sworn that he gave credit to the prisoner, not to the draft, the twelve judges were unanimously of the opinion that the conviction was right; "for it was a false instrument not drawn by any such person as it purported to be, and the using a fictitious name was only for the purpose of deceiving."

The same question was also decided in the later case of *Rex v. Whiley*, supra. There it was said (quoting from the syllabus): "Where the name made use of by the prisoner in the forged instrument was assumed by him with the

intention of defrauding the prosecutor, a conviction for forgery was held to be right, though the prisoner's real name would have carried with it as much credit as the assumed name."

And to the same effect are the cases of *Rex v. Francis*, *Rex v. Marshall*, *Rex v. Bolland*, and *Rex v. Taylor*.

In Wharton's *Criminal Law*, vol. 1, § 659, it is said: "It is forgery to sign a money order in an assumed name, if the name were assumed to defraud the person to whom such order was given, though the prisoner was known to the prosecutor only by the assumed name."

In support of this statement he cites the case of *Rex v. Francis*, *supra*.

The principle laid down in these early English cases was followed in *Com. v. Costello*, 120 Mass. 370, where it is said: "There may be a forgery by the use of a fictitious name, as well as by the use of a person's own name, if the intent exists to commit a fraud by deception as to the identity of the person who uses the name."

In the still later case of *State v. Wheeler*, 20 Or. 192, 10 L.R.A. 779, 23 Am. St. Rep. 119, 25 Pac. 394, decided in December, 1890, the supreme court of Oregon, after citing and quoting approvingly from a number of the cases that we have cited, including *Com. v. Costello*, held that a promissory note given by the defendant, Edward Wheeler, in the name of John Williams, a fictitious person, with an intent to defraud, was forgery.

In 13 Am. & Eng. Enc. Law, 2d ed. p. 1088, it is said: "To constitute forgery, the name alleged to be forged need not be that of any person in existence. It may be wholly fictitious, if the instrument is made or altered with intent to defraud."

And in the case of *Maloney v. State*, 91 Ark. 485, 134 Am. St. Rep. 83, 121 S. W. 728, 18 Ann. Cas. 480, decided so late as October 4, 1909, the supreme court of Arkansas quoted with approval what is said in 13 Am. & Eng. Enc. Law.

In the case of *United States v. Turner*, 7 Pet. 132, 8 L. ed. 633, the party was charged with the forgery of an attempt to pass a certain paper writing in imitation of and purporting to be a bill or note issued by the president, directors, and company of the Bank of the United States. The note was signed with the name of John Huske, who had not been at any time the president of the Bank of the United States, and was countersigned by the name of John W. Sanford, who at no time was cashier of the bank, although both of said persons were indirectly connected with said bank in other capacities. Judge Story, speaking for the court in that case, said:

"It is wholly immaterial whether the bill attempted to be passed be signed in the name of real or fictitious persons, or whether it would, if genuine, be binding on the bank or not. . . . The public mischief would be equally great whether the names were those of the genuine officers, or of fictitious or unauthorized persons. . . ."

"Upon examining the English authorities upon the subject of forgery and the utterance of counterfeit paper, they appear to us fully to justify and support a similar doctrine. It is, for instance, clearly settled that the making of a false instrument, which is the subject of forgery, with a fraudulent intent, although in the name of a nonexisting person, is as much a forgery as if it had been made in the name of a person known to exist, and to whom credit was due."

The indictment charging John Grant Lyman with the commission of the offense refers to him as otherwise called A. O. Brown, whose signature is affixed to the check, and because of this fact the defendant contends that the facts and circumstances under which that name was placed to the check, showing by its use an intention to deceive, should have been disclosed by the indictment. This, in our opinion, was not necessary. The indictment, which is in the language of the statute, charges the defendant with falsely

making the check to which he placed the assumed name of A. O. Brown, with an intention to defraud. Whether the check was made with fraudulent intention was a matter for the jury to determine after hearing the facts and circumstances under which it was signed, but it was not essential to the sufficiency or validity of the indictment that it should contain such facts and circumstances.

Indictment—
forgery by use
of fictitious
name—neces-
sary allegations.

As was said in *Com. v. Costello*, supra: "Whether the name was used in the particular instance with intent to defraud by a deception as to the identity of the person whose signature is affixed is always a question of fact for the jury."

The third count in the indictment, which is known in these proceedings as the false pretense count, charged that "John Grant Lyman, otherwise called Henry H. Howe, otherwise called A. O. Brown, . . . by a certain false pretense by him then and there made to Guy W. Robertson with intent then and there to defraud, he, the said John Grant Lyman, otherwise called Henry H. Howe, otherwise called A. O. Brown, then and there well knowing the said pretense to be then and there false (which said false pretense was not then and there a mere promise for future payment, and was not then and there a mere promise for future payment not intended to be performed), unlawfully, knowingly, and designedly did obtain from Guy W. Robertson four bonds, issued and granted by and under the authority of the United States, each bond of the value of \$50 current money, of the goods and chattels, moneys and property, of Guy W. Robertson."

This count of the indictment is based upon § 122 of article 27 of the Code, which provides that "any person who shall by any false pretense obtain from any other person any chattel, money or valuable security, with intent to defraud any person of the same, shall be guilty of a misdemeanor, and being convicted

thereof shall be liable, at the discretion of the court, to be punished by fine and imprisonment, or by confinement in the penitentiary for not less than two years nor more than ten years, as the court shall award: . . . Provided . . . that a mere promise for future payment, though not intended to be performed, shall not be sufficient to authorize a conviction under this section."

Section 498 of article 27 of the Code provides that "in any indictment for false pretenses it shall not be necessary to state the particular false pretenses intended to be relied on in proof of the same, but the defendant, on application to the state's attorney before the trial, shall be entitled to the names of the witnesses and a statement of the false pretenses intended to be given in evidence."

The defendant availed himself of the right conferred upon him by the foregoing section of the Code, and asked for a bill of particulars as to the false pretense intended to be given in evidence under such count of the indictment. The state in response thereto filed a bill of particulars, which we have already set out in this opinion.

In the bill of particulars it is alleged that the false pretense "consisted in the representation" that the check above mentioned and referred to, signed by the defendant in the name of A. O. Brown, and given to Guy W. Robertson by one May Shade, agent of the said defendant, "was then and there a good and genuine check" for the payment of the amount therein stated, etc., "and which the said John Grant Lyman then and there well knew to be worthless and of no value."

The defendant excepted to the bill of particulars because, as we understand him, the disclosures made by it involved the giving of a check upon a bank in which the defendant had no funds from which it could be paid; his contention being that since the passage of Acts 1914, chap. 281, which is now article 27, § 123, of the Code, there can be no prosecution under § 122, where the giving of a

worthless check is involved, but in all such cases the prosecution must be under § 123. This, in our opinion, is not the effect of the passage of that act.

Section 123 provides that "every person who, with intent to cheat and defraud another, shall obtain money, credit, goods, wares or anything of value by means of a check, draft or any other negotiable instrument of any kind drawn upon any bank, person, firm or corporation, not indebted to drawer, or where he has not provided for the payment or acceptance, and the same be not paid upon presentation, shall be deemed to have obtained such money, credit, goods or things of value by means of a false pretense, and upon conviction, shall be fined or imprisoned, or both, as provided in § 122 of this article, at the discretion of the court. The giving of the aforesaid worthless check, draft or negotiable instrument shall be prima facie evidence of intent to cheat or defraud; provided that if such person shall deposit with the drawee of such paper within ten days thereafter funds sufficient to meet the same, with all costs and interest which may have accrued, he shall not be prosecuted under this section, and no prosecution either by presentment, indictment or otherwise, shall be instituted or commenced until after the expiration of said period of ten days."

This statute, in substance, provides that money or other things therein named, obtained by the giving of a worthless check or other instrument, as therein stated, shall be deemed to have been obtained by means of false pretenses, where the same was done with the intention to cheat and defraud, and "the giving of the aforesaid worthless check, draft, or negotiable instrument shall be prima facie evidence of intent to cheat or defraud," subject to the provision that follows. By both statutes there must be an intent to defraud.

In § 122 the burden of showing such fraudulent intent is on the

state, while in § 123 the burden shifts to the defendant, when it is shown that a worthless check has been given, as stated in that section, because of the provision therein contained that the existence of such facts shall be prima facie evidence of the intent to cheat or defraud.

The effect of § 123 is to relieve the state of the burden of proving such intent to defraud, when certain facts mentioned in the statute are shown to exist, but it was never intended that, because a worthless check was involved in the fraudulent transaction, the defendant could not be prosecuted under § 122, when the state was ready and willing to assume the burden of showing the existence of such intent to defraud by evidence such as false statements of the defendant as to existing facts made in connection with the giving of the check.

**False pretenses
—passing of
worthless check.**

It could hardly have been the intention of the legislature to confine the prosecution in such cases to § 123, when under that section "no prosecution either by presentment, indictment, or otherwise, shall be instituted or commenced until after the expiration of said period of ten days." In that time opportunities of escape would be afforded the offender, and in many instances he, by reason of such delay, would evade prosecution, although it could have been shown, if tried under § 122, that he had made, in connection with the giving of such worthless check, many false statements as to existing facts, clearly showing an intent to cheat and defraud. Such could not have been the intention of the legislature. The court, we think, acted properly in overruling the exception to the bill of particulars. In view of what we have said of the exception to the bill of particulars, it is not necessary to discuss the correctness of the action of the court in overruling the motion to quash the third count of the indictment, even should there be an appeal therefrom.

This brings us to the rulings upon the evidence. The defendant in his brief refers only to the third, fourth, fifth, sixth, and eighth bills of exceptions. The third bill of exceptions was taken to the admission in evidence of the check to Robertson, which is mentioned in the indictment. There can be no question as to the admissibility of the check, in view of what we have said upon the demurrer to the first and second counts and the exception to the bill of particulars.

The fourth and fifth exceptions were to the admission of other checks signed by the defendant in the same way and about the same time, and given to other persons in similar dealings. These were admissible, as showing the defendant's intent to defraud, as well as "a scheme to obtain goods wherever and from whomsoever he could," by means of such false checks. *Carnell v. State*, 85 Md. 6, 36 Atl. 117.

In the sixth bill of exceptions the defendant asked the court to strike out all the testimony of Miss Shade, "in so far as the same may be offered to sustain the third count of the indictment." This motion was overruled, and the testimony allowed to remain in. The reason

assigned by the defendant for striking out this testimony was because it was at variance with the bill of particulars. Just what the variance is, is not stated, except in the plaintiff's brief, where it is said: "No representation having been proven to have been made by Miss Shade, this evidence could not properly have been admitted to sustain the third count of the indictment."

Even though her evidence contained no such representation made by her, this would not warrant the exclusion of her testimony, which was otherwise relevant and material as tending to sustain the charge of false pretenses, and it should not have been stricken out.

The eighth exception was taken to the ruling of the court in refusing to strike out the testimony of Robertson upon a like motion made by the defendant. The ruling of the court thereon, we think, was proper, in view of what we have said as to the sixth exception.

In his brief the defendant makes no reference to the seventh, ninth, and tenth exceptions, but in the rulings of the court thereon we find no reversible error.

The judgment of the court below will therefore be affirmed.

Judgment affirmed, with costs.

ANNOTATION.

Forgery: use of fictitious or assumed name.

- I. In general, 407.
- II. Statutory provisions, 412.
- III. Evidence, 414.
- IV. Miscellaneous, 417.

I. In general.

The rule is well settled, in accord with the holding in the reported case (*LYMAN v. STATE*, ante, 401), that, apart from express statutory provisions to that effect, forgery may be committed by the use of a fictitious or assumed name with the intention to defraud.

United States.—*United States v. Turner* (1833) 7 Pet. 132, 8 L. ed. 633 (recognizing rule); *United States v.*

Peacock (1804) 1 Cranch, C. C. 215, Fed. Cas. No. 16,019 (rule assumed); *United States v. Mitchell* (1831) Baldw. 366, Fed. Cas. No. 15,787; *Ex parte Hibbs* (1836) 26 Fed. 421; *Logan v. United States* (1903) 59 C. C. A. 476, 123 Fed. 291.

Alabama.—*State v. Givens* (1843) 5 Ala. 747; *Thompson v. State* (1873) 49 Ala. 16; *Williams v. State* (1899) 126 Ala. 50, 28 So. 632.

Arkansas.—*Maloney v. State* (1909) 91 Ark. 485, 134 Am. St. Rep. 83, 121 S. W. 728, 18 Ann. Cas. 480.

California.—*People v. TerriH* (1901) 133 Cal. 120, 65 Pac. 303. See

other California cases, cited under II. *infra*.

Louisiana.—*State v. Hahn* (1886) 38 La. Ann. 169. See also *State v. Alexander* (1904) 113 La. 747, 37 So. 711.

Maryland.—*LYMAN v. STATE* (reported herewith) ante, 401.

Massachusetts.—*Com. v. Baldwin* (1858) 11 Gray, 197, 71 Am. Dec. 703; *Com. v. Costello* (1876) 120 Mass. 358; *Com. v. Chandler* (1828) Thacher, Crim. Cas. 187.

Michigan.—*People v. Marion* (1874) 29 Mich. 31; *People v. Warner* (1895) 104 Mich. 337, 62 N. W. 405; *Harmon v. Old Detroit Nat. Bank* (1908) 153 Mich. 73, 17 L.R.A. (N.S.) 514, 126 Am. St. Rep. 467, 116 N. W. 617.

Missouri.—*State v. Warren* (1891) 109 Mo. 430, 32 Am. St. Rep. 681, 19 S. W. 191; *State v. Stegner* (1918) 276 Mo. 427, 207 S. W. 826. See also *State v. Allen* (1893) 116 Mo. 548, 22 S. W. 792. For statutory provisions in this state, see II. *infra*.

Montana.—*State v. Vineyard* (1895) 16 Mont. 138, 40 Pac. 173.

Nebraska.—*Randolph v. State* (1902) 65 Neb. 520, 91 N. W. 356.

New Hampshire.—*State v. Hayden* (1844) 15 N. H. 355.

New York.—*People v. Jones* (1887) 106 N. Y. 523, 13 N. E. 93; *People v. Davis* (1839) 21 Wend. 309; *People v. Peabody* (1841) 25 Wend. 472; *Brown v. People* (1876) 8 Hun, 562, affirmed in (1878) 72 N. Y. 571, 28 Am. Rep. 183; *People v. Browne* (1907) 118 App. Div. 793, 103 N. Y. Supp. 903, affirmed without opinion in (1907) 189 N. Y. 528, 82 N. E. 1130; *Grant's Case* (1818) 3 City Hall Rec. 142; *Riley's Case* (1820) 5 City Hall Rec. 87; *Goto-bed's Case* (1821) 6 City Hall. Rec. 25. See also, as recognizing rule, *People v. Krummer* (1858) 4 Park. Crim. Rep. 217.

Ohio.—*Armstrong v. Pomeroy Nat. Bank* (1889) 46 Ohio St. 512, 6 L.R.A. 625, 15 Am. St. Rep. 655, 22 N. E. 866. See also *Farrington v. State* (1841) 10 Ohio, 354 (rule assumed).

Oregon.—*State v. Wheeler* (1890) 20 Or. 192, 10 L.R.A. 779, 23 Am. St. Rep. 119, 25 Pac. 394; *State v. Kelliher* (1907) 49 Or. 77, 88 Pac. 867.

Pennsylvania.—*Com. v. Smith* (1819) 6 Serg. & R. 568; *Com. v. Bachop* (1896) 2 Pa. Super. Ct. 299.

South Dakota.—*State v. Larson* (1917) 39 S. D. 120, 163 N. W. 566.

Tennessee.—*Chism v. First Nat. Bank* (1896) 96 Tenn. 641, 32 L.R.A. 778, 54 Am. St. Rep. 863, 36 S. W. 387; *Abston v. State* (1915) 134 Tenn. 604, 185 S. W. 706. See also, as recognizing rule, *Peete v. State* (1879) 2 Lea, 513.

Texas.—*Barnwell v. State* (1877) 1 Tex. App. 745; *Brewer v. State* (1893) 32 Tex. Crim. Rep. 74, 40 Am. St. Rep. 760, 22 S. W. 41; *Hocker v. State* (1893) 34 Tex. Crim. Rep. 359, 53 Am. St. Rep. 716, 30 S. W. 783; *Davis v. State* (1895) 34 Tex. Crim. Rep. 117, 29 S. W. 478; *Williams v. State* (1895) — Tex. Crim. Rep. —, 32 S. W. 533; *Johnson v. State* (1895) 35 Tex. Crim. Rep. 271, 33 S. W. 231; *Chapman v. State* (1896) — Tex. Crim. Rep. —, 34 S. W. 621; *Davis v. State* (1897) 37 Tex. Crim. Rep. 218, 39 S. W. 296; *Scott v. State* (1898) 40 Tex. Crim. Rep. 108, 48 S. W. 523; *Hanks v. State* (1899) — Tex. Crim. Rep. —, 54 S. W. 587; *Adkins v. State* (1900) 41 Tex. Crim. Rep. 577, 56 S. W. 63; *King v. State* (1900) 42 Tex. Crim. Rep. 110, 96 Am. St. Rep. 792, 57 S. W. 840 (rule recognized); *Allen v. State* (1902) 44 Tex. Crim. Rep. 63, 100 Am. St. Rep. 839, 68 S. W. 286; *Boswell v. State* (1910) 59 Tex. Crim. Rep. 161, 127 S. W. 820; *McGee v. State* (1911) 62 Tex. Crim. Rep. 358, 137 S. W. 686; *Walder-en v. State* (1915) 76 Tex. Crim. Rep. 358, 174 S. W. 348. See also, as assuming the rule, *Lasister v. State* (1906) 49 Tex. Crim. Rep. 532, 94 S. W. 233; *Feeney v. State* (1910) 58 Tex. Crim. Rep. 152, 124 S. W. 944, later appeal in (1911) 62 Tex. Crim. Rep. 585, 138 S. W. 135; *Fluewellian v. State* (1910) 59 Tex. Crim. Rep. 334, 128 S. W. 621; *Carter v. State* (1911) 61 Tex. Crim. Rep. 609, 136 S. W. 47.

England.—*Lewis's Case* (1754) 2 East, P. C. 957; *Rex v. Dunn* (1765) 1 Leach, C. L. 57, 2 East, P. C. 962; *Wilks's Case* (1767) 2 East, P. C. 957; *Rex v. Bolland* (1772) 1 Leach, C. L. 83, 2 East, P. C. 958; *Rex v. Lockett* (1772) 1 Leach, C. L. 94, 2 East, P. C.

940; *Rex v. Taft* (1772) 1 Leach, C. L. 172, 2 East, P. C. 959; *Rex v. Taylor* (1779) 1 Leach, C. L. 214, 2 East, P. C. 690; *Rex v. Shepherd* (1781) 2 East, P. C. 967, 1 Leach, C. L. 226, Russ. & R. C. C. 169; *Rex v. Parkes* (1796) 2 East, P. C. 963, 992, 2 Leach, C. L. 775; *Rex v. Marshall* (1804) Russ. & R. C. C. 75; *Rex v. Whiley* (1805) Russ. & R. C. C. 90; *Rex v. Francis* (1811) Russ. & R. C. C. 209; *Rex v. Peacock* (1814) Russ. & R. C. C. 278; *Rex v. Froud* (1819) 1 Brod. & B. 300, 129 Eng. Reprint, 738, 3 J. B. Moore, 645, 7 Price, 609, 146 Eng. Reprint, 1076, Russ. & R. C. C. 389; *Rex v. Backler* (1831) 5 Car. & P. 118; *Rex v. King* (1832) 5 Car. & P. 123; *Rex v. Brannan* (1834) 6 Car. & P. 326; *Reg. v. Avery* (1838) 8 Car. & P. 596; *Reg. v. Rogers* (1838) 8 Car. & P. 629; *Reg. v. Mitchell* (1847) 1 Den. C. C. 282; *Rex v. Ashby* (1860) 2 Fost. & F. 560. See also *Rex v. Sponsonby* (1784) 1 Leach, C. L. 332, 2 East, P. C. 996; *Rex v. Aickles* (1787) 2 East, P. C. 968, 1 Leach, C. L. 438; *Rex v. Bontien* (1813) Russ. & R. C. C. 260; *Reg. v. White* (1861) 2 Fost. & F. 554; *Rex v. Epps* (1864) 4 Fost. & F. 81.

Canada.—*Ex parte Cadby* (1886) 26 N. B. 452; *Re Murphy* (1894) 26 Ont. Rep. 163, appeal dismissed in (1895) 22 Ont. App. Rep. 386; *Re Lazier* (1899) 30 Ont. Rep. 419, affirmed in (1899) 26 Ont. App. Rep. 260, 3 Can. Crim. Cas. 167; *Reg. v. McDonald* (1854) 12 U. C. Q. B. 543.

Definitions of forgery quoted in *Ex parte Hibbs* (1886) 26 Fed. 421, *supra*, are that at common law forgery is "the false making or altering, *malò animo*, of any written instrument;" that it is the "making a false document with intent to defraud;" that it is the "false making or materially altering with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability;" or the "false making of a writing." It was said also that forgery, at common law, belonged to that class of misdemeanors called "cheats;" but that, owing to the serious wrongs and frauds thereby perpetrated, it was distinguished in time by a particular name and a special punishment.

And the common-law definition of forgery was said in *People v. Warner* (1895) 104 Mich. 337, 62 N. W. 405, to be a false making, or a making *malò animo*, of any written instrument with intent to defraud.

It will be observed that none of the above definitions of forgery, apparently, requires the use of the name of an existing person.

In *Lewis's Case* (1754) 2 East, P. C. Eng. 957, eleven of the judges were of the opinion that forgery could be committed in the name of a person having no existence; that the main ingredients of the crime were the falsity of the instrument and the intention to defraud; and that Lord Coke's definition that forgery is committed when an act is done in the name of another person is too narrow.

It was held in *Ex parte Hibbs* (Fed.) *supra*, that forgery was committed where a postmaster, with intent to defraud, drew a money order on the application of a fictitious person, and, through correspondence in the name of such person, obtained and converted the proceeds to his own use. The court considered that forgery was committed, both at common law and under the Federal statute prescribing a punishment for any person who, with intent to defraud, should "falsely make" any order in imitation of, or purporting to be, a money order issued by the Postoffice Department. The court recognized the rule that forgery may be committed by the signing of a fictitious name with intent to defraud, although the decision, in its result, is more direct authority for the proposition that forgery may be committed by making a false writing in one's own name, and that it is not necessary that the name signed be that of another.

The signing of fictitious names, as president and cashier, to national bank notes, may constitute forgery, the public mischief being the same whether the names forged are those of the genuine officers of the bank or of fictitious persons. *Logan v. United States* (1903) 59 C. C. A. 476, 123 Fed. 291. See also *United States v. Turner* (1833) 7 Pet. (U. S.) 132, 8 L. ed. 633.

The corporate existence of the bank, it was held in *Com. v. Smith* (1819) 6 Serg. & R. (Pa.) 568, need not be proved, on an indictment charging one with unlawfully uttering and publishing as true and genuine a certain false paper in the form of a bank note of a certain bank, with intent to defraud a certain individual.

So, it was held in *Reg. v. McDonald* (1854) 12 U. C. Q. B. 543, that one may commit forgery by falsely making a note in the form of a bank note, although the bank whose note it purports to be is not in existence.

See also, as to forgery of bank notes, *State v. Hayden* (N. H.) and *People v. Davis and People v. Peabody* (N. Y.) under II. *infra*.

It has been held that the fact that a note signed with a fictitious name as maker is so signed in the presence of the payee does not prevent the act from constituting forgery, if the signature is with intent to defraud and the payee does not know the real name of the maker. *Adkins v. State* (1900) 41 Tex. Crim. Rep. 577, 56 S. W. 63.

And in *Rex v. Dunn* (1765) 1 Leach, C. L. (Eng.) 57, it was held that the fact that the act of signing is in the presence of the person defrauded is immaterial on the question of forgery, if the signer is a stranger to the other party, and by using another than his real name fraudulently induces the latter to give a credit which would not otherwise have been given. In this case the defendant applied for a seaman's wages, representing herself to be the widow and executrix of a seaman, and giving a name not her own. Wages were due a seaman of that name, and money was advanced her on receipt of a note signed by her in the assumed name. It was held that she was guilty of forgery, the court saying that it was immaterial whether there was such a person as the one she represented herself to be, since a false instrument, purporting to be the act of another, by which a credit is obtained which would not otherwise have been given, constituted forgery, though the name given is in reality a nonentity. It is stated that "the case is very different from that of a person borrowing money upon his own note, and

merely assuming a fictitious name, without any relation to a different person; for there the whole credit is given to the party himself; the lender accepts the security as the security of that person only; he has no other remedy in view but merely against the man he is dealing with; and the security itself is really and truly the instrument of the party whose act it purports to be, however subscribed by a fictitious name; he has therefore a remedy upon it against the person on whose credit he took it, and consequently is not substantially defrauded. But in the present case no credit was given to the prisoner herself personally, for she was totally unknown."

But in *Reg. v. Martin* (1879) L. R. 5 Q. B. Div. (Eng.) 34, it was held that if credit is given entirely to the person and not to the name signed, which is not the real name, the crime may be false pretenses, but is not forgery. In this case the defendant was well known to the party defrauded, and signed a check for the purchase price of personal property in the name of "William Martin," his real name being "Robert Martin." The name was signed in the presence of the payee, the seller, who took it without observing the signature. It was held that forgery was not committed, the rule in *Dunn's Case* (Eng.) *supra*, applying that "if a person give a note entirely as his own, his subscribing it by a fictitious name will not make it a forgery, the credit there being wholly given to himself, without any regard to the name or without any relation to a third person."

There are, however, several earlier English cases in which, although apparently credit was given to the person and not to the name, and the result would, it seems, have been the same if the signature had been in the signer's real name, he being a stranger to the person defrauded, it was held that forgery was committed if the signature was made under the fictitious name with intent to defraud. *Rex v. Marshall* (1804) Russ. & R. C. C. (Eng.) 75; *Rex v. Whiley* (1805) Russ. & R. C. C. (Eng.) 90; *Rex v. Francis* (1811) Russ. & R. C. C. (Eng.) 209.

The question of intention to defraud is, as has been already indicated, of vital importance in determining whether one signing under an assumed or fictitious name is guilty of forgery, for it is clear that one may innocently and rightfully assume and use a name not his own. See, however, *Phillips v. State* (Ga.) under II. *infra*, decided under the Georgia statute.

Thus, it is said in *State v. Wheeler* (1890) 20 Or. 192, 10 L.R.A. 779, 23 Am. St. Rep. 119, 25 Pac. 394, that when a party signs a name not his own, but one which he has adopted, using it without the intent to deceive as to the identity of the person signing it, he does not commit forgery; the question of intent being material in determining the question of guilt. This rule is approved in *State v. Ford* (1918) 89 Or. 121, 172 Pac. 802.

But it is held in *Harrison v. State* (1904) 72 Ark. 117, 78 S. W. 763, that forgery is not committed by drawing a check on a bank in which the drawer has no funds, in the name in which he is generally known, although it is not his real name.

But while one may sign a fictitious name which he has adopted for innocent purposes without being guilty of forgery, and while an assumption of a name generally for purposes of fraud is not sufficient to convict of forgery unless in the particular case fraud is shown in using the name, yet, if such fraud is shown, the fact that the name had been previously assumed by the one signing it, and used for purposes of fraud generally, with no reference to the particular fraud, will not prevent the signature being a forgery; one cannot acquire a right to use a name not his own for fraudulent purposes, by using it any number of times previously for such purposes. *Com v. Costello* (1876) 120 Mass. 358. It was said that the previous use of the fictitious name would be evidence that, by the use of it in the case charged, the person so using it did not do so for the purpose of representing himself as another than the actual signer.

• The case of *Reg. v. Whyte* (1851) 5 Cox, C. C. (Eng.) 290, supports, apparently, the proposition that if one as-

sumes a name not his own for the purposes of fraud generally, and is known by and signs a bill by that name, he is not guilty of forgery, although he might be guilty of obtaining money or goods under false pretenses; but that to render him guilty of forgery it must appear that the name was assumed originally for the purpose of issuing the particular bill. It seems, however, from the instructions given that the latter condition might be fulfilled if he assumed the name for the purpose of defrauding parties with whom he dealt by issuing false bills of exchange, and that the bill in question was one of these so issued. In this case the defendant signed a partnership name, "Whiffen & Co.," it appearing that he had been transacting business under that name and falsely representing himself to be a partner with his brother-in-law, who bore the name of Whiffen.

As to necessity of assumption of fictitious name for purposes of the particular fraud, under statute, see *Lascelles v. State* (Ga.) under II. *infra*.

So, it seems to be assumed in *Rex v. Bontien* (1813) Russ. & R. C. C. (Eng.) 260, that the defendant on a trial for forgery by use of a fictitious name must have assumed the false name for the purpose of the particular fraud, and that he would not be guilty if he had been known previously by that name. The evidence was held insufficient in this case to show that the defendant had not been known by the name in question before the time of the alleged forgery, or that he had assumed the name for that purpose, and it was held, therefore, that a conviction was unwarranted.

Writing the name of a fictitious firm was said in *Reg. v. Rogers* (1832) 8 Car. & P. (Eng.) 629, to be the same as writing the name of a fictitious person.

But, although recognizing the rule that forgery may be committed by signing the name of a fictitious person or firm, the court in *Com. v. Baldwin* (1858) 11 Gray (Mass.) 197, 71 Am. Dec. 703, held that forgery was not committed where a person by the name of Baldwin signed the name

"Schouler, Baldwin, & Co." to a note, which he gave in exchange for his own overdue individual note, representing at the time that the members of the firm were himself and Schouler, whereas there was in fact no such partnership. The court said: "As a general rule, however, to constitute forgery, the writing falsely made must purport to be the writing of another party than the person making it. The mere false statement or implication of a fact, not having reference to the person by whom the instrument is executed, will not constitute the crime.

The writing alleged to be forged in the case at bar was the handwriting of the defendant, known to be such, and intended to be received as such. It binds the defendant. Its falsity consists in the implication that he was a partner of Schouler, and authorized to bind him by his act. This, though a fraud, is not, we think, a forgery. . . . If the defendant had written upon the note, 'William Schouler, by his agent Henry W. Baldwin,' the act plainly would not have been forgery. The party taking the note knows it is not the personal act of Schouler. He does not rely upon his signature. He is not deceived by the semblance of his signature. He relies solely upon the averred agency and authority of the defendant to bind Schouler. So in the case before us the note was executed in the presence of the promisee. He knew it was not Schouler's signature. He relied upon the defendant's statement of his authority to bind him as partner in the firm of Schouler, Baldwin, & Co. Or if the partnership had in fact before existed, but was then dissolved, the effect of the defendant's act was a false representation of its continued existence."

II. Statutory provisions.

In some states the crime of forgery by the use of a fictitious name is expressly declared by statutes the construction and application of which have been before the courts in numerous cases. See, for example: *People v. Elliott* (1891) 90 Cal. 586, 27 Pac. 433; *People v. Eppinger* (1894) 105 Cal. 36, 38 Pac. 538, later appeals in

(1895) 109 Cal. 294, 41 Pac. 1037, and in (1896) 114 Cal. 350, 46 Pac. 97; *People v. Ellenwood* (1897) 119 Cal. 166, 51 Pac. 553; *People v. Terrill* (1901) 133 Cal. 120, 65 Pac. 303; *People v. Nishiyama* (1902) 135 Cal. 299, 67 Pac. 776; *People v. Chretien* (1902) 137 Cal. 450, 70 Pac. 305; *People v. Jones* (1909) 12 Cal. App. 129, 106 Pac. 724; *People v. Gordon* (1910) 13 Cal. App. 678, 110 Pac. 469; *People v. Bernard* (1913) 21 Cal. App. 56, 130 Pac. 1063; *Phillips v. State* (1855) 17 Ga. 459; *Lascelles v. State* (1892) 90 Ga. 347, 35 Am. St. Rep. 216, 16 S. E. 945, affirmed in (1893) 148 U. S. 537, 37 L. ed. 549, 13 Sup. Ct. Rep. 687; *Townsend v. State* (1893) 92 Ga. 732, 19 S. E. 55, 9 Am. Crim. Rep. 299; *Shirk v. People* (1887) 121 Ill. 61, 11 N. E. 888; *State v. Minton* (1893) 116 Mo. 605, 22 S. W. 808.

The California Penal Code, as amended in 1905, provides that every person, who, with intent to defraud, signs the name of another person or of a fictitious person, knowing that he has no authority so to do, to any acceptance or indorsement of any bill of exchange, promissory note, draft, order, or other contract for payment of money, is guilty of forgery. It was held in *People v. Jones* (1909) 12 Cal. App. 129, 106 Pac. 724, that the indorsement of a check is equivalent to an "order for money," within the meaning of the statute, so that one may be guilty of forgery by indorsing a check by the name of a fictitious payee.

It was held in *People v. Chretien* (1902) 137 Cal. 450, 70 Pac. 350, that the expression "instrument in writing for the payment of money or property" in the statute had reference to some instrument similar in character to a bill, note, or check, given for the payment of money, and did not include a deed signed in the name of a fictitious grantor.

Under the California statute prescribing imprisonment for every person who made or uttered a fictitious bill or note for the payment of money, of some bank, individual, etc., when in fact there was no such bank or "individual" in existence, it was held in *People v. Terrill* (1901) 133 Cal. 120,

65 Pac. 303, that an indictment was sufficient which charged the uttering of a fictitious note, "purporting to be the note of an individual," naming him, when in fact there was no such "person" in existence.

It was said in *People v. Nishiyama* (1902) 135 Cal. 299, 67 Pac. 776, that, if the name is that of a fictitious person, it is no defense that the defendant intended to write the name of a particular person well known in the community.

An indictment charging one with feloniously and falsely making and forging a deed purporting to be the act of a certain fictitious person, without setting out the deed or alleging that the name of a person not in existence was "affixed" to the deed, was held insufficient to sustain a conviction, in *State v. Minton* (1893) 116 Mo. 605, 22 S. W. 808, under the Missouri statute declaring it forgery falsely to make any instrument or writing purporting to be the act of another, by which any right in property is transferred, "to which shall be affixed a fictitious name or the name or pretended signature of any person not in existence."

Under the Missouri statute declaring it to be forgery for any person falsely to make a check purporting to be drawn on a bank, it was held in *State v. Stegner* (1918) 276 Mo. 427, 207 S. W. 826, that, since the false check, as pleaded, showed on its face that it had sufficient efficacy to enable it to be used to the injury of another, it was immaterial whether the name signed as maker was that of a real or fictitious person, and that special averments as to the character of the maker were unnecessary.

Under the Georgia statute, providing that "any person who shall draw or make a bill of exchange, duebill, or promissory note, or indorse or accept the same in a fictitious name, shall be guilty of forgery," it was held in *Phillips v. State* (1855) 17 Ga. 459, that it was not necessary to allege and prove an intent to defraud, where a note was drawn and delivered in a fictitious name. The court said: "Under the 1st section of this same head of the Code, the general offense of

forgery is defined, and there it is made necessary to allege in the indictment, and consequently to prove on the trial, the intent to defraud. But in the particular species of forgery for which the defendant is prosecuted, as will be seen from the statute, no such requirement is made. The court is bound to presume that this omission was intentional. The law makes the act the crime, and infers a criminal intent from the act itself."

Under the above statute, it was held in *Lascelles v. State* (1892) 90 Ga. 347, 35 Am. St. Rep. 216, 16 S. E. 945, affirmed in (1893) 148 U. S. 537, 37 L. ed. 549, 13 Sup. Ct. Rep. 687, that if one signed a bill of exchange under a name not his own, or the name of another living person, with intent to defraud, the name used was fictitious, within the meaning of the statute, even though it was one which the signer had previously used and had not assumed merely for the purpose of perpetrating the particular fraud. The court said: "It was insisted that, in order to constitute forgery, the name must have been assumed for the sole purpose of defrauding the persons alleged to have been defrauded. We think it is immaterial for what purpose the name was originally assumed and used, if it is shown that in the instance in question it was used to defraud. . . . Where one has been accustomed to use a certain assumed name, it is not to be implied, merely from his signing such name to a bill of exchange or other writing, that the purpose is to defraud; it is not forgery unless there is something else besides the mere signing to show that the fictitious character of the name is, in that instance, an instrument of fraud. . . . In the present case, however, the accused, at the time of signing the writing, gave a fictitious character to the name, upon the faith of which he induced the parties with whom he was dealing to give value for the writing." The defendant in this case had represented that he was the son of an English nobleman of great wealth, who was about to deposit a large sum in bank in the name of his son, and the parties with whom he was dealing paid over the

money to the supposed son of the English lord, whereas the name signed was not that of the singer, and the Englishman had no son by that name. An instruction was held properly refused in this case, which included, among others, the direction that if the person using or signing the name has assumed the same as applicable to himself previously to the act complained of, and with no intent to commit that act, the name was not fictitious within the meaning of the statute. Generally, as to necessity of assumption of the fictitious name for purposes of the particular fraud, see *I. supra*.

The term "bill of exchange" in the Georgia statute above cited was held in *Townsend v. State* (1893) 92 Ga. 732, 19 S. E. 55, 9 Am. Crim. Rep. 299, not to include a check on a bank, so as to permit the conviction under this section of the Code for forgery of one signing such a check by a fictitious name. The decision rests largely on the fact that other statutes, although not providing for a case where a check is made in a fictitious name, covered cases of checks or drafts falsely made. The Georgia Code, as interpreted in this case, and *Brazil v. State* (1903) 117 Ga. 32, 43 S. E. 460, does not apparently provide a punishment for making or uttering a bank check drawn in a fictitious name.

The expression, "or other instrument in writing for the payment of money," in the Illinois statute, providing that whoever should make, utter, or publish, with an intention to defraud any other person, any fictitious bill, note, or check, purporting to be the bill, note, or check, or other instrument in writing for the payment of money or property of some individual, when in fact there is no such individual in existence, with knowledge of the fictitious character of such instrument, should be imprisoned in the penitentiary for a certain period, was held in *Shirk v. People* (1887) 121 Ill. 61, 11 N. E. 888, to include only such instruments as are of the same class or kind as those mentioned, and not to include a contract in writing for the purchase of personal property, to

be delivered on a future date and paid for on delivery.

Under a statute providing for the punishment of any person who should falsely make or counterfeit any bank bill or note "purporting" to be issued by any bank, it was held in *State v. Hayden* (1844) 15 N. H. 355, that it was not necessary, to constitute the offense, that there should have been a bank actually in existence of the name in question. The court said: "The public and individuals may be defrauded as well by notes purporting to be issued by a bank which does not really exist, as by the bills of an incorporated institution; and there is as much reason for legislation in one case as in the other." To the same effect are *People v. Davis* (1839) 21 Wend. (N. Y.) 309, and *People v. Peabody* (1845) 25 Wend. (N. Y.) 472, decided under the New York statute, providing that every person having in his possession any forged or counterfeit negotiable note, bill, draft, or other evidence of debt "issued or purporting to have been issued" by any corporation or company, with intention to pass the same, should be subject to the punishment prescribed for forgery. See also, as to forgery of bank notes, *I. supra*.

III. Evidence.

Only questions as to evidence which are distinctive to, or more likely to arise in, the class of cases under consideration, are here treated, it being impossible, of course, within the scope of the annotation, to cover questions of evidence likely to arise in any case of forgery, whether by use of a fictitious name or otherwise.

Detectives or police officers who have made an investigation and attempted, without success, to find the party whose name purports to be signed to an instrument alleged to have been forged, may testify as to their inquiries and the result, to prove that the name is fictitious, the extent and nature of their investigation going only to the weight, and not to the competency of the evidence. *People v. Eppinger* (1894) 105 Cal. 36, 38 Pac. 558, later appeals in (1895) 109 Cal. 294, 41 Pac. 1037, and in (1896) 114

Cal. 350, 46 Pac. 350; *People v. Bernard* (1913) 21 Cal. App. 56, 130 Pac. 1063; *State v. Hahn* (1886) 38 La. Ann. 169 (detectives); *People v. Sharp* (1884) 53 Mich. 523, 19 N. W. 168 (sheriff).

So, the directory of the city or county in question is competent evidence to show that the name signed to an instrument alleged to have been forged is fictitious. *People v. Eppinger* (1894) 105 Cal. 36, 38 Pac. 558, later appeals in (1895) 109 Cal. 294, 41 Pac. 1037, and in (1896) 114 Cal. 350, 46 Pac. 350; *People v. Terrill* (1901) 133 Cal. 120, 65 Pac. 303; *People v. Laird* (1897) 118 Cal. 291, 50 Pac. 431; *State v. Hahn* (1886) 38 La. Ann. 169.

And testimony of officers or employees of the bank on which the instrument alleged to have been forged is drawn, that no person by the name of the purported maker has or ever did have an account there, or was a customer of the bank, is competent to prove that the name is fictitious. *Williams v. State* (1899) 126 Ala. 50, 28 So. 632; *Maloney v. State* (1909) 91 Ark. 485, 134 Am. St. Rep. 83, 121 S. W. 728, 18 Ann. Cas. 480; *People v. Eppinger* (1894) 105 Cal. 36, 38 Pac. 558, later appeals in (1895) 109 Cal. 294, 41 Pac. 1037, and in (1896) 114 Cal. 350, 46 Pac. 350; *People v. Bernard* (1913) 21 Cal. App. 56, 130 Pac. 1063; *State v. Hahn* (1886) 38 La. Ann. 169; *State v. Allen* (1893) 116 Mo. 548, 22 S. W. 792; *Rex v. Backler* (1831) 5 Car. & P. (Eng.) 118; *Rex v. Brannan* (1834) 6 Car. & P. (Eng.) 326; *Rex v. Ashby* (1860) 2 Fost. & F. (Eng.) 560.

A prima facie case that the name of the maker of a check is fictitious is made by proof that the name does not appear in the city directory of the place in question, that no such person kept an account in the bank upon which the check is drawn, and that detectives were unable to find such a person. *State v. Hahn* (1886) 38 La. Ann. 169, supra.

Testimony of the bank officers that no such person or firm as that of the purported maker kept an account at the bank may establish a prima facie case that the name is fictitious. *Peo-*

ple v. Eppinger (1894) 105 Cal. 36, 38 Pac. 558, supra.

To prove that the name signed to a check was that of a fictitious person, testimony of a clerk in the army agent department of the establishment on which the check was drawn, and not in the banking department, the check being drawn on a house which did business as bankers and army agents, that there was no person by the name signed who had an account there, and that, while he did not know the names of all the customers of the house, he did not know of anyone by that name in his department, and that he had inquired of the other clerks and was informed by them that there was no such person in the banking department, was held sufficient in *Rex v. Brannan* (1834) 6 Car. & P. (Eng.) 326, to make a prima facie case that the name was that of a fictitious person, and to call on the defendant to prove the contrary.

And testimony of a clerk in the banking house on which a check alleged to have been forged was drawn, that the bank had no customer of that name, and that he knew the village in which the check purported to be made, and that there was no one there by the name of the maker who would be likely to have an account with the bank, was held in *Rex v. Ashby* (Eng.) supra, to make a prima facie case that the name signed was that of a fictitious person.

It was held also in *Rex v. Backler* (1831) 5 Car. & P. (Eng.) 118, that, in the absence of evidence by the defendant on a trial for forgery, a prima facie case against him that the signature of the check alleged to have been forged was that of a fictitious person was made by evidence of the banking house on which it was drawn that no such person had an account there, or had a right to draw upon it. The court stated that drawing a check without funds would have been a fraud, and not a forgery, if it were proved that the signer was a real person, but, as indicated, considered the evidence as making a prima facie case that the name was fictitious.

Testimony of a witness that he made inquiry of the person who, the

defendant in an indictment for a forgery informed him, drew the check in question, and also of another person, at the instance of the defendant, and was unable to find anyone having the name signed to the check, was held competent in *Williams v. State* (1899) 126 Ala. 50, 28 So. 632, to prove that the name of the drawer of the check was fictitious.

To prove that the names of the maker and of the indorser of a note were those of fictitious persons, it was held in *People v. Jones* (1887) 106 N. Y. 523, 13 N. E. 93, that evidence was admissible of the means taken by the witness to find the parties, and of the result, as well as of the fact that he had looked over the assessment rolls of the town in which the defendant represented they resided, and found no such names.

And to prove that the signature to a certificate purporting to have been signed by a clerk of the district court was that of a fictitious person, testimony was held admissible in *People v. Marion* (1874) 29 Mich. 31, that the witness had personally known every clerk of the county and court in question, and that no such person was ever in that office, in connection with testimony by him as to what persons occupied the office at different periods.

Evidence of inquiries made by the prosecuting witness at the place of residence of the alleged acceptor of a bill of exchange, as shown on the bill, was held admissible in *Rex v. King* (1832) 5 Car. & P. (Eng.) 123, to prove that the acceptance was in the name of a fictitious person, although the inquiries were made by one who was a stranger in that place, the court stating that while this was not the most satisfactory evidence, nor that usually given in such cases, yet it was evidence, and that the question whether it was sufficient, in the absence of evidence on the part of the defendant, to prove that the signature was that of a fictitious person, was for the jury.

Where one is in possession of a check which is worthless, and which there is some evidence to show is signed in the name of a fictitious person, the officers of the bank on which

it is drawn and other business men of the county having testified that they never knew or heard of such a person, a duty devolves on the possessor of the check, when charged with having in his possession a forged check, signed in the name of a fictitious person, with intent fraudulently to utter the same, to offer some explanation of the manner in which he obtained possession and some evidence of the existence of the maker; in other words, while the prosecution assumes in the first instance the burden of proving a negative, namely, that no such person as the maker of the check existed, yet the presumption arises under the circumstances stated that the name is fictitious, and the defendant must introduce evidence to prove the contrary. *State v. Allen* (1893) 116 Mo. 548, 22 S. W. 792. In this case it was held that the evidence was sufficient to sustain a conviction, the testimony for the prosecution being as above indicated, and the defendant offering an unreasonable explanation of his method of obtaining possession of the check, and not introducing evidence to prove the existence of the maker, who he claimed was living on a farm within 10 miles from the place of trial.

And it was held in *People v. Gordon* (1910) 13 Cal. App. 678, 110 Pac. 469, that an instruction was properly refused, in a prosecution for forgery of a draft on the theory that the maker's name was fictitious, that the nonexistence of the maker of the draft must be proved beyond and to the exclusion of all reasonable doubt and to a moral certainty, and that if the jury had any reasonable doubt as to whether or not there was in existence anywhere in the world such an individual as the purported maker, on the date in question, they must resolve that doubt in favor of the defendant. The court said that the prosecution certainly was not required to prove, nor were the jury required to believe, beyond a reasonable doubt, that there was no such person in the world as the purported maker of the draft; but it was only necessary to show to a common certainty that there was no such person in existence in the vicini-

ty of and connected with the particular acts charged, in the place and county where jurisdiction accrued.

Testimony of a police officer that after diligent inquiry, including an examination of the directories of all the cities and towns of the county in question, he could find no such person as that of the purported signer of a check, and of the cashier and book-keeper of the bank at which it was payable that no such person had or ever had had an account there, was held sufficient, in *People v. Bernard* (1913) 21 Cal. App. 56, 130 Pac. 1063, to support a conviction on the theory that a fictitious name was signed to the check.

But to prove that the name signed was that of a fictitious person, it was held in *Lassiter v. State* (1906) 49 Tex. Crim. Rep. 532, 94 S. W. 233, that it was error to permit the tax collector to testify that the name in question did not appear on the tax rolls, the rolls themselves not being introduced in evidence. The court intimates that evidence in any form that the name did not appear on the tax rolls would be inadmissible, stating in effect that the fact that the name did not appear on the tax rolls would not be a circumstance tending to show that it was that of a fictitious person.

And on an issue whether a name signed to a check was that of a fictitious person, it was held reversible error in *People v. Lee* (1900) 128 Cal. 333, 60 Pac. 854, to admit in evidence the subpoena issued by the court in the proceedings, requiring the attendance as a witness of the purported signer of the check, and the sheriff's return, stating that after diligent search and inquiry he was unable to find the person named, the statute making the sheriff's return *prima facie* evidence of the facts stated therein not applying to proof by this method of such issues, which were in no way dependent upon or connected with the discharge of the sheriff's duty in serving the subpoena, and which the sheriff was not required officially to ascertain or declare.

It is for the jury to determine whether, under the evidence, the per-

son whose name appears signed to the instrument is a real or fictitious person; and if they find that the name is that of a fictitious person, the inference arises that the person who utters and publishes the instrument as true either forged the same, or knew it to be forged. *Maloney v. State* (1909) 91 Ark. 485, 134 Am. St. Rep. 83, 121 S. W. 728, 18 Ann. Cas. 480.

And from the facts that one in possession of a check bearing the name of a fictitious person utters it and that it is made payable to his order, the jury may infer an intent on his part to defraud, and that he himself forged it. *Williams v. State* (1899) 126 Ala. 50, 28 So. 632. It should be observed, however, that this rule does not apparently depend on the fact that the name signed is that of a fictitious person, and the point is not peculiar to the class of cases under consideration.

It has been held that although there is no allegation in the indictment that a name signed to an instrument which it is alleged is forged is that of a fictitious person, evidence is admissible that the name signed is fictitious, if the fictitious person is not the one defrauded. *Johnson v. State* (1895) 35 Tex. Crim. Rep. 271, 33 S. W. 231; *Chapman v. State* (1896) — Tex. Crim. Rep. —, 34 S. W. 621; *Davis v. State* (1897) 37 Tex. Crim. Rep. 218, 39 S. W. 296.

And it was held in *State v. Stegner* (1918) 276 Mo. 427, 207 S. W. 826, that, without allegations in an information charging forgery as to the fictitious character of the maker of the alleged false instrument, it was not error to admit evidence that the name signed was that of a fictitious person.

As to effect as evidence of previous assumption of fictitious name, see *Com. v. Costello* (1876) 120 Mass. 358, under I. *supra*.

IV. Miscellaneous.

The annotation does not purport to cover cases involving civil rights under the rule which regards a negotiable instrument payable to the order of a fictitious person as payable to bearer, although some of these cases may assume or recognize the principle that forgery may be committed by the

use of a fictitious name. See, for example, the following: *Jordan Marsh Co. v. National Shawmut Bank* (1909) 201 Mass. 397, 22 L.R.A.(N.S.) 250, 87 N. E. 740; *Harmon v. Old Detroit Nat. Bank* (1908) 153 Mich. 73, 17 L.R.A.(N.S.) 514, 126 Am. St. Rep. 467, 116 N. W. 617; *Coggill v. American Exch. Bank* (1847) 1 N. Y. 113, 49 Am. Dec. 310; *Shipman v. Bank of State* (1891) 126 N. Y. 318, 12 L.R.A. 791, 22 Am. St. Rep. 821, 27 N. E. 371; *Phillips v. Mercantile Nat. Bank* (1894) 140 N. Y. 556, 23 L.R.A. 584, 37 Am. St. Rep. 596, 35 N. E. 982; *Seaboard Nat. Bank v. Bank of America* (1908) 193 N. Y. 26, 22 L.R.A. (N.S.) 499, 85 N. E. 829; *Armstrong v. Pomeroy Nat. Bank* (1889) 46 Ohio St. 512, 6 L.R.A. 625, 15 Am. St. Rep. 655, 22 N. E. 866; *Snyder v. Corn Exch. Nat. Bank* (1908) 221 Pa. 599, 128 Am. St. Rep. 780, 70 Atl. 876; *Chism v. First Nat. Bank* (1896) 96 Tenn. 641, 32 L.R.A. 778, 54 Am. St. Rep. 863, 36 S. W. 387. So far as these cases appear distinctly to hold that forgery may be committed by the use of a fictitious name, they are cited elsewhere in the note.

Where a check was given for stolen cattle, the seller, who was a stranger to the buyer, receiving the check under a fictitious name as payee, it was held in *Meridian Nat. Bank v. First Nat. Bank* (1893) 7 Ind. App. 332, 52 Am. St. Rep. 450, 33 N. E. 247, 34 N. E. 608, that, whether or not his indorsement of the check in the fictitious name was a forgery, the indorsement was sufficient to transfer title to one who took it in good faith, relying on a previous certification.

An information charging one with falsely making a fictitious check purporting to be the check of an individual, when there was no such individual in existence, was held in *People v. Nishiyama* (1902) 135 Cal. 299, 67 Pac. 776, not open to the objection that it failed to negative the remote possibility that there might have been a bank, corporation, or copartnership by the name in question.

It was held in *People v. Gordon* (1910) 13 Cal. App. 678, 110 Pac. 469, that an information charging one with

feloniously uttering and passing a fictitious instrument in writing for the payment of money, whereas there was no such individual as the purported maker "then and there" in existence, was not subject to demurrer, on the ground that the words quoted were indefinite.

And an information charging the making of a fictitious check signed by an individual name, whereas "there was and is" no such individual, if objectionable as not stating with sufficient certainty and directness the time to which the expression "was and is" relates, it was held in *People v. Ellenwood* (1897) 119 Cal. 166, 51 Pac. 553, is subject only to demurrer, and if objection is not taken in this manner it is waived.

An allegation in an indictment for forgery, charging that the defendant fraudulently made a false instrument "purporting to be the act of another, to wit, the act of Clay Rollins, a fictitious person," was held in *Hocker v. State* (1895) 34 Tex. Crim. Rep. 359, 53 Am. St. Rep. 716, 30 S. W. 783, not an averment that the instrument purported to be that of a fictitious person, but to be merely descriptive in its use of the words "a fictitious person," of the person whose name was used; so that a variance was not created by the fact that the instrument set out did not purport to be the act of a fictitious person.

The rule that if the maker of a check intends it to be payable to a certain person, though describing him by a different name, his indorsement by that name is not a forgery, is supported by *State v. Anderson* (1910) 1 Boyce (Del.) 135, 74 Atl. 1097. But it does not appear in this case that the name of the payee was that of a fictitious person, the check being made payable to H. J. Anderson and being delivered by mistake, so it was claimed, to the defendant, Howard H. Anderson, who indorsed the payee's name on the check.

Such cases as *State v. Chance* (1910) 82 Kan. 388, 27 L.R.A.(N.S.) 1003, 108 Pac. 789, 20 Ann. Cas. 164, holding that, where one affixes to a

note a signature which he intends shall be regarded as that of another person, the act is not prevented from being forgery by the circumstance that the name is not correctly written, are, of course, distinguishable from the class of cases under consideration, and are not included in the note.

Forgery may consist in signing the name of a deceased person. *Billings v. State* (1886) 107 Ind. 54, 57 Am. Rep. 77, 6 N. E. 914, 7 Am. Crim. Rep. 188; *Henderson v. State* (1855) 14 Tex. 503; *Brewer v. State* (1893) 32 Tex. Crim. Rep. 74, 40 Am. St. Rep. 760, 22 S. W. 41; *Dreeben v. State* (1913) 71 Tex. Crim. Rep. 341, 162 S. W. 501.

In further illustration of the range of conditions upon which the crime of forgery may be predicated, attention is called, without attempting to cover this point, to the fact that there are cases supporting the view that forgery may be committed by making a false instrument in the writer's own name, with intent to defraud. See, for example, *Com. v. Wilson* (1889) 89 Ky. 157, 25 Am. St. Rep. 528, 12 S. W. 264; *Com. v. Baldwin* (1858) 11 Gray (Mass.) 198, 71 Am. Dec. 703; *Luttrell v. State* (1886) 85 Tenn. 232, 4 Am. St. Rep. 760, 1 S. W. 886; also *Ex parte Hibbs* (1886) 26 Fed. 421, set out under, I. *supra*. R. E. H.

MAYOR AND ALDERMEN OF THE CITY OF SAVANNAH,

Plff. in Err.,

v.

HAGAR R. BARNES.

Georgia Supreme Court — August 13, 1918.

(148 Ga. 317, 96 S. E. 625.)

Highway — abandonment.

1. A municipal corporation may, by abandonment, relinquish its control over a street which has been dedicated to it for public use. Where an easement has been acquired by grant, a mere nonuser, without further evidence of an intent to abandon it, will not constitute abandonment.

[See note on this question beginning on page 423.]

Deed — construction — rules.

2. In the construction of a trust deed, or a deed in the nature of a trust deed, due regard should be had to the intention of the parties; and the construction must be upon the whole deed, and not merely upon disjointed parts of it. Thus construed,

the deed to plaintiff in error conveyed to it merely an easement for a street.

[See 8 R. C. L. 1047.]

Evidence — sufficiency.

3. The evidence was sufficient to authorize the verdict, and the court did not err, for any of the reasons assigned, in refusing a new trial.

Headnotes by GEORGE, J.

ERROR to the Superior Court for Chatham County (Meldrim, J.) to review a judgment in favor of plaintiff in an action brought to enjoin the removal of her fence from a certain tract of land, and to have title to the premises decreed to be in her. *Affirmed*.

The facts are stated in the opinion of the court.

Messrs. Robert J. Travis and David S. Atkinson, for plaintiff in error:

No prescription will lie against the city.

Thornton v. Trammell, 39 Ga. 202;

Jackson v. Dougherty County, 99 Ga. 185, 25 S. E. 625; *Thompson v. Hart*, 133 Ga. 540, 66 S. E. 270; 3 Dill. Mun. Corp. ¶¶ 979, 1106; *Norrell v. Augusta R. & Electric Co.* 116 Ga. 313, 59 L.R.A.

101, 42 S. E. 466; *Augusta v. Burum*, 93 Ga. 68, 26 L.R.A. 340, 19 S. E. 820; *Langley v. Augusta*, 118 Ga. 590, 98 Am. St. Rep. 133, 45 S. E. 486; *Wade v. Cornelia*, 136 Ga. 89, 70 S. E. 880; *Kelsoe v. Oglethorpe*, 120 Ga. 951, 102 Am. St. Rep. 138, 48 S. E. 366; *Parsons v. Atlanta University*, 44 Ga. 529; *Savannah v. Bartow Invest. Co.* 137 Ga. 198, 73 S. E. 1095; *Robins v. McGehee*, 127 Ga. 431, 56 S. E. 461; *Black v. O'Hara*, 54 Conn. 17, 5 Atl. 598; *Flick's Estate*, 6 Kulp, 329; *San Francisco v. Bradbury*, 92 Cal. 414, 28 Pac. 803; *Hall v. Breyfogle*, 162 Ind. 494, 70 N. E. 883.

The fact that a street or alley has never been used by the public, but has been occupied by an individual, does not change the case.

Wallace v. Cable, 87 Kan. 835, 42 L.R.A.(N.S.) 587, 127 Pac. 5; *McQuillin*, Mun. Corp. § 1401; *Lexington v. Hoskins*, 96 Miss. 163, 50 So. 561; *Indianola Light, Ice & Coal Co. v. Montgomery*, 85 Miss. 304, 37 So. 958; *Phy v. Hatfield*, 135 Am. St. Rep. 905, and note, 122 Tenn. 694, 126 S. W. 105, 19 Ann. Cas. 374.

Where a party in possession enters with the knowledge that the land does not belong to her, prescription will never run in her favor.

Ellis v. Dasher, 101 Ga. 5, 29 S. E. 268; *Cowart v. Young*, 74 Ga. 694; *Hunt v. Dunn*, 74 Ga. 120; *Crawford v. Crawford*, 143 Ga. 310, 85 S. E. 192; *Compton v. Newton*, 129 Ga. 619, 59 S. E. 270; *Powell*, *Actions for Land*, ¶ 327.

Messrs. *Leo A. Morrissey*, *Alexander R. MacDonnell*, and *Walter C. Hart-ridge* for defendant in error.

George, J., delivered the opinion of the court:

In 1870, Dr. Louis A. Falligant owned a tract of land near the then southern border of the city of Savannah. This tract of land was surveyed into city lots. On October 20, 1870, Dr. Falligant conveyed to the city of Savannah the streets and lanes through said tract, as shown by the map of Southville, by which name he designated the tract. Among the streets conveyed by Dr. Falligant to the city was "western half of Price street, 25 feet and 6 inches wide." The deed to the city was duly recorded on November 9, 1870. In 1872, Dr. Falligant conveyed lot

No. 92 of the Southville division to Hagar Barnes (then Crittendon). This deed gave the dimensions of lot 92 as fronting 30 feet on Lamar avenue, with "the extension of Price street as the eastern boundary thereof." Price street was not then opened and used as a street. In 1872, Hagar Barnes inclosed lot No. 92 and the tract lying immediately east thereof and designated upon the map as Price street. She has been in the peaceable, undisputed, open, and notorious possession thereof from that date until this. In 1899, the city of Savannah concluded to open Price street, but it did not use the land conveyed for that purpose by Dr. Falligant, but, on the contrary, purchased land about 35 feet eastward, and used that for the purpose of opening Price street. Hagar Barnes purchased the strip immediately east of the tract conveyed by Dr. Falligant to the city, and lying between said tract and Price street as actually opened up. In December, 1915, the city of Savannah served notice on Hagar Barnes to remove her fences from the tract conveyed to it by Dr. Falligant as Price street; and she filed a petition in equity against the city, in which she prayed for injunction against the summary removal of her fences from the tract in question. She also prayed that title to the premises be decreed in her. She contended that the city had never used the tract of land for street purposes, but, upon the contrary, that the original plan to open Price street through "Southville division" was abandoned in 1899, and the street actually opened 35 feet to the eastward.

To this petition the defendant demurred generally and specially; one of the grounds of general demurrer being that the petition showed that the plaintiff, at the time she entered into possession of the premises in dispute, knew that the land in controversy had been conveyed to the defendant for a street, and that the plaintiff was a mere squatter. Another ground of the general demur-

rer was that the petition showed that the city's interest in the premises was not that of an easement, but a fee, with restrictions attached to its use, and that prescription will not run against the city. The general demurrers were overruled. By cross bill the city sought to recover the premises in dispute, relying upon the deed from Dr. Falligant to the city. The trial of the case resulted in a verdict for the plaintiff. Error is assigned upon certain rulings of the court in admitting and rejecting evidence, upon certain charges to the jury, and upon refusals to charge. Error is also assigned here upon exceptions pendente lite taken to the judgment overruling the general demurrer.

The case presents two controlling questions. The first involves a construction of the deed from Dr. Falligant to the city. The deed recites the offer of Dr. Falligant to the mayor and aldermen of the city of Savannah "to make to them a deed of dedication of certain streets and parts of streets," being parts of certain described tracts of land, upon condition that the city would pay to him a certain sum of money and complete certain work of grading the streets at the expense of the city. It further recites the reference of the offer to the committee on streets and lanes, and the recommendation of this committee "that Dr. Falligant's offer be accepted, viz., Dr. Falligant to give a full and complete deed to the city of all the streets and lanes named in his communication," upon the consideration therein expressed. The deed then undertakes to convey, according to a map attached, "all those portions of lot 7 . . . laid off as public streets or highways, forever" (describing the streets or highways in detail), "together with all and singular the houses, outhouses, edifices, buildings, stables, yards, gardens, liberties, privileges, easements, commodities, emoluments, hereditaments, rights, members and appurtenances whatsoever, thereunto belonging, and the reversion and re-

versions, remainder and remainders, rents, issues, and profits, and all the estate, right, title, interest, property and possession, claim and demand whatsoever, in law or in equity, of the party of the first part, of, in, or to the same, or any part or parcel thereof, with the appurtenances, to have and to hold the said streets and lanes . . . to the only use and behoof of the said party of the second part and their successors in office, for the purpose of public highways forever, and to and for no other use, intent, or purpose whatsoever." The consideration recited is \$750, to be paid in city bonds. The grantor had expended, according to his offer to the city, approximately \$1,500 in grading the lots and streets in the Southville division. About one half of this amount was used in grading the streets. It was contemplated that the city would so extend its boundaries as to include within its limits the Southville division, and the cost of grading the streets in the division, and already paid by the grantor, was to be thus repaid him.

It is insisted by plaintiff in error that the deed merely specifies the use or purpose for which the land is granted to the city, and that the purpose expressed does not qualify the estate granted, but simply limits the use for which the land is to be held, and that the property does not revert to the grantor or to the abutting landowner upon a discontinuance of the use. In the construction of this deed the technical rules of the common law are not to be applied, but due regard should be had to the intention of the parties. The construction must be reasonable, and agreeable to the common understanding. The construction must be on the whole deed, and not merely upon disjointed parts of it. In as-
Deed—
construction—
rules.
certaining the intention of the parties, the recitals contained in the deed, the contract, the subject-matter, the object, purpose, and the nature of the restrictions or limitations, and the attend-

ant facts and circumstances of the parties at the time of the making of the deed, are to be given consideration. *Caldwell v. Hammons*, 40 Ga. 342, 344; *Thurmond v. Thurmond*, 88 Ga. 182, 14 S. E. 198 (1); *Bray v. McGinty*, 94 Ga. 192, 21 S. E. 284; *Georgia & F. R. Co. v. Swain*, 145 Ga. 817, 90 S. E. 44. We are of the opinion that the interest or estate conveyed by the deed was an easement for a street; and our conclusion is that the court did not err in overruling the general demurrer to the plaintiff's petition, nor in charging or refusing to charge the jury, as set out in several grounds of the amended motion, as to the effect of the deed. This ruling also disposes of certain objections to the admission of evidence. If it be granted that some of the evidence admitted was irrelevant and immaterial, no possible harm could have resulted to the defendant in error, in view of the construction here given the deed from Dr. Falligant to the city.

The second question is: If the interest or estate conveyed by Dr. Falligant to the city was an easement, may such an easement be destroyed by abandonment or adverse user? Counsel for the plaintiff in error insist that, inasmuch as prescription does not run against a municipal corporation in regard to land held for the benefit of the public where the land has been offered to a municipality for use as a public street, and the offer to dedicate has been accepted, and the dedication thereby made complete, no adverse possession of the street by a private individual can ripen into a prescriptive title, and that the doctrine of abandonment does not apply. It is declared by the Civil Code, § 3644, that "an easement may be lost by abandonment, or forfeited by non-user, if the abandonment or nonuser continue for a term sufficient to raise the presumption of release or abandonment."

This section has been held to apply to a municipal corporation as well as to an individual, in two

cases. *Kelsoe v. Oglethorpe*, 120 Ga. 951, 102 Am. St. Rep. 138 (3), 48 S. E. 366; *Savannah v. Bartow Invest. Co.* 137 Ga. 198, 204, 72 S. E. 1095. It is said that this ruling was unnecessary in the cases cited. A careful reading of the cases would seem to bear out this assertion; but upon consideration we are satisfied that the rule announced is the true one, although there are decisions elsewhere to the contrary. It is, of course, settled by our decisions that prescription will not run against a municipality with respect to lands held by it for public purposes. It is also decided, in at least three cases, that where a municipality owns a mere easement prescription will not run against it. See *Augusta v. Burum*, 93 Ga. 68, 26 L.R.A. 340, 19 S. E. 820; *Langley v. Augusta*, 118 Ga. 590, 98 Am. St. Rep. 133 (13), 45 S. E. 486; *Wade v. Cornelia*, 136 Ga. 89, 90, 70 S. E. 880. While prescription does not run against a municipality with respect to land held by the municipality for public use, it by no means follows that the municipality may not, by voluntary abandonment, relinquish its control over streets dedicated to its use by the public. In *Norrell v. Augusta R. & Electric Co.* 116 Ga. 313, 315, 59 L.R.A. 101, 42 S. E. 466, it seems to have been recognized that the doctrine of abandonment applies alike to municipal corporations and to individuals. In 1 R. C. L. 4, it is said: "It is not the individual alone who may abandon that which is his. Public rights, such as the easement of passage which the public has in respect to a highway, may be lost by abandonment."

In 1 C. J. 11, it is said: "Public as well as private rights, it seems, are within the rule, where persons entitled to enforce them have abandoned them."

See also *Derby v. Alling*, 40 Conn. 410; *Seaboard Air Line R. Co. v. Sikes*, 4 Ga. App. 7, 60 S. E. 868 (4).

It is, however, true that an easement acquired by grant, as in this

case, cannot be lost by a mere non-user, without further evidence of an intention to abandon; and this rule is especially true with respect to an easement held by a municipality for the benefit of the public. Where an easement is acquired by mere user, the doctrine of extinction by mere nonuser may in reason apply; but where an easement is acquired by grant, the doctrine of extinction by nonuser should not apply. In the latter case there must be an actual

**Highway—
abandonment.**

adverse user by the owner of the land servient, or other and further evidence of an intention to abandon. In this case the plaintiff, the owner of the land on which the proposed extension of Price street abutted, was not only in the actual and adverse possession of the land in dispute, but the city had actually opened Price street 35 feet east of the tract of land conveyed by Dr. Falligant to the city to be used for that purpose. The city never took possession of the tract of land in dispute in this case, and did not for forty-five years demand possession of the same. Upon these facts, and others not recited here, the jury was authorized to find that the city had abandoned Price street as de-

scribed in the deed from Dr. Falligant to the city, and that the plaintiff was entitled to the relief prayed against it. On the doctrine of abandonment as applied to an easement acquired by grant, see note to *Phy v. Hatfield*, 135 Am. St. Rep. 888, 898. Abandonment is distinguished from sale, gift, conveyance, etc., 1 C. J. 5 (2), and cases there cited.

Under the decision in *Robins v. McGehee*, 127 Ga. 431, 56 S. E. 461 (5), the street never having been actually opened up or used by the municipality as a public street, the plaintiff was entitled to an injunction against the city, enjoining it from summarily removing her fences; and this would be true, even though the city owned in fee simple the land inclosed by the plaintiff. The rulings complained of upon the main questions presented by this record were in accordance with what is said above, and none of the assignments of error will require a reversal.

Judgment affirmed.

All the Justices concur.

Petition for rehearing denied September 14, 1918.

ANNOTATION.

Loss of easement by adverse possession or nonuser.

- I. Introductory, 423.
- II. Nonuser without adverse possession, 423.
- III. Nonuser and adverse possession, 425.
- IV. What constitutes adverse possession, 425.

I. Introductory.

It is intended in the present annotation to review the recent cases discussing the loss of an easement by adverse possession or nonuser. The earlier cases are collected in the annotation in 1 A.L.R. 884.

II. Nonuser without adverse possession.

The rule laid down in the original annotation that, where an easement

has been created by grant, deed, or reservation, a mere nonuser of the easement will not extinguish it, has been sustained by several recent decisions. *Western U. Teleg. Co. v. Louisville & N. R. Co.* (1918) — Ala. —, 81 So. 44; *Parker v. Swett* (1919) — Cal. App. —, 180 Pac. 351; *SAVANNAH v. BARNES* (reported herewith) ante, 419; *Perry v. Wiley* (1918) 285 Ill. 25, 120 N. E. 455; *Morris v. Daniel* (1919) 183 Ky. 780, 210 S. W. 668; *Henderson v. Le Duke* (1920) — Tex. Civ. App. —, 218 S. W. 655.

"An easement created by express grant cannot be lost by nonuser. It can only be extinguished by hostile

adverse possession for the statutory period." *Perry v. Wiley* (1918) 285 Ill. 25, 120 N. E. 455.

So, in *Western U. Teleg. Co. v. Louisville & N. R. Co.* (Ala.) *supra*, rehearing denied 1919, the court said: "Mere nonuser of a right of way or other easement, acquired by grant or condemnation, however long continued, will not of itself work an abandonment and forfeiture of the right. Such nonuser must be accompanied by an intention to abandon, and this intention must be clearly deducible from the declarations or conduct of the claimant, or from the facts and circumstances incidental to his non-user."

In *Morris v. Daniel* (Ky.) *supra*, the court, discussing the effect of a non-user of an easement, said: "It is well settled that, where a right to a roadway is vested by grant or judgment in a partition proceeding, all subsequent purchasers who hold under the grant or judgment are bound by the road reservation, and the servient estate cannot avoid the burden by pleading and proof of nonuser of the easement acquired by the grant, or in any manner, except by adverse holding for the statutory period."

In *Parker v. Swett* (1919) — Cal. App. —, 180 Pac. 351, it was held that the neglect of the plaintiff for twenty-five years to exercise his right to lay a pipe line on a right of way acquired by grant was not an abandonment of the easement, since mere nonuser, no matter of what duration, cannot, in the absence of a clear intention of abandonment, work a loss of the easement.

An easement of a roadway the grant of which did not place any restrictions as to use in a special way, and did not provide for forfeiture or termination if the full width was not used, was not shown to be abandoned, so as to predicate a loss by adverse possession, by the fact that, because of the destruction of a bridge across a branch on the right of way, the road was not used by wagons where it continued to be used as a footpath. *Henderson v. LeDuke* (1920) — Tex. Civ. App. —, 218 S. W. 655.

In the reported case (*SAVANNAH v. BARNES*, ante, 419) the question arose whether a municipal corporation had relinquished its control over a street which had been dedicated to the public use. The court reaffirmed the doctrine that mere nonuser of an easement which has been acquired by grant does not work a loss thereof.

It has also been held that an implied easement may not be defeated by a mere nonuser, in the absence of sufficient evidence of intention to abandon it. *Williamson v. Salmon* (1918) 105 Misc. 485, 173 N. Y. Supp. 617.

However, an easement may be extinguished by nonuser without adverse possession when the nonuser is coupled with other acts evidencing an intention to abandon. *Babcock v. Gregg* (1918) 55 Mont. 317, 178 Pac. 284; *Mathews Slate Co. v. Advance Industrial Supply Co.* (1918) 185 App. Div. 74, 172 N. Y. Supp. 830; *Eidlitz v. French* (1918) 105 Misc. 163, 173 N. Y. Supp. 646. See also *Fullerton v. Randall* (1918) 52 N. S. 354. And see *McClure v. Monongahela Southern Land Co.* (1919) 263 Pa. 368, 107 Atl. 386.

"The abandonment of an easement or a profit a prendre is not established by a mere cesser to use, but, when accompanied by other circumstances showing an intention to abandon, long disuse will establish it." *Mathews Slate Co. v. Advance Industrial Supply Co.* (1918) 185 App. Div. 74, 172 N. Y. Supp. 830.

In *Babcock v. Gregg* (Mont.) *supra*, it was held that an easement to maintain an irrigation ditch across the lands of another was lost by a non-user, following the act of the owner of the lands in completely filling the ditch, without objection from the owner of the easement, who did not thereafter acquire a right of way for a new ditch.

Where, for a period of years, the owners of an easement in and over the lands of another practically abandoned it, and subsequently acquiesced in an improvement of the land which obliterated a portion of the lane to which the right of way had been confined, the court held that, in view

of the practical abandonment of the easement, coupled with acquiescence in the acts of the owner of the premises in destruction of the easement, and evidence that a public street had recently been opened which would answer the purposes of the easement, the owners thereof were estopped from reoccupying the abandoned portion of the right of way. *Eidlitz v. French* (1918) 105 Misc. 163, 173 N. Y. Supp. 646.

In *McClure v. Monongahela Southern Land Co.* (Pa.) supra, wherein it appeared that one having an easement to mine coal in place, after satisfying himself that all the coal of value to him had been removed, chose to abandon the premises, and thirty-three years later sought to reassert his abandoned rights, it was held that the easement was extinguished by such act of abandonment.

In *Fullerton v. Randall* (1918) 52 N. S. 354, the court said that the non-user of a passway for a long period of time, coupled with a joinder with the owner of the lands in the erection of a fence across the passway, were serious difficulties in the way of persons seeking to establish their right to an easement therein.

III. Nonuser and adverse possession.

While nonuser does not of itself work the loss of an easement, nonuser coupled with adverse possession by another for the prescriptive period will terminate it. Thus, in the reported case (*SAVANNAH v. BARNES*, ante, 419), the neglect of a city to exercise a right of way granted to it, for a period of more than forty years, during which time land lying within the grant is inclosed and openly and notoriously occupied by another, is held to be sufficient evidence of abandonment to prevent the city from thereafter obtaining an injunction to remove the fencing from across the right of way.

IV. What constitutes adverse possession.

An adverse possession sufficient to extinguish an easement must be wholly inconsistent with the right to enjoy the easement, and amount in effect to

a disseisin or ouster. See subdivision III. a, of the previous annotation. This rule finds support in several recent decisions. *Parker v. Swett* (1919) — Cal. App. —, 180 Pac. 351; *SAVANNAH v. BARNES* (reported herewith) ante, 419; *Perry v. Wiley* (1918) 285 Ill. 25, 120 N. E. 455; *Morris v. Daniel* (1919) 183 Ky. 780, 210 S. W. 668; *Brookshire v. Harp* (1919) — Ky. —, 216 S. W. 379.

In *Morris v. Daniel* (1919) 183 Ky. 780, 210 S. W. 668, supra, the court, discussing the extent to which a hostile use must go to establish a right by prescription, said: "Nothing less than an adverse and hostile use of the servient estate, wholly inconsistent with the right of the owner of the easement, will start the Statute of Limitation running, which will, when the period has elapsed, extinguish the right. Certainly nothing short of the continuous adverse use for the statutory period will establish a right by prescription in the adverse claimant."

In order that the Statute of Limitations may run against the right of the owner of an easement, it has been said that there must be definite and positive evidence of an adverse claim and an adverse holding. And where express recognition of the rights of the holder of the easement has been made, such acknowledgment is contrary to any claim of adverse possession. *Parker v. Swett* (Cal.) supra.

The act of an adjoining landowner in using the easement of another in a carriageway for a short time, which use was discontinued on the request of the owner of the easement, has been held to be insufficient evidence of adverse user to extinguish the easement. *Perry v. Wiley* (1918) 285 Ill. 25, 120 N. E. 455.

In *Brookshire v. Harp* (Ky.) supra, an occasional locking of gates during the wet seasons of the year, across a passway in which there was an implied easement of a right of way, was held to be insufficient to constitute adverse possession. The court said: "Such obstructions were temporary only, and did not in any sense constitute an appropriation of plaintiffs' property in the easement, nor was it

such an adverse holding as to eventually bar the right to the easement. . . . To accomplish such a result the alleged adverse user must be of the same character as is required to obtain title to real estate, i. e., it must be notorious, continuous, adverse, and exclusive for the statutory period."

In the reported case (*SAVANNAH v. BARNES*, ante, 419), it was held that the open and notorious occupancy of land lying within a right of way granted to a municipality, and the erection of fencing inclosing such land, which inclosure existed for over forty years,

was sufficient evidence of adverse possession to entitle the possessor to an injunction, restraining the city from removing the fences across its right of way.

However, a private easement of passage over a purported street will be lost by nonuser and adverse possession, where the right of passage has not been asserted for over sixty years, and for the same period of time passage has been prevented by fences and buildings. *Stillman v. Olean* (1920) 228 N. Y. 322, 127 N. E. 267.

R. E. B.

STATE OF NORTH CAROLINA

v.

FRED SHOAF, Appt.

North Carolina Supreme Court — April 7, 1920.

(— N. C. —, 102 S. E. 705.)

Sunday — place selling wieners and sandwiches as restaurant.

1. Serving wieners and egg sandwiches to persons occupying stools in front of a counter is within an exception in a Sunday law of restaurants or cafés furnishing meals to actual guests.

[See note on this question beginning on page 428.]

Definition — joint.

2. A "joint" is usually regarded as a place of meeting or resort for per-

sons engaged in evil and secret practices of any kind.

APPEAL by defendant from a judgment of the Superior Court for Forsyth County (Ray, J.) convicting him of unlawfully and wilfully exposing goods for sale and keeping open his place of business on Sunday in violation of law. *Reversed.*

Statement by Walker, J.:

Defendant was charged with the offense of "unlawfully and wilfully exposing for sale his goods and keeping open his place of business on Sunday," in violation of Public Local Laws of 1919, chap. 320, which reads as follows, omitting immaterial parts thereof: "No person, firm or corporation in Forsyth county shall expose for sale, sell or offer for sale on Sunday, any goods, wares or merchandise within four miles of the corporate limits of any incorporated town or city; and no store, shop, or other place of busi-

ness in which goods, wares or merchandise of any kind are kept for sale shall keep open doors from 12 o'clock Saturday night until 12 o'clock Sunday night: Provided, that this act shall not be construed to apply to hotels or boarding houses, or to restaurants or cafés furnishing meals to actual guests, where the same are not otherwise prohibited by law from keeping open on Sunday."

The only witness was E. E. Wooten, who testified: "I know Fred Shoaf, the defendant. He runs what is called a 'wiener joint' at

Hanestown, a village about 3 miles west of Winston-Salem. I have seen defendant selling lunches, wieners, and egg sandwiches on Friday night, Saturdays, and Sundays. I did not take the names of the people who bought from him. I saw him selling these things on two different Sundays within the last six months at Hanestown, in Forsyth county. He had no tables in his place, but had a counter with stools along in front of it, and his customers occupied those stools while eating."

The place at which defendant sold these meals, or lunches, was within 2 miles of the corporate limits of Winston-Salem. At the close of the evidence the defendant moved for judgment of nonsuit. Motion denied, and he excepted. He was convicted, and appealed from the judgment.

Messrs. W. T. Wilson and J. B. Craver for appellant.

Messrs. James S. Manning, Attorney General, and Frank Nash, Assistant Attorney General, for the State:

Sunday laws such as the one in question are constitutional.

State v. Williams, 26 N. C. (4 Ired. L.) 400; State v. Brooksbank, 28 N. C. (6 Ired. L.) 74; Rodman v. Robinson, 134 N. C. 507, 65 L.R.A. 682, 101 Am. St. Rep. 877, 47 S. E. 19; State v. Medlin, 170 N. C. 682, 86 S. E. 597.

Walker, J., delivered the opinion of the court:

The facts in this case bring it directly within the purview of the exemption, and not within the prohibition of the statute, being excepted from it by the proviso.

Sunday—place selling wieners and sandwiches as restaurant.

The terms "restaurant" and "café," in common parlance, and, we think, as used in the statute, are substantially synonymous. A restaurant is generally understood to be a place where refreshments, food, and drink are served. Whether they are served to guests seated at a table or on a stool at a counter does not affect the definition, that being merely a detail in the operation of the restaurant. The evidence shows that the defendant had no tables in

his place, but had a counter with stools arranged along in front of it, and to the guests seated on these stools he sold lunches, wieners, and egg sandwiches. This, it seems to us, was strictly a restaurant business within the approved definition as shown in the dictionaries, and in 7 Words and Phrases, p. 6180. While the word "restaurant" has no strictly defined meaning, it seems to be used indiscriminately as a name for all places where refreshments can be had, from a mere eating house and cookshop to any other place where eatables are furnished to be consumed on the premises. Richards v. Washington F. & M. Ins. Co. 60 Mich. 420, 27 N. W. 586; Lewis v. Hitchcock (D. C.) 10 Fed. 4. It has been defined as a place to which a person resorts for the temporary purpose of obtaining a meal or something to eat (People v. Jones, 54 Barb. 311, 317), and a restaurant keeper as a caterer, who keeps a place for serving meals, and provides, prepares, and cooks raw materials to suit the taste of his patrons (Re Ah Yow [D. C.] 59 Fed. 561, 562; Swift & Co. v. Tempelos, 178 N. C. 487, 7 A.L.R. 1581, 101 S. E. 8; 7 Words & Phrases, pp. 6180 & 6181). The "wiener" of the witness is a small sausage of unknown content, and is here commonly called a "hot dog," as stated in the case. To a great many people it is a palatable and appetizing article of food, notwithstanding the implication attaching to one of its names. So far as the case shows, the defendant's place of business was conducted in an orderly manner, and he sold nothing but simple food to his customers. He was conducting a restaurant, and is fully protected by the words of the proviso exempting that class of business from the operation of the statute.

The witness called the place a "wiener joint," but there is nothing in this case to show that to be a just or correct designation of it, if it was meant by the term to imply that the restaurant was not

Definition—
joint.

kept in a decent or orderly manner. A "joint" is usually regarded as a place of meeting or resort for persons engaged in evil and secret practices of any kind, as a tramps' joint, such a place as is usually kept by Chinese for the accommodation of persons addicted to the habit of opium smoking, and where they are furnished with pipes, opium, etc., for that purpose, and called an opium joint, or, generally speaking, a rendezvous for persons of evil habits and practices. If, in this sense, the words were intended as an opprobrious epithet, the evidence utterly fails to disclose that this place was not properly conducted in every way, or that there has been the slightest disturbance of the peace and quiet of the community by reason of any disorderly or im-

proper conduct therein. So far as appears, there was absolutely nothing done that would mar in the least the proper and peaceful observance of the Sabbath, no more than there would be in a well-conducted hotel or in one's home. Food and drink are necessary to the sustenance of man, and the statute was not intended to prohibit the furnishing of them to patrons when there is, in no other respect, a violation of the law alleged or shown.

It was error to submit the case to the jury and to refuse the nonsuit. The verdict will be set aside, and judgment of nonsuit will be entered in the Superior Court, which shall have the force and effect, as provided by statute (Acts of 1913, chap. 73; Gregory's Supp. § 3265a), of a verdict of not guilty.

ANNOTATION.

What is "restaurant," "café," or "victualing house" within Sunday law.

As used in a Sunday law, either by way of prohibition or of exception to a prohibition, the terms "restaurant," "café," and "victualing house" seem to have the same meaning, and to intend an establishment where food is sold to the public for consumption on the premises. *Com. v. London* (1912) 149 Ky. 372, 149 S. W. 852; *McAfee v. Com.* (1917) 173 Ky. 83, L.R.A.1917C, 377, 190 S. W. 671; *Com. v. Meckel* (1915) 221 Mass. 70, 108 N. E. 917; *State v. Jacques* (1897) 69 N. H. 220, 40 Atl. 398; *Burry's Appeal* (1888) 5 Chester Co. Rep. (Pa.) 481; *Reg. v. Albertie* (1900) 3 Can. Crim. Cas. 356, 20 Can. L. T. Occ. N. 123; *Rex v. Sabine* (1904) 8 Can. Crim. Cas. 70; *Rex v. Stinson* (1905) 10 Can. Crim. Cas. 17; *Rex v. Weatherall* (1908) 18 Can. Crim. Cas. 372; *Rex v. Wells* (1911) 24 Ont. L. Rep. 77, 18 Can. Crim. Cas. 377. And see the reported case (*STATE v. SHOAF*, ante, 426).

The reported case (*STATE v. SHOAF*) seems to be the only decision passing on the term "café," as used in an exception to a Sunday law. Holding that an establishment where "wieners" and sandwiches are sold is within

the exception, the court says that the term "café" is synonymous with "restaurant."

The Sunday law involved in *Com. v. London* (1912) 149 Ky. 372, 149 S. W. 852, having been held to except impliedly restaurants and the like, it was held that the business of selling bread, butter, sandwiches, chocolate, and coffee came within the exception. The court said: "In disposing of these articles, appellees were doing the business of a restaurant keeper; they are charged in the petition, however, of keeping a confectionery, but the petition also specifically names the articles which they sold, and which we think, for all intents and purposes, would class them as restaurant keepers."

In *State v. Jacques* (1897) 69 N. H. 220, 40 Atl. 398, it was held that the keeping open of a shop on Sunday for the sale of food and ice cream to be eaten on the premises was the keeping open of a place for the reception of company, within the meaning of a statute which provided as follows: "No person shall keep his shop, warehouse, cellar, restaurant, or workshop

open for the reception of company, or shall sell or expose for sale any merchandise whatsoever on the Lord's day; but this section shall not be construed to prevent the entertainment of boarders, nor the sale of milk, bread, and other necessities of life, nor drugs and medicines."

The business of conducting a restaurant or victualing house has been held to include the sale of articles of refreshment incident to that business, which would be a violation of the Sunday law if not made as an incident to a permitted business.

Thus, in holding that the fact that a confectioner puts a few tables in his shop, and places a few articles of food on his menu, and takes out a municipal victualing license, does not privilege him to carry on his business as a confectioner, it was said in *Rex v. Sabine* (1904) 8 Can. Crim. Cas. 70, that a bona fide victualer could make sales of confectionery in connection with his business. See to the same effect, *Rex v. Weatheral* (1908) 18 Can. Crim. Cas. 372.

So, it was held in *Reg. v. Albertie* (1900) 3 Can. Crim. Cas. 356, 20 Can. L. T. Occ. N. 123, under a statute exempting victualing houses, that the serving of ice cream to persons by the keeper of a victualing house did not violate the Sunday law. The court said: "A victualing house is defined as 'a house where persons are provided with victuals, but not lodgings.' Victuals are defined as comprising everything that is food for man, and everything which, when mixed with something else, constitutes such food."

The victualing-house keeper and innkeeper provide for the public, the first, food or victuals, the second, food, victuals, and lodging. Each is equally necessary to the community, not alone for six days in the week, but for the whole seven days. Whether the customer is rich or poor, a boarder by the day or week, or a casual visitor, I think, can make no difference. If, then, it be lawful for an eating-house keeper to carry on his ordinary business on the Lord's day as a work of necessity, then I am of the opinion that on the question as to whom he shall supply or what he shall

supply, so long as it can fairly be considered food or victuals in any one of their numberless variations, the keeper is not punishable for a breach of the Lord's Day Act. If he is protected in supplying meals, he is protected in suiting the taste of his customers as to the article of food required. As I have said before in an earlier part of this opinion, I am satisfied from the evidence that the defendant was carrying on, on Sunday the 25th of June, the date of his alleged offense, strictly and exclusively his business as a victualer. His candy department, if the small stock he carried can be so described, was closed to the public. I am of the opinion, under all the circumstances of the case, that the supplying the constables with the ice cream was the supplying a refreshment in the nature of a light meal in the ordinary course of his business as an eating-house keeper or a victualing-house keeper, and was not an offense under the statute."

See also *Rex v. Wells* (Ont.) *infra*, as to the right to sell cigars. But in *Rex v. Stinson* (1905) 10 Can. Crim. Cas. 17, the court held that the act was violated by serving ice cream otherwise than with bona fide meals. In discussing what would be termed a restaurant, it was said: "The modern term 'restaurant' is considered equivalent to victualing house. Reference to the Imperial and other dictionaries will establish this fact. In the Imperial Dictionary the definitions are as follows: 'Restaurant—a commercial establishment for the sale of refreshments; a house where cooked food and liquors are sold; an eating house.' 'Victualing house—a house where provision is made for strangers to eat; an eating house.' The same test must be applied whether the establishment be called restaurant or victualing house. Looking at the act, the only test applicable is 'necessity.' If the keeper of the premises is selling meals he is performing a work of necessity under the decisions. A meal means food and drink. But, it is said, to quench thirst is as much a matter of necessity as to satisfy hunger. If the keeper can sell food as a necessity, why cannot he sell drink? Drink in

the shape of liquor is regulated by the Liquor Acts, and need not be considered. Drink not in the shape of liquor need not necessarily be taken with food. Admitting this to be the case, can the articles, the sale of which is complained of here, be said fairly to be necessary? That they are grateful and comforting does not mean that they are necessary, or that people require them. They are not meals in the fair, ordinary sense of the word. On the whole I have come to the conclusion that I am not called upon to change the view I have acted upon, and that is that, where bona fide meals are supplied, the act does not prohibit."

To constitute a sale of food or refreshment an incident of a restaurant business, it must be sold for consumption on the premises. Thus, in *Rex v. Wells* (1911) 24 Ont. L. Rep. 77, 18 Can. Crim. Cas. 377, it was held that, if a restaurant keeper makes sales on Sunday of cigars and soft drinks to be taken off the premises, the statute is violated. The court said: "A restaurant is defined as 'a place where refreshments and meals are provided to order, especially one not connected with an hotel—the dining room of an hotel conducted on the European plan—an eating house or café.' The restaurant keeper may supply meals and refreshments. The refreshments may be either food or drink, or both, and I can see no reason why he may not sell a cigar as an incident to a meal; but it is of the essence of his calling that what he sells is sold for consumption on the premises. He may on week days have an ancillary or collateral business as a merchant and trader, and sell as merchandise, candy, cigars, etc., etc.; but, as to this, he is a merchant or trader, and must obey the Sunday laws, which apply to all merchants and traders. He is none the less a merchant because he is also a restaurant keeper." So, in *Com. v. Meckel* (1915) 221 Mass. 70, 108 N. E. 917, the court said: "Assuming that the defendant, as a common victualer, has the right, although not required by law, to keep open her place of business on the Lord's day (Rev. Laws, chap. 102, § 8), she can keep it

open as such only for the purpose of supplying her customers with food to be eaten on the premises. The common victualer, in keeping an open shop or doing work or business, except for the purposes permitted by law, is like any other person who violates the provisions of the Lord's Day Statute. The keeper of such a place cannot sell on that day any kind of food to anyone, if it is sold to be taken and carried away." In *McAfee v. Com.* (1917) 173 Ky. 83, L.R.A.1917C, 377, 190 S. W. 671, the evidence showed that the defendant was the keeper of a confectionery or small grocery store, where he sold soft drinks, tobacco, canned goods, cheese, crackers, fruits, and candies. The court said: "We do not think that McAfee was engaged in the exclusive business of keeping a restaurant, or in the exclusive business of furnishing meals or food for the accommodation of the public. On the contrary, we think his business was that of a small grocer or confectioner, engaged in the business of keeping a store at which any person who wanted to buy tobacco, cigars, canned goods, or any of the articles mentioned in the agreed facts could obtain them on Sunday as well as on other days. It may be conceded that a person who was hungry might get from McAfee cheese or crackers, or a can of oysters or sardines, and so he might get these at any ordinary grocery establishment where such articles are usually sold in connection with other things kept in such a store."

In *Burry's Appeal* (1888) 5 Chester Co. Rep. (Pa.) 481, it was held, under a Pennsylvania statute which prohibited the performance of any worldly employment or business on Sunday, except works of necessity or charity, with the proviso that it should not prohibit "the dressing of victuals" in bakehouses, lodging houses, inns, and other houses of entertainment for the use of sojourners, travelers, or strangers, that a parlor where the owner of a bakeshop sold bread, cake, pies, and ice cream did not come within the exception to the statute. The court said: "But a bakehouse is not a place for

entertainment of sojourners, travelers, or strangers. This is evident from the Act of 1786, in which the exception was as to private families, bakehouses, or lodging house, inns, or other places of entertainment, showing, by the use of the word 'or' that bakehouses were not regarded as places of public entertainment, but were classed with private families. It is not pretended that the defendant entertains sojourners, travelers, or strangers, or that he furnishes the ordinary victuals for customers. In his testimony he

says: 'We have no regular boarders.' His entertainment is simply in the way of refreshment, which was expressly authorized by the Act of 1705, and is as plainly prohibited by the Act of 1794, by the omission of such exceptions. We are clearly of the opinion that the business conducted by the defendant, that is, the sale of ice cream, cakes, pies, lunches, etc., is a worldly employment, prohibited by the Act of 1794, and not within any of the exceptions to the act." E. C. B.

E. M. FOSTER et al.,

v.

A. H. ROBERTS et al., Appts.

Tennessee Supreme Court — March 27, 1920.

(— Tenn. —, 219 S. W. 729.)

Tax — exemption — state bonds.

1. The exemption by a state of its own bonds from taxation is an act of sovereignty not within a constitutional provision that all property shall be taxed.

[See note on this question beginning on page 436.]

Judgment — stare decisis — when applicable.

2. The rule of stare decisis does not apply in case of an erroneous decision under which no property rights

have become vested nor in which acquiescence has had the effect of establishing rules of conduct.

[See 7 R. C. L. 1001, 1008.]

APPEAL by defendants from a decree of the Davidson Chancery Court (Newman, J.) in favor of complainants in a suit to restrain defendants from offering for sale or disposing of Victory Bonds authorized by statute as tax-free securities. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Frank M. Thompson, Attorney General, and E. J. Smith, for appellants:

Article 2, § 28, of the Constitution of Tennessee, does not make invalid an act of the legislature which provides for the issuance of state bonds to be exempt from state, county, and city taxation.

Wheeler v. Weightman, 96 Kan. 50, L.R.A.1916A, 846, 149 Pac. 977; *Vertrees v. State Bd. of Elections*, 141 Tenn. 645, 214 S. W. 737; *Hill v. Roberts*, — Tenn. —, 217 S. W. 826; 1 *Cooley*, Taxn. 8d ed. 343.

Law is presumed to be made for

the subject or citizen only, and the sovereign is not reached by the Constitution or by a statute, unless therein named, or by necessary implication.

Ransom v. Rutherford County, 123 Tenn. 1, 130 S. W. 1057, Ann. Cas. 1912B, 1356; *Hill v. Roberts*, — Tenn. —, 217 S. W. 826; *Morristown v. Hamblen County*, 136 Tenn. 242, 188 S. W. 796; *Mobile & O. R. Co. v. Union City*, 137 Tenn. 491, 194 S. W. 572; *State Highway Dept. v. Mitchell*, — Tenn. —, 216 S. W. 336.

In Tennessee, the property of the state or of a county or city is impliedly exempt from taxation, and no legis-

lative act is necessary to confer such exemption on such property.

Nashville v. Bank of Tennessee, 1 Swan, 269; *Nashville v. Smith*, 86 Tenn. 213, 6 S. W. 278.

An act providing for the exemption from taxation of state bonds before the issuance thereof, and as a means of obtaining a better price therefor, is not in violation of article 2, § 28, of the Constitution of Tennessee.

Chester County v. White, 70 S. C. 433, 50 S. E. 28.

Bonds of the state are not property within the purview of article 2, § 28, of the Constitution of Tennessee, and therefore the constitutionality of chapter 114 of the Public Acts of 1919 cannot be tested by this section and article of the Constitution.

37 Cyc. 883; *Lynn v. Polk*, 8 Lea, 179; *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 30 L. ed. 895, 7 Sup. Ct. Rep. 826; *Augusta v. Dunbar*, 50 Ga. 387; *Miller v. Wilson*, 60 Ga. 505; *Macon v. Jones*, 67 Ga. 489; *Penick v. Foster*, 129 Ga. 217, 12 L.R.A. (N.S.) 1159, 58 S. E. 773, 12 Ann. Cas. 346; *Lumberton Improv. Co. v. Robeson County*, 146 N. C. 353, 59 S. E. 1014; *Pullen v. Corporation Commission*, 152 N. C. 548, 68 S. E. 155; *Chester County v. White*, *supra*; *Newark City Bank v. Fourth Ward Assessor*, 30 N. J. L. 13; *State ex rel. Da Ponte v. Board of Assessors*, 35 La. Ann. 651; *State ex rel. Louisiana Improv. Co. v. Board of Assessors*, 111 La. 982, 36 So. 91; *Williamson v. Massey*, 33 Gratt. 237; *Re First Nat. Bank*, L.R.A.1917B, 294, and note, 58 Okla. 508, 160 Pac. 469; *Re First State Bank*, —Okla. —, 171 Pac. 864.

Chapter 114 of the Public Acts of 1919 is a valid exercise of the sovereign power of the state, which, in its entirety, is reposed in the legislative branch of the government except in so far as it is limited, either expressly or by necessary implication, by the Constitution of the United States or the Constitution of Tennessee.

Prescott v. Duncan, 126 Tenn. 106, 148 S. W. 229.

Mr. J. H. Acklen, for appellees:

The act in question is unconstitutional.

Keith v. Funding Bd. 127 Tenn. 441, 155 S. W. 142, Ann. Cas. 1914B, 1145; *Gee v. Williamson*, 27 Am. Dec. 628, and note, 1 Port. (Ala.) 313; 2 R. C. L. 228.

Decisions construing the Constitution or acts of the legislature should

be followed, in the absence of cogent reasons to the contrary, inasmuch as it is of the utmost importance that our organic and statute law be of certain meaning and fixed interpretation.

State ex rel. Pitts v. Nashville Baseball Club, 127 Tenn. 303, 154 S. W. 1151, Ann. Cas. 1914B, 1243; *Judges' Cases*, 102 Tenn. 509, 46 L.R.A. 567, 53 S. W. 134; *Steedman v. Dobbins*, 93 Tenn. 397, 24 S. W. 1133; *Cooley*, Const. Lim. 7th ed. 88; 11 Cyc. 748.

Bachman, J., delivered the opinion of the court:

The power of the legislature to authorize the issuance of nontaxable bonds of the state is again brought in question by this proceeding, wherein the complainants, as citizens and taxpayers, seek to restrain the funding board of the state from offering for sale or disposing of the Victory Bonds authorized by the provisions of chapter 122 of the Public Acts of 1919, as tax-free securities authorized by the provisions of chapter 114 of the Public Acts of 1919. The latter act is as follows:

"Section 1. Be it enacted by the general assembly of the state of Tennessee, that whenever the state of Tennessee shall issue any bonds upon her faith and credit for any public purpose neither the principal nor the interest of said bonds shall be taxed by this state or by any county or municipality of this state, and that it shall be so stated on the face of said bonds when issued.

"Sec. 2. Be it further enacted, that in the event the courts of the state should hold that § 1 is invalid and that said bonds are taxable, such holding shall not affect the validity of any such bonds so issued.

"Sec. 3. Be it further enacted, that this act take effect from and after its passage, the public welfare requiring it."

It is insisted that this act of the legislature is unconstitutional, in that it is an assumption of legislative authority creating an exemption which is repugnant to article 2, § 28, of the Constitution, and so declared by this court in passing upon a similar statute involved in the case of

Keith v. Funding Bd. 127 Tenn. 441, 105 S. W. 142, Ann. Cas. 1914B, 1145. Upon the authority of the case mentioned the learned chancellor adjudged the act unconstitutional, expressing the opinion that if the question presented was one of first impression in the state, he would be constrained to hold that the constitutional mandate relied upon was not intended as a limitation on the right of the state to exercise its sovereign function of contracting with reference to its credit, but was designed "to prevent the evil of exemptions and discriminations between taxpayers of the state, which otherwise could exist by statute and render unequal the burdens of government."

In view of the exhaustive research of all the authorities and the most able and comprehensive discussion of every phase of the question evinced by the opinions in Keith v. Funding Bd. it is perceived that a renewal of discussion would result in the presentation of no new matter other, perhaps, than the citation of recent authorities from other jurisdictions wherein the question has been passed upon since the last declaration of this court.

By the opinions of the majority of the court it was declared that the determination of the power of the legislature to exempt its governmental securities came within the purview of, and was mandatorily controlled by, article 2, § 28, of the Constitution, affecting taxation, while the minority members were of the view that the question was one of the exercise of the sovereign power of the state, and was independent of, and determinable without reference to, the provisions of the Constitution fixing the equality of the taxation of property and forbidding discrimination between taxpayers.

An examination of the case referred to clearly discloses that the correctness of the positions taken therein depends entirely upon whether the consideration of the question is undertaken as one of tax exemption of property forbidden by

9 A.L.R.—28.

the Constitution, or whether it is to be viewed as an act of sovereignty. If the former basis is the true one, and decision is to be predicated upon reasoning and authority applicable thereto, then it is at once apparent that the conclusions reached by the majority of the court are correct, for the force of the logical deductions therein is indisputable. If, however, the question is regarded as one involving the action of the state in its sovereign capacity, the dissenting opinions unquestionably present the correct view, and are supported by the entire number of those cases wherein the question has been directly or inferentially at issue. Not only by reason of the supreme importance of a correct adjudication of the issue here involved, but also because of the direct assault made upon the correctness of the former decision, we have, with the utmost care, reviewed in their entirety those decisions which in any wise affect the question, and from the consideration given we are of the opinion that the holding of the majority opinions in Keith v. Funding Bd. must be overruled, and a decision made in the instant case in

conformity with the ~~Tax—exemption~~
~~—state bonds.~~ reasoning found in the dissenting opinions therein. In so doing we are fully cognizant of the gravity of such course and the evils attendant upon any disturbance or impairment of settled judicial interpretations. However, so thoroughly are we convinced that the former adjudication proceeded upon interpretations of the Constitution widely divergent from those which we entertain to be correct, and so commanding is the importance of this exercise of sovereign power, that we feel it necessary to recede from the former position and place the decision of this question in line with the other authorities in this country. It is not our purpose to extensively reassert the reasons advanced by the dissenting opinions in Keith v. Funding Bd. in support of the power of the legislature

to authorize tax-free bonds of the state. The expositions there made, together with the citations of authorities, are most exhaustive and conclusive, and we are content to rest our decision here upon the cogent considerations therein deduced.

The statement of certain fundamental propositions of constitutional interpretation must render obvious the correctness of the conclusions we have reached. The sovereignty of the state rests in its citizens, and the expression of sovereign power is through representation by the legislature. The state Constitution is not the source of legislative authority, but is the inclusive embodiment of such prerogatives of sovereignty as may be therein expressly or impliedly contained, together with such limitations as were self-imposed and acquiesced in by the people in the adoption of its provisions. As the representatives of the people the legislature has the power to pass such laws as are not directly or impliedly in contravention of the mandates of the Constitution. *Cooley*, *Const. Lim.* 7th ed. 126; *People ex rel. Wood v. Draper*, 15 N. Y. 532-543; *Thorpe v. Rutland & B. R. Co.* 27 Vt. 140-142, 62 Am. Dec. 625; *Redistricting Cases*, 111 Tenn. 234-246, 80 S. W. 750; *Prescott v. Duncan*, 126 Tenn. 106-127, 148 S. W. 299; *Jackson v. Nimmo*, 3 Lea 597-599.

That the inherent power of the state to make contracts with reference to its credit is separate and distinct from the inherent power of taxation is, we think, not to be questioned. Both exist without direct constitutional authority, but further than that the latter is in aid of and maintains the former. They are wholly distinct attributes of sovereignty; the one a right optional with the state and those with whom it contracts; the other compulsory and a pecuniary burden upon the owner of property. Because of this distinction, the wisdom of freedom from restraint of the one and the necessity for limitation upon the

other are clearly manifest. Save in two particulars not pertinent to this question, further than recognizing the right of the state to contract its credit, our Constitution contains no limitation upon this vital power. Empowered as it unquestionably is, it is difficult to see upon what ground it is possible to maintain the impotency of the state to incorporate in its securities the provision here sought to be held invalid, and, with the exception of the decision of *Keith v. Funding Bd.*, our examination of the authorities discloses no adjudication in conflict with the view we entertain.

While the power of the state to tax its own obligations and property may be admitted, it is nowhere to be found that the right has been sustained in opposition to a legislative direction to the contrary. In those cases wherein it is correctly held that the bonds of a state are not impliedly exempt from taxation (*State Nat. Bank v. Memphis*, 116 Tenn. 641, 7 L.R.A.(N.S.) 663, 94 S. W. 606, 8 Ann. Cas. 22, and supporting cases cited therein), it is to be noted that the contractual status of the state and the holders of its bonds had been established prior to any claim of exemption. These cases can have no application to the right of the state to stipulate in advance the terms upon which it agrees to contract its faith and credit.

Further, we are of the opinion that the bonds of the state do not constitute property within the meaning of that term, as used in the taxation clause of the Constitution, but that they are to be regarded as evidences of a debt for money secured for and devoted to the public use, and as such are to be considered instrumentalities of government upon which it cannot be contended that the legislature is mandatorily required to impose a tax, or which, because of the language of the Constitution, cannot be exempted from taxation. *Augusta v. Dunbar*, 50 Ga. 387; *Miller v. Wilson*, 60 Ga. 505; *Macon v. Jones*, 67 Ga. 489; *Penick v. Foster*, 129 Ga. 217, 12 L.R.A.

(N.S.) 1159, 58 S. E. 773, 12 Ann. Cas. 346; *State ex rel. Da Ponte v. Board of Assessors*, 35 La. Ann. 651; *State ex rel. Louisiana Improv. Co. v. Board of Assessors*, 111 La. Ann. 982, 36 So. 91; *Pullen v. Corporation Commission*, 152 N. C. 548, 68 S. E. 155; *Mercantile Nat. Bank v. New York*, 121 U. S. 138-162, 39 L. ed. 895, 904, 7 Sup. Ct. Rep. 826; *M'Culloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579; *Weston v. Charleston*, 2 Pet. 449, 7 L. ed. 481; *New York ex rel. Bank of Commerce v. Tax Comrs.* 2 Black, 620, 17 L. ed. 451; *Home Ins. Co. v. New York*, 134 U. S. 598, 33 L. ed. 1029, 10 Sup. Ct. Rep. 593.

Manifestly, the purpose of article 2, § 28, of the Constitution, was to promote the uniformity of a taxation and to prevent discrimination between taxpayers. The state is not to be included in this class, for, unless there exist a clear divestiture of its right, it is, as the sovereign, not subject to the payment of taxes, but is the recipient thereof. A tax upon its bonds must ultimately be borne by the state itself, and we do not believe that the framers of the Constitution, proclaimed by their work to be thoroughly versed in the law of political economy, ever intended the anomaly of the imposition of taxes upon the state. *Nashville v. Smith*, 86 Tenn. 213, 6 S. W. 273; *Van Brocklin v. Tennessee* (*Van Brocklin v. Anderson*, 117 U. S. 151-175, 29 L. ed. 845-853, 6 Sup. Ct. Rep. 670; *Worcester County v. Worcester*, 116 Mass. 193, 17 Am. Rep. 159; *Public Schools v. Taylor*, 30 N. J. Eq. 618; *People v. Doe G.* 1,034, 36 Cal. 221, 222.

Since the decision of *Keith v. Funding Bd.* the right of a state to issue its tax-free bonds has been brought in question in but two reported cases, so far as we are advised or our investigation discloses, both of which uphold the power upon the principles above stated.

In the case of *Re First Nat. Bank*, 58 Okla. 508, 520, L.R.A.1917B, 300, 160 Pac. 473, in passing upon the question here involved, the court

said: "While it is true the obligations of the state, in the form of its bonds, are not specifically named in the Constitution as exempt from taxation, we do not believe that the framers of the Constitution, fully cognizant of the many necessities of the state upon its admission into the Union, intended, by denying to the legislature the power to discriminate between taxpayers, to thereby curtail its power to provide in the most efficient way possible, and in such method as its judgment and patriotism might suggest, for the preservation of the credit and good faith of the people of the state. Fairly construed, the Constitution, denying the legislature the right to exempt property from taxation, reflects the wisdom of the times. By this limitation an effectual curb was placed upon abuses that had crept into the legislation of many of the sister states. Favoritism, involving exemption from taxation, was thereby made impossible, or at least unenforceable, save in the limited and exceptional instances provided for in § 6, art. 10, of the Constitution. By the provision against exemption from taxation, it was not intended to deny to the state an exercise of sovereignty so necessary and essential to the due and orderly administration of its affairs. It was not intended thereby to deny to the state the power to go upon the open money markets of the world and compete for money upon equal terms with other sovereign states; or to deny to the state the power to provide a security of equal attractiveness to its own citizens, with that of other state governments of no better credit. Neither was it the purpose to place the state in the ungenerous attitude of asking the public to advance money upon its securities, which it was thereafter bound to render unprofitable by enforced taxation. Thus interpreted, the state building bonds, constituting as they do obligations of the state for the payment of money, and being an exercise of the borrowing power, and a use of the state's credit, do not

constitute property within the meaning of § 50, art. 5, of the Constitution; and hence the statutes exempting such bonds from taxation do not contravene the constitutional limitation against exemption from taxation. Our conclusions we believe to be supported both by sound principle and the weight of authority."

The above holding is reaffirmed in the later case of *Re First State Bank*, — Okla. —, 171 Pac. 864.

In announcing our conclusions, we are not unmindful of the doctrine of *stare decisis*, urged upon us by counsel for the appellees. The importance and necessity of this salutary rule cannot be minimized where there exists a reason for its application, but where, convinced of an erroneous decision under which no property rights have become vested, nor in which acquiescence has had the effect of estab-

Judgment—
stare decisis—
when applicable.

lishing rules of conduct, the reason of the doctrine ceases to exist, and it is our duty to declare a correct interpretation rather than to remain bound by the apprehension of resultant evils which have no foundation in fact. *State ex rel. Pitts v. Nashville Baseball Club*, 127 Tenn. 292–308, 154 S. W. 1151, Ann. Cas. 1914B, 1243; *Arnold v. Knoxville*, 115 Tenn. 195–202, 3 L.R.A. (N.S.) 837, 90 S. W. 469, 5 Ann. Cas. 881; *Postal Teleg. Cable Co. v. Farmville & P. R. Co.* 96 Va. 661, 32 S. E. 468; *State ex rel. Guilbert v. Lewis*, 69 Ohio St. 202, 69 N. E. 132; *Young v. Downey*, 150 Mo. 317, 51 S. W. 751; *Burks v. Hinton*, 77 Va. 1; *Montgomery County Fiscal Ct. v. Trimble*, 104 Ky. 629, 42 L.R.A. 738, 47 S. W. 773; *Pratt v. Brown*, 3 Wis. 603.

The decree of the Chancellor is reversed and the bill of complainants dismissed.

ANNOTATION.

Constitutional enumeration of subjects of tax exemption as affecting power of legislature to free government securities or property from taxation.

A majority of the few decisions which have considered the precise question determined in the reported case (*FOSTER v. ROBERTS*, ante, 431) support the rule announced therein that the legislature may exempt government securities from taxation, although the state Constitution enumerates the subjects of exemption, and does not specifically name government securities.

Thus in *Re First Nat. Bank* (1916) 58 Okla. 508, L.R.A. 1917B, 294, 160 Pac. 469, the question was raised as to the power of the legislature to exempt from taxation public securities in the form of state public building bonds, authorized by a statute which provided that the bonds so issued should be nontaxable for any purpose. It was urged that the act was in conflict with § 50, article 5, of the Oklahoma Constitution, providing that "the legislature shall pass no law exempting any property within this state

from taxation, except as otherwise provided in this Constitution," and that as § 6 of article 10 of the Constitution, prescribing what was exempt from taxation, did not include either state or municipal bonds, and as such bonds in the hands of the owner constituted property, the bonds were taxable. This contention was not upheld, however, the court saying: "While it is true the obligations of the state, in the form of its bonds, are not specifically named in the Constitution as exempt from taxation, we do not believe that the framers of the Constitution, fully cognizant of the many necessities of the state upon its admission into the Union, intended, by denying to the legislature the power to discriminate between taxpayers, to thereby curtail its power to provide in the most efficient way possible, and in such method as its judgment and patriotism might suggest, for the preservation of the credit and good faith

of the people of the state. Fairly construed, the Constitution, denying the legislature the right to exempt property from taxation, reflects the wisdom of the times." The foregoing case was followed in *Re First State Bank* (1918) — *Okla.* —, 171 Pac. 864, wherein the question for determination was the power of the legislature to exempt from taxation the depositors' guaranty fund warrants issued by the state banking board under authority of the Act of March 6, 1913, by § 7 of which act it was provided that "said warrants shall be nontaxable for any purpose whatsoever." It was argued that as § 50, article 5, of the Constitution, prohibited the legislature from enacting a law exempting any property within the state from taxation except as otherwise provided in the Constitution, and as the guaranty fund warrants did not come within the terms of the constitutional provision expressly defining what property should be exempted from taxation, the act was repugnant to the Constitution, and that, notwithstanding the legislative intention to exempt, the exemption provision, because of the constitutional limitation, should fall. It was held, however, that the act was constitutional, as the warrants were not "property" within the meaning of the constitutional limitation against exempting property from taxation, but constituted the means resorted to by the state to effectuate the powers of government, and were, in effect, instrumentalities of government.

In *Williamson v. Massey* (1880) 33 Gratt. (Va.) 237, it was held that the legislature had the power to exempt state bonds from taxation notwithstanding the following clause in the Virginia Constitution: "Taxation, except as hereinafter provided, whether imposed by the state, county or corporate bodies, shall be equal and uniform, and all property, both real and personal, shall be taxed in proportion to its value, to be ascertained as prescribed by law. No one species of property from which a tax may be collected, shall be taxed higher than any other species of property of equal value." The decision was based on a

construction of the constitutional provision which would permit the exemption even of classes of private property, rather than on the public character of the property.

In *Keith v. Funding Bd.* (1912) 127 Tenn. 441, 155 S. W. 142, Ann. Cas. 1914B, 1145, the majority of the court held that the provision in the act of the Tennessee general assembly of February 2, 1913, authorizing the issue and sale of state bonds, which declared that "neither the principal nor the interest of said bonds shall be taxed by this state or any county or municipal corporation thereof, and it shall be so stated in the face of said bonds," was unconstitutional and void, in that it violated article 2, § 28, of the Tennessee Constitution, providing that all property shall be taxed, except such property as may be held by the state and used exclusively for public purposes. This view was based on the ground that an express intention to exempt state bonds was absent from the Constitution, and that state bonds were not within the purview of the permissible exemptions, since such bonds were not held by the state and used exclusively for public purposes. The minority members of the court were of the view, however, that the question was one of the exercise of the sovereign power of the state, and was independent of, and determinable without reference to, the provisions of the Constitution requiring equality in the taxation of property, and forbidding discrimination between taxpayers. In the reported case (*FOSTER v. ROBERTS*, ante, 431) the foregoing case is expressly overruled, the court holding that the dissenting opinions presented the correct view; that the section of the Constitution relied on was not intended as a limitation on the right of the state to exercise its sovereign function with reference to its credit, but was designed to prevent the evil of exemptions and discrimination between taxpayers of the state. It is also held that these bonds did not constitute property within the meaning of that term, as used in the taxation clause of the Constitution, but that they were to be regarded as

evidences of a debt for money secured for and devoted to the public use, and as such were to be considered as instrumentalities of government on which it could not be contended that the legislature was mandatorily required to impose a tax, or which, because of the language of the Constitution, could not be exempted from taxation. Compare *State Nat. Bank v. Memphis* (1906) 116 Tenn. 641, 7 L.R.A. (N.S.) 663, 94 S. W. 606, 8 Ann. Cas. 22, wherein it was held that article 2, § 28, of the Tennessee Constitution, requiring "all property" to be taxed, was an inhibition on the legislature to exempt state bonds. In the reported case (*FOSTER v. ROBERTS*), however, it is said with reference to that case: "In those cases wherein it is correctly held that the bonds of a state are not impliedly exempt from taxation (*State Nat. Bank v. Memphis*

(Tenn.) supra, and supporting cases cited therein), it is to be noted that the contractual status of the state and the holders of its bonds had been established prior to any claim of exemption. These cases can have no application to the right of the state to stipulate in advance the terms upon which it agrees to contract its faith and credit."

In *Probasco v. Raine* (1889) 10 Ohio Dec. Reprint, 413, reversed on other grounds in (1893) 50 Ohio St. 378, 34 N. E. 536, wherein it was held that, under the Ohio Constitution of 1851 (art. 12, § 2), requiring the uniform taxation of investments in bonds, there was no power in the legislature to exempt from taxation stocks or bonds of the state issued after the adoption of the Constitution and held by residents of the state. W. F. F.

HENRY A. PEARSON, Appt.,
v.
CATHERINE SULLIVAN.

Michigan Supreme Court — February 27, 1920.

(— Mich. —, 176 N. W. 597.)

Landlord and tenant — right of tenant to alter building.

1. A tenant cannot, without consent of the landlord, make material changes or alterations in a building to suit his taste or convenience.

[See note on this question beginning on page 445.]

Notice — to agent — effect on principal.

2. Notice to a mere agent for collection of rents of the subletting of the leased premises, in violation of the terms of the lease, is not binding upon the property owner.

[See 21 R. C. L. 838 et seq.]

Landlord and tenant — waiver of option against subletting.

3. Occupation of a portion of the leased premises by a subtenant, to the knowledge of the landlord at the time a lease is executed, waives a provision in the lease against subletting.

— continuing to receive rent.

4. Continuing to receive the monthly rent for eighteen months after no-

tice of subletting waives a provision in the lease against subletting.

[See 16 R. C. L. 1132.]

Forfeiture — enforcement by courts.

5. Courts do not favor a forfeiture.

[See 10 R. C. L. 328, 331; 16 R. C. L. 1116.]

Landlord and tenant — refusal to enforce provision against subletting.

6. A provision against subletting in a lease of property for saloon purposes will not be enforced where the use of the property for such purposes becomes unlawful, so that enforcement of such provision would result in a forfeiture.

— limiting use of property.

7. A provision in a lease authorizing the use of the property for a specified

(— Mich. —, 176 N. W. 597.)

purpose does not limit the use of the premises to such purpose.

[See 16 R. C. L. 735.]

— **compelling consent to alteration.**

8. A landlord will not be compelled to consent to material alterations of a

building to fit it for a subtenant where the lease is about to expire, and the option to renew has not been exercised, and will not be unless consent to the alteration is secured, so that the sublease can be effected.

APPEAL by plaintiff from a decree of the Circuit Court for Wayne County in Chancery (Mandell, J.), dismissing a bill filed to restrain defendant from forfeiting a lease and for other relief. *Reversed.*

The facts are stated in the opinion of the court.

Mr. Frederick E. McCain, for appellant:

When a tenant, under a lease containing the usual clause against assigning and subletting without consent, sublets portions of the premises to others from the very commencement of the said lease, and continues to do so without interruption for a long period, and the landlord, knowing of the subletting, receives and accepts the rent each month, he has waived his right to object to further subletting under the lease.

Barrie v. Smith, 47 Mich. 132, 10 N. W. 168; *Patterson v. Carrel*, 171 Mich. 296, 137 N. W. 158; 24 Cyc. 970; *Conger v. Duryee*, 90 N. Y. 599; *Murray v. Harway*, 56 N. Y. 337; 18 Am. & Eng. Enc. Law, 2d ed. 382; *Ireland v. Nichols*, 46 N. Y. 413; *Collins v. Hasbrouck*, 56 N. Y. 157, 15 Am. Rep. 407; *Warner v. Cochrane*, 63 C. C. A. 207, 128 Fed. 553; *Wertheimer v. Hosmer*, 83 Mich. 56, 47 N. W. 47; *Loveland v. Bump*, 198 Mich. 564, 165 N. W. 855; *Westinghouse Electric & Mfg. Co. v. Hubert*, 175 Mich. 568, 141 N. W. 600, Ann. Cas. 1915A, 1099; *Brown v. People's Nat. Bank*, 170 Mich. 416, 40 L.R.A. (N.S.) 567, 136 N. W. 506; *Geel v. Goulden*, 168 Mich. 413, 134 N. W. 484; *Hilsendegen v. Hartz Clothing Co.* 165 Mich. 255, 130 N. W. 646; *Great Lakes Realty & Bldg. Co. v. Turner*, 190 Mich. 582, 157 N. W. 57.

The conditions of a continuous subletting over a long period of time work an estoppel.

White v. Huber Drug Co. 190 Mich. 212, 157 N. W. 60; *Kiowiatkowski v. Duluth-Superior Dredging Co.* 201 Mich. 251, 167 N. W. 970; *Stoddard v. Gallagher*, 133 Mich. 374, 94 N. W. 1051; *Patterson v. Carrel*, 171 Mich. 296, 137 N. W. 158; 24 Cyc. 971; *Warner v. Cochrane*, 63 C. C. A. 207, 128 Fed. 553.

There was a good and valuable consideration for the waiver of the clause in the lease forbidding subletting.

Barrie v. Smith, 47 Mich. 133, 10 N. W. 168; 24 Cyc. 912; *Conkling v. Tuttle*, 52 Mich. 630, 18 N. W. 391; *Walsh v. Martin*, 69 Mich. 29, 37 N. W. 40; *Blodgett v. Foster*, 120 Mich. 392, 79 N. W. 625; 9 Cyc. 353; *Scanlon v. Northwood*, 147 Mich. 139, 110 N. W. 493.

A tenant having a lease for a period of eighteen years has the right to repair, improve, and rearrange the building which he occupies, so as to make it acceptable to modern requirements and commensurate with the rents which he expects to receive.

Leslie v. Smith, 32 Mich. 65; *Kerr v. Kingsbury*, 39 Mich. 150, 33 Am. Rep. 362; *O'Brien v. Kusterer*, 27 Mich. 289; 24 Cyc. 1101; *Crippen v. Morrison*, 13 Mich. 23; *Curtis v. Leasia*, 78 Mich. 480, 44 N. W. 500; *Felcher v. McMillan*, 103 Mich. 494, 61 N. W. 791; *Bostwick v. Losey*, 67 Mich. 554, 35 N. W. 246; *Hovey v. Walker*, 90 Mich. 527, 51 N. W. 678; *Petz v. Voight Brewery Co.* 116 Mich. 424, 72 Am. St. Rep. 531, 74 N. W. 651; *Minnis v. Newbro-Gallogly Co.* 174 Mich. 635, 44 L.R.A. (N.S.) 1110, 140 N. W. 980; 24 Cyc. 1104; 18 Am. & Eng. Enc. Law, 2d ed. 228; *J. B. Hill Co. v. Pinque*, 3 A.L.R. 677, note; *Wykes*, Mich. Mechanics Liens, chap. 9, § 70; *Holli-day v. Mathewson*, 146 Mich. 336, 109 N. W. 669; *Fuller v. Detroit Loan & Bldg. Asso.* 119 Mich. 71, 77 N. W. 642; *Sheldon, K. & Co. v. Bremer*, 166 Mich. 578, 13 N. W. 117; *Jossman v. Rice*, 121 Mich. 270, 80 Am. St. Rep. 493, 80 N. W. 25; *Hyatt v. Grand Rapids Brewing Co.* 168 Mich. 360, 134 N. W. 22; *Lewis v. Sheldon*, 103 Mich. 102, 61 N. W. 269; *Grovenburgh v. McKeough*, 117 Mich. 555, 76 N. W. 77; *Randall v. Chubb*, 46 Mich. 311, 41 Am. Rep. 165, 9 N. W. 429; *Macomb v. Wilkinson*, 83 Mich. 486, 47 N. W. 336; *Bliss v. Plummer*, 103 Mich. 181, 61 N. W. 263; *Re Bresler*, 155 Mich. 567, 119 N. W. 1104; *Davis v. Butters*, 201 Mich. 244, 167 N. W. 889; *Tolsma*

v. Tolsma, 183 Mich. 314, 149 N. W. 1050; B. Siegel Co. v. Wayne Circuit Judge, 183 Mich. 153, 149 N. W. 1015.

Messrs. Beaumont, Smith, & Harris and Archibald Broomfield, for appellee:

Even though Mrs. Sullivan might have known of the subletting, that does not operate as a waiver of the clause in question.

1 Tiffany, Land. & T. p. 935; Wertheimer v. Hosmer, 83 Mich. 57, 47 N. W. 47; White v. Huber Drug Co. 190 Mich. 214, 157 N. W. 60.

While a tenant has the right to make repairs without the consent of the owner, he has no right to make improvements or structural changes without such consent.

24 Cyc. 1094.

Stone, J., delivered the opinion of the court:

Bill for injunction to restrain defendant from forfeiting a lease, and for other relief.

On March 5, 1912, James Sullivan, now deceased, was the owner of the premises involved in this suit, which premises are located on the east side of Woodward avenue, near the intersection of Piquette avenue, in the city of Detroit, and are known, as Nos. 1368-1370 Woodward avenue, upon which premises is located a two-story brick building. On that date he leased the premises to the plaintiff for "hotel and bar" for a period of five years from May 1, 1912, at an annual rental of \$2,000. The lease gave the plaintiff the privilege of a further period of three years from May 1, 1917, at an annual rental of \$2,500, and the privilege of a still further period of ten years from May 1, 1920, at an annual rental of \$3,000. The lease contains the following clause: "Said party of the second part further covenants that he will not assign nor transfer this lease or sublet said premises, or any part thereof, without the written assent of said party of the first part."

James Sullivan died testate on June 16, 1912, being a little more than three months after the date of said lease, and the defendant, Catherine Sullivan, by virtue of the will of her husband, the said James Sul-

livan, became, and still is, the sole owner of said premises. The prayer for relief in the amended bill of complaint contains the following: "That said defendant, Catherine Sullivan, and her representatives and agents, be forever restrained by the order and injunction of this honorable court from interfering with, or preventing the full, continuous, and peaceful occupation of the said premises by this plaintiff, or any of his subtenants, either now or in the future, or from making or installing any repairs, alterations, or improvements therein during the life of said lease."

As to the conditions existing when the lease was made, and eliminating the testimony of the plaintiff as to matters equally within the knowledge of James Sullivan, deceased, it appears and is uncontradicted that the plaintiff had been a tenant and occupant of said premises for some time prior to the making of said written lease, and that he had sublet the southerly portion of the building, known as 1368, to a barber named Dorr.

The hearing in this case occurred in September, 1919, and Mr. Dorr, among other things, testified as follows: "I am engaged in the barber business and am located at 1368 Woodward avenue. I have been there eight years, over eight years. I pay my rent to Mr. Pearson, and have done so all this time. . . . That was July eight years ago. It was a barber shop before my time at the same location. During the years 1917 and 1916, perhaps, a restaurant was in the rear of my place. A man by the name of Webber was in there about two years, I should think, around that time. . . . There are tenants upstairs at the present time other than Mr. Pearson. There were tenants and have been tenants upstairs, to my knowledge, before Mr. Pearson moved out in May. No; I have not had any dealings or have ever known any of the Sullivans, or Mr. Sullivan, James Sullivan, or Mrs. Catherine Sullivan, or Mr. Frank Sullivan."

There was no evidence at the hearing that either James Sullivan, Catherine Sullivan, the defendant, or Frank Sullivan, her son and manager, has ever been upon the premises during the life of the present lease. The rent has been collected monthly by an agent of the defendant, or of Frank Sullivan, who seems to have visited the premises for the purpose of collecting the rent.

It is one of the claims of the plaintiff that the occupancy of these premises must have been known to the agent who collected the rent, and that the principal is chargeable with such facts as are known to his agent; and counsel for the plaintiff cites *Ireland v. Nichols*, 46 N. Y. at page 416, and quotes the following language: "The evidence authorized the judge to assume that John B. Ireland was the general agent of the plaintiff in respect to the leasing and care of the premises and collecting the rents. His knowledge of the subletting and the receipt by him of rent subsequently accruing with such knowledge had the same effect in waiving the forfeiture as such receipt by the plaintiff personally, with like knowledge, would have had."

Counsel has failed to state that in the *Ireland Case* the plaintiff's agent

Notice—to agent
—effect on
principal.

was the same person who signed the lease; and there was positive testimony that he was told of the underletting of the premises. We doubt if a mere agent for the collecting of rent would have authority to waive a clause of the lease, or to so act as that his conduct should operate as an estoppel of the landlord from asserting his rights. Notice to the agent within the scope and purview of his employment is undoubtedly notice to the principal, but this qualification should be borne in mind.

We confess that it is almost inconceivable, however, that the occupancy of these premises, covering a period under the lease of over six years, should not have been brought to the knowledge of the defendant

or her son, who seems to have been her general manager, and both of whom resided in Detroit. It is undisputed, and appears by competent testimony, that the occupancy of the barber shop and restaurant in the rear thereof, and other occupancies in the upper story, had existed to a greater or less extent, during the entire period of the lease; yet it must be said, in the light of this record, that there is no affirmative evidence that James Sullivan, the defendant, or her son and manager, had actual knowledge of such occupancy. There is no doubt that occupancy of the premises by a subtenant at the time of the making of the lease, and known to the defendant, would be a waiver of that clause in the lease to prohibit

Landlord and
tenant—waiver
of option
against
subletting.

subletting without the written assent of the landlord. In such a case we think the principle announced by this court in *Gordon v. St. Paul F. & M. Ins. Co.* 197 Mich. 227, L.R.A. 1918E, 402, 163 N. W. 956, should apply. We there held that the insurance company should be estopped from asserting a forfeiture for a condition of the premises existing at the time of the fire which existed to the knowledge of the company at the making of the contract. See cases there cited.

It is urged by plaintiff that Mrs. Sullivan or her son, Frank Sullivan, cannot claim, with any show of reason, that they did not know that Mr. Pearson had subtenants; for, if they were not aware of the fact, how did it happen that they instructed their attorneys, Messrs. Wurzer & Wurzer, to write the letter, exhibit 4? That was a letter dated March 1, 1918, and addressed to the plaintiff in this suit. After speaking of rent claimed to have been in arrears, that letter contains the following language: "We further call your attention to that section of the lease which reads as follows: 'Said party of the second part further covenants that he will not assign nor transfer this lease or sublet said

premises or any part thereof, without the written assent of said party of the first part.' If you have any subtenant or subtenants on said premises, you will kindly remove them at once; otherwise the lease will be canceled and you will be removed as well."

In the sixth paragraph of her answer to the amended bill the defendant said: "She further says that about March 1, 1918, her agents and attorneys received certain information that the plaintiff was subletting or might sublet said premises, and that her said agents and attorneys sent a written notice to the said plaintiff on said day, calling his attention to said subletting clause, and objecting to any subletting without her written consent, and thereupon the agent of the plaintiff notified this defendant's attorneys that he had no subtenants."

In ¶ 10 she said: "That when her agents first obtained information of subletting, on March 1, 1918, they did in her behalf object to the same in writing, as aforesaid, and were informed that the plaintiff was not subletting, and she denies that she is now estopped from forbidding or objecting to further subletting."

In the eleventh paragraph she denies that the plaintiff believed that she had no objection to subletting said premises, for the reason that he was notified on March 1, 1918, of said objection. And similar language occurs in the thirteenth paragraph of her answer.

It should here be said that there is no evidence in the record that the plaintiff or his agent ever notified the defendant or her attorneys that he had no subtenants.

It is urged by plaintiff's attorney that, even if it should be conceded that this constituted the defendant's first knowledge of the subletting, and it appearing undisputed that the defendant had continued to receive the rent each month since, and was still receiving it at the time of the hearing, it would constitute a general waiver in itself.

We think that under the authori-

ties there is much force in this position. For over one year and a half after the defendant concedes that she, or her attorneys, had notice of subletting, she continued to receive the rent from month to month down to the time of the hearing of this case. The conditions here appear to have been continuing and constant. —continuing to receive rent.

It was not a case of only temporary subletting for a short period and by special arrangement, but a general open and notorious condition. Upon this point the plaintiff cites the following cases: *Barrie v. Smith*, 47 Mich. 130-132, 10 N. W. 168; *Patterson v. Carrel*, 171 Mich. 296, 137 N. W. 158; *Conger v. Duryee*, 90 N. Y. 594-599. There the court of appeals of the state of New York said: "A single condition dispensed with is dispensed with forever. Receiving rent after forfeiture waives the forfeiture and affirms the lease, freed from the condition."

Counsel also cites *Murray v. Harway*, 56 N. Y. 337, 24 Cyc. 970, and the following language in 18 Am. & Eng. Enc. Law, 2d ed. at page 382: "It may be stated as a general rule that, where the lessor, after knowledge of the breach of a covenant or condition for which he could enforce a forfeiture, expressly or impliedly recognizes the continuance of the tenancy, he thereby waives the forfeiture for such breach, and is afterwards precluded from asserting it."

But it seems that actual knowledge is not necessary where the cause is such that the lessor should have known it, and it is equally within the cognizance of the landlord and tenant. . . . Where his act amounts to a waiver of the forfeiture or a recognition of the continuance of the tenancy, he is precluded from asserting that it was not his intention to waive the forfeiture."

Counsel also cites upon this point *Ireland v. Nichols*, *supra*; *Collins v. Hasbrouck*, 56 N. Y. 157, 15 Am. Rep. 407, the latter illustrating a case of subletting by special per-

mission of the landlord, such as is found in *Wertheimer v. Hosmer*, 83 Mich. at page 56, 47 N. W. 47; *Warner v. Cochrane*, 63 C. C. A. 207, 128 Fed. 553. See also 18 Am. & Eng. Enc. Law, 2d ed. at page 386.

It is also urged by plaintiff's counsel that the business which plaintiff conducted on the premises in question, to wit, that of a saloon, is now unlawful, and to prevent him from continuing to sublet will in effect work a forfeiture of his lease, which is not favored by the courts. We hardly need cite authorities in sup-

Forfeiture—
enforcement
by courts.

port of the position that the courts do not favor a forfei-

ture. We think that the plaintiff is entitled to possession and use of the premises during the term of his lease, relieved of the clause against

Landlord and
tenant—refusal
to enforce
provision
against
subletting.

subletting without the written consent of the party of the first part in the lease. The better

doctrine seems to be that a provision in a lease authorizing the use of the premises for a specified pur-

—limiting use
of property.

pose is generally regarded as permissive instead of re-

strictive, and does not limit the use of the premises by the lessee to such purpose. 16 R. C. L. title "Landlord and Tenant," p. 735, and see the following cases there cited: *Burr v. Spencer*, 26 Conn. 159, 68 Am. Dec. 379; *Hayton v. Seattle Brewing & Malting Co.* 66 Wash. 248, 37 L.R.A. (N.S.) 432, 119 Pac. 739.

We are of the opinion that the plaintiff is entitled to have the defendant and her representatives and agents restrained by the decree and injunction of this court from interfering with or preventing the full, continuous, and peaceful occupation of the said premises by the plaintiff or his subtenants, either now or in the future. To this extent we think the plaintiff, in the light of this record, is entitled to relief.

This brings us to what we consider the most important question in the case: Should the defendant

be restrained from interfering with the plaintiff in making or installing repairs or alterations under the lease? There is no claim of the plaintiff that the defendant has waived any of the provisions of the lease in this respect. By the terms of the lease the plaintiff is to keep the premises, and every part thereof, in as good repair, and at the expiration of the term yield and deliver up the same in like condition as when taken, reasonable use and wear thereof and damage by the elements excepted. The general rule, as stated in 24 Cyc. at page 1094, is as follows: "In the absence of express stipulation, a tenant has no right to make material or permanent alterations in the demised premises." See cases there cited.

The doctrine seems to be well established that a tenant cannot, without the consent of the landlord, make material changes or alterations in a building to suit his taste or convenience, and, if he does so, it is waste; and any material change in the nature and character of the buildings made by the tenant is waste, although the value of the property should be enhanced by the alterations. See *Brock v. Dole*, 66 Wis. 142, 28 N. W. 334, and numerous cases there cited. See also 16 R. C. L. 733, and cases cited.

—right of tenant
to alter
building.

In the *Brock* Case the court quotes from *Jackson ex dem. Van Rensselaer v. Andrew*, 18 Johns. 434, the following language: "That a tenant cannot, under the pretense of advantage to the reversioner, change the nature of the buildings, and many cases show that such changes, though beneficial, would be waste." "The ground on which alterations in demised premises, not prejudicial to the value of the property, have been declared waste, is that they change the identity of the estate."

The taking down of partitions, the making of two rooms into one, the putting up of permanent partitions, any change in the structural character of the premises, is waste.

Abel v. Wuesten, 141 Ky. 766, 133 S. W. 774, Ann. Cas. 1912C, 389; Id., 143 Ky. 513, 136 S. W. 867, Ann. Cas. 1912C, 391.

In this case a peculiar condition exists, and upon this branch of the case the plaintiff's claim for relief may be termed a "fishing expedition." The plaintiff's present term expires on the 1st day of May, 1920. He has not exercised the option or privilege of claiming or asking a continuation of the terms of the lease after that date. While by the bill of complaint he claims to be negotiating with a party known as the Ueata Lunch Company, it appears that such negotiation hinges upon obtaining the consent of the owner to the alterations proposed, and that there is no existing contract shown between the plaintiff and said company, but it rests in a proposition contingent upon this court compelling the defendant to consent to the alterations proposed. Those alterations are very extensive. The said lunch company proposes to tear out the present store front and put in a new one principally of tile, granolithic floors throughout, tile walls, and metal ceilings, and bricking in of the space under the rear porch, thus increasing the size of the store proper. They propose to change or remove the center or north stairway, and to take out and change certain partitions and stairways. This, in our judgment, will change the structural character of the building. There is nothing in the evidence or in the lease preventing the plaintiff from continuing on the premises any business contemplated by the lease; but the lunch company will not make this lease without the written consent of the defendant to the proposed alterations.

In her answer to the amended bill of complaint the defendant says: "That she does not wish to have structural changes made in said premises; that she does not wish to have said premises converted so that they can be used only for restaurant purposes; that she does not wish to permit any subtenant to demolish a

portion of said premises and then be given the right to abandon the same with impunity; that it might impose mechanics' liens on her title, which she would be required to remove; that she has no security whatever under said lease for any default in the making of said alterations, or for any damages caused to the premises by reason of the same, or from any mechanics' liens; that said alterations and improvements probably would increase the assessed value of the premises without increasing her revenue under the lease; that she also owns the premises adjacent to and directly north of the premises involved in this suit, and the same are under a nine or ten year lease to the People's State Bank, and that the proposed alterations might jeopardize said premises and said lease."

It is significant that the plaintiff himself testified as follows:

Now, in this lease the first term is a period of five years. I believe the period would expire May 1, 1917. Then I have an option for a further period of three years. Sure, that option I have exercised. I have signified my willingness to keep the premises for that three-year period. That period will expire May 1, 1920. As to the lease containing a condition for a further period of ten years after May 1st, there, of course, has been no exercise of that option by me.

Q. So that, as the matter now stands, both parties are bound under the lease continuing until May 1, 1920?

A. I have the right, before May 1, 1920, to extend the time for a period of ten years more. That is a right that exists in me, but does not exist in Mrs. Sullivan.

So it appears that there is no existing or subsisting contract between the plaintiff and defendant for any period beyond May 1, 1920. Whether the plaintiff shall exercise this option depends, no doubt, upon the result of this lawsuit. We do not recognize the right of a party to

thus speculate upon the result of a litigation where there is no existing contract between the parties. In our opinion it would be unjust and inequitable to compel the defendant, under the circumstances stated, to consent to the structural changes proposed in this record. As to that branch of the case, we think the plaintiff should be denied relief.

This court has no power or authority to compel the plaintiff to exercise this right or option. The plaintiff may exercise it or not, as he chooses; but he asks us to say that, if he does exercise that right,

then that he or his subtenant shall have the right to make the changes and alterations proposed, and that the defendant be ordered to consent to such changes.

The decree of the court below dismissing the bill will be reversed. The plaintiff will be given the relief herein indicated, and to that extent only; to wit, to restrain the defendant from forfeiting the lease by reason of the clause of the lease heretofore set forth, which clause we hold has been waived by the conduct of the defendant, and that she should be estopped from enforcing the same. No costs will be awarded to either party.

ANNOTATION.

Right of tenant to make alterations in structures on leased premises.

I. General rule, 445.

II. Application of rule:

a. In absence of covenant:

1. Adaptation to new use, 446.
2. Making openings in building, 448.
3. Destruction of old, or erection of new, building, 449.
4. Miscellaneous alterations, 451.

b. Covenant prohibiting any alteration:

1. Altering building, 451.

II. b.—continued.

2. Tearing down or erecting building, 454.

c. Covenant permitting some alterations:

1. Altering building, 455.
2. Tearing down or erecting building, 457.

d. Covenant to repair:

1. Altering building, 457.
2. Tearing down or erecting building, 459.

Scope.

This note, as the title indicates, is confined to alterations in leased premises relative to the structures thereon; i. e., changes in a structure, in the number of structures, or in their position. It excludes cases involving the cutting of timber, changes in the character of the land, the opening or working of mines, quarries, or gas wells, and the removal of sand, gravel, or other materials from the premises. It is also limited to cases where the relation of landlord and tenant exists, and excludes life tenants.

I. General rule.

The general rule is, as stated in the reported case (PEARSON v. SULLIVAN, ante, 438), as follows: A tenant cannot, without the consent of the landlord, make material changes or

alterations in a building to suit his taste or convenience, and, if he does so, it is waste; and any material change in the nature and character of the building, made by the tenant, is waste, although the value of the property should be enhanced by the alterations.

United States.—United States v. Bostwick (1876) 94 U. S. 53, 24 L. ed. 65; Bass v. Metropolitan West Side Elev. R. Co. (1897) 39 L.R.A. 711, 27 C. C. A. 147, 53 U. S. App. 542, 82 Fed. 857.

Alabama.—F. W. Woolworth Co. v. Nelson (1920) — Ala. —, 85 So. 449.

Kentucky.—Abel v. Wuesten (1911) 143 Ky. 513, 136 S. W. 867, Ann. Cas. 1912C, 391.

Louisiana.—Denechaud v. Trisconi (1874) 26 La. Ann. 402.

Maryland.—Maddox v. White

(1853) 4 Md. 72, 59 Am. Dec. 67; *Baughner v. Crane* (1867) 27 Md. 36; *Crowe v. Wilson* (1886) 65 Md. 479, 57 Am. Rep. 343, 5 Atl. 427.

Mississippi.—*Winston v. Franklin Academy* (1854) 28 Miss. 118, 61 Am. Dec. 540.

Nebraska.—*Hayman v. Rownd* (1908) 82 Neb. 598, 45 L.R.A. (N.S.) 623, 118 N. W. 328.

New Jersey.—*Klie v. Von Broock* (1897) 56 N. J. Eq. 18, 37 Atl. 469.

New York.—*Agate v. Lowenbein* (1874) 57 N. Y. 604; *Cohen v. Simon Strauss* (1913) 139 N. Y. Supp. 929; *Douglass v. Wiggins* (1815) 1 Johns. Ch. 435.

Oregon.—*Davenport v. Magoon* (1884) 13 Or. 3, 57 Am. Rep. 1, 4 Pac. 299.

Texas.—*Hamburger v. Settegast* (1910) 62 Tex. Civ. App. 446, 131 S. W. 639.

Wisconsin.—*Brock v. Dole* (1886) 66 Wis. 142, 28 N. W. 334.

England.—*London v. Greyme* (1607) Cro. Jac. 181, 79 Eng. Reprint, 158; *Cole v. Green* (1672) 1 Lev. 309, 83 Eng. Reprint, 422, 2 Wms' Saund. 252, 85 Eng. Reprint, 1037, 1 Mod. 94, 86 Eng. Reprint, 759; *Bonnett v. Sadler* (1808) 14 Ves. Jr. 526, 33 Eng. Reprint, 622; *Kimpton v. Eve* (1813) 2 Ves. & B. 349, 35 Eng. Reprint, 352, 13 Revised Rep. 116; *Young v. Spencer* (1829) 10 Barn. & C. 145, 109 Eng. Reprint, 405, 5 Moody & R. 47, 8 L. J. K. B. 106; *Smyth v. Carter* (1853) 18 Beav. 78, 52 Eng. Reprint, 31.

Ireland.—*Maunsell v. Hort* (1877) Ir. Rep. 11 Eq. 478; *Brooke v. Mernagh* (1888) Ir. L. R. 23 Eq. 86; *Brooke v. Kavanagh* (1888) Ir. L. R. 23 Eq. 97.

Canada.—*Holman v. Knox* (1912) 25 Ont. L. Rep. 588, 21 Ont. Week. Rep. 325, 3 Ont. Week. N. 745, 3 D. L. R. 207; *Sullivan v. Dore* (1913) 5 Ont. Week. N. 70, 25 Ont. Week. Rep. 31, 13 D. L. R. 910; *Straus Land Corp. v. International Hotel Windsor* (1919) 15 Ont. Week. N. 411.

And it is stated in *Parkman v. Aicardi* (1859) 34 Ala. 393, 73 Am. Dec. 457, that this rule is an old principle of the common law.

The ground on which alterations in demised premises, not prejudicial to

the value of the property, have been declared waste, is that they change the identity of the estate. *Brock v. Dole* (1886) 66 Wis. 142, 28 N. W. 334.

The court said in *Cawker v. Trim-mel* (1913) 155 Wis. 108, 143 N. W. 1046, Ann. Cas. 1915C, 1005, that, while the making by a tenant for years of any material change was waste, even though it enhanced the value of the property, very material changes may be made by a life tenant, so long as the value of the property is not thereby depreciated, and that, therefore, we have a different rule applicable to the ordinary relation of landlord and tenant from that which applies to life tenant and remainderman.

It is said in *Agate v. Lowenbein* (1874) 57 N. Y. 604: "The right which the tenant has is to make use of the property. The power of making an alteration does not arise out of a mere right of user; it is, therefore, incompatible with his interest for a tenant to make any alteration, unless he is justified by the express permission of his landlord. . . . By a lease, the use, not the dominion of the property demised, is conferred. If a tenant exercises an act of ownership, he is no longer protected by his tenancy."

II. Application of rule.

a. In absence of covenant.

1. Adaptation to new use.

A tenant has no right, in the absence of a covenant to that effect in the lease, to make such alterations as may be necessary to adapt the leased building to a different use from that for which it was constructed or previously used. *Abel v. Wuesten* (1911) 143 Ky. 513, 136 S. W. 867, Ann. Cas. 1912C, 391; *Maddox v. White* (1853) 4 Md. 72, 59 Am. Dec. 67; *Baughner v. Crane* (1867) 27 Md. 36; *Fred v. Moseley* (1912) — Tex. Civ. App. —, 146 S. W. 343; *London v. Greyme* (1607) Cro. Jac. 181, 79 Eng. Reprint, 158; *Cole v. Green* (1672) 1 Lev. 309, 83 Eng. Reprint, 422, 2 Wms' Saund. 252, 85 Eng. Reprint, 1037, 1 Mod. 94, 86 Eng. Reprint, 759; *Bonnett v. Sadler* (1808) 14 Ves. Jr. 526, 33 Eng. Reprint, 622; *Maunsell v. Hort* (1877) Ir. Rep. 11 Eq. 478.

And therefore the lessor of a building for a postoffice can enjoin the tearing down of partitions, and the making of alterations in the arrangement of the building, by a sublessee, to convert the building into a liquor store. *Maddox v. White* (1853) 4 Md. 72, 59 Am. Dec. 67.

And the alteration by a lessee of a corn mill into a horse mill is waste, although it may be for the lessor's advantage. *London v. Greyme* (1607) Cro. Jac. 181, 79 Eng. Reprint, 158.

The lessor of a four-story brick warehouse can enjoin the making of alterations by sublessees, although not intended to convert the leased premises to uses inconsistent with the terms of the lease, where such lessees have commenced to tear away the whole of the front of the first story of such warehouse, are about to alter and change the arrangement of the doors and windows, and to reduce the width of the front of the store on the first floor by putting a side door with stairway leading to the second story, have cut away various parts of the joists and beams and ceiling of the first and main story, have taken away various braces and other portions of the building, which has weakened the whole building, and are about to make many other alterations and changes which will completely change the character and appearance of such store, and greatly impair the building. *Baughner v. Crane* (1867) 27 Md. 36.

The conversion by a lessee of brew-houses into tenements, though of greater value, is waste, by reason of the alteration of the nature of the thing and of the evidence thereof. *Cole v. Green* (1672) 1 Lev. 309, 83 Eng. Reprint, 422, 2 Wms' Saund. 252, 85 Eng. Reprint, 1037, 1 Mod. 94, 86 Eng. Reprint, 759.

Lessees will be restrained from proceeding to pull down the front of a private house, and turn the upper rooms into lofts, for the purpose of carrying on the business of coach makers, where it appears that they leased the house, representing that they wished to occupy it as a dwelling house, that the lessors would not have rented the house for the purpose of a coach maker's business, since they

carried on such business next door, and that the alteration of the house for such a purpose required its alteration from top to bottom, and made an absolute change in the nature of the premises. *Bonnett v. Sadler* (1808) 14 Ves. Jr. 526, 33 Eng. Reprint, 622.

The conversion by a lessee of premises consisting of a dwelling house, coach house, and stable, of the latter two buildings into a butcher shop, necessitating a complete alteration of the structural character of such buildings, is waste. *Maunsell v. Hort* (1877) Ir. Rep. 11 Eq. 478.

It is apparently assumed, in *Bollenbacker v. Fritts* (1884) 98 Ind. 50, that changes and alterations made in buildings previously used for a woolen factory, so as to adapt them to the purposes of a stove factory, for which the lessee leased them, constitutes waste.

Altering a frame store building so as to adapt it to the use of a moving picture theater, by putting in a new floor, removing the store partitions on the first floor, the front part of the stairs, and the front of the building, and building a new front further back from the sidewalk than the old one, and removing an old stairway, necessitating the expenditure of \$1,000 to restore the building to its former condition, is such a radical and substantial change in the character of the building as to constitute waste, although the building was out of repair and in a dangerous condition. *Abel v. Wuesten* (1911) 143 Ky. 513, 136 S. W. 867, Ann. Cas. 1912C, 391, reversing on rehearing (1911) 141 Ky. 766, 133 S. W. 774, Ann. Cas. 1912C, 389.

But the lessee of a store under a lease containing no stipulation regarding the character of the business to be carried on therein cannot be enjoined from fixing up the building for a moving picture theater, by taking out the show windows in front, putting in two partitions of lumber, one in the back and one in the front, and putting in the front an operating room built with steel and on the outside with lumber, and under the operating room a ticket office built of lumber, where the lease provides for the re-

turn of the building at the end of the lease in like good condition as when leased, and there is no proof that the lessee is unable to respond in damages if such provision is not complied with. *Fred v. Moseley* (1912) — Tex. Civ. App. —, 146 S. W. 343.

2. *Making openings in building.*

From the general rule hereinbefore set out it follows that the cutting of an opening through a party wall of the leased building, so as to communicate with an adjoining building, constitutes waste, since such act destroys the identity of the leased building as a building separated completely from the adjoining building, and to all intents and purposes makes the two buildings one, and increases the hazard from fire, although the opening does not materially impair the strength of the wall, and may be closed up at a trifling expense. *Hamburger v. Settegast* (1910) 62 Tex. Civ. App. 446, 131 S. W. 639. And it was held that the fact that the lessee became entitled to the possession of both the leased building and the adjoining building was not such a change in conditions as to authorize him to make such alterations, and the court, in this connection, in answer to the contention that while the act would have been waste at common law, according to what is spoken of as the "modern rule" it would not be, said: "We think this is probably a misuse of terms. The modern rule spoken of seems to be nothing more than the application of the principles of the common law to new and changed conditions. . . . 'These rules (of the common law) are not arbitrary in their nature nor invariable in their application; but from their nature, as well as the necessities in which they originate, they are and must be susceptible of a modified application, suited to the circumstances under which the application is to be made.' 2 Words & Phrases, 1326, title 'Common Law.' But what changed conditions have we here which should affect the application of the old common-law rule as to waste? From the beginning of the erection of buildings adjoining each other, as in this case,

which condition certainly prevailed when the common law was in process of formation, it must have been anticipated, in fact, the conditions must often have arisen, when a tenant of two buildings belonging to different owners might desire, and it might have been greatly to his convenience and benefit, to make a common use of the two, and to unite them by an opening from the one to the other, just as in this case." The court further said: "In some of the definitions of waste it seems to be essential that the injury to the property must be permanent; and it is insisted in the present case that the injury may be repaired and the wall placed in statu quo at a trifling expense; hence, that it is not permanent. In this view of the matter hardly any alteration in a building can be said to be permanent which stops short of its entire destruction, and in none of the cases investigated by us, where the act was declared actionable waste, was the injury to the freehold irreparable. . . . It is no justification of an act of waste that a party will, at some future time, put the premises in the same condition as they were when the lease was made. . . . The landlord has a right to a continuance of the state of things as they existed when the injury was done. . . . It is not necessary that the alteration should diminish the value of the property. It may even enhance its value. This does not affect its character as waste. The landlord has the right to exercise his own judgment and caprice whether there shall be a change."

And cutting a doorway through a party wall of the leased building, thereby materially weakening it, constitutes waste, although done with the consent of the other joint owner of the party wall. *Klie v. Von Broock* (1897) 56 N. J. Eq. 18, 37 Atl. 469.

In *Young v. Spencer* (1829) 10 Barn. & C. 145, 109 Eng. Reprint, 405, 5 Moody & R. 47, 8 L. J. K. B. 106, an action on the case by the landlord against his tenant for pulling down part of the wall and making a door leading from the leased dwelling house into the street, where the jury found that such alteration did not

weaken or injure the leased premises, the judge directed a verdict for the lessor with nominal damages, on the ground that the tenant had no right to put in the door, but referred the case to the court, which granted a new trial, upon the ground that the question was whether there was any injury to the lessor's reversionary right, and that that question should have been left to the jury.

And in *Denechaud v. Trisconi* (1874) 26 La. Ann. 402, the court, holding that a tenant has no right to make material alterations in the leased premises without express permission, sustained an injunction, granted at the instance of the tenant of a hotel and pavilion, restraining a subtenant of the barroom and saloon in the basement of the hotel from re-opening a gate through the fence separating the hotel and the pavilion at the place in the fence where the tenant had closed the gate, having made another a short distance away to take its place.

The lessee of a storeroom in a one-story frame building has no right to erect a chimney upon the inside of his room, and cut a hole through the ceiling and through the roof therefor. *Brock v. Dole* (1886) 66 Wis. 142, 28 N. W. 334.

And a tenant is guilty of waste who drills holes through a brick wall, and drives wooden pegs therein, for the purpose of attaching a sign, when such use would cause the brick in that part of the wall to become loose or displaced. *Hayman v. Rownd* (1908) 82 Neb. 598, 45 L.R.A.(N.S.) 623, 118 N. W. 328.

But the lessee of the ground floor only of a building for the purpose of a theater entrance, under a lease providing that the lessee shall obtain water service at his own expense, has the right to bore holes through the floor, so that he may pass connecting pipes through the basement to the city mains, and a stipulation in the lease that the lessee, in the installation of water, shall not interfere in any way with the balance of the building not included in the lease, or with any other tenants in the building,

9 A.L.R.—29.

does not prohibit the lessee from passing water pipes through the basement to the water mains and sewers, where there appears to be no other way in which to make the connections to obtain the service, and the basement is unoccupied, and the connection will not interfere with any reasonable use to which the basement can be devoted. *Burns v. Dufresne* (1912) 67 Wash. 158, 121 Pac. 46.

And in *Jackson ex dem. Thomas v. Tibbits* (1829) 3 Wend. (N. Y.) 341, cutting through a partition in the second story of the leased house, and placing a door therein leading into a bedroom, and putting a window in the door of the cellar kitchen, without the permission of the lessor, was held not to be waste, because, instead of being injurious, such alterations were beneficial to the premises. The court stated that, without damage, there could be no waste.

Where the owner of land leases it for a term of years under a lease containing a covenant that the lessee shall build thereon a large building to be used as a part of a department store, and, after the erection of such building, the lessee obtains adjoining land and constructs a building thereon, and thereafter makes openings in the wall of the building on the leased land, so as to connect it with the new building, equity will not compel the lessee to close up such openings, where it appears that they do not impair the strength of the building, and can be closed up at a small expense, and are the only means of communication or access to the new building, whether the making of such openings be regarded as a technical waste or as a technical violation of an implied negative covenant; and the lessor will be left to his remedy at law. *Liggett v. Kaufmann* (1901) 17 Pa. Super. Ct. 631.

3. *Destruction of old, or erection of new, building.*

A tenant has no right to remove or destroy buildings on the leased premises, and is liable to the lessor for damages therefor. *Winston v. Franklin Academy* (1854) 23 Miss. 118, 61 Am. Dec. 540.

And the tearing down of fences and walls, and the use of the materials therefrom for sidewalks and the erection of other buildings, is voluntary waste, and within the prohibition of the implied agreement on the part of the lessee, in every lease, unless excluded by the operation of some express covenant or agreement, to so use the property as not unnecessarily to injure it. *United States v. Bostwick* (1876) 94 U. S. 53, 24 L. ed. 65.

And a lessee of a public house will be enjoined from tearing down the leased building, and erecting in its place a brewery, to which the landlord objects, although the new building will be better than the old, and it will be to the landlord's interest to have it erected, since the landlord has a right to exercise his own judgment and caprice whether there shall be any change in the leased premises. *Smyth v. Carter* (1853) 18 Beav. 78, 52 Eng. Reprint, 31.

The destruction of a dovecote is waste. *Kimpton v. Eve* (1813) 2 Ves. & B. 349, 35 Eng. Reprint, 352, 13 Revised Rep. 116.

A tenant under a lease containing a covenant for perpetual renewal will be enjoined from tearing down and removing a dwelling house on the leased premises, where such action would greatly impair and endanger the security for the rents reserved, but as long as the rent is secured, the tenant has the right to take down and build up, alter, remodel, and reconstruct the buildings on the leased premises at his own pleasure. *Crowe v. Wilson* (1886) 65 Md. 479, 57 Am. Rep. 343, 5 Atl. 427.

But the tearing down of a barn by a copyholder, although without any intention of rebuilding, is not waste where there is no injury done to the leased premises. *Doe ex dem. Grubb v. Burlington* (1833) 5 Barn. & Ad. 507, 110 Eng. Reprint, 878, 3 L. J. K. B. N. S. 26, 2 Nev. & M. 534.

And it was held in *Beers v. St. John* (1844) 16 Conn. 322, that the court could not determine whether the tearing down by a tenant for years of a shop standing on the leased premises, and the erection, using a portion of the materials, on its foundation, of

another shop for the same purposes, constituted waste, where it appeared that the old shop had gone, wholly or partly, to decay, but not whether it had gone to so great a degree of decay as to render it entirely valueless and unfit for use, or beyond reparation, or only so little as might be restored by slight repairs, where it did not appear what the condition of the building was when the tenant went into occupation of the premises, whether it was then tenantable or not, nor the term of the lease, nor under what circumstances the old shop, or its remains, were removed, nor whether it was removed with or without the consent of the owner.

The erection, by a lessee of an ordinary agricultural holding, of a number of dwelling houses, of timber with brick foundations, on the demised premises, is such a material change in the nature of the demised premises as to constitute waste. *Brooke v. Mer-nagh* (1888) Ir. L. R. 23 Eq. 86; *Brooke v. Kavanagh* (1888) Ir. L. R. 23 Eq. 97.

And the erection by a copyholder of a mill upon his copyhold is a ground for forfeiture of his estate. *Grey v. Ulisses* (1562) Dyer, 211b, note, 73 Eng. Reprint, 467.

The refusal of the landlord to permit the tenant to reconstruct in the rear of the leased building, as a brick structure 10 by 12 feet, a bake oven in the basement, essential to the tenant's business, which had collapsed without the landlord's fault, is not an eviction, especially where the tenant continues to occupy the premises. *Carey v. Tremont* (1912) 171 Ill. App. 604.

But it was held in *Winship v. Pitts* (1832) 3 Paige (N. Y.) 259, that the erection, by a lessee of a dwelling house and lot, the lower room of which house was occupied as a drug store, of a brick building in the yard, to be used for a livery stable, was not waste. The court said: "Some of the ancient cases restrict the tenant within very narrow limits, as to his right to alter or improve the premises held by him without subjecting him to an action of waste, or to a forfeiture of the estate. It was for a time questionable

whether a tenant or a copyholder could erect a new building upon the premises without subjecting himself to a loss of the property. . . . But whatever doubts may have formerly been entertained on this subject, I have no hesitation in saying that, by the law of this state, as now understood, it is not waste for the tenant to erect a new edifice upon the demised premises, provided it can be done without destroying or materially injuring the buildings or other improvements already existing thereon. I admit he has no right to pull down valuable buildings, or to make improvements or alterations which will materially and permanently change the nature of the property, so as to render it impossible for him to restore the same premises, substantially, at the expiration of the term. . . . And upon the principles of these modern cases, it cannot be waste to make new erections upon the demised premises, which may be removed at the end of the term without much inconvenience, leaving the property in the same situation it was at the commencement of the tenancy; and the materials of which new buildings, if left on the premises, would more than compensate the owner of the reversion for the expenses of their removal. That is the nature of the building which the defendant is about to erect on the rear of this lot; and if the landlord insists upon its removal at the end of the term, the lessee will undoubtedly be pleased to obtain such a privilege, which most tenants are anxious to secure by an express stipulation in their lease. Even if the new edifice is permitted to remain, the complainant will not be compelled to use it as a livery stable. He may, at the end of the term, convert it to some use which will be more agreeable to the tenants of the adjacent lots, and to the occupant of the house upon the front of this."

And in *Hubble v. Cole* (1888) 85 Va. 87, 7 S. E. 242, an injunction restraining the erection by a lessee of a stable on the leased premises without the consent of the lessor was held to be properly dissolved, where the order of dissolution provided that the stable

should be removed at the expiration of the term.

And lessees of a wharf have a right to extend and improve it so as to increase its facilities, or to build a pier attached thereto for their use and occupancy, so far as their acts are not prohibited by the terms of the lease, and do not constitute waste. *Bedlow v. New York Floating Dry Dock Co.* (1889) 112 N. Y. 263, 2 L.R.A. 629, 19 N. E. 800.

4. *Miscellaneous alterations.*

A lessee of a house has the right to erect a partition across the hall on the ground floor in such a manner that it may be quickly and easily removed without injury to the building, unless the lease prohibits the making of alterations without the consent of the lessor. *Kunemann v. Boisse* (1867) 19 La. Ann. 26.

And a change in the name of a leased hotel is not an alteration within the meaning of the rule that a tenant cannot make an alteration without the landlord's consent. *Sieward v. Denechaud* (1908) 120 La. 720, 45 So. 561.

b. *Covenant prohibiting any alteration.*

1. *Altering building.*

Where the lease contains a covenant prohibiting the making of any alterations, the question becomes one of construction; i. e., whether the changes made or contemplated by the tenant constitute an alteration within the meaning of the covenant.

Thus, the removal of a partition was held in *Webster v. Nosser* (1867) 2 Daly (N. Y.) 186, 33 How. Pr. 136, to be a breach of a covenant not to make alterations in the leased premises without the lessor's consent.

And the removal of partitions and mantelpieces constitutes waste, and is a breach of a covenant by the lessee to make alterations only with the consent of the lessor. In this case the court said that the lessee could not offset any benefit to the property against injuries by him in the nature of waste, and that that being so, the real question of damages was how much the premises were injured by the unauthorized alterations; not

whether the premises, by reason of their improvements, were of greater or less value than when let. *Wotton v. Wise* (1880) 15 Jones & S. (N. Y.) 515.

So, the tearing up by a tenant of a marble platform adjoining the building on the outside, manifestly a part of the demised premises, is a violation of a covenant in the lease prohibiting alterations without the landlord's consent. *Satzman v. Barry* (1918) 170 N. Y. Supp. 929.

Converting windows in the wall of the leased building into open passageways, and constructing from such windows bridges connecting with similar openings in another building across an alley, and closing the entrance to the leased building, so that access to the upper floors thereof is confined to the bridges so made, constitute alterations within the covenant in the lease providing that the lessee shall not cut openings through the walls of the leased buildings, nor make alterations without the consent of the lessor. *Peer v. Wadsworth* (1904) 67 N. J. Eq. 191, 58 Atl. 379.

And where a lessee, in violation of a covenant against alterations without the lessor's consent, has cut a door through the brick wall of the leased premises to make a communication with an adjoining building, and has built an extension, equity will restrain the making of further alterations, but will not compel the lessee to restore the premises to the condition they were in when leased, when to do so would be practically impossible, and would not benefit the lessor, but would be a great injury to the lessee; and the lessor cannot recover damages for such alterations without proof that he has been injured thereby. *Engle v. Thorn* (1854) 3 Duer (N. Y.) 15.

The erection by a sublessee of a wooden awning entirely around the leased store, constructed so as to form a covering from the building at the height of the store, extending to the curbstone in the street, fastened with cleats to the front part of the building, and supported at the curbstone by posts, is an alteration within the meaning of the covenant against al-

terations without the consent of the lessor. It was claimed that, the awning being outside the building, it was not an alteration, since the covenant prohibited only alterations "in" the demised premises; but the court said that such a construction of the covenant was too narrow; that the word "in" was to be taken as including "upon" as well, so that the covenant might read, "alteration in or upon," and therefore covered the erection in question; that otherwise, any alteration of the exterior of the building would be no breach, and the tenant could remove the entire front of his store and work serious injury to the building, under the claim that it was not an alteration "in" the building. *Trenor v. Jackson* (1873) 15 Abb. Pr. N. S. (N. Y.) 115, 46 How. Pr. 389.

Affixing to the leased house boards for advertisements, permanent enough for such purpose, and erecting on the parapet wall an extra story for the same purpose, constitute a breach of a covenant by the lessee not to alter the house nor make or erect any other building or erection on any part of the demised premises, without the lessor's consent. *Pocock v. Gilham* (1883) Cab. & El. (Eng.) 104.

But there are some changes which are not alterations within the meaning of such a covenant. Thus, a tenant of one floor of a building has the right to place locks upon the doors to his premises, notwithstanding the prohibition in the lease against the making of alterations to the building. *Lederer v. Fox* (1909) 151 Ill. App. 300.

And the boring of a half or three-quarter inch hole through the floor of the leased building for electric wires is not an alteration within the meaning of a covenant prohibiting alterations without the consent of the lessor, since the word "alteration" in such a covenant means a substantial change in the building. *Cawker v. Trimmel* (1913) 155 Wis. 108, 143 N. W. 1046, Ann. Cas. 1915C, 1005. The court in this case said: "We are not unmindful of the claim that an alteration in a leased building, resulting in damage thereto, would constitute waste at common law, and would be

enjoined by a court of equity, or of the argument that the word 'alteration' in the lease must be given some effect, and that if it is held to mean change resulting in damage, it might as well have been omitted entirely. Some courts have held that an express covenant prohibiting alterations to be made refers to those changes which a tenant might otherwise make without the consent of the owner. . . . It may be conceded for the purposes of this case that the principle underlying the decisions in these cases is correct, although the reasoning on which it is based is by no means invulnerable. These courts must of necessity recognize the rule that there may be alterations which are material and those which are not, and in this latter class fall these changes which do not result in damage to the landlord, but which none the less are alterations. . . . In all of the cases above cited it was practically conceded that the thing done constituted an alteration. In one of the cases the tenant proposed to put up an addition to the building, and in two of the others partitions were so put in as to make two rooms where there was but one before. The decisions only go to the point that where it is proposed to make an actual alteration in a building when the lease forbids alterations to be made, the courts will prevent the change, although the landlord may not be able to show that he would be injured thereby. The cases do not pretend to change or enlarge the meaning of the word 'alteration,' but simply hold that actual alterations, not harmful, will be prevented under an express covenant in a lease prohibiting them. Here the thing proposed is so small and inconsequential that we do not think it could be said that it would constitute an alteration. If it was shown that damage would result from the act, no doubt the plaintiffs would have a remedy regardless of the fact that the building or premises were not or would not be altered."

Advertising signs erected upon the roof and other parts of the leased building, constructed of sheet iron, wood, and metal, and firmly bolted and clamped to the roof and various por-

tions of the outer wall and cornice with steel rods and bolts, but easily removable without injury to the building, are not alterations or changes within a covenant providing that all alterations or changes shall be subject to the approval of the lessor. An alteration or change in the building means an alteration of the structure itself, as distinct from a mere addition to the outside of the building, or other additions to the building itself which have no relation to its structure and make no change in its character. Changing an apartment or residential building to a store building, where the addition would be the taking out of the front and putting in a store front, would be in the nature of a structural change which would essentially change the character of the structure upon the property; but merely putting upon the roof a sign, whether for the benefit of the tenant in the building, or for others, would not be a change in the nature or character of the building itself, but would be merely a use to which the outside of the building could be applied. *Brown v. Broadway & 72d Street Realty Co.* (1909) 131 App. Div. 780, 116 N. Y. Supp. 306.

And the erection of a large clock affixed to the exterior wall of the leased jewelry shop by means of bolts driven into the wall is not a breach of a covenant prohibiting the making of alterations by the lessee without the lessor's consent, since the word "alteration" in such covenant applies only to alterations which would affect the form or structure of the building. *Bickmore v. Dimmer* [1903] 1 Ch. (Eng.) 158, 72 L. J. Ch. N. S. 96, 88 L. T. N. S. 78, 51 Week. Rep. 180, 19 Times L. R. 96.

In *Hope Bros. v. Cowan* [1913] 2 Ch. (Eng.) 312, holding that the lessee of an outside office in an office building had the right to fix flower boxes outside the office windows, the court said: "I have mentioned that the underlease contained a covenant by the underlessees not to make any alterations so as to alter the structure, and but for the decision in *Bickmore v. Dimmer* [1903] 1 Ch. (Eng.) 158, 72 L. J. Ch. N. S. 96, 51 Week. Rep. 180,

88 L. T. N. S. 78, 19 Times L. R. 96, which has been mentioned to me, I might have doubted whether what has been done here were not an alteration to this structure. But, however, the contention that what the defendant had done was any alteration in the structure was expressly disclaimed at the bar."

2. Tearing down or erecting building.

The covering over by the lessee of the yard, inclosed on three sides by walls and on the street side by a fence which the lessee converted into the front of such wooden structure by putting in a door and windows, constitutes an alteration within a covenant prohibiting any alteration or addition in and to the buildings on the leased premises, without the lessor's consent, although such structure could be readily removed without any injury to the buildings or walls, or without disturbing the soil, and this is so independently of the question whether it should be considered as a trade fixture, removable by the tenant, it having been erected and used for a workshop. *Whitwell v. Harris* (1871) 106 Mass. 532.

And the erection of a wooden, open trellis-work screen about 58 feet long and reaching about 12 feet above the boundary wall of the leased premises, is a "building" within the meaning of a covenant prohibiting the erection by the lessee of any building without the lessor's consent. *Wood v. Cooper* [1894] 3 Ch. (Eng.) 671, 63 L. J. Ch. N. S. 845, 8 Reports, 517, 71 L. T. N. S. 222, 43 Week. Rep. 201.

It was held in *Cartwright v. Russell* (1912) 56 Sol. Jo. (Eng.) 467, as digested in *Butterworth's Dig.* 1912, 364, that under a covenant in a lease of gardens in the center of a London square, prohibiting the making by the lessee of any alteration without the consent of the lessor, which consent is not to be unreasonably withheld, that the lessor was precluded from withholding his consent unreasonably to any proposed alteration by the lessee, but that in the circumstances his consent to the erection of a building in such square was reasonably withheld.

In *Haigh v. Waterman* (1867) 16 L. T. N. S. (Eng.) 375, the court, on a balance of convenience and inconvenience, restrained the lessor from ejecting the lessees because of the erection of a greenhouse in the kitchen garden on the leased premises, in violation of a covenant prohibiting the erection of any building on the premises without the lessor's consent, but said, in answer to the argument that such building was an improvement instead of a deterioration of the property, that the lessor alone was the person who had a right to decide whether or not his property had been benefited by the erection of the greenhouse in derogation of the covenant.

A proviso in a lease for re-entry if the lessee commits waste to the value of 10 shillings means that the waste must produce an injury to the reversion to the amount of 10 shillings; and that therefore, where it is possible that the value of the reversion may be increased by the alteration, it is a question for the jury whether waste to the value of 10 shillings has been committed. In this case the premises at the time of the demise consisted of a building one story high, occupied as two tenements, had a back linnhay or bullock house and a garden, and the alteration consisted in raising the building and converting it into five separate dwellings, and pulling down the back bullock house, and erecting a building on its site, intended for three cottages. *Doe ex dem. Darlington v. Bond* (1826) 5 Barn. & C. 855, 108 Eng. Reprint, 318, 8 Dowl. & R. 738, 5 L. J. K. B. 68, 29 Revised Rep. 436.

Where a lease of a store, bounded on vacant land of a third party, excepts and reserves to the lessor the right to stop up and build against windows in the store fronting upon such land, and provides that no alterations in the leased building shall be made during the term, without the lessor's consent, and subsequently the lessee obtains a lease of the adjoining vacant land from its owner and erects a building thereon in contact with the walls of the store in which the windows are, thus interfering with the light and air of the store, the erec-

tion of the building on the adjoining lot is not an alteration within the meaning of the covenant in the first lease, prohibiting alterations without the lessor's consent. *Atkins v. Chilson* (1845) 9 Met. (Mass.) 52.

c. Covenant permitting some alterations.

1. Altering building.

In some leases the covenants upon this subject, instead of generally prohibiting alterations, permit or prohibit particular alterations; in which case the question is whether the change made or contemplated by the tenant is the particular alteration permitted or denied.

Thus, the lessee of a store and cellar may raise the store from 1 to 2 feet, and build such walls and erect such other fixtures as render the cellar convenient for occupancy as a victualing cellar, although it never had been used for that purpose before, under a lease giving him the right to alter and improve the premises in such manner as should be for his interest and benefit, and such alterations do not constitute waste within the meaning of a covenant not to commit waste, where it appears that the expenditure increased the value of the property to an amount greater than the sum expended. *Hasty v. Wheeler* (1835) 12 Me. 434.

And a lessee under a long-term lease has the right, under a Code provision giving a lessee permission to make any improvement in the property leased that he may deem proper, provided that he does not change its form or substance, and under a clause in the lease providing that the lessee may make such "works" on the building as his business requires, provided that neither the strength nor the value of the building is impaired, to remove a thick masonry wall and substitute therefor a reinforced concrete wall, which will add materially to the floor space required by the lessee's business, will strengthen the building, and increase both its intrinsic and rental value. *Enriquez v. Watson & Co.* (1912) 22 Philippine, 623.

It was held in *J. B. Hill Co. v. Pinque* (1919) 179 Cal. 759, 3 A.L.R.

669, 178 Pac. 952, that an allowance of damages against a tenant for making a specified use of the building, and making alterations in it, cannot be sustained, on appeal, if the use was not unlawful, and there is no way of determining what portion of the damages was allowed on that account. The lease gave the lessee the right to make changes or improvements for the convenience of any business desired to be conducted, and the premises, a storeroom, were used by him as a garage, and the alterations made, for which the landlord claimed damages, were the removal of a portion of the foundation of the building, which was alleged to have caused the floor to settle and to have injured and damaged the premises; and the court said that if the defendant was liable for waste in removing a portion of the foundation of the building, there was no separate finding of damage resulting from such act, and that the award of damages based in part upon the lawful use of the premises as a garage could not stand.

The installation of an electric light advertisement on the front of the leased premises, consisting of a framework of light iron bars forming a meshed net to which the letters of the advertisement were attached, hung by steel bands affixed to the ornamental stonework in front of the building, but not fixed to the structure of the building, supported by struts resting on, but not attached to, the stone cornices, the whole framework, letters, and electric lights being capable of being unbolted, taken to pieces, and removed in a few hours without injuring the building, is not a breach of a covenant not to make any alteration in the elevation of the building or in the architectural decoration thereof, without the lessor's consent, since such covenant refers to alterations in the fabric, and not to alterations in appearance caused by temporary advertisements. *Joseph v. London County Council* [1914] W. N. (Eng.) 204, 111 L. T. N. S. 276, 58 Sol. Jo. 579, 30 Times L. R. 508.

But the lessee of the ground floor or store floor of a building under a lease permitting him to make altera-

tions and improvements on the premises, so as to make the same more desirable for the use of the premises for a moving picture house, has no right to lower the floor 3 feet at one end of the building, and by a gradual slope bring it to the former floor level at the entrance, because, by so doing, he would appropriate that much additional space from the basement, which had been leased to another tenant. *Cohen v. Simon Strauss* (1913), 139 N. Y. Supp. 929.

Under a lease giving the lessee the right to make such inside alterations to the leased premises as he may think proper, providing that the same do not injure the premises, it was held that whether extensive alterations, consisting principally in the taking down of partitions, and in the removal of a large number of chandeliers, and in the destruction of plumbing work, really caused injury, or were reasonably required for the enjoyment of the premises, according to the business carried on by the lessee, was a question of fact, and not a question of law; but that, if such question was considered to be one of law, the court stated that such alterations were not justified by such alteration clause in the lease. It was held that such alteration clause conferred upon the lessee more power to make alterations than he would have had if it had not been inserted; that it permitted acts which, in point of law and technically, were waste, but yet were not accompanied by actual injury to the premises; that it plainly gave only a qualified right to make alterations; that the lessee's will was limited by the fact that the alterations were to cause no injury to the premises; and that a further reasonable limitation was that the act of alteration was not to be wanton nor capricious, but must be made with a purpose to facilitate the transaction of the lessee's business. *Agate v. Lowenbein* (1874) 57 N. Y. 604.

A lessee under a lease providing that he is to lay out a certain amount in improvements, to be approved by the lessor, may not, against the consent of the lessor, convert the leased dwelling house into a store, and take down partitions, and cut through the

ceilings and floors in the second and third stories, and fix a wheel and tackle in the third story to raise heavy packages, all of which would be to the great and constant injury of the building. *Douglass v. Wiggins* (1815) 1 Johns. Ch. (N. Y.) 435.

A tenant has no right to cut off the corner of a building, placed by him upon the leased property under a stipulation requiring him to make the erection, and requiring the lessor to purchase it at the expiration of the term, or to renew the lease for a specified time, at the expiration of which the title should pass to the lessor. *Bass v. Metropolitan West Side Elev. R. Co.* (1897) 39 L.R.A. 711, 27 C. C. A. 147, 53 U. S. App. 542, 82 Fed. 857.

A covenant, in a lease of premises consisting of a wharf and dock, dwelling house, wash house, and courtyard, providing that the lessee shall not erect any structure thereon, nor make any external alteration whatsoever in the premises, nor any internal alterations in the dwelling house that may lessen the value thereof, without the consent of the lessor, is violated by the raising of the river wall 3 feet, removing the coping and iron railing therefrom, and placing thereon a piece of timber about a foot thick, and raising the level of the wharf 3 feet, and raising the roof of the wash house, whether or not such alterations increase or lessen the value of the leased premises, since the covenant prohibits all external alterations, and the qualification as to the lessening of the value thereof applies only to internal alterations in the dwelling house. *Perry v. Davis* (1858) 3 C. B. N. S. 769, 140 Eng. Reprint, 945.

A lessee of a building, the ground floor of which is to be used as a store, and whose second floor is divided into offices, is not, by a provision of the lease giving him the right to make such changes in such parts of the building as he finds necessary for his purposes, providing that such alterations will not injure the building, authorized to cut a door through the party wall, so as to connect the second floor of the leased building with the second floor of the adjoining building, and remove the partitions between the

es, in order to make them available for use as an annex to the other building. *F. W. Woolworth Co. v. Nelson* (1920) — Ala. —, 85 So. 449.

The making, by a lessee of a business block, of openings on the several floors into an adjoining block, which he has leased to meet the needs of his growing business, constitutes a change in the exterior of the leased building within a prohibition in the lease that no changes in the exterior of the building shall be made without the approval of the lessor; but the lessor cannot arbitrarily withhold his approval, if such changes will not impair the structural safety of the building, where the preceding clause in the lease provides that the lessee may make any changes in such building that will not impair the structural safety thereof. *B. Siegel Co. v. Wayne* Circuit Judge (1914) 183 Mich. 145, 149 N. W. 1015.

Posting bills on the wall of the leased house is a breach of the covenant not to make any alteration in the external appearance of the building. *Heard v. Stuart* (1907) 24 Times L. R. (Eng.) 104.

2. Tearing down or erecting building.

A stipulation in a lease that the lessee may make alterations in the leased building, so as to fit it for some other business than that to which it has previously been devoted, does not authorize the lessee to tear down the building and erect in its place another and different structure, although it may be a better and more expensive one. *Davenport v. Magoon* (1884) 13 Or. 3, 57 Am. Rep. 1, 4 Pac. 299.

And equity will restrain a lessee from tearing down buildings on the leased premises in violation of a covenant not to cut, or injure, or pull down the principal timbers or walls. *Hindley v. Emery* (1865) L. R. 1 Eq. (Eng.) 52, 35 L. J. Ch. N. S. 6, 11 Jur. N. S. 874, 13 L. T. N. S. 272, 14 Week. Rep. 25.

And the erection, by a lessee of premises consisting of a mill and a small dwelling house attached thereto, of an additional building, containing a number of rooms, on entirely new foundations, immediately adjacent to

the house, with a separate entrance, but used by the occupant, together with the original house, as one entire dwelling house, is a breach of a covenant by the lessee not to erect, without the lessor's consent, any house, edifice, cabin, farm, or other building which shall, in whole or in part, be occupied as a dwelling house. *Domville v. Colville* (1873) Ir. Rep. 7 C. L. 68.

But under a lease containing no negative covenant, but granting permission to the lessee to erect buildings on the demised premises, the lessee may pull down a building with a view to rebuilding. *Re McIntosh* (1891) 61 L. J. Q. B. N. S. (Eng.) 164.

d. Covenant to repair.

1. Altering building.

The making of alterations by a tenant is sometimes considered as a breach of a covenant to repair.

Thus, the opening of two doorways through the wall between the leased house and an adjoining house is a breach of a covenant to repair. *Gange v. Lockwood* (1860) 2 Fost. & F. (Eng.) 115.

And making an opening along practically the whole side of the leased building, so as to enable it and the adjoining building to be used as one, is a continuing breach of a covenant to repair, and is also waste, although the lessee is given by the lease the right to maintain, continue, use, build, and rebuild such wall. *Holman v. Knox* (1912) 25 Ont. L. Rep. 588, 21 Ont. Week. Rep. 325, 3 Ont. Week. N. 745, 3 D. L. R. 207.

It was held in the lower court, in *Straus Land Corp. v. International Hotel Windsor* (1918) 15 Ont. Week. N. 10, that the making, by the lessee of hotel property, of an immaterial variation in the design, altering the front so as to make two entrances, and breaking up the interior into two shops, was not a breach of a covenant to repair, where the evidence showed that the value of the property as a revenue-producer was increased instead of being decreased by the alteration, but on appeal, it was held in (1919) 15 Ont. Week. N. 411, that

the changes could not lawfully have been made without the lessor's consent, and that therefore the lessees were wrongdoers, and were not helped by the fact, if a fact, that the building was better as changed than it was before, and that the lessees were liable in damages, for the wrong done by these changes.

But equity will not enjoin the lessees of storehouses under a lease for nine hundred years from converting them into dwelling houses, by raising the external walls to a uniform height, putting in the necessary internal walls, and altering the level of the floors, where such storehouses are in disrepair, cannot be rented as such, and their conversion into houses is an improvement and increases the value of the demised premises, and the lease contains no covenant against their use for dwellings, although such alterations may be a breach of a covenant to repair, and technically waste. *Doherty v. Allman* (1878) L. R. 3 App. Cas. (Eng.) 709, 39 L. T. N. S. 129, 26 Week. Rep. 513.

And the making of an opening in the wall for the purpose of making the leased building suitable for the trade carried on is not such a material alteration as to constitute waste, or a breach of the covenant to repair. *Sullivan v. Dore* (1913) 5 Ont. Week. N. 70, 25 Ont. Week. Rep. 31, 13 D. L. R. 910.

The moving, by the lessee of premises for a grocery and liquor store, of a wooden partition, erected by the lessor for an office, the closing up of the door in such partition, and the conversion of a front window into a door, so as to comply with a new law requiring the separation of liquors from groceries, is not a breach of a covenant to repair the demised premises, with the fixtures and things that may be erected and made during the term, since such covenant, by implication, grants permission to the lessee to erect and make such fixtures and things as shall not diminish the value of the demised premises; nor do such alterations constitute waste, since the reversion is not damaged thereby. *Holderness v. Lang* (1886) 11 Ont. Rep. 1.

And it was held in *Hyman v. Rose* [1912] A. C. (Eng.) 623, 81 L. J. K. B. N. S. 1062, 106 L. T. N. S. 907, 28 Times L. R. 432, 56 Sol. Jo. 535, that where the lease of a chapel contains no provision requiring the building to be used as a chapel, but permits it to be used as a moving picture theater, alterations by the lessee to adapt it to such purpose, consisting in the removal of a door, wall, and railings around the building, the cutting of the wall of the chapel for the purpose of making a new doorway into the street, and also a window, and the cutting of another wall for the purpose of enlarging an existing doorway, and the removal of two wooden staircases from one end of the interior, and, in lieu thereof, the construction of two new fireproof staircases at another end, and, for this purpose, the removal of a portion of the wooden gallery in the interior, and the removal of the organ and the blocking up of the organ chamber with a plaster screen, and the erection of a lantern loft at one end of the building, and the raising of the floor between the seats, are not a breach of a covenant to repair, and that such alterations do not constitute waste.

A tenant of a private dwelling house has the right to take down part of the house front next the street, and convert the lower portion of the premises on that side into a shop and exhibition room for pictures, taking out the house windows and putting in their place shop windows, and to cut through an inside partition on the ground floor a new door, and close up the old one, under a lease containing a covenant by the tenant to repair and keep in repair the premises and all such buildings, improvements, and additions as should be made thereon by him during the term, since permission to make such alterations may be implied from such covenant. *Doe ex dem. Dalton v. Jones* (1832) 4 Barn. & Ad. 126, 110 Eng. Reprint, 403, 2 L. J. K. B. N. S. 11, 1 Nev. & M. 6.

Changing the position of some of the fences on the leased farm is not per se a breach of a covenant to repair and to keep fences in repair; but whether such alterations are a breach

of such covenant depends on the nature of the fences and the use to which they have been put. *Leighton v. Medley* (1882) 1 Ont. Rep. 207.

It appears from *Edge v. Pemberton* (1843) 12 Mees. & W. 187, 152 Eng. Reprint, 1164, 1 Dowl. & L. 467, 13 L. J. Exch. N. S. 48, that the removal by a lessee of windows and window frames from the leased building constitutes voluntary waste, the court holding that the lessor could not recover for such voluntary waste in an action for breach of a covenant to deliver up the premises in tenantable repair.

2. Tearing down or erecting building.

A covenant by the lessee to repair, and at the end of the term to surrender, the leased building in good condition, does not preclude the lessors from obtaining an injunction against the pulling down of the building and the carrying away of the materials.

London v. Hedger (1810) 18 Ves. Jr. 355, 34 Eng. Reprint, 352.

But it was held in *Jones v. Chappell* (1875) L. R. 20 Eq. (Eng.) 539, 44 L. J. Ch. N. S. 658, that the erection by the tenant of buildings upon the leased land which improve or increase its value is not waste; that in order to prove waste it is necessary to show an injury to the inheritance; and the court said that the utmost that the landlord could do would be to file an injunction to restrain the lessee from continuing the building. The court further said, that in the lease in question not only was there no covenant restraining the lessee from erecting buildings, but there was a covenant that he would keep all future buildings and erections in repair; showing that the erection of buildings was contemplated, and that, therefore, so far as the lease went, it was almost an implied license to erect buildings.

G. V. I.

W. P. McLEAN, SR., Trustee, etc., et al., Plffs. in Err.,

v.

J. J. BREEN.

Texas Supreme Court — April 7, 1920.

(— Tex. —, 219 S. W. 1089.)

Trust — to pay expenses of last illness — what included.

Under a trust to pay the expenses of the last sickness of a person, only those expenses are included which attend the illness which immediately precedes and results in death, not the expenses of the general and protracted illness of a chronic invalid.

[See note on this question beginning on page 462.]

ERROR to the Court of Civil Appeals for the Second Judicial District to review a judgment affirming a judgment of the District Court for Tarrant County (Brown, J.) in favor of plaintiff in an action brought to recover for services rendered and expenditures incurred by plaintiff in the care of a certain person during her last illness. *Reversed.*

The facts are stated in the Commissioner's opinion.

Messrs. McLean, Scott, & McLean, for plaintiffs in error:

The terms of the will plainly limit the amount which the trustee could turn over to Mrs. Morey for her support and maintenance to the net income of the estate, and the trustee,

being thus limited, could not bind the estate beyond the directions of the will.

Kennedy v. Pearson, — Tex. Civ. App. —, 109 S. W. 280; 3 Pom. Eq. Jur. 3d ed. § 1062; 40 Cyc. 1632; *McCreary v. Robinson*, 94 Tex. 221, 59

S. W. 536; *Lynn v. Busby*, 46 Tex. 600; *McClelland v. McClelland*, — Tex. Civ. App. —, 37 S. W. 358.

Messrs. Capps, Cantey, Hanger, & Short, for defendant in error:

It was not alleged that the wife of plaintiff was authorized by him to make an agreement to care for Mrs. Morey for \$30 per month, and therefore it was proper for the court to instruct the jury with reference to the ratification of the alleged contract.

Cline v. Hackbarth, 27 Tex. Civ. App. 391, 65 S. W. 1087; *National Fire Ins. Co. v. Wagley*, — Tex. Civ. App. —, 68 S. W. 820; *Wadkins v. Watson*, 86 Tex. 194, 22 L.R.A. 779, 24 S. W. 385; *Cruger v. McCracken*, 87 Tex. 584, 30 S. W. 537.

Plaintiff would not be bound by any agreement upon the part of his wife to care for Anna Morey during her last sickness and until the time of her death for \$30 per month, unless he ratified and confirmed such agreement.

Cleburne Street R. Co. v. Barnes, — Tex. Civ. App. —, 168 S. W. 992; *Elser v. Putnam Land & Development Co.* — Tex. Civ. App. —, 171 S. W. 1053; *Bitter v. Butchers' & Saloon Men's Ice Mfg. Asso.* — Tex. Civ. App. —, 77 S. W. 424.

Plaintiff alleged that the sickness of Anna Morey causing her confinement, as stated by the witness whose evidence is objected to, was her last sickness, and the question of whether such sickness continued until her death was a question of fact for the jury.

Huse v. Brown, 8 Me. 169.

The admission of evidence as to the time Mrs. Morey was confined to her bed was harmless, as the court expressly restricted a recovery in favor of plaintiff to the expenses of the last sickness of Anna Morey.

Missouri, K. & T. R. Co. v. Gober, — Tex. Civ. App. —, 125 S. W. 385; *Pacific Exp. Co. v. Needham*, — Tex. Civ. App. —, 94 S. W. 1071.

The estate of Rose Dodd was liable to plaintiff for the expenses of the last sickness of Anna Morey.

Missouri, K. & T. R. Co. v. Gober, — Tex. Civ. App. —, 125 S. W. 385; *Texas & P. R. Co. v. Ellerd*, 38 Tex. Civ. App. 596, 87 S. W. 362; *Pacific Exp. Co. v. Needham*, *supra*.

The period of time covered by the last sickness of Anna Morey was a question of fact to be determined by the jury, and they were authorized to

find that it extended during the entire time alleged by the plaintiff, or for a lesser period of time during which services were rendered and expenditures made by him for Anna Morey, of the value of \$1,000.

Percival v. McVoy, 23 S. C. L. (Dud.) 337; *Huse v. Brown*, 8 Me. 167; *Wasson's Estate*, 8 Pa. Dist. R. 480; *Stagger's Estate*, 8 Pa. Super. Ct. 260.

Sonfield, P. J., filed the following opinion:

Suit by J. J. Breen, defendant in error, against W. P. McLean, Sr., trustee of the estate of Rose A. Dodd, deceased, and another, plaintiffs in error, for services rendered to, and expenditures made by plaintiff and wife for and in behalf of, Mrs. Anna Morey. Defendant McLean was the duly appointed and qualified trustee under the will of Mrs. Rose A. Dodd. The will vested the estate in the trustee in trust for her sister, Anna Morey, directing that the net income be turned over to the sister during her natural life. Upon the death of the sister, "and the payment of whatever expenses may be incurred in her last sickness and for her funeral expenses," all the estate then on hand was to go to the Congregation of the Sisters of Charity of the Incarnate Word, to whom the trustee was directed to turn it over "after the payment of the said expenses of last sickness and funeral expenses of my said sister."

The sisters, Mrs. Morey and Mrs. Dodd, were quite old, and for some time prior to the death of Mrs. Dodd they became boarders at the St. Joseph's Infirmary in Fort Worth. At the date of the will, and at the time of Mrs. Morey's death, she had on deposit in a bank the sum of \$630, which constituted the whole of her property, and received from the United States government a pension of \$12 per month. During the period of about one year after the death of Mrs. Dodd, defendant trustee paid the St. Joseph's Infirmary the sum of \$30 per month for the board and room rent of Mrs. Morey. The net income from Mrs. Dodd's estate

did not exceed, on an average, that amount.

About the month of January, 1910, Mrs. Morey went to live with the family of plaintiff. It was agreed between plaintiff's wife and defendant trustee that the charge for Mrs. Morey's board and room rent should be the same that had been paid to St. Joseph's Infirmary, and the sum of \$30 per month was paid to plaintiff's wife each month during the time Mrs. Morey lived in the home of plaintiff, which was about two years and eight months.

After the death of Mrs. Morey, which occurred on the 12th day of September, 1912, plaintiff presented to defendant trustee an account for expenditures made and services rendered covering the whole period of Mrs. Morey's residence with his family, aggregating the sum of \$2,467.83. The account included charges for nurse hire, liquors, fuel, and washing, for mattresses, pillows, linens, and carpet spoiled and replaced, or used and worn out, and for extra care in addition to the amount contracted and paid for during this period. The account was rejected and payment refused by the trustee. At the time of the presentation of this account, defendant trustee had paid all the funeral expenses and bills for medical attendance on Mrs. Morey up to the date of her death. Herein plaintiff sought judgment in the sum of \$2,360.

The Congregation of the Sisters of Charity of the Incarnate Word, residuary legatee and devisee under the will of Mrs. Dodd, was made a party defendant, and was coplaintiff in error in the application for writ of error.

Trial to a jury resulted in a verdict and judgment in favor of defendant in error in the sum of \$1,000, which, on appeal, was affirmed by the court of civil appeals, — Tex. Civ. App. —, 183 S. W. 394.

The court of civil appeals held that, from the evidence of Mrs. Breen and her two daughters, and various neighbors who visited the Breen home during Mrs. Morey's

stay there, the theory was sustainable that, although Mrs. Morey was able, at intervals, to be up, and even to go to town as late as May, 1912, yet she was, during the period intervening between June, 1911, and her death in September, 1912, suffering from the same and continuous ailment of which she died. The amount awarded by the verdict was held by the court of civil appeals to be justified.

The supreme court, in granting the writ of error, regarded the judgment as wrong in decreeing recovery for expenditures for services which could not be considered as having been incurred on account of "the last sickness" of Mrs. Morey, under the legal meaning of that term as applied to one in her physical condition.

Mrs. Morey was over eighty years old at the time she went to live in the home of plaintiff. She suffered the usual infirmities of old age. She was feeble, and doubtless required much more attention and care than would a younger person. Mrs. Breen, the wife of plaintiff, testified that Mrs. Morey was first confined to her bed in 1911 for a period of three weeks in the spring; that in the fall of 1911 she was in bed seven weeks during the months of September and August; that in 1912 she was confined to her bed from April until her death in September; that Mrs. Morey took to her bed in April, 1912, and did not get up again; that in May of that year she got up once or twice and went as far as the dining room; that she had to be assisted to the table and could not remain there, and had to be taken back to bed; that that was the last time she was ever out of her room, and from that time she was so sick she could not be out of bed, or get out without assistance. She also testified that Mrs. Morey went to town in the month of February, 1912.

The supreme court, on investigation of the record, advises that it adheres to the opinion expressed in the

granting of the writ of error; that the time of "the last sickness," as applied to one in the invalid condition of Mrs. Morey, and under the facts as disclosed by the evidence, should be reckoned, as a matter of law, as from the date when she was last permanently confined to her bed. In view of this holding, conceding a full recovery for each item for the full period, and including the value of the linens, mattresses, and carpet claimed to have been ruined, as of this period, and deducting therefrom the \$30 per month paid to plaintiff, as under the instruction of the court, there is no evidence to sustain a verdict in the sum of \$1,000.

We are of opinion that the judgment of the Court of Civil Appeals, affirming that of the District Court, should be reversed, and the cause remanded for a new trial.

Phillips, Ch. J., delivered the opinion of the court:

The judgment recommended by the commission of appeals is

adopted and will be entered as the judgment of the supreme court.

The undisputed proof in this record is that in February, 1912, Mrs. Morey was able to leave the home of the Breens and go into the city of Fort Worth and there attend to certain business affairs. A verdict which reckons the period of her "last sickness" as embracing a time when such was the state of her health cannot be sustained.

"Last sickness" means the illness which immediately precedes and results in death. It does not mean the general or protracted illness from which a chronic invalid may at no time be free. Applied to one in Mrs. Morey's condition,—an old lady, past eighty years of age, so infirm as to be habitually ill,—it could not in fairness and right be held to mean other than that illness by which she was last taken to her bed. The time of such illness did not antedate April, 1912.

Trust—to pay expenses of last illness—what included.

Petition for rehearing denied.

ANNOTATION.

Meaning of phrase "last sickness," and the like.

- I. In general, 462.
- II. In statutes giving preference to expenses, 463.
- III. In statutes as to nuncupative wills, 464.

I. In general.

It will be seen that it is held in the reporter case (*MCLEAN v. BREEN*, ante, 459) that a trust for the testatrix's sister providing for the payment of "expenses that may be incurred in her last sickness" is construed to include only those expenses which attend the illness which immediately precedes and results in death, not the expenses of the general and protracted illness of a chronic invalid.

It may be noted that where a will provided, "I also give to the said Carrie Robins the sum of \$200 in trust in money of Allison Bunnell to be placed in savings bank to be used as she may

need it to pay her last sickness and funeral expenses," it was held that no part of the money could be used for other purposes than payment of the beneficiary's last sickness and funeral expenses. *Birge v. Nucomb* (1918) 93 Conn. 69, 105 Atl. 335. It may also be noted that in the same case it was also held that an absolute gift was made by the following clause: "The remaining two thirds I direct to be equally divided between my two brothers Daniel and John Woodruff to be placed in savings bank in trust, they to have the use during their lifetime and if necessary a sufficient amount to pay for their last sickness and funeral expenses, the same to be to them their heirs forever."

In a case concerning the meaning of "last sickness" under the United States Pension Laws, the court charged the jury as follows: "The

last sickness means the sickness which results in death. . . . If it was such a case as this was, lingering, and, while admitting of transient temporary recuperation, followed immediately by relapses, and every day adding to his aggregate weakness, why, the last sickness would commence from the time this consumption, in a pronounced way, set in. You must deal with that as you find it. It may be a year or less. It was from the time that he took to his bed and never left it. On the other hand, it should not be extended over a lifetime, but you must, as sensible men, look at it when, in the opinion of doctors, and in the opinion of those who knew, he had the disease operating upon him from which he died." United States v. Frisbie (1886) 28 Fed. 808.

In a successful action to set aside gifts made by a husband to defeat dower, it was held that these gifts were made in the donor's last sickness where it appeared that he was "over seventy years of age, and had suffered a stroke of paralysis, was ruptured, had varicose veins, was so feeble that he required support to get across the streets to avoid teams, that he complained of pains in his head which he said were killing him, that he constantly had dark things before his eyes which he said was a bad sign, that several of his family had died that year, and he did not expect to be living at the end of the year. He married February 24, 1897, and disposed of the bulk of his very large estate by gifts to his children in July and August, and died about October 1, 1897." Rice v. Waddill (1902) 168 Mo. 99, 67 S. W. 605.

The meaning of the phrase has sometimes arisen in connection with gifts causa mortis. Thus where an old man in declining health, but not confined to the house, made in January what was alleged to be a gift causa mortis, and some days later he walked a mile and also 2 miles, and died in April, it was held that it was not sufficiently established that he was in his last sickness to sustain the gift. Robson v. Robson (1866) 3 Del. Ch. 51.

And where a consumptive, in

March, being sick and expecting to live but a little while, assigned a note to his daughter, but got better and attended to his business till December, when he was taken sick and confined to the house and some time afterwards died, the gift was held not made in his last sickness. Weston v. Hight (1840) 17 Me. 287, 35 Am. Dec. 250.

And in Adams v. Nicholas (1835) 1 Miles (Pa.) 90, it was held that "the fact of a will having been made subsequent to the alleged donatio causa mortis, regularly proved before the register, and not impeached on the trial, was conclusive evidence that the gift was not made during such a last sickness as the law required to constitute a disposition of property causa mortis."

II. In statutes giving preference to expenses.

A number of cases have construed the meaning of the phrase "last sickness," and like phrases, in statutes giving a preference to the expenses of the last sickness. In these cases, generally, the statute is liberally construed.

Thus, the services of a physician for six months prior to the death of one suffering from Bright's disease were held expenses of last illness, the court saying: "It is explained that the sufferer's condition became very much more grave from about the 1st of May, 1900, and this circumstance justifies, perhaps, the claim that what may be called his last illness began at that date." Schmidt's Succession (1902) 108 La. 293, 32 So. 413.

So it was held that debts for the "last sickness" included physician's charges for medicines and services accruing between January 19th and June 28th, 1828, inclusive, where the patient died December 16th, in the same year, of a cancer in the nose, which had existed about two years, and had been regarded as a fatal disease as early as in April preceding. He was sixty-six years old, and had bestowed some personal attention on the business of his farm during the summer of 1828, and was occasionally abroad in the autumn following. Huse v. Brown (1831) 8 Me. 167.

And in *Percival v. McVoy* (1838) 23 S. C. L. (Dud.) 337, the services of a nurse were preferentially allowed for apparently about a year, more or less, as "expenses of the last sickness," while the patient was lingering under the disease which killed him, the court saying that the statute should be construed liberally.

So, services for a year and a half for incurable heart disease from which the patient died were held to be during the "last illness" of the decedent. *Staggers's Estate* (1898) 8 Pa. Super. Ct. 260.

So, a woman, who died from stone in the kidney from which she suffered several years, it gradually breaking her down, was held to be in her last illness for about eighteen months before her death, so far as concerned her physician's charge for that period. *Wasson's Estate* (1898) 8 Pa. Dist. R. 480.

And in case of a death from consumption, where the physician's claim was for attendance, etc., from January to April, after which the patient went elsewhere and died in September, it was held that "this sickness was properly the last illness from the time the deceased was incapacitated from doing any work or attending to business, and that that period commenced prior to the attendance of the claimant." *Jones's Estate* (1886) 2 Chester Co. Rep. (Pa.) 302.

But where the physician had for a year attended a decedent who died from softening of the brain, the court said that the disease manifested itself only in weakness and irritability "up to within a short time of her death, when it resulted in apoplexy. Prior to this change the doctor's attendance was irregular. The patient being sometimes better and sometimes worse, he went only when called. Subsequently his visits seem to have been regular and pretty constant. We think the claim to preference must be confined to the latter period. The report of the auditor must be corrected accordingly." *Duckett's Estate* (1883) 1 Chester Co. Rep. (Pa.) 78.

And in *Re Reese* (1872) 2 Pearson (Pa.) 482, it was held that "medicine furnished and medical attendance

given during the last illness of the decedent" did not include attendance, etc., following a fall from which decedent "so far recovered as to be able to attend to his ordinary business, but doubtless with less efficiency than formerly, visited New York and Philadelphia in the course of the autumn and made his purchases, and received little or no medical attendance for some time; afterwards called in another physician, and died in the following December."

And attendance, etc., for an insane person for six years preceding his death, were not allowed as expenses of his last illness in *Re Orun* (1886) 18 Phila. (Pa.) 85.

In *Re Reese* (Pa.) *supra*, the court said that the "medical attendance," etc., given during the last illness of the decedent, "relates not to the remote but proximate cause of death, and the attendance spoken of must be during the last sickness; it does not relate to cases where the party lingers for a long period, partially convalescing; then the attendance is broken off, and, the patient again relapsing, the attendance is renewed. If we were to so construe the statute the claim might run over a long lifetime, as some persons are never in good health, but linger under the same disease from the cradle to the grave."

In *McLean v. Crow* (1891) 88 Cal. 644, 26 Pac. 596, the court said: "We do not feel called upon to consider whether the phrase 'last sickness,' in § 1643 of the Code of Civil Procedure, means services rendered in extremis, although it would seem obvious enough that it must mean something more than that, and something more than the same phrase in statutes authorizing nuncupative wills."

III. In statutes as to nuncupative wills.

By the Statute of Frauds, 29 Car. II. chap. 3, § 19, it was provided that no nuncupative will shall be good unless "made in the time of the last sickness of the deceased." The courts are not agreed as to the meaning of the expression "last sickness" in this and similar statutes.

Some of the courts hold that the expression means in extremis: *Elling-*

ton v. Dillard (1871) 42 Ga. 361; *Scaife v. Emmons* (1890) 84 Ga. 619, 20 Am. St. Rep. 383, 10 S. E. 1097; *Bellamy v. Peeler* (1895) 96 Ga. 467, 23 S. E. 387; *Harp v. Adams* (1914) 142 Ga. 5, 82 S. E. 246 (as stating the rule); *O'Neill v. Smith* (1870) 33 Md. 569; *Biddle v. Biddle* (1872) 36 Md. 630; *Hammett v. Shanks* (1874) 41 Md. 201 (as stating the rule); *Carroll v. Bonham* (1887) 42 N. J. Eq. 625, 9 Atl. 371; *Prince v. Hazelton* (1822) 20 Johns. (N. Y.) 502, 11 Am. Dec. 307 (leading case); *Re Yarnall* (1833) 4 Rawle (Pa.) 46, 26 Am. Dec. 115; *Boyer v. Frick* (1842) 4 Watts & S. (Pa.) 357; *Werkheiser v. Werkheiser* (1843) 6 Watts & S. (Pa.) 184; *Haus v. Palmer* (1853) 21 Pa. 296; *Rutt's Estate* (1901) 200 Pa. 549, 50 Atl. 171; *Mellor v. Smyth* (1908) 220 Pa. 169, 69 Atl. 592 (as recognizing the rule); *Shover's Estate* (1917) 258 Pa. 70, 101 Atl. 862; *Meisenhelter's Will* (1881) 15 Phila. (Pa.) 651 (as recognizing the rule); *Conaughton's Will* (1892) 11 Pa. Co. Ct. 460, 1 Pa. Dist. R. 309; *Wiley's Estate* (1897) 6 Pa. Dist. R. 691; *Bippus's Estate* (1906) 15 Pa. Dist. R. 469; *Megary's Estate* (1904) 25 Pa. Super. Ct. 243 (recognizing the rule); *Reese v. Hawthorn* (1853) 10 Gratt. (Va.) 548 (apparently; see *infra*).

In *Reese v. Hawthorn* (1853) 10 Gratt. (Va.) 548, *supra*, where, three or four days before deceased's death the attending physician had given up all hope, and a paper was prepared which proved defective as a written will, and was attempted to be established as a nuncupative will, it was held that the statute contemplated such a sickness as afforded no opportunity or ability to execute a written will, and the court refused to uphold the instrument as a nuncupative will. The real decision here seems to be that there was no purpose to make a nuncupative will, but the court declined to admit that there was any holding that "last sickness" meant anything else than in extremis in *Page v. Page* (1843) 2 Rob. (Va.) 424, where deceased had a severe attack of pleurisy at night, was improved in the morning, later grew worse, and that

9 A.L.R.—30.

day made a nuncupative will, but did not expect that he would die. He was alternately better and worse for about a week, being in possession of his senses a part of each day, and died eight days after making the nuncupation and the will was held to have been made in his last sickness.

(All the foregoing Pennsylvania cases except the first were decided under a statute reading "during the last sickness.")

In *Bellamy v. Peeler* (1895) 96 Ga. 467, 23 S. E. 387, *supra*, it was held that the court correctly charged the jury that a nuncupative will must be made in the last sickness; and that if they believed from the evidence that the alleged testatrix, "after making the alleged nuncupative will, had the time and opportunity and means at hand to have reduced it to writing, but failed to do so, then said alleged will is invalid."

A nuncupative will was held invalid where the deceased had been confined to the house for eight months prior to his death, and the nuncupation was made the day before his death when he had time and strength to make a written will, and he was in the possession of his senses up to the time of his death. *O'Neill v. Smith* (1870) 33 Md. 569, *supra*.

In *Boyer v. Frick* (1842) 4 Watts & S. (Pa.) 357, *supra*, it was held that an alleged nuncupative will was not made in the last sickness when it was made by a person bodily and mentally able to make a written will, four hours before an operation was to be performed.

But in *Sampson v. Browning* (1857) 22 Ga. 293, where the alleged testator, at the time of speaking, was lying mortally wounded, and died twelve hours after, his condition being that of stupor, from which he had to be aroused several times when making the nuncupation, and into which he lapsed when left to himself, it was held that this was a last sickness within the meaning of the statute, although there seems to have been evidence that there were time and strength to have made a written will.

In *Smith v. Salter* (1902) 115 Ga. 286, 41 S. E. 621, where deceased was

dangerously sick and conscious of her condition, and died an hour or two after making the alleged will, it was held that it could not be said, as a matter of law, that she had time and opportunity to reduce her wishes to writing.

And where a patient suffering from appendicitis, within an hour after her attention was called to the necessity of an operation, and after she made a parol declaration as to the disposition of her property upon death, was carried by automobile to a city, where she underwent an operation shortly after her arrival at the hospital, but after the operation was performed she did not regain consciousness, and died on the following morning, it was held that the jury were authorized to find that she had not "the time and opportunity and means at hand to have reduced it to writing." *Harp v. Adams* (1914) 142 Ga. 5, 82 S. E. 246.

(It may be noted that while not deciding the point, the court expressed the opinion in *Wiley's Estate* (1898) 187 Pa. 82, 67 Am. St. Rep. 569, 40 Atl. 980, that "although there was sufficient time, even after the physician had warned the decedent to settle her affairs, for her to have made a will, yet if she, through misplaced confidence in her ability to 'pull through,' as the doctor expressed it, postponed doing so, it would not necessarily follow that she might not yet make a valid nuncupative will.")

On the other hand, in other jurisdictions, it has been held that the phrase "last sickness," in statutes relating to nuncupative wills, does not mean in extremis. *Johnston v. Glasscock* (1841) 2 Ala. 218 (criticizing as obiter the contrary view expressed in *Sykes v. Sykes* (1830) 2 Stew. (Ala.) 364, 20 Am. Dec. 40); *Harrington v. Stees* (1876) 82 Ill. 50, 25 Am. Rep. 290; *Baird v. Baird* (1905) 70 Kan. 564, 68 L.R.A. 627, 79 Pac. 163, 3 Ann. Cas. 312; *Godfrey v. Smith* (1905) 73 Neb. 756, 103 N. W. 450, 10 Ann. Cas. 1128 (will rejected on another ground); *Nolan v. Gardner* (1872) 7 Heisk. (Tenn.) 215; *Re Miller* (1907) 47 Wash. 253, 13 L.R.A. (N.S.) 1092,

125 Am. St. Rep. 904, 91 Pac. 967, 14 Ann. Cas. 1163.

The requirement that a verbal will, to be valid, must be made in the last sickness, is satisfied if the disease of which the testator dies has progressed to such a point that he expects death at any time, and is liable to die therefrom at any time, and in view of such expected death, and as preparatory thereto, such will is made, and death from such sickness does occur seventeen days thereafter. *Baird v. Baird* (1905) 70 Kan. 564, 68 L.R.A. 627, 79 Pac. 163, 3 Ann. Cas. 312, *supra*.

Similarly, in *Godfrey v. Smith* (1905) 73 Neb. 756, 103 N. W. 450, 10 Ann. Cas. 1128, *supra*, where the will was made a day before the death, but was rejected on another ground, it was held that where a verbal will is made in the last sickness, of which the testator dies, when such sickness has progressed to such a point that he expects death at any time, and realizes that he is liable to die therefrom at any time, and in view of such expected death, and as preparatory thereto, makes a will near to the time of his death, such will is made in the last sickness of the testator, although a sufficient time may have intervened between the making of the oral will and the death of the testator to have permitted the making of a written will.

In *Nolan v. Gardner* (1872) 7 Heisk. (Tenn.) 215, *supra*, a nuncupative will was sustained, made when, in the language of the witnesses, the testatrix was in her last sickness, but she did not die until some six days afterwards, during which period she was sometimes better and sometimes worse, and was able at times to walk about the house, until the day she died. At the time of making the will she was very sick, and remarked that she was liable to die at any time, but she had ample time after the nuncupation to have made a written will. The court stated that the power to make a nuncupative will existed independently of the statute providing that it must be made in the last sickness, and said: "Perhaps in this case it is not proper to do more than to say that it

must appear that at the time of making the will the testator was sick, and, as the authorities indicate, that he must have acted in contemplation of death from this sickness; that it must further appear that it was his last sickness,—that is, this sickness must continue until the testator dies; that the particular attack of disease, or 'sickness,' must end in death; but no rule is given as to the violence or particular character of the sickness or its duration. Nor will it defeat the will to show that the testator might without difficulty have reduced his will to writing."

In *Gwin v. Wright* (1848) 8 Humph. (Tenn.) 639, where the deceased, a soldier, was afflicted with a disease which frequently proved fatal, and was informed by the doctor that he could not live, and he made a will and died a few hours afterwards,—the will was upheld on the ground that the statute did not require an immediate anticipation of death; although it was said that this case would also satisfy that requirement.

In *Re Miller* (1907) 47 Wash. 253, 13 L.R.A. (N.S.) 1092, 125 Am. St. Rep. 904, 91 Pac. 967, 14 Ann. Cas. 1163, supra, it was held that the last sickness during which one is permitted by statute to make a nuncupative will does not mean a sickness when testator is in extremis, when there is no time or opportunity to reduce the will to writing, but a sickness which has progressed to a point where testator expects death at any time, is liable to die at any time, and in fact does die from such sickness, and, in view of its occurrence, and as preparatory thereto, dictates the will.

Indecisive cases.

Some of the cases are indecisive on the point. Thus, it was held in *Kennedy v. Douglas* (1909) 151 N. C. 336, 66 S. E. 216, that a dictation nine months before the death is not in law "during the last sickness," though there was no recovery from the sickness."

In *Donald v. Unger* (1897) 75 Miss. 294, 22 So. 803, it was held that a will was not executed in the last sickness where "the last sickness here lasted two or three months; the alleged nuncupation took place a week or ten days before her death; the alleged testatrix had the amplest time and opportunity to make a written will, even after she was 'positively and emphatically' told by the physician—her son—that she could not possibly recover, and after that repeatedly tried to have a written will made, and one was at last prepared too late. Her purpose manifestly was to make a written will." The court said: "Whether the phrase 'last sickness,' in § 4492, Code of 1892, means in extremis in the sense that the party must not have reasonable time and opportunity to make a written will (as clearly intimated in *Lucas v. Goff* (1857) 33 Miss. 644, and *Parkison v. Parkison* (1849) 12 Smedes & M. (Miss.) 678, following *Prince v. Hazleton* (1823) 20 Johns. (N. Y.) 502, 11 Am. Dec. 307, and the weight of authority), or not (as held in *Johnston v. Glasscock* (1841) 2 Ala. 242), we think it is manifest—even under the views suggested in *Sadler v. Sadler* (1882) 60 Miss. 251—on the facts of this case, that the alleged will cannot be upheld as a nuncupative will."

B. B. B.

LINN COUNTY BANK, Appt.,

v.

O. L. DAVIS,

and

R. L. GLASCOCK, Garnishee.

Kansas Supreme Court — November 9, 1918.

(103 Kan. 672, 175 Pac. 972.)

Bulk Sales Law — chattel mortgage as sale.

1. A chattel mortgage of a stock of merchandise, at least when accompanied by the taking of possession by the mortgagee, is a "sale or disposal" within the meaning of that phrase as used in the provision of the Bulk Sales Law requiring a list of creditors to be furnished in order to render such a transaction valid.

[See note on this question beginning on page 473.]

— omission of name of creditor — effect on title.

2. Where, upon the sale of a stock of merchandise, the vendor furnishes a list of creditors, from which one is omitted, and the list is not verified by his oath, as required by the Bulk Sales Law, the title does not pass as against the omitted creditor, and he may follow the goods into the hands of the buyer.

Chattel mortgage — permitting sales — validity.

3. A chattel mortgage on a stock of merchandise, from which sales were permitted to be made by the mortgagor without any accounting, is held to have been invalid.

[See 5 R. C. L. 434, 435.]

Subrogation — purchaser under Bulk Sales Law.

4. Where a purchaser of a stock of merchandise, who has been furnished with an unverified list from which one creditor is omitted, is innocent of in-

tentional wrong, he is entitled, when sued by the omitted creditor, to be subrogated to the rights of the listed creditors whose claims he has paid, and the plaintiff's recovery should be limited to that proportion of the value of the goods which his own claim bears to the total indebtedness of the vendor at the time of the sale, including a debt owing to the purchaser which formed the consideration for the transfer.

Pleading — garnishment — violation of Bulk Sales Law.

5. Although a creditor may invoke the benefit of the Bulk Sales Law by a direct action against one who has purchased goods without the requirements of that statute having been complied with, yet if he elects to proceed by garnishment, in an action on his claim against the seller, allegations regarding the sale have no office to perform in the petition.

Headnotes by MASON, J.

APPEAL by plaintiff from a judgment of the District Court for Reno County (Prigg, J.) in favor of the garnishee in an action brought to enforce payment of plaintiff's claim against defendant upon the sale of a stock of merchandise which was purchased by the garnishee. *Reversed.*

The facts are stated in the opinion of the court.

Mr. Carr W. Taylor for appellant.

Mr. C. M. Williams for appellee.

Mason, J., delivered the opinion of the court:

On March 20, 1917, O. L. Davis, a merchant, executed a bill of sale on his stock to R. L. Glascock, who took

possession thereof. On March 24, 1917, the Linn County Bank, a creditor of Davis, brought an action against him upon its claims, and caused a garnishee summons to be served upon Glascock, who filed an answer denying any liability to

Davis. The plaintiff took issue on this answer on the ground that the transaction between Davis and Glascock involved a violation of the Bulk Sales Law, inasmuch as it had been given no notice thereof. A trial resulted in a judgment in favor of the garnishee, and the plaintiff appeals.

1. At the time of the execution of the bill of sale, the seller gave to the buyer a list of his creditors, complete except for the omission of the plaintiff. The buyer (the garnishee), having no knowledge of the existence of the plaintiff's claim, paid off all the other creditors. He contends that these facts protect him from liability, assuming that the Bulk Sales Law is applicable to the transaction.

There is some conflict of judicial opinion as to the effect of the omission of one or more creditors from a list otherwise properly furnished in accordance with the Bulk Sales Law, at the time of a sale of a stock of goods. In some jurisdictions it is held that in such a case the omitted creditors have no remedy against the buyer (*Coach v. Gage*, 70 Or. 182, 138 Pac. 847; *International Silver Co. v. Hull*, 140 Ga. 10, 45 L.R.A. (N.S.) 492, 78 S. E. 609), even if he learns of their claims before making payment (*Glantz v. Gardiner*, 40 R. I. 297, L.R.A.1917F, 226, 100 Atl. 913). A view more in keeping with the spirit and purpose of the statute is that the buyer is bound to hold any part of the price still under his control when he is advised of the existence of a creditor not mentioned in the list. *Re Thompson* (D. C.) 242 Fed. 602. See also *Rabalsky v. Levenson*, 221 Mass. 289, 108 N. E. 1050. Here the transfer of stock was made in consideration of a pre-existing debt, and it seems that (inasmuch as a release procured by the debtor's furnishing an incomplete list of creditors, in violation of the law, would be ineffective) the buyer would have parted with nothing in the transaction, and would therefore be answerable to the omitted creditor. That, however, need not be determined, for the

same result follows from another circumstance. The statute requires the list of creditors given to the buyer to be certified by the seller under oath to be complete. Gen. Stat. 1915, § 4894. No such verification was made in this case. If the buyer had insisted upon the law being followed in this regard, it is conceivable that the seller would have used more diligence in assuring himself of the completeness of the list. At all events, the buyer, having closed the deal without requiring a compliance with the statute, acted at his peril, and the title he received is subject to the claims of the omitted creditor. *Williams v. J. W. Crowdus Drug Co.* — Tex. Civ. App. —, 167 S. W. 187.

Bulk Sales Law—
omission of
name of creditor
—effect on title.

2. So far, it has been assumed that the Bulk Sales Law applies to the transaction involved. A doubt on this question arises from evidence that the bill of sale referred to was given as security, and from the circumstance that at the time of its execution the buyer agreed in writing to reconvey the property upon the repayment of the purchase price within a fixed time. If, however, the bill of sale is deemed to have been in legal contemplation a chattel mortgage, we still regard it as constituting a "sale or disposal" of the stock within the meaning of the statute. If the

—chattel mortgage as sale.

owner of a stock of merchandise, while allowed to sell it only upon notice to his creditors, could mortgage it effectively without such notice, the evasion of the statute would be so easy as to deprive it of all practical force. In this state the title to chattels passes by the execution of a mortgage (Gen. Stat. 1915, § 6501), which, therefore, amounts to a sale, or at least to a disposal. This view finds support in decisions elsewhere. *Baker v. Nipper*, — Tex. Civ. App. —, 198 S. W. 596; *Semmes v. Rudolph Stecher Brewing Co.* 195 Mo. App. 621, 187 S. W. 604. In some jurisdictions what might seem to be

a contrary conclusion is reached, but this is by reason of local statutes under which the mortgagor of chattels continues to be their owner. *Des Moines Packing Co. v. Unca-phor*, 174 Iowa, 39, 156 N. W. 171; *Hannah v. Richter Brewing Co.* 149 Mich. 220, 12 L.R.A.(N.S.) 178, 119 Am. St. Rep. 674, 112 N. W. 713, 12 Ann. Cas. 344; *Dill v. Ebey*, 27 Okla. 584, 46 L.R.A.(N.S.) 440, 112 Pac. 973.

3. It appears that in May, 1916, Davis had executed a chattel mortgage on the stock to Glascock to secure the same debt, and it is suggested that this gave a valid lien which is a protection to the garnishee. Assuming that this mortgage, if otherwise valid, would not itself have been void under the Bulk Sales Law, it cannot be regarded as affecting the present situation, for

Chattel mort-
gage—permit-
ting sales—
validity.

it permitted sales by the mortgagor without an account-
ing, thus rendering it ineffectual (*First Nat. Bank v. Hardman*, 89 Kan. 212, 131 Pac. 602), and the mortgagee said of it on the stand that "this merchandise stuff was changing hands all the time, and it wasn't security."

4. It results from these consid-
erations that error was committed in denying the plaintiff all relief. The extent of his recovery, however, remains to be determined. The goods in a sense constituted a trust fund for the benefit of all creditors alike, and as the purchaser was free from intentional wrong, he may justly be subrogated to the rights

Subrogation—
purchaser under
Bulk Sales Law.

of the creditors whose claims he has paid off. Notes in 51 L.R.A.(N.S.) 343, and L.R.A.

1917D, 1067. Nor is any reason ap-
parent why his own claim should not be as favorably treated as those of others. We conclude, therefore, that the plaintiff should recover the proportion of the value of the stock that the amount of his claim bears to the total sum owed by the vendor at the time of the sale, including the debts paid off by the buyer and that originally owing to him.

5. A complaint is made regard-
ing a matter of practice. The peti-
tion included allegations regarding the violation of the Bulk Sales Law, which were stricken out on motion of the defendant. The purchaser's liability might have been determined in a direct action against him, as well

Pleading—
garnishment—
violation of
Bulk Sales Law.

as by garnishment (*Burnett v. Trimmell*, 103 Kan. 130, L.R.A. 1918E, 1058, 173 Pac. 6); but, as he was not made a defendant, the aver-
ments in question seem to have served no purpose in the petition.

The judgment is reversed, and the cause remanded for further pro-
ceedings in accordance herewith.

NOTE.

The reported case (*LINN COUNTY BANK v. DAVIS*, ante, 463) is illustrative of those cases which do not adhere to the general rule that a chattel mort-
gage is not within the application of Bulk Sales Laws, but, as pointed out in the annotation following *SCHWARTZ v. KING REALTY & INVEST. Co.* post, 473, which treats the general question of the applicability of such laws to chat-
tel mortgages and sales thereunder, the court distinguished the cases reaching a contrary conclusion.

ISIDORE SCHWARTZ
v.
KING REALTY & INVESTMENT COMPANY, Appt.

New Jersey Court of Errors and Appeals—March, 1920.

(— N. J. —, 109 Atl. 567.)

Bulk Sales — chattel mortgage.

1. A sale in bulk made by virtue of a chattel mortgage, or by the joint of mortgagor and mortgagee, is not within the prohibition of the statute of 1915 (P. L. p. 377.)

note on this question beginning on page 473.]

— presumption that inference made.

The appellate court may presume a necessary inference from facts was made by the court,

where it was a permanent court of record vested with common-law powers.

[See 2 R. C. L. 219 et seq.]

Headnote 1 by SWAYZE, J.

APPEAL by defendant from a judgment of the Supreme Court affirming a judgment of the District Court of Orange in favor of plaintiff in an action of replevin brought to recover possession of certain goods and chattels. **Affirmed.**

The facts sufficiently appear in the opinion of the court.
Mr. Edward R. McGlynn, for appellant:

There had been no proof of compliance, or an attempt to comply, with any of the provisions of the Bulk Sales Act, and therefore the sale by the Schultz Printing Company to the plaintiff was void, and, there being no title in the plaintiff, he should be nonsuited.

Kett v. Masker, 86 N. J. L. 97, 90 Atl. 243; Hart v. Brierley, 189 Mass. 598, 76 N. E. 286; 36 Cyc. 1102.

Messrs. Furst & Furst, for appellee:

A principal's constructive possession of goods in the hands of an agent or bailiff is sufficient to entitle the owner to maintain an action in replevin against the principal.

34 Cyc. 1352, 1400.

The plaintiff acquired absolute title to support an action in replevin, and the Bulk Sales Act does not apply.

Woodside v. Adams, 40 N. J. L. 417; Bodell v. Real Securities & Invest. Co. 88 N. J. L. 155, 95 Atl. 758, affirmed in court of errors and appeals, 89 N. J. L. 707, 99 Atl. 337; Wasserman v. McDonnell, 190 Mass. 326, 76 N. E. 959; Ayres v. Johnson, 7 N. J. L. 119; Ryerson v. Quackenbush, 26 N. J. L. 237; State, Hand, Prosecutor, v. Howell, 61 N. J. L. 142, 38 Atl. 748.

Plaintiff was under no obligation to show a compliance with the Bulk Sales Law. It was purely an affirmative defense.

Dickinson v. Harbison, 78 N. J. L. 97, 72 Atl. 941.

Swayze, J., delivered the opinion of the court:

The facts are stated in the opinion of the supreme court, 93 N. J. L. 111, 107 Atl. 154. The state of the case sets forth the existence of the chattel mortgage, the public sale by auction, the purchase of the goods by the plaintiff, that he paid the auctioneer for his purchase, that thereafter the mortgagee was paid, and his indebtedness canceled.

We concur in the view of the supreme court as to the propriety of bringing replevin against the present defendant. As to the construction of the Bulk Sales Act (P. L. 1915, p. 377), we reach the same result on different reasoning.

It is clear that the statute means a sale by the owner, and by him otherwise than in the ordinary course of trade. What it aims at is the sale in bulk of the whole or a

large part of the stock or merchandise or fixtures, otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business or occupation.

**Bulk sales—
chattel
mortgage.**

It does not mean a sale under a mortgage—a paramount title. If the words, "sale," "seller," "stock," "creditors," "course of trade," left this in doubt, that doubt would be removed by the provisions as to the sale in the regular and usual prosecution of the seller's business, and as to the inquiry by the purchaser of the seller for the names of creditors and the amount of indebtedness. These words would be quite inappropriate, if the sale were a sale on foreclosure of the mortgage, for in connection with the context they would involve the absurdity of holding that a chattel mortgage sale could, under some circumstances, be in the regular and usual prosecution of the mortgagor's business, and that the mortgagee's own sale could, under some circumstances, be void as to himself, since he also is a creditor. Such a sale is a sale under a superior title, and not within the mischief intended to be remedied.

The words of the statute are equally inappropriate in case of a sale by the mortgagor and mortgagee jointly. The purchaser is required to make inquiry of the seller. Under our statute the singular number imports the plural as well; the purchaser must therefore, if the Bulk Sales Act applies, make inquiry of the sellers as to creditors, an inquiry, so far as the mortgagee is concerned, into a matter of which he can know nothing. Such a requirement would be absurd, and cannot have been meant by the legislature. The only question that can arise is whether it appears in the case that the sale was either by the mortgagee acting alone and foreclosing his mortgage, or whether it was a friendly sale by joint action of the mortgagor and mortgagee. There is no direct positive finding to either

effect; but the necessary inference from the facts, as set forth in the state of the case, is either that the sale was by the mortgagee by way of foreclosure, or by him jointly with the owner, or by the owner with the assent of the mortgagee. Obviously it was intended that the purchaser should have a clear title. Otherwise the chattel mortgage would not have been paid. In any case the purchaser, the present plaintiff, would be entitled to the protection of the title of the mortgagee. A specific finding to that effect is not necessary. The district court, which tried the case, is a permanent court of record, vested with common-law powers, and every intendment is in favor of the legality of their proceedings, and only when their errors are affirmatively shown are they noticed by courts sitting in review. *State, Schneider, Prosecutor, v. Marinelli*, 62 N. J. L. 739, 42 Atl. 1077; *Lloyd v. Richman*, 57 N. J. L. 385, 387, 30 Atl. 432. In the latter case the court presumed that facts necessary to be proved to entitle the complainant to have judgment were in fact proved. Much more may we presume that a necessary inference from proven facts was made by the court.

**Appeal—pre-
sumption that
inference
was made.**

The distinction we make, under the Bulk Sales Act, between a sale by the mortgagee under a chattel mortgage and a sale by the owner, was made by the supreme judicial court of Massachusetts in *Wasserman v. McDonnell*, 190 Mass. 326, 76 N. E. 959; *Mills v. Sullivan*, 222 Mass. 587, 111 N. E. 605.

It is true that a chattel mortgage might be used as a mere means of evading the law, but so might a sale by the sheriff under an execution, and that is within the express exceptions of the statute. If it should be made to appear that the chattel mortgage was a mere evasion, the question might arise as to the applicability of the statute; but the burden of proof of the evasion would

be upon the one alleging it. We find nothing in this case to indicate that the sale was anything else than an ordinary bona fide foreclosure, or a

friendly sale by mortgagor and mortgagee co-operating.

The judgment must be affirmed, with costs.

ANNOTATION.

Applicability of Bulk Sales Law to chattel mortgages and sales thereunder.

The decided weight of authority is to the effect that the giving of a chattel mortgage on a stock of goods for a bona fide debt does not constitute a sale, transfer, or assignment in bulk, in violation of statutes forbidding such a sale or transfer in bulk of a stock in trade, otherwise than in the ordinary course of business, without certain preliminary proceedings.

Arkansas.—*Farrow v. Farrow* (1918) 136 Ark. 140, 206 S. W. 134.

Georgia.—*Avery v. Carter* (1916) 18 Ga. App. 527, 89 S. E. 1051.

Massachusetts.—*Wasserman v. McDonnell* (1906) 190 Mass. 326, 76 N. E. 959; *Mills v. Sullivan* (1916) 222 Mass. 587, 111 N. E. 605.

Michigan.—*Hannah v. Richter Brewing Co.* (1907) 149 Mich. 220, 12 L.R.A.(N.S.) 178, 119 Am. St. Rep. 674, 112 N. W. 713, 12 Ann. Cas. 344; *Symons Bros. & Co. v. Brink* (1915) 187 Mich. 43, 153 N. W. 359, on subsequent appeal in (1916) 194 Mich. 389, 160 N. W. 638.

Nebraska.—See *Lee v. Gillen* (1912) 90 Neb. 730, 134 N. W. 278, wherein the point was raised but not passed upon.

New Jersey.—See *SCHWARTZ v. KING REALTY & INVEST. CO.* (reported herewith) ante, 471.

Oklahoma.—*Noble v. Ft. Smith Wholesale Grocery Co.* (1911) 34 Okla. 662, 46 L.R.A.(N.S.) 455, 127 Pac. 14.

Washington.—*Daniels v. Pacific Brewing & Malting Co.* (1915) 86 Wash. 416, 150 Pac. 609. And see *McAvoy v. Jennings* (1906) 44 Wash. 79, 87 Pac. 53.

Canada.—See *Drinkle v. Regal Shoe Co.* 7 West. Week. Rep. 194, as set out in Can. Ann. Dig. (1914) col. 695.

In *Hannah v. Richter Brewing Co.* (1907) 149 Mich. 220, 12 L.R.A.(N.S.) 178, 119 Am. St. Rep. 674, 112 N. W.

713, 12 Ann. Cas. 344, in holding that a chattel mortgage was not a sale, transfer, or assignment of a stock of goods in bulk within the meaning of the Michigan Bulk Sales Law of 1905, the court said: "To find the legislative intent in construing a statute, it is proper for the court to consider the entire statute, the ordinary meaning of the words used, the object of the legislation, and the status of the law of the state in relation to the subject-matter under discussion. The terms, 'sale, transfer, or assignment,' used in the entitling and in the body of the act, taken in their usual and ordinary signification, mean the disposition of the entire title of the seller. This meaning is indicated by the provision in the statute relative to notice required to be given to creditors, as follows: 'And unless the purchaser, transferee, and assignee shall, at least five days before taking possession of such merchandise, or merchandise and fixtures, or paying therefor, notify personally, or by registered mail, every creditor whose name and address are stated in said list, or of which he had knowledge, of the proposed sale, and of the price, terms, and conditions thereof.' Taking this language and the other language of the act, it is apparent that its object was to regulate those sales made of an entire stock upon an immediate payment and change of possession, and which before the act might have been valid, although in fact a fraud upon creditors. To hold a chattel mortgage within the meaning of the statute, it is necessary to hold that it is a sale within the common acceptance of that term, transferring the entire title, and entitling the vendee to immediate possession. This, by the specific terms of this mortgage, which are the same as those of chattel mort-

gages generally in this state, and under our decisions above cited, cannot be done. . . . It is also urged that the court must hold chattel mortgages within the meaning of the act, in order to remedy the mischief sought to be cured. While it is true that the act is intended to prevent certain debtors from defrauding their creditors, it is not for the courts to give the statute a construction it will not bear, because the legislature has not included within its prohibition certain transactions whereby frauds may be and undoubtedly are perpetrated. That is a matter for the consideration of the legislative branch of the government."

Applying the above-stated general rule, it has been held that a chattel mortgage on the stock and fixtures of a liquor business, given to secure the price of goods previously furnished, was not a "sale, transfer, or assignment" of a stock of "goods, merchandise, and fixtures in bulk," as prohibited by the Michigan Statute of 1905: *Hannah v. Richter Brewing Co.* (Mich.) *supra*. And the giving of a chattel mortgage on the goods and fixtures of a mercantile business to secure the purchase price thereof has been held not a sale, transfer, or assignment in bulk of such goods and fixtures within the meaning of the Arkansas Bulk Sales Law, which was passed to protect the rights of creditors from fraudulent sales of property upon which credit had been extended. *Farrow v. Farrow* (1918) 136 Ark. 140, 206 S. W. 134. So, a security deed given to secure a loan was held, in *Avery v. Carter* (1916) 18 Ga. App. 527, 89 S. E. 1051, not to be within Ga. Civ. Code, §§ 3226, 3228, 3229, relating to sales of merchandise in bulk. And again in *Noble v. Ft. Smith Wholesale Grocery Co.* (1911) 34 Okla. 662, 46 L.R.A. (N.S.) 455, 127 Pac. 14, a chattel mortgage on a stock of merchandise was held to create a lien only, and not to pass title, so that the transaction was not a sale, exchange, or assignment within the meaning of the Oklahoma Bulk Sales Law, which declares sales in bulk presumptively fraudulent unless certain specified conditions are complied with,—at

least, where the mortgagor remains in possession and retains the right of redemption.

But the general rule that a chattel mortgage is not within the application of Bulk Sales Laws has not been universally adhered to, it having been squarely held in *Beene v. National Liquor Co.* (1917) — Tex. Civ. App. —, 198 S. W. 596, that a mortgage of a stock of goods was a "transfer," if not a "sale," of goods in bulk within the meaning of the Texas Bulk Sales Law, and therefore void as against the creditors of the mortgagor, where the notice required by the statute was not given, although the mortgagee was not the holder of the legal title. In reaching this conclusion, the court said: "The article of the statute last referred to provides: Any sale or transfer of any portion of a stock of merchandise otherwise than in the ordinary course of trade in the usual and regular prosecution of the seller's or transferor's business or a sale or transfer of an entire stock of merchandise in bulk, shall be void as against creditors of the seller or transferrer unless previous notice shall be given ten days before the transfer is made. The question is: Does the giving of a chattel mortgage on a stock of goods in bulk offend the provisions of that article? In other words, is a mortgage either a sale or a transfer within its meaning? The purpose of this article of the statute was to prevent an insolvent from giving a secret preference to one or more of a number of creditors. It is clear that he could not make a sale in bulk without complying with the terms of the statute; but, if he may mortgage the stock to a particular creditor, and thereby give the latter a prior right to thereafter have the stock of merchandise sold in bulk and the proceeds applied to the satisfaction of his debt, the evasion of the statute would be easy. It is not likely that such an obvious opening was overlooked by the legislature. . . . While a mortgagee does not under our law become the holder of the title to the mortgaged property, he does acquire, by virtue

of a transfer from the owner, some fixed interest in the property, of which he cannot be divested without his consent. Hence we conclude that mortgaging a stock of goods in bulk is a 'transfer,' if not a sale, which is prohibited by statute except upon the conditions named. If the owner of a stock of goods will not himself be permitted to sell it in bulk until the notices provided for have been given, certainly he cannot confer that right upon a third party, or upon the court in the judicial foreclosure of the mortgage. He will not be permitted to do by indirection, through another, what he could not himself do directly."

And a similar conclusion has been reached in Kansas. Thus, in *LINN COUNTY BANK v. DAVIS* (reported herewith) ante, 468, the court, proceeding upon the theory that in Kansas the title to chattels passes by the execution of a mortgage, held that a chattel mortgage of a stock of merchandise,—at least, when accompanied by a transfer of possession,—constituted a "sale or disposal" within the meaning of the Kansas Bulk Sales Law. However, this decision is seemingly not in actual conflict with the majority rule. In fact the court itself said that the seemingly contrary conclusions reached in some other jurisdictions were attributable to local statutes under which the mortgagor of chattels continued to be their owner.

And even in a jurisdiction such as Massachusetts, which has adopted the general rule that Bulk Sales Laws do not apply to chattel mortgages of a stock in trade, it has been held that where a chattel mortgage of a stock in trade was immediately followed by a release of the equity of redemption, there was in effect a conveyance of the legal title so as to bring the transaction within the meaning of the Bulk Sales Law, although not made in bad faith. *Mills v. Sullivan* (1916) 222 Mass. 587, 111 N. E. 605.

Like the general rule to the effect that the various Bulk Sales Laws do not apply to the giving of a chattel mortgage on a stock of goods, it has also been held that a sale of a stock

of goods under a chattel mortgage, executed in good faith for a valuable consideration, is not invalidated by a statute prohibiting the sale or transfer, etc., of merchandise in bulk in fraud of creditors. *Wasserman v. McDonnell* (1906) 190 Mass. 326, 76 N. E. 959; *Symons Bros. & Co. v. Brink* (1915) 187 Mich. 43, 153 N. W. 359, reaffirmed on subsequent appeal in (1916) 194 Mich. 389, 160 N. W. 638; *SCHWARTZ v. KING REALTY & INVEST. CO.* (reported herewith) ante, 471; *Daniels v. Pacific Brewing & Malting Co.* (1915) 86 Wash. 416, 150 Pac. 609; *Drinkle v. Regal Shoe Co.* 7 West. Week. Rep. 194, as set out in *Can. Ann. Dig.* (1914) col. 695. In the *Wasserman Case* the theory was that, since the object of the Massachusetts Bulk Sales Law was to protect creditors against fraudulent sales, the statute could not apply where the mortgage was given in good faith for a valuable consideration. And this reasoning was approved in *Symons Bros. & Co. v. Brink* (1916) 194 Mich. 389, 160 N. W. 638. And the decision in *SCHWARTZ v. KING REALTY & INVEST. CO.* (reported herewith) ante, 471, is upon the ground that a foreclosure sale is a sale under a superior title, wherefore it is not within the mischief intended to be remedied. And in *Drinkle v. Regal Shoe Co.* 7 West. Week. Rep. 194, as set out in *Can. Ann. Dig.* (1914) col. 695, supra, the theory seems to have been that the Bulk Sales Act under consideration was not intended to destroy a security such as a chattel mortgage, so as to enable the general creditors of the mortgagor to share equally with the secured creditor, the mortgagee.

And *SCHWARTZ v. KING REALTY & INVEST. CO.* (reported herewith) ante, 471, is authority for the proposition that it is immaterial whether the sale was an ordinary bona fide foreclosure of the mortgage, or was by the joint action of the mortgagor and the mortgagee. Likewise, in *Daniels v. Pacific Brewing & Malting Co.* (1915) 86 Wash. 416, 150 Pac. 609, supra, the transfer seems to have been by voluntary agreement. G. J. C.

KAUFMAN BEEF COMPANY, FOR USE OF TRAVELERS INSURANCE COMPANY, et al., Appts.,

v.

UNITED RAILWAYS & ELECTRIC COMPANY OF BALTIMORE et al.

Maryland Court of Appeals—January 13, 1930.

(— Md. —, 109 Atl. 191.)

Highway. — collision with obstruction in street — negligence.

1. The driver of an automobile truck who permits it to come in contact with a bundle of papers in the street, which he could have seen in ample time to avoid the obstacle, is guilty of such negligence as to prevent holding the one placing the papers in the street liable for the resulting injury to the driver.

[See note on this question beginning on page 479.]

Trial — instruction — segregation of facts — propriety.

2. Where the question of contributory negligence of a driver of a motor-truck, who was injured when the truck ran over a bundle of papers dropped from a street car, depended upon how long before the truck reached the papers they were dropped from the car, a prayer directing the jury to find for defendant if there was no car immediately ahead of the truck at the time it struck the papers is proper, although it involves a segregation of facts.

— when facts may be segregated.

3. A prayer may segregate a particular fact for the consideration of the jury, provided the facts which it omits do not support a conclusion different from the one with which the prayer is concerned.

[See 14 R. C. L. 780, 794.]

— prayer to withdraw case from jury.

4. A prayer to withdraw the case from the jury so far as it affects a defendant, as to whom there is no evidence legally sufficient to charge it with liability, is properly granted.

[See 26 R. C. L. 1080.]

APPEAL by plaintiffs from a judgment of the Court of Common Pleas of Baltimore City (Ambler, J.) in favor of the defendant railway in an action brought to enforce liability for the death of an employee of the plaintiff company, alleged to have been caused by defendants' negligence. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. William L. Rawls and Marbury, Gosnell, & Williams for appellants.

Mr. D. K. Este Fisher, for appellee Curtis Publishing Company:

In order to hold the Curtis Publishing Company responsible for the accident, it was necessary for the plaintiffs to prove as a link in the chain of proof that the bundle of papers was placed in the street by someone who was an agent of the company, and that in so doing he was acting in the line of his agency in his principal's business, rather than in a transaction of his own.

Marshall v. Hanley, 4 Md. 498, 59 Am. Dec. 92; Wilson v. Kelso, 115 Md. 162, 80 Atl. 895; Atwell v. Miller, 11 Md. 348, 69 Am. Dec. 206; Baltimore & O. R. Co. v. State, 71 Md. 590, 18

Atl. 969; Darby Candy Co. v. Hoffberger, 111 Md. 84, 73 Atl. 565; Adams v. Cost, 62 Md. 264, 50 Am. Rep. 211; Philadelphia, B. & W. R. Co. v. Green, 110 Md. 32, 71 Atl. 986; Baltimore & O. R. Co. v. Black, 107 Md. 642, 69 Atl. 439; Ewing v. Rider, 125 Md. 149, 93 Atl. 409; Diamond State Teleph. Co. v. Blake, 105 Md. 570, 66 Atl. 631; Firor v. Taylor, 116 Md. 69, 81 Atl. 389, 2 N. C. C. A. 551.

The chauffeur, Ellsworth Stickell, was guilty of negligence directly contributing to the accident; for, under the circumstances, he ought to have seen and avoided the package.

Knight v. Baltimore, 97 Md. 647, 55 Atl. 388.

Messrs. J. Pembroke Thom and J. Stanislaus Cook for other appellees.

Uerner, J., delivered the opinion of the court:

The appellant's employee, while engaged in the performance of his duty as driver of its motortruck, was killed in a collision of the truck with a car of the United Railways & Electric Company of Baltimore. The accident was due to the fact that one of the wheels of the motortruck ran over a bundle of Saturday Evening Posts which had been cast into the street from a north-bound car, and the truck, which was also proceeding northwardly, had its steering gear disarranged by the jar resulting from its contact with the package of papers, and was thus caused to swerve from its course and collide with a street car on the south-bound track. Compensation having been awarded to the dependents of the deceased employee by the State Industrial Accident Commission, the pending subrogation suit, as permitted by statute (Code, art. 101, § 58,) was brought by the appellant as employer against the United Railways & Electric Company and the Curtis Publishing Company, the latter corporation being the publisher of the papers which figured in the accident.

At the close of the plaintiff's testimony a verdict was directed for the Curtis Publishing Company, on the ground that no evidence had been offered legally sufficient to prove that it was responsible in any way for the injury on account of which recovery is sought in this suit. The trial then proceeded against the United Railways Company, and resulted in an undirected verdict in its favor.

The most strongly urged exception in the record was taken to the granting, on behalf of the remaining defendant, of a prayer which is said to involve an improper and injurious segregation of facts. In order that the prayer may be understood in its relation to the issue which developed at the trial, only a brief reference to the testimony is required.

The principal witness for the

plaintiff was Thomas Lewis, who testified that he was seated in the motortruck beside the driver whose life was lost in the accident, and that the bundle of papers was dropped off the moving north-bound street car just as the front of the truck was about opposite the rear end of the car, and that there was not sufficient time for the driver of the truck to avoid the obstacle thus placed in his way. The accident happened in the afternoon, and the package was a plainly visible object in the street. But the testimony of Lewis that it was thrown from the car when the truck was too close to turn aside from the obstruction tended to relieve the driver of any imputation of contributory negligence. All the other witnesses, however, on both sides of the case, who were questioned on the subject, testified, in effect, that the car from which the papers were dropped had gone northward some time before the truck reached the place where they were deposited. According to this testimony there was ample opportunity for the driver of the truck to see and avoid the obstacle. If, in fact, the package had been thrown into the street and was visible to the driver long before he arrived at the spot where it was lying, there could be no escape from the conclusion that in allowing one of the wheels of the truck to run over it he directly contributed to his fatal injury. If it was primary negligence for the motorman on the street car to drop the bundle of papers in the street, it was certainly contributory negligence on the part of the chauffeur to fail to avoid that object, provided there were time and space to accomplish that result by the exercise of due care. The same possibility of danger to traffic which would make it negligent for the motorman to place such an object in the street would make it incumbent upon those using the street to exercise a proper degree of care to avoid the danger. It is an undisputed fact that the package could be seen from a considerable distance. A driver who failed

to turn aside from such an impediment would be chargeable with negligence directly contributing to injury sustained from contact with it, unless he was deprived of the opportunity to discover its presence and escape the danger by circumstances for which he was not responsible. *Knight v. Baltimore*, 97 Md. 647, 55 Atl. 388.

Highway—
collision with
obstruction in
street—
negligence.

The question, therefore, as to whether the parcel of papers was thrown into the street from a car passing just ahead of the motor-truck became a decisive inquiry in the case. It was a question of fact upon which the whole issue of contributory negligence depended. The defendant consequently proposed by one of its prayers to have the jury instructed to render a verdict in its favor, if they should find "that there was no north-bound car immediately opposite or ahead of the truck at the time the truck struck the bundle of papers." This was a simple and practical way of presenting one of the important issues of fact which the jury had to determine. As decisive of the question of contributory negligence, it was sufficient for the jury to find whether the north-bound car from which the papers were thrown was immediately opposite or ahead of the motor-truck. If this was the fact, as the plaintiff's witness Lewis testified, then contributory negligence on the part of the driver could not be inferred. But if the jury believed the testimony of the other witnesses that the car which had carried the papers was far beyond the scene of the accident when it occurred, and that hence the package must have been in the street for a period of time which afforded the driver of the truck ample opportunity to see and avoid it in the exercise of ordinary care, then the inference of contributory negligence was inevitable.

The prayer referred to undoubted-

ly involved a segregation of facts, but that did not render it objectionable in view of the conditions we have described. The conclusion which it permitted could be reached consistently with all the other facts as to which testimony had been offered. A prayer may segregate a particular fact for the consideration of the jury, provided the facts which it omits do not support a conclusion different from the one with which the prayer is concerned. *Hart v. Leitch*, 124 Md. 83, 91 Atl. 782; *Dolby v. Laramore*, 121 Md. 624, 89 Atl. 442; *Darrin v. Whittingham*, 107 Md. 52, 68 Atl. 269. This rule was not violated by the granting of the prayer in question. It really submitted the only theory as to the absence of contributory negligence upon which the plaintiff could rely. The only evidence which tended to exonerate the chauffeur from such negligence was that which described the car from which the papers were dropped as being just beyond the truck when the package was thrown from the front platform. This evidence was taken into full consideration by the prayer. The plaintiff was not prejudiced by the omission of the prayer to deal with the effect of the other evidence, all of which was unfavorable to the plaintiff's theory in reference to the issue to which the prayer was directed.

Trial—instruction—segregation of facts—propriety.

—when facts may be segregated.

The only other granted prayer of the defendant submitted the question of contributory negligence to the jury, in general terms and in the usual form. There was no evidence legally sufficient to charge the Curtis Publishing Company with any responsibility for the accident, and the prayer to withdraw the case from the jury as to that defendant was properly granted. But it is evident that a different ruling on this prayer would not have aided the plaintiff, as it could not

—prayer to withdraw case from jury.

have affected the issue presented to the jury, or the verdict rendered, under the prayer we have first considered. There was no error in the exclusion of the evidence to which the four remaining exceptions refer. They are rendered unimportant by our disposition of the other questions raised by the record. Judgment affirmed, with costs.

ANNOTATION.

Contributory negligence of one injured by striking object temporarily deposited in street.

This note does not include cases involving injury received in running into building material deposited in streets, or from running into appliances or materials standing in a street, to be used in its repair.

No general rule can be laid down as to what constitutes contributory negligence on the part of one injured by striking an object temporarily deposited in the street, since it depends upon the particular facts of each individual case. The point under discussion resolves into the question whether, in the exercise of ordinary care, the person injured should have seen and avoided the object struck, and this question is usually one of fact for the jury.

His negligence may depend, as in the reported case (*KAUFMAN BEEF CO. v. UNITED R. & ELECTRIC CO.* ante, 476), upon whether the object was deposited in the street a sufficient length of time before it was struck, so as to permit the one injured to have avoided it. In this case, the driver of an automobile truck permitted it to come in contact with a bundle of magazines thrown off a street car, thereby causing the truck to collide with another street car, and the jury found that the bundle had been deposited in the street a sufficient length of time before the approach of the truck to have enabled its driver to have avoided the package, which was plainly visible to him, and

that he was therefore guilty of contributory negligence.

Or the negligence of one injured by striking an obstacle in the street may depend, where there is no dispute as to how long it has lain there, upon whether it is of such a size or character as to be readily noticed, as in the case of *Overhouser v. American Cereal Co.* (1902) 118 Iowa, 417, 92 N. W. 74, in which it was held that the negligence of a bicyclist who ran into a small stone dropped from a wagon was a question for the jury.

Or contributory negligence, where the length of time the object had been in the street is not involved, may depend on the rate of speed at which the person injured was traveling, as in the case of *Jefson v. Crosstown Street R. Co.* (1911) 72 Misc. 103, 129 N. Y. Supp. 233, where the fact that the automobile in which the plaintiff was riding was rushing through the street at the rate of 50 or more miles an hour defeated his recovery of damages for injuries in an accident caused by the automobile striking a bundle of newspapers thrown into the street from a street car.

And it was held in *Overhouser v. American Cereal Co.* (Iowa) supra, that the fact that a bicyclist, on striking a stone in the street, was riding at a rate of 7 miles an hour was not negligence as matter of law.

G. V. I.

WILL BUGG, Appt.,
v.
TOWN OF HOULKA.

Mississippi Supreme Court (In Banc)—April 10, 1920.

(— Miss. —, 84 So. 387.)

Witness — deaf-mute.

1. If deaf-mutes have sufficient understanding to comprehend facts about which they undertake to speak, and appreciate the sanctity of an oath, they may give evidence by signs, or through an interpreter, or in writing, and such testimony, through an interpreter, is not hearsay.

[See note on this question beginning on page 482.]

Evidence — book of ordinances.

2. On the trial of a defendant charged with the violation of a municipal ordinance, a book identified by the mayor as the ordinance book in which all ordinances of the municipality are kept and recorded, and there is nothing in the evidence to impeach the document as a public record, is competent testimony to prove the existence of the ordinance in question; and, in the absence of evidence to the

contrary, at least makes a prima facie case that the ordinance is one duly passed and in existence.

[See 10 R. C. L. 1115; 19 R. C. L. 908.]

— of deaf-mute.

3. The evidence of a deaf-mute given through an interpreter is admissible if the interpreter understands the signs usually employed by the witness and can well and truly interpret the meaning.

Headnotes by STEVENS, J.

APPEAL by defendant from a judgment of the Circuit Court for Chickasaw County (Crum, J.) convicting him of violation of an ordinance of the plaintiff town, by unlawfully and feloniously stealing meat. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. J. E. Harrington, for appellant:
The burden is upon the city to show that it has a valid ordinance.

Morris v. Greenwood, 73 Miss. 430, 19 So. 105; Sample v. Verona, 94 Miss. 264, 48 So. 2; Corinth v. Sharp, 107 Miss. 696, 65 So. 888.

These ordinances must be proved, and the court will not take judicial notice of the same.

Naul v. McComb City, 70 Miss. 699, 12 So. 903.

It was error to allow the interpreter to testify to the answers, when he stated that there were questions and answers that he might not be able to give on cross-examination.

Mask v. State, 32 Miss. 405; Walton v. State, 87 Miss. 303, 39 So. 690; 40 Cyc. 2473, 2476.

Mr. J. H. Ford for appellee.

Stevens, J., delivered the opinion of the court:

Appellant was charged with the violation of an ordinance of the town

of New Houlika, the affidavit before the mayor charging that the defendant did "unlawfully, wilfully, and feloniously take, steal, and carry away a certain lot of meat, bacon, hams, and shoulder of meat," the property of Bill Dummy, alias William Darden, of the value of \$20.

On the trial of the appeal in the circuit court appellant was convicted, and now challenges the correctness of the learned circuit court's judgment under four assignments of error: First, the alleged failure of the town to prove a valid ordinance; second, that the evidence was insufficient; third, that the trial court permitted the prosecutor, Bill Dummy, a deaf-mute, to testify through an interpreter; it is alleged that both the witness and the interpreter were incompetent; fourth, it is said that the affidavit was sworn

out before the mayor of New Houlka, while the judgment of conviction was rendered by the mayor of Houlka.

On the trial the mayor of New Houlka was introduced, and testified that the town kept an ordinance book, and that all ordinances of the town were recorded and appeared of record in the ordinance book; that the ordinance book was delivered to him as such when he was inducted into the mayor's office, and had been in his possession ever since. Ordinance No. 14 was thereupon identified by the mayor and read to the jury. This ordinance states upon its face that it was duly passed at a regular meeting of the town council. It was in due form and appeared to be valid upon its face. This showing is not denied by counsel for appellant, but it is insisted that the mayor on cross-examination admitted that he was not present when the ordinance was passed, and could not of his own knowledge testify that the ordinance was in fact passed, and, further, that the minutes of the town council showing the passage of the ordinance were not introduced.

The ordinance book was sufficiently identified by the mayor, and it was vouched for as a genuine public

Evidence—
book of
ordinances.

record. There was no effort to impeach the document, and

the ordinance is properly in evidence. There was at least a *prima facie* case on this point.

It is contended that the evidence of Bill Dummy, alias Will Darden, was incompetent. The objection appears to go both to the competency of the witness and of the interpreter, one Wilber Walker. The court examined the interpreter for the purpose of inquiring into his competency, and in the course of this examination the interpreter stated that there were several deaf-mutes in the neighborhood, that there was a method of communication by signs, and that the witness was familiar with this method of communication, and was in fact able to

9 A.L.R.—31.

communicate and carry on a conversation with them through signs. The witness, however, admitted on cross-examination that there were some questions that he felt sure he could not ask, and there might be some answers he could not interpret.

From the testimony itself it affirmatively appears that all material questions and answers were propounded and interpreted by the witness, and there is no showing on this appeal that the deaf-mute did not testify to all material facts within his knowledge pertaining to issues in the case. In one or two instances the interpreter was unable to put the question in the form in which counsel asked them, but the omissions relate to inquiries more or less immaterial. There was a search warrant sworn out, and the officer making the search testified to acts which tended strongly to prove the guilt of the accused. So it is that the testimony of Bill Dummy was strongly corroborated.

It is stated in Wharton's Criminal Evidence 10th ed. vol. 1, § 375: "Deaf-mutes; Competency as Witnesses.—Deaf-mutes were formerly regarded as idiots, and therefore incompetent to testify, but to-day this presumption has disappeared, and the modern doctrine is that, if they have sufficient understanding to com-

Witness—
deaf-mute.

prehend the facts as to which they speak, and appreciate the sanctity of an oath, they can give evidence by signs, or through an interpreter, or in writing. He can express himself in writing if, through this means, he can be more clearly understood, or through a sworn interpreter by whom his signs can be interpreted. . . . Such testimony, though made through interpretation, is not hearsay, nor is it excluded by the fact that the witness can write."

Mr. Blackstone stated, in substance, that one who was born deaf and dumb was presumed to be incapable of understanding and was considered in law an idiot. But such a doctrine was announced at a time

when eleemosynary institutions were few and when there was no adequate system of education for deaf-mutes. The doctrine announced in Blackstone's day has been largely relaxed, if not altogether abolished, and deaf and dumb persons are now generally accepted as competent witnesses. Of course, the showing must be made in any given case that the witness has a system of communication, and, if otherwise competent, his testimony is received. So much for the testimony of the deaf-mute.

There is no merit, we think, in the argument that the interpreter was incompetent. It has been ruled that the interpreter for a deaf and dumb person need not be an expert if he can sufficiently understand the signs usually employed by the witness, and can well and truly interpret the meaning. There is no objection in this case to

**Evidence—
of deaf-mute.**

the relationship or interest of the interpreter, and could be none. No material prejudice of appellant's rights is shown.

On the competency of the deaf-mute we refer to *State v. Weldon*, 24 L.R.A. 126, and case note (39 S. C. 318, 17 S. E. 688).

On the competency of the interpreter and the admissibility of evidence through an interpreter, we refer to *Com. v. Vose*, 17 L.R.A. 813, and case note (157 Mass. 393, 32 N. E. 355), and likewise to the case note to *State v. Fong Loon*, found in L.R.A.1916F, 1206.

The testimony is amply sufficient to support a conviction. The record affirmatively shows that the prosecution was before the mayor of New Houlka, and the judgment of conviction appealed from is in favor of New Houlka. There can be no merit, therefore, in the contention that the record shows two towns.

Affirmed.

ANNOTATION.

Deaf-mute as a witness.

Competency in general.

Lord Hale in his *Pleas of the Crown* (1 Hale, P. C. 34) states that the presumption of law in ancient times was that deaf-mutes so born were idiots, which, of course, would render them incompetent to testify, and refers for authority to chap. 14 of the Laws of King Alfred, where, according to Greenleaf on Evidence, § 366, it was said: "Si quis mutus vel surdus natus sit, ut peccata sua confiteri nequeat, nec inficiari, emendet pater scelera ipsius." And the rule as stated by Lord Hale was approved in *Rex v. Steel* (1787) 1 Leach, C. L. (Eng.) 451.

But this former legal presumption of idiocy has largely if not entirely disappeared, or, at least, has been so far modified as to merely require that the party calling a deaf-mute as a witness show certain qualification; such as understanding as to the nature of an oath and intelligence sufficient to permit receiving and communicating ideas

regarding facts in controversy. For instance, in *State v. Howard* (1893) 118 Mo. 127, 24 S. W. 41, it was said that the presumption that a person deaf and dumb from birth should be deemed an idiot does not seem to obtain in modern practice. And see to the same effect *Cowley v. People* (1881) 83 N. Y. 478, 38 Am. Rep. 464. And Mr. Justice Gould in *Rex v. Steel* (Eng.) supra, said: "Yet that presumption may be repelled by evidence of that capacity to understand by signs and tokens which it is known that persons thus afflicted frequently possess to a very great extent." And in fact the modern and generally accepted rule is to the effect that deaf-mutes are competent witnesses where they have sufficient knowledge to understand and appreciate the sanctity of an oath and comprehend the facts as to which they wish to speak, and are capable of communicating their ideas with respect thereto.

Arkansas.—*Dobbins v. Little Rock*

R. & Electric Co. (1906) 79 Ark. 85, 95 S. W. 794, 9 Ann. Cas. 84.

Colorado.—*Ritchey v. People* (1896) 23 Colo. 314, 47 Pac. 272, rehearing denied in (1896) 23 Colo. 323, 47 Pac. 384.

Connecticut.—*State v. DeWolf* (1830) 8 Conn. 93, 20 Am. Dec. 90.

Illinois.—See *People v. Weston* (1908) 236 Ill. 104, 86 N. E. 188.

Indiana.—*Snyder v. Nations* (1840) 5 Blackf. 295; *Skaggs v. State* (1886) 108 Ind. 53, 8 N. E. 695.

Iowa.—*State v. Butler* (1912) 157 Iowa, 163, 138 N. W. 383 (dictum). And see *State v. Burns* (1899) — Iowa, —, 78 N. W. 681; and *State v. Rohn* (1909) 140 Iowa, 640, 119 N. W. 88.

Massachusetts.—See *Com. v. Hill* (1817) 14 Mass. 207.

Mississippi.—*BUGG v. HOULKA* (reported herewith) ante, 480.

Missouri.—*State v. Howard* (1893) 118 Mo. 127, 24 S. W. 41; *State v. Smith* (1907) 203 Mo. 695, 102 S. W. 526.

New York.—*People v. McGee* (1845) 1 Denio, 19; *Cowley v. People* (1881) 83 N. Y. 478, 38 Am. Rep. 464 (dictum).

South Carolina.—*State v. Weldon* (1893) 39 S. C. 818, 24 L.R.A. 126, 17 S. E. 688.

Vermont.—See *Quinn v. Halbert* (1882) 55 Vt. 224.

England.—*Rex v. Jones* (1773) 1 Leach, C. L. 102; *Ruston's Case* (1786) 1 Leach, C. L. 408; *Rex v. Steel*, supra; *Martin's Case* (1823) as set out in 2 Alison, Crim. Law Pr. of Scotland, 436; *Morrison v. Lennard* (1827) 3 Car. & P. 127; *Bartholomew v. George* (1851) Kent, Sp. Ass. 1851, M. S., as set out in 1 Best on Evidence, Morgan's ed. p. 226.

The fact that difficulty attends the examination of a deaf-mute is no reason for excluding his testimony. *Ritchey v. People* (1896) 23 Colo. 314, 47 Pac. 272, rehearing denied in (1896) 23 Colo. 323, 47 Pac. 384. And see *Ruston's Case* (1786) 1 Leach, C. L. (Eng.) 408.

However, as indicated in the modern rule as above stated, a deaf-mute, in order to be a competent witness, must have sufficient intelligence to be able

to understand the nature of an oath and to communicate in some manner with the court. Thus, in *Reg. v. O'Brien* (1845) 1 Cox, C. C. (Eng.) 185, it was held that a deaf and dumb person could not testify as a witness where she could not be made to understand clearly the precise terms and nature of an oath, and this although she was intelligent and capable of communicating and receiving information generally by signs. And in *Territory v. Duran* (1884) 3 N. M. 189, 3 Pac. 53, where a deaf-mute eight or nine years of age was offered as a witness, it was held that he was incompetent, it appearing that he had never been educated, and could not be made to understand the nature of an oath, and in fact could not make himself understood except as to most ordinary everyday wants, and this only by gestures which in a limited way were understood by the other members of his individual family. On the other hand, in *State v. Smith* (1907) 203 Mo. 695, 102 S. W. 526, in passing upon the question, What degree of intelligence is essential? it was held that a deaf and dumb person possessing the intelligence of a child nine or ten years of age is a competent witness.

Method of taking testimony.

It has been said that a court has the inherent power to elicit testimony from a competent deaf-mute by whatsoever means necessary to the end to be obtained (*State v. Howard* (1893) 118 Mo. 127, 24 S. W. 41), and that the manner in which the examination of a deaf-mute should be conducted is a matter to be regulated and controlled by the trial court in its discretion (*Skaggs v. State* (1886) 108 Ind. 53, 8 N. E. 695). However, it has also been said that the best method should be adopted. *Dobbins v. Little Rock R. & Electric Co.* (1906) 79 Ark. 85, 95 S. W. 794, 9 Ann. Cas. 84; *Morrison v. Lennard* (1827) 3 Car. & P. (Eng.) 127. And there is authority to the effect that the method adopted will not be reviewed by an appellate court in the absence of a showing that the complaining party was in some way injured by reason of the particular method adopted. *Skaggs v. State* (1886)

108 Ind. 53, 8 N. E. 695. In fact it has been said that, in the absence of a showing as to what constituted the best method of taking a deaf-mute's testimony, it will be presumed on appeal that the trial court adopted the best method. *Dobbins v. Little Rock R. & Electric Co.* (Ark.) *supra*.

As is stated in the authorities approved in the reported case (*BUGG v. HOULKA*, ante, 480), the general rule is that deaf-mutes who are competent to testify may give evidence by signs, or through an interpreter, or in writing. And for general statements to the same effect, see *State v. Butler* (1912) 157 Iowa, 163, 138 N. W. 383; *State v. Howard* (1893) 118 Mo. 127, 24 S. W. 41; *State v. Weldon* (1893) 39 S. C. 318, 24 L.R.A. 126, 17 S. E. 688; and *Bartholomew v. George* (1851) Kent, Sp. Ass. 1851, M. S. (Eng.) as set out in 1 *Best on Evidence*, Morgan's ed. p. 226.

More specifically it has been held that a deaf-mute who can read and write may testify through that medium. Thus, in *Ritchey v. People* (1896) 23 Colo. 314, 47 Pac. 272, rehearing denied in (1896) 23 Colo. 323, 47 Pac. 384, a deaf-mute was examined by submitting to him written questions, to which he replied in writing, which questions and answers were then read to the jury. And generally to the same effect see *State v. Howard* (Mo.) and *Morrison v. Lennard* (Eng.) *supra*.

And the general rule is that the evidence of a deaf-mute who can be communicated with by signs may be taken through an interpreter who understands such signs and can interpret them to the court. *Snyder v. Nations* (1840) 5 Blackf. (Ind.) 295; *Skaggs v. State* (1886) 108 Ind. 53, 8 N. E. 695; *State v. Burns* (1899) — Iowa, —, 78 N. W. 681; *State v. Smith* (1907) 203 Mo. 695, 102 S. W. 526; *BUGG v. HOULKA* (reported herewith) ante, 480; *People v. McGee* (1845) 1 Denio (N. Y.) 19; *State v. Weldon* (1893) 39 S. C. 318, 24 L.R.A. 126, 17 S. E. 688; *Rex v. Jones* (1773)

1 Leach, C. L. (Eng.) 102; *Ruston's Case* (1786) 1 Leach, C. L. (Eng.) 408; *Rex v. Steel* (1787) 1 Leach, C. L. (Eng.) 451; *Martin's Case* (1823) as set out in *Alison's Crim. Law Pr. of Scotland*, 436; *Morrison v. Lennard* (Eng.) *supra*. And see *Com. v. Hill* (1817) 14 Mass. 207, and *Quinn v. Halbert* (1882) 55 Vt. 224. And it has been held that it is permissible to take the testimony of a deaf-mute through an interpreter by signs notwithstanding the evidence could have been written. *Dobbins v. Little Rock R. & Electric Co.* (1906) 79 Ark. 85, 95 S. W. 794, 9 Ann. Cas. 84; *State v. DeWolf* (1830) 8 Conn. 93, 20 Am. Dec. 90; *State v. Howard* (1893) 118 Mo. 127, 24 S. W. 41; *Bartholomew v. George* (1851) Kent, Sp. Ass. 1851, M. S. (Eng.) as set out in 1 *Best on Evidence*, Morgan's ed. p. 226. At least where there is no showing that the interpretation by signs is not the better method. *Dobbins v. Little Rock R. & Electric Co.* (Ark.) *supra*. And especially where it appears that the witness is capable of relating the facts "correctly" by signs, but, while able to read and write, can only communicate ideas "imperfectly" by writing. *State v. DeWolf* (1830) 8 Conn. 93, 20 Am. Dec. 90. And it is not necessary that the witness be able to read and write. *People v. McGee* (1845) 1 Denio (N. Y.) 19. However, it has been said that it would seem to be better in the case of a deaf and dumb witness who can read and write to conduct his examination in writing. *Morrison v. Lennard* (1827) 3 Car. & P. (Eng.) 127.

With respect to the conducting of the examination of a deaf-mute itself, it has been held that the allowing of leading questions is in the discretion of the court. *State v. Burns* (1899) — Iowa, —, 78 N. W. 681. This discretion was said to arise out of the fact that "there is always more or less difficulty in eliciting testimony" where the witness is a deaf-mute.

G. J. C.

JOHN DURANTE et al.

v.

MICHAEL ALBA, Appt.

Pennsylvania Supreme Court — February 23, 1920.

(266 Pa. 444, 109 Atl. 796.)

Easement — lateral support — conveyance with building standing.

1. Conveyance of the portion of a larger tract of land containing a building which extends to the division line between the parcels granted and retained includes an easement of lateral support for the building.

[See note on this question beginning on page 488.]

— when runs with land.

2. An easement of lateral support, created by division of a parcel of land and conveyance of the portion having a building on it, runs with the land into possession of subsequent grantees of the retained portion.

[See 1 R. C. L. 382, 383.]

Adjoining owner — negligence in supporting wall on neighboring property — liability.

3. One who, in excavating for a building on his own land, attempts to support the wall of a building on his neighbor's property, is liable for injury to the building by negligence in the performance of his undertaking.

[See 1 R. C. L. 387.]

Damages — for destruction of building.

4. The measure of damages for destroying a building by negligently removing its lateral support is not the difference in value of the land before

and after the injury, but the cost of repair if that can be done within the value of the building immediately before the injury, or, if not, then the actual value of the building at the time of destruction, taking into consideration its age, condition, and any other circumstances affecting it, less anything salvaged from it.

[See 1 R. C. L. 392, 393.]

Appeal — error in rule of damages — harmlessness.

5. Awarding damages for destruction of a building on the basis of the difference between the value of the land before and after the injury is not harmless error, where the court finds that there is no evidence from which to assess damages for injury to the building, although it also finds that the value of the building as it stood at the time of injury was approximately the equivalent of the diminution in the value of the real estate with the building destroyed.

APPEAL by defendant from a judgment of the Court of Common Pleas for Montgomery County (Miller, J.) in favor of plaintiff in an action brought to recover damages for the alleged negligent destruction of a building. *Modified.*

The facts are stated in the opinion of the court.

Messrs. C. Townley Larzelere, Franklin L. Wright, Henry M. Brownback, and Nicholas H. Larzelere, for appellant:

Defendant is not liable for the collapse of the building.

Richart v. Scott, 7 Watts, 460, 32 Am. Dec. 779; McGettigan v. Potts, 149 Pa. 155, 24 Atl. 198; Noonan v. Pardee, 200 Pa. 488, 55 L.R.A. 410, 86 Am. St. Rep. 722, 50 Atl. 255, 21 Mor. Min. Rep. 517; Matulys v. Philadelphia & R. Coal & I. Co. 201 Pa. 76, 50 Atl.

823, 21 Mor. Min. Rep. 745; Cooper v. Altoona Concrete Constr. & Supply Co. 231 Pa. 557, 80 Atl. 1047; Freseman v. Purvis, 51 Pa. Super. Ct. 506; McKeand v. Skirboll, 55 Pa. Super. Ct. 28; Haverstick v. Seipt, 33 Pa. 368; Rennyson's Appeal, 94 Pa. 147, 39 Am. Rep. 777; Liquid Carbonic Co. v. Wallace, 219 Pa. 457, 26 L.R.A. (N.S.) 327, 68 Atl. 1021; Geible v. Smith, 146 Pa. 276, 28 Am. St. Rep. 796, 23 Atl. 437.

The rule of law applied in cases of the taking or injury to land by eminent

domain, by ascertaining the market value before and after, is not applicable to this case.

McGettigan v. Potts, 149 Pa. 155, 24 Atl. 198; *Rider v. York Haven Water & P. Co.* 251 Pa. 18, 95 Atl. 808; *McClelland v. Schwerd*, 32 Pa. Super. Ct. 313.

Messrs. Henry Freedley and Henry L. Fox for appellees.

Simpson, J. delivered the opinion of the court:

The owner of a tract of ground upon which was erected a brick building sold to plaintiffs a part of the land with the building thereon, retaining the balance of the property extending to the side of said building. Subsequently this balance, by various mesne conveyances, became vested in defendant, who proceeded to erect thereon a store, the cellar of which was to extend below the bottom of the foundation wall of plaintiffs' house, the division wall whereof was, however, to be used as a party wall, defendant having purchased from plaintiffs the right to so use it. In order to protect it, the contractor for the excavation, when he reached the bottom of the wall, receded back before digging deeper, thus leaving a bench of earth for its support. Subsequently, and after several rainy days, defendant went into the cellar and removed the bench of earth, thus leaving the foundation wall unsupported on the side toward his property. As a result the wall fell, dragging down the rest of the building, and plaintiffs brought this action to recover for the loss thereof. By agreement of the parties, the case was referred to the court below for trial without a jury, resulting in findings of fact and conclusions of law, exceptions thereto filed by defendant were dismissed, judgment was entered for plaintiffs, and therefrom defendant now appeals, averring the court below erred: (1) In deciding he had any other duty than to support the soil in its natural state; and (2) that the damages were the difference between the value of the property before and after the injury. The assignments of error are numerous,

but these two objections cover the whole case.

In support of his claim that he is not liable for the collapse of the building, defendant relies upon *Richart v. Scott*, 7 Watts, 460, 32 Am. Dec. 779, and the cases in its train. The basis of these decisions is that everyone is bound to know of his neighbor's right to excavate his lot when and as he pleases, so long as he does not do so negligently, and hence at his peril builds too close to the neighbor's line. This rule, however, has no relevancy, as here the building is not erected near to a party line, but at the time of its construction derived ample support from the rest of the builder's own land. In the former instance the adjoining owner has no duty of lateral support except for the soil itself; whereas in the latter, if the owner thereafter divides the property and conveys the portion with the building on it, retaining ownership of the rest, there arises an implied duty of lateral support of the building as well as of the soil, charged upon so much of the land adjoining the building as is necessary for that purpose; and, unless excluded by the grant, this implication runs with the land in the hands of subsequent purchasers of the retained portion. This distinction is universally recognized, both in this country and abroad (4 Sharswood & B. Am. Law of Real Prop. 268; *Goddard*, Easements, 6th ed. 320, 321; *Jones*, Easements, § 605; *Washburn Easements & Servitudes*, *436; 1 R. C. L. 387), the obligation under such circumstances being as absolute regarding the building as it is regarding the land in its natural state (1 R. C. L. 387; 1 C. J. 1216). Moreover, this conclusion is sound in principle, and while no case squarely in point is found in this state, it is in accord with our rulings in *Seibert v. Levan*, 8 Pa. 383, 49 Am. Dec. 525, and *Kiefer v. Imhoff*, 26 Pa. 438, and the

Easement—
lateral support—
conveyance
with building
standing.

—when runs
with land.

numerous cases following them, in which we held that the purchaser of a portion of a tract of land takes it burdened or benefited by all palpable and manifest qualities annexed thereto, or which appear in his chain of title.

The same result would be reached, however, even if the rule contended for by defendant applied; for while (under the circumstance of separate ownership at the time of the erection of a building) the adjoining owner is not obliged to support it when he builds on his own land, he may do so if he chooses, being liable for any damage caused by his negligence.

Adjoining owner—
negligence in
supporting wall
on neighboring
property—
liability.

Malone v. Pierce, 231 Pa. 534, 80 Atl. 979; Cooper v. Altoona Concrete

Constr. & Supply Co. 231 Pa. 557, 80 Atl. 1047. Here defendant elected to support the building, possibly because of his purchase of the right to use the division wall as a party wall, and, as the court below found, so carelessly removed the bench of earth from under it as to cause its collapse. In either aspect of the case, therefore, the court below correctly held defendant responsible, and the only remaining question was the amount for which he was liable.

Upon this point the trial judge incorrectly held the measure of damages to be the difference between the value of plaintiffs' property as it was with the building upon it, and its value after the building fell. This is a necessary rule in cases of eminent domain, for not otherwise can be measured the extent of the consequential damages to which the owner is constitutionally entitled. It also applies where the realty, as distinguished from the structures upon it, has been permanently injured or destroyed; as, for instance, where riparian land has been partially washed away by changing the channel of a stream (Shaffer v. Pennsylvania Co. 265 Pa. 542, 109 Atl. 284), or springs of water upon the property have been destroyed, as

in Rabe v. Schoenberger Coal Co. 213 Pa. 252, 3 L.R.A. (N.S.) 782, 62 Atl. 854, 5 Ann. Cas. 216, 19 Am. Neg. Rep. 527, upon which the trial judge relied; wherein, however, the distinction referred to was made manifest, when we said: "Other injuries, such as the sinking of the dwelling house . . . were remediable. For the latter, the cost of repair or restoration is obviously the measure of the damage."

In the present instance the only claim made is for "totally wrecking and destroying the building." Hence, if enough thereof was left to justify its repair, at a cost not exceeding its value immediately prior to the injury, this would be the measure of plaintiffs' damage. Otherwise it would be the actual value of the building itself, taking into consideration its age, condition, and any other circumstances affecting it, and less anything salvaged from it. Of course, in either case, damages for detention should be allowed if the facts justify them.

Damages—for
destruction
of building.

It follows from what has been said that the court below was right in entering judgment for plaintiffs, but wrong in the measure of damages adopted by it, and hence we must sustain the twenty-second and twenty-third assignments, challenging its rulings on this matter, unless the error was harmless. This, however, we cannot conclude from either the findings or the proofs. It is true the trial judge says, "The cost of restoring the plaintiffs' property . . . would have exceeded the depreciation in the market value of their premises," and again, "The value of the old [building], as it stood in place on the day of its destruction, was approximately equivalent to such diminution" in the market value of the land and building; but he also found

Appeal—error
in rule of
damages—
harmlessness.

"there is no evidence from which the court could assess damages to plaintiff for any

injury to his building," as distinguished from "the building and its lot, or the premises as a whole."

Happily, under § 1 of the Act of June 16, 1836 (P. L. 785), and § 2 of the Act of May 20, 1891 (P. L. 101), this error can be corrected by so modifying the judgment as to set aside the assessment of damages,

and by remitting the record with a procedendo, with leave to produce additional evidence in order that the damages may be properly determined.

The judgment of the court below is modified by vacating the assessment of damages, and the record is remitted, with a procedendo.

ANNOTATION.

Implied easement upon severance of tract where building is near or encroaches upon the dividing line.

- I. In general, 488.
- II. Mutual support of houses, 489.
- III. Support of house by adjoining land:
 - a. Where house is retained, 489.
 - b. Where house is sold, 490.
- IV. Dividing line going through house:
 - a. In general, 490.
 - b. One division including all of common wall, 491.
- V. Encroachments:
 - a. In general, 492.
 - b. Encroachment on property retained, 493.
 - c. Encroachment on property sold, 495.

I. In general.

Where an owner of land subjects part of it to a service in favor of another part, and then aliens either part, the grant not referring to the service, the grantee will take subject to the burden or benefit, as the case may be, if the service is one strictly necessary to the enjoyment of the dominant property. And the grantee of the dominant part will also take the benefit of such a service if it is open, visible, and reasonably necessary to the enjoyment of the property granted. Whether the grantee of the servient part will take subject to the burden of a service not strictly necessary to the enjoyment of the property retained is a question upon which the authorities are not agreed. It is to be remembered that a grantor may not derogate from his own grant, and that the law will imply an easement more readily in favor of a grantee than in favor of a grantor.

There are comparatively few cases upon the subject of this annotation,

and the application to the subject of the general rules of implied easements is attended with difficulty and marked by considerable confusion.

"Support to that which is artificially imposed upon land cannot exist *ex jure naturæ*, because the thing supported does not itself so exist; it must in each particular case be acquired by grant, or by some means equivalent in law to grant, in order to make it a burden upon the neighbor's land, which (naturally) would be free from it. . . . If at the time of the severance of the land from that of the adjoining proprietor it was not in its original state, but had buildings standing on it up to the dividing line, or if it were conveyed expressly with a view to the erection of such buildings, or to any other use of it which might render increased support necessary, there would then be an implied grant of such support as the actual state or the contemplated use of the land would require, and the artificial would be inseparable from, and (as between the parties to the contract) would be a mere enlargement of, the natural." *Selborne, Lord Chancellor, in Dalton v. Angus* (1881) L. R. 6 App. Cas. (Eng.) 793, 14 Eng. Rul. Cas. 769.

This annotation does not include cases where the division line runs through the center of a division wall, nor cases where property was conveyed expressly for building purposes, nor cases where the encroachment does not touch the property encroached upon.

It may be noted that *Murchie v.*

Black (1865) 19 C. B. N. S. 190, 144 Eng. Reprint, 759, 34 L. J. C. P. N. S. 337, 11 Jur. N. S. 608, 12 L. T. N. S. 735, 13 Week. Rep. 896, and Howarth v. Armstrong (1897) 77 L. T. N. S. (Eng.) 62, sometimes cited in this connection, were decided under special contracts.

II. *Mutual support of houses.*

Where several houses belonging to the same owner are built together, so that each requires the mutual support of the neighboring house, and the owner parts with one of the houses, the right to such mutual support is not thereby lost, the legal presumption being that the owner reserves to himself such right, and at the same time grants to the new owner an equal right, and consequently, if the owner parts with several of the houses at different times, the possessors still enjoy the right to mutual support, the right being wholly independent of the question of the priority of their titles. *Richards v. Rose* (1853) 9 Exch. 218, 156 Eng. Reprint, 93, 2 C. L. R. 311, 23 L. J. Exch. N. S. 3, 17 Jur. 1036.

Where the owner of two sawmills conveyed first one to the plaintiff and then the other to the defendant, and the two mills rested on a foundation of timbers so interlocked that the cutting away of the floor timbers of the plaintiff's mill from the streak sill of the defendant's would cause the plaintiff's mill to settle and fall, unless otherwise supported, it was held that the foundation of the plaintiff's mill, as it was when he purchased, was necessary for the use and for the support of the mill, and that by his deed, he acquired the right to have it remain as it then was during the existence of the mill, if it should endure so long, and that the defendant had no right to remove or impair it to the plaintiff's injury. *Jordan v. Otis* (1854) 38 Me. 429.

But in *Whiting v. Gaylord* (1895) 66 Conn. 337, 50 Am. Rep. 87, 34 Atl. 85, it was held that an easement of support would not be implied where it was not an open and visible one, nor necessary. In that case the owner of a double house, divided by a partition wall, con-

veyed to the plaintiff the west half, bounded east by the center of the division wall, and later to the defendant the other half; eight of the joists ran from a partition west of the plaintiff's hallway to and through the division wall to the partition east of the defendant's hallway, and were supported on such partitions, as would have been shown by an inspection of the premises; the defendant rebuilt his house, supporting the new house on a new independent wall, by which he supported the ends of the said joists; he used proper care, but, by reason of the jarring of the timbers of the plaintiff's house and the change of the wall caused by the destroying of the original support of the ends of the joists and the placing them on new ones, the walls of the plaintiff's house were badly cracked, and the doors were rendered incapable of being opened or closed. It was held that the defendant was not liable for the damage, as the means of support of the joists used in the original house were not open and visible, nor necessary.

It has been held that the easement does not extend to the support of a new and heavier building. Thus, where an owner of two adjoining lots with frame buildings thereon conveyed one to the defendant's predecessor, and devised the other to the plaintiff's predecessor, and the house on the plaintiff's lot was destroyed by fire, replaced by a similar structure which was also burned, and a larger building of brick was then erected thereon, it was held that there was no longer any right to have the building on the plaintiff's land supported by the defendant's land. *Turnstall v. Christian* (1885) 80 Va. 1, 56 Am. Rep. 581.

III. *Support of house by adjoining land.*

a. *Where house is retained.*

In *Starr v. Stanard-Tilton Mill. Co.* (1913) 183 Ill. App. 454, while not necessary to the result, it was held that where an owner of land, part of which is covered by a building, sells land next to such building without express reservation, he retains no easement of support of the building by the sold land.

In this connection, reference may be made to *Union Lighterage Co. v. London Graving Dock Co.* (1902) 2 Ch. (Eng.) 557, 71 L. J. Ch. N. S. 791, 87 L. T. N. S. 381, 18 Times L. R. 754, where the owner of a dock and an adjoining wharf, with a fence between, in order to secure the dock, carried tie rods underground beneath the fence, fastened by nuts to piles in the wharf, two of these nuts being at times visible but not conspicuous. The wharf premises were sold to the plaintiff without express reservation of the right to support the dock, and several years later the dock premises were sold to the defendants' predecessor. It was held that the defendants were not entitled to have their dock supported by means of the rods and ties, as the easement must have been expressly reserved, it not being one of necessity.

But in *Shubbrook v. Tufnell* (1882) 46 L. T. N. S. (Eng.) 886, 46 J. P. 694, where the proprietor of land with two houses thereon made an equitable lease for ninety-nine years of the land alongside of the houses, and later made a lease for ninety-nine years of the rest of the land, with the houses, to another person, and thereafter a drain was made through the first-mentioned land, causing a structural damage to the houses by the loss of support, it was held that an easement of support for the houses had been impliedly reserved, as it was an easement of necessity.

In *Backus v. Smith* (1880) 5 Ont. App. Rep. 341, it was held that an owner of land and a house with poor foundations, who sells the land beyond the house, is not entitled to an easement of support by implied reservation, as such an easement is not apparent.

b. Where house is sold.

It will be observed that it is held in the reported case (*DURANTE v. ALBA*, ante, 485) that where the owner of land with a building thereon sells a part of the land with the building, retaining the rest of the property extending to the side of said building, that the land retained is charged with the lateral support not only of the land sold, but of the building.

In this connection, it may be noted that in *Starrett v. Baudler* (1917) 181 Iowa, 965, L.R.A.1918B, 528, 165 N. W. 216, where the eastern wall of a house stood on the lot of an adjoining owner, who conveyed the strip on which the wall stood to the owners of the house, and thereafter conveyed the remainder of his lot to another, it was held that an easement for lateral support was created in favor of the wall, and that the grantee of the remainder of the property was therefore liable if he excavated so as to cause the wall to fall, and that it was immaterial that the deed to the parcel containing the wall was not recorded until after the other conveyance had been made.

In *Stevenson v. Wallace* (1876) 27 Gratt. (Va.) 77, it was held that where a person owns two adjoining lots and conveys one with a house on it, and reserves in the deed the right to join the two end walls of the house free of charge, he retains the right to join a building to that conveyed, by an independent wall alongside of it, or to make it a part of his building by joining only the end walls, and that the privilege of joining the building in the mode indicated in the reservation does not extinguish or impair his implied reservation of support.

IV. Dividing line going through house.

a. In general.

Where, on the death of an owner of land and a building thereon divided into five stores, three of them were allotted to the widow for dower, it was held that the devisees of the rest of the building could not tear down their portion, which was in good condition, when the effect would be to destroy the only means of access to the second and third stories of the stores of the dowress, and to remove the skylight, and to deprive her building of necessary support, as the conveniences provided for such portion by the common owner were continuous and apparent, and necessary to the reasonable enjoyment of it. *Morrison v. King* (1871) 62 Ill. 30.

An owner of a lot of land on which was a barn, who conveyed by warranty deed a portion of the land by

metes and bounds, the boundary line in fact running through the barn, though not entitled to the whole use of the barn, may maintain an action against the grantee for the loss of support and shelter to the grantor's portion of the barn, where the grantee cut off so much of the barn as was on his land, as there was here a necessity which was apparent. *Adams v. Marshall* (1885) 138 Mass. 228, 52 Am. Rep. 271. The court said: "After the repeated references to *Richards v. Rose* (1853) 9 Exch. 218, 156 Eng. Reprint, 93, 2 C. L. R. 311, 23 L. J. Exch. N. S. 3, 17 Jur. 1036, either with approval or without disapproval, we do not feel at liberty to hold that the necessity for support from the defendant's premises does not exist because the plaintiff can erect a sufficient support upon his own land, although a way by necessity would not be implied under similar circumstances. It is the injury to the plaintiff's estate by the acts of the defendant, after the grant, in changing the existing relations between the two estates, that the plaintiff complains of."

Where the owner of land with a house upon it conveyed part of the land to the plaintiff by such metes and bounds that one half of the house was on the land conveyed, and then died, having devised all her property to the defendant, it was held that the plaintiff was entitled to enjoin the defendant from pulling down the half of the house on his land. *Wray v. Morrison* (1885) 9 Ont. Rep. 180.

But, on the other hand, the court did not think that any easement had been created in *Whyte v. Builders' League* (1900) 164 N. Y. 429, 58 N. E. 517, where the division line ran through a house. In that case the heirs of an owner of two lots with three frame houses thereon,—the middle house covering about 8 feet of each lot and being separated from the other houses by studding partitions,—conveyed by deeds of even date, with full covenants against all encumbrances, the easterly lot to the mother of the plaintiff, who was one of the heirs, and the westerly lot to another heir who, several years later, con-

veyed it to the defendant; the chimney of the middle house stood on a line between the two lots, a common sewer ran along the dividing line, and the water supply pipe for the middle house came through the easterly lot; just before the conveyance to the defendant the middle house was sawn through on the dividing line of the lots, and before such conveyance the plaintiffs notified the defendant that they claimed rights in that portion of the middle house which stood on the easterly lot; the defendant tore down the part of the middle house standing on its lot, thus destroying the sewer and water connections, and erected a new building covering nearly all of its lot, and the plaintiffs demanded the restoration of the middle house and damages. In holding for the defendant, the court stated that any easement ended with the sawing through of the house and the tearing down of the defendant's portion of it, but, as heretofore said, the court did not think that there was any easement created.

b. One division including all of common wall.

One class of cases, where one division includes all of a common wall, is where the original owner parts with title to both portions of the property at the same time.

Where the owner of two lots built two houses thereon, divided by a common wall, and sold both lots by deeds recorded at the same time, the easterly lot to one through whom the plaintiff claimed and the westerly lot to the defendant's grantor, the easterly lot's description embracing the whole of the division wall and 2 inches west of it, it was held that the plaintiff's premises were charged with the servitude of having the beams of the defendant's house supported by the wall,—so long, at least, as the buildings should endure,—and of passing over the 2 inches to reach the wall, as the servitude was continuous and apparent. *Rogers v. Sinsheimer* (1873) 50 N. Y. 646.

In *Henry v. Koch* (1882) 80 Ky. 391, 44 Am. Rep. 484, where the owner of two lots built two houses thereon, divided and supported by a partition

wall which was 5 feet within lot A, and sold both lots at the same time to different purchasers, it was held (reversing the judgment below) that the purchaser of lot A, who was the appellee, could not impair the wall. But on a rehearing it was stated, obscurely enough, that "on the return of the cause, the appellee by appropriate pleading may build the wall on his own ground, and require the appellant to pay one half the cost, or make such contribution as the chancellor shall deem equitable."

It is stated to have been held in the briefly reported case of *Smith v. Martin* (1882) 4 Ky. L. Rep. 442, that where two houses were built by the same person at different times, and the wall of the house first built was used to support the house afterwards built, the allotment of the house first built and the ground upon which it stood to one of the heirs of the original owner passed the title to the entire wall, giving to the heir to whom the other house was allotted only a right to the use of the wall as a support for his house, and the facts that the second house was built a story higher than the first, and that the upper story was made to rest upon and extend over the wall of the first house, did not change the location of the original division line, or affect the title to the wall originally constructed.

Reference may be made in this connection to *Ringgold Lodge v. De Kalb Lodge* (1914) 157 Ky. 203, 162 S. W. 1111. In that case, after a building had been built, another was built by its side, using its eastern wall for two stories and for a few feet in the front part of the third story. Later the two tenants in common of the land and buildings divided the same so that the plaintiff took the original building and the land on which it stood, extending back the width of such building, and the defendant the other building and the rest of the land. It was held that the defendant could not use the support of the eastern wall of the plaintiff's building for any materially changed building on his land, as, for example, by extending his third story to use such wall throughout.

The question is somewhat different where the whole wall is parted with in the first conveyance.

Where the owner of two buildings supported by a common wall sold the southerly building by a description conveying the whole of the wall, and without reserving the right to use it, the deed covenanting that the premises were free from encumbrances, it was held that the seller could not prevent the destruction of the wall, it not being a necessity, as it was found he could build a wall on his remaining premises. *Cherry v. Brizzolara* (1909) 89 Ark. 309, 21 L.R.A.(N.S.) 508, 116 S. W. 668 (where, however, the court held that the grantee, having permitted the continued use of the wall for five years, would not be allowed to interfere with its continued use so long as he did not wish to alter or change the wall).

There is a still different question where the whole wall is retained.

Where the owner of two adjacent houses grants one of them with its appurtenances, its joists being supported by the wall of the retained house, he grants an easement in such wall, and on his subsequent sale of the retained house it necessarily continues subject to such easement, and if the easement is so open that the grantee is presumed to have known it, which is a question for the jury, it is not a breach of the covenant against encumbrances. *Kahn v. Cherry* (1917) 131 Ark. 49, 198 S. W. 266.

V. Encroachments.

a. In general.

Where the owner of two adjoining lots built a dwelling house on each, and conveyed to the defendant lot 1, with its improvements, ways, easements, rights, privileges, and appurtenances, and thereafter conveyed lot 2 to the plaintiff, the stone and cement porch of the house on lot 1 encroaching 5 feet on lot 2, and being supported on the wall of a bay window on lot 2, which bay window, when reaching the fourth story, projected a foot over lot 1, and was supported by the house thereon, it was held that the plaintiff could not maintain a bill in

equity against the defendant for a mandatory injunction compelling the removal of the porch. *Wilson v. Riggs* (1906) 27 App. D. C. 550.

In *Murphy v. Bedford* (1878) 35 Phil. Leg. Int. (Pa.) 262, where a master's sale in partition was advertised "clear of all encumbrances," though nothing was said in the order of sale as to encumbrances, the plaintiff and defendant both bought at the sale on the same day, the plaintiff being the earlier buyer. It was held that he could not have ejectment against the defendant for a strip 3 feet, 6 inches, by 16 feet, 6 inches, being part of the plaintiff's lot overhung by the defendant's bathhouse, projecting over the land and supported by posts resting on the plaintiff's lot, as the plaintiff had notice of the condition, and an easement was not an encumbrance.

Where two tenants in common, A and B, owned two lots, B conveyed his half interest in lot 1 to A, who built a house thereon, the porch of which encroached on lot 2, and A then conveyed lot 1 to his wife. Later B conveyed his undivided half of lot 2 to A, and thereafter A's wife conveyed lot 1 to C, A joining in the deed but not in the covenants, and still later A and his wife conveyed lot 2 to the plaintiff by deed, with covenants by A upon which the action was brought. In affirming a judgment for the defendant, it was held, by three judges to two, that C never acquired any right to have his porch encroach on lot 2, as the builder of the porch was not the absolute owner of both lots. The dissent was upon the ground that A's joinder in the deed to C conveyed an easement of support of the porch encroachment. *Farley v. Howard* (1901) 60 App. Div. 193, 70 N. Y. Supp. 51, affirmed in (1902) 172 N. Y. 628, 65 N. E. 1116, on opinions of the majority below.

b. Encroachment on property retained.

There are a number of cases holding that, where a building on the property conveyed encroaches on other property of the grantor, the grantee will take an easement for the use of

the property encroached upon. *Lead City Miners' Union v. Moyer* (1916) 235 Fed. 376; *Sprengel v. Windmueller* (1919) 286 Ill. 411, 121 N. E. 805; *Carrigg v. Mechanics' Bank* (1907) 136 Iowa, 261, 111 N. W. 329; *John Hancock Mut. L. Ins. Co. v. Patterson* (1885) 103 Ind. 582, 53 Am. Rep. 550, 2 N. E. 188; *Wilson v. Wightman* (1898) 36 App. Div. 41, 55 N. Y. Supp. 806; *New York C. & H. R. R. Co. v. Needham* (1899) 29 Misc. 435, 61 N. Y. Supp. 992.

Thus, where the owner of three lots and of an adjoining strip, on which lots there were three houses one of which rested partly on such strip, mortgaged the three lots, the mortgagee, on acquiring the property through foreclosure, was held entitled to an easement of the use of so much of such strip as was reasonably necessary. *John Hancock Mut. L. Ins. Co. v. Patterson* (1895) 103 Ind. 582, 53 Am. Rep. 550, 2 N. E. 188, *supra*.

Similarly, where an owner of three lots and a strip of land adjoining one of the lots erected a building on the property in such manner that a wall of the building extended upon and over the strip, the mortgagee of the three lots only, who took title under foreclosure of the mortgage, took an easement to have the wall of the building remain where it was on the strip of land, with all the other rights necessary to the enjoyment of the building (but did not obtain title to such strip of land). *Carrigg v. Mechanics' Bank* (1907) 136 Iowa, 261, 111 N. W. 329, *supra*.

And where the plaintiff, owning two lots, built two houses thereon, the stoop of the southerly house extending over a strip 4 inches in width and 5 feet in depth on the northerly lot, and he conveyed the southerly lot by metes and bounds to the defendant, and later the northerly lot by metes and bounds to another party, it was held that the plaintiff, suing for the benefit of the grantee of the northerly lot, could not eject the defendant from such strip, as an easement of necessity must be implied (but that the plaintiff was entitled to a judgment for the possession of the land, subject to an ease-

ment over the strip). *Wilson v. Wightman* (1898) 36 App. Div. 41, 55 N. Y. Supp. 806, *supra*.

Where the owner of lots 27 and 28 conveys lot 28 with the house thereon, and such house extends 1 foot over lot 27, the grantee takes an easement in such 1 foot. *Sprenzel v. Windmueller* (1919) 286 Ill. 411, 121 N. E. 805, *supra*, where the deed conveyed the lot with the house thereon, and "all other improvements of whatsoever kind and nature thereon, and commonly known as"—giving the street number.

Thus, in *Lead City Miners' Union v. Moyer* (1916) 235 Fed. 376, *supra*, the owner of two lots, the front lot being 105 feet deep, built a three-story building covering all the front lot and 10 feet of the back lot, and added a three-story rear porch covering an additional 10 feet of the back lot; one of the floors was used as a theater, a part of the stage being at the end of the building on the back lot, and extending over onto the front lot, the dressing rooms being on the porch. Such owner conveyed to the city for use as a way or alley all of the back lot not covered by the building or porch, and ten years later mortgaged the front lot, described as 105 feet deep. There were no means of entering or leaving the building situated on the front lot, from the rear part of the building, except through that portion of the building standing on the back lot, and through use of said porch, and such use had been made of the rear of the building and porch on said back lot since the completion of the building, many years prior to the giving of said mortgage. It was held that the mortgagee was entitled to a perpetual easement of use of the part of the back lot covered by the building and porch.

In *New York C. & H. R. R. Co. v. Needham* (1899) 29 Misc. 435, 61 N. Y. Supp. 992, *supra*, it was held that a conveyance of land on which was a dwelling house carried an easement for the support of part of a substantial outhouse attached to the dwelling house, which part encroached upon the remaining land of the grantor. (The

report does not give the terms of the conveyance.)

There are two New York cases, however, which held that there was no easement under circumstances of this character.

Thus, where a deed conveyed a lot by metes and bounds, with the buildings and improvements thereon, together with the appurtenances thereto belonging, and on the rear of the lot was a building extending 5 feet over upon the adjoining lot of the grantor, and for this building there never was a separate side wall, but its front and rear walls were extended over the line until they met the walls of a house built on the adjoining lot, and the extended walls were not keyed upon this exterior wall of the other house, and the timbers of the house did not rest on it, but were supported by piers, though the plastering was placed upon or against it, it was held that the deed did not convey the strip of the adjoining lot covered by the building on the lot conveyed, or any easement of support therein, as the same was not necessary. *Griffiths v. Morrison* (1887) 106 N. Y. 165, 12 N. E. 580.

And in *Reiners v. Young* (1888) 109 N. Y. 648, 16 N. E. 368, reversing (1885) 38 Hun, 335, where the owner of two lots erected a building on the easterly lot and conveyed this lot to the defendant's predecessor by metes and bounds, with no mention of buildings or appurtenances, and later conveyed the other lot to the plaintiffs, who discovered through a survey that the westerly wall of the defendant's house, and his west fence in the rear, stood upon their lot to the extent of a few inches, and brought ejectment, it was held that the plaintiffs were entitled to recover. The majority of the court concurred in the decision, but not in the opinion, which states that no easement was apparent, that the one claimed was not found in the grant, and that there was no necessity for its existence,—citing *Griffiths v. Morrison* (N. Y.) *supra*.

Smith v. Lockwood (1907) 100 Minn. 221, 110 N. W. 980, was decided under the Recording Acts. In that case an owner of two lots built a building on

lot 1 which encroached on lot 2, 5 feet in front and 7 feet in the rear, and he then mortgaged lot 1. Thereafter, while in possession of both lots, he sold lot 2 to the plaintiff's predecessor, who had no knowledge of the mortgage. It was held that one claiming under the mortgage could not resist ejectment by the plaintiff.

c. Encroachment on property sold.

Where a retained building encroaches on property conveyed and the easement is one of necessity, it will be implied.

Thus, where the owner of land with houses thereon conveyed the unimproved portion thereof, on which one of the buildings encroached several inches, there was held to be an implied easement of support reserved, as the burden was apparent, continuous, and necessary. *Grotenstein v. Kaplan* (1915) 90 Misc. 403, 153 N. Y. Supp. 614.

It is stated (obiter) in substance, in *Katz v. Kaiser* (1897) 154 N. Y. 294, 48 N. E. 532, that if the owner of a house grants an adjoining lot, the description covering a part of the wall of the house, the grantee takes his premises charged with the servitude of the encroaching wall.

In *Taylor v. Wright* (1909) 76 N. J. Eq. 121, 79 Atl. 433, the court seemed to be of the opinion that there was a reservation of an easement where the owner of two houses on a village street conveyed one of the houses, and the boundary line between the premises conveyed and those retained was such as to cut off part of the porch and part of the eaves of the retained house, as the easement was apparent and reasonably necessary and continuous; but the question was not decided.

But an encroachment, though obvious, was held insufficient to sustain an implied reservation, as it was not necessary, in *Runge v. Koch* (1913) 156 App. Div. 217, 141 N. Y. Supp. 232, where, at the time of the grant, there was a party wall between the buildings granted and those retained, and beyond the party wall an oven had been erected on the lot retained, and one of its walls was in the general direc-

tion of a continuation of the party wall, and extended some inches over on the plaintiff's lot. It was held that the conveyance to the plaintiff, which stated the boundary to be part of the way through a party wall, did not reserve an easement in favor of the grantor for the use of so much of the plaintiff's land as supported part of the oven wall. The court said: "Assuming, therefore, that the jury were justified in finding that it was obvious to anyone viewing the premises that the wall encroached upon the plaintiff's premises, still we are of opinion that there was no implied reservation to the grantor and his grantees to retain it in its then position."

And where the owner of a lot with a house thereon conveyed one half of the lot, and a house on the rest of the lot encroached upon the property conveyed on a strip 7 inches wide by 40 feet deep aboveground and 14 inches wide underground, it was held that no easement of support was retained by the grantor, as this would have required an express reservation, the court considering also that the servitude could not be said to be visible, as it would have required a survey to show the 7 inches aboveground. *Sloat v. McDougall* (1890) 30 N. Y. S. R. 912, 9 N. Y. Supp. 631.

In this connection should be cited the case of the sale of a lot, within the limits of which were underground foundations of a building on adjoining property of the grantor. In *National Trust Co. v. Western Trust Co.* (1912) — Sask. —, 4 D. L. R. 455, it was held, where the owner of property consisting of several numbered lots built a building on one of the lots, the foundations of which extended underground within the limit of another of the lots, and sold such other lot to a purchaser without reference to these foundations, such purchaser knowing nothing about them, that these foundations belonged to the purchaser, and that he could remove them, he having taken a certificate of title under the Land Titles Act without any reservation, and therefore (according to § 65 of said act) he held the same absolutely free from "all encumbrances, liens,

estates, or interests whatsoever" the act further providing (§ 71) that when any right of way or other easement is intended to be created or transferred, the owner shall execute a transfer describing the land and containing an accurate description of the estate, interest, or easement intended to be transferred or created, and that (§ 73) whenever any easement is created for the purpose of being annexed to, or used and enjoyed together with, other land, the registrar shall make a memorandum of the instrument creating such easement upon the certificate of title of such other land. The court stated that it

was not necessary to decide whether an easement of necessity could be created except in the manner specified by § 71, because it was shown at the trial that the building could be supported by foundations entirely in its own lot, and it was simply a question of expense. (This question, curiously enough, arose on an action by the grantee to compel the grantor and his successor to remove the footings, and the judgment was for the defendant on the ground that the footings belonged to the plaintiff and that he could remove them if he chose.)

B. B. B.

NEW YORK CENTRAL RAILROAD COMPANY, Plff. in Certiorari,
v.
WILBUR H. MOHNEY.

United States Supreme Court — March 1, 1920.

(252 U. S. 152, 64 L. ed. —, 40 Sup. Ct. Rep. 287.)

Carriers — wilful or wanton negligence — gratuitous passenger.

1. A carrier is liable to a person traveling on a pass who is wilfully or wantonly injured by the carrier's employees, notwithstanding a stipulation in such pass releasing the carrier from liability for negligence.

[See note on this question beginning on page 501.]

— limitation of liability — employee riding on pass — transportation not interstate.

2. The mental purpose of a railway employee traveling on an annual pass, good only over a line wholly within the state, to continue his journey into another state, using another carrier to a point still within the state, where

he expected to find awaiting him another pass from the first carrier which would be good for the interstate part of his journey, does not make him an interstate passenger while traveling on the first pass, so as to validate, contrary to local public policy, a stipulation in such pass releasing the carrier from liability for negligence.

CERTIORARI to the Court of Appeals for Lucas County in the State of Ohio, to review a judgment affirming a judgment of the Court of Common Pleas in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by the negligence of defendant's servant. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Howard Lewis and Frederick W. Gaines, for plaintiff in certiorari:

The contract of carriage was interstate.

Texas & N. O. R. Co. v. Sabine Tram Co. 227 U. S. 111, 57 L. ed. 442, 33

Sup. Ct. Rep. 229; Baer Bros. Mercantile Co. v. Denver & R. G. R. Co. 233 U. S. 479, 490, 58 L. ed. 1055, 1061, 34 Sup. Ct. Rep. 641; Illinois C. R. Co. v. De Fuentes, 236 U. S. 157, 163, 59 L. ed. 517, 519, P.U.R.1915A; 840, 35 Sup. Ct. Rep. 275; McFadden v.

Alabama Great Southern R. Co. 154 C. C. A. 338, 241 Fed. 562; Railroad Commission v. Worthington, 225 U. S. 101, 108, 109, 56 L. ed. 1004, 1008, 32 Sup. Ct. Rep. 653; Southern P. Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 527, 55 L. ed. 310, 320, 31 Sup. Ct. Rep. 279.

The journey being interstate, rights and liabilities thereunder are governed by the Federal laws exclusively.

Cincinnati, N. O. & T. P. R. Co. v. Rankin, 241 U. S. 319, 60 L. ed. 1022, L.R.A.1917A, 265, 36 Sup. Ct. Rep. 555; St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156; Turman v. Seaboard Air Line R. Co. 105 S. C. 287, 89 S. E. 655; Prigg v. Pennsylvania, 16 Pet. 539, 10 L. ed. 1060; Southern R. Co. v. Prescott, 240 U. S. 632, 60 L. ed. 836, 36 Sup. Ct. Rep. 469.

The pass was gratuitous.

Cincinnati, N. O. & T. P. R. Co. v. Rankin, 241 U. S. 319, 60 L. ed. 1022, L.R.A.1917A, 265, 36 Sup. Ct. Rep. 555; Louisville & N. R. Co. v. Maxwell, 237 U. S. 94, 59 L. ed. 853, L.R.A.1915E, 665, P.U.R.1915C, 300, 35 Sup. Ct. Rep. 494; Charleston & W. C. R. Co. v. Thompson, 234 U. S. 576, 577, 58 L. ed. 1476, 1478, 34 Sup. Ct. Rep. 964.

A carrier may validly stipulate that it shall not be liable for injuries to the person to whom the pass is issued.

Charleston & W. C. R. Co. v. Thompson, *supra*; Boering v. Chesapeake Beach R. Co. 193 U. S. 442, 448, 48 L. ed. 742, 744, 24 Sup. Ct. Rep. 515.

When, on account of the fog, the engineer did not see the signals, or disregarded them, he was not guilty of negligence which was wilful and wanton.

7 Thomp. Neg. § 22; White, Personal Injuries on Railroads, § 14; 1 Shearm. & Redf. Neg. 6th ed. § 114a; Stewart v. Burlington & M. River R. Co. 32 Iowa, 561; Fluckey v. Southern R. Co. 155 C. C. A. 244, 242 Fed. 468; Cleveland, C. C. & St. L. R. Co. v. Miller, 149 Ind. 502, 49 N. E. 445; King v. Illinois C. R. Co. 52 C. C. A. 489, 114 Fed. 855; Louisville & N. R. Co. v. Muscat, 147 Ala. 701, 41 So. 302; Louisville & N. R. Co. v. Mitchell, 134 Ala. 261, 32 So. 735; Southern R. Co. v. Fisk, 86 C. C. A. 373, 159 Fed. 373.

There being no wilful or wanton negligence pleaded, no recovery can be had therefor, even if such had been proved.

9 A.L.R.—32.

Gentry v. United States, 41 C. C. A. 185, 101 Fed. 51; Re Rosser, 41 C. C. A. 497, 101 Fed. 562; Re Wood, 210 U. S. 246, 254, 52 L. ed. 1046, 1049, 28 Sup. Ct. Rep. 621.

Messrs. Albert H. Miller, A. Jay Miller, and Charles H. Brady, for defendant in certiorari:

It cannot be logically contended that Mohney was on anything but an intrastate journey when he was traveling on transportation entitling him to ride only from Toledo, Ohio, to Cleveland, Ohio.

Southern P. Co. v. Arizona, 249 U. S. 472, 63 L. ed. 713, P.U.R.1919D, 462, 39 Sup. Ct. Rep. 313; White v. St. Louis Southwestern R. Co. — Tex. Civ. App. —, 86 S. W. 962; Judson, Interstate Commerce, p. 15, ¶ 1; Luken v. Lake Shore & M. S. R. Co. 248 Ill. 383, 140 Am. St. Rep. 220, 94 N. E. 175, 21 Ann. Cas. 82; Gulf, C. & S. F. R. Co. v. Texas, 204 U. S. 403, 51 L. ed. 540, 27 Sup. Ct. Rep. 360, affirming 97 Tex. 274, 78 S. W. 495; New Jersey Fruit Exch. v. Central R. Co. 2 Inters. Com. Rep. 84; Missouri & I. R. Tie & Lumber Co. v. Cape Girardeau & S. W. R. Co. 1 Inters. Com. Rep. 607, 1 I. C. C. Rep. 30; Hope Cotton Oil Co. v. Texas & P. R. Co. 10 Inters. Com. Rep. 696; St. Louis Hay & Grain Co. v. Chicago, B. & Q. R. Co. 11 Inters. Com. Rep. 82.

State law regulates state transportation.

Smith v. Atchison, T. & S. F. R. Co. 114 C. C. A. 157, 194 Fed. 79.

All passes are not free passes.

Norfolk Southern R. Co. v. Chatman, 244 U. S. 276, 61 L. ed. 1131, L.R.A. 1917F, 1128, 37 Sup. Ct. Rep. 499; Tripp v. Michigan C. R. Co. L.R.A. 1918A, 758, 151 C. C. A. 385, 238 Fed. 449; Wiley v. Grand Trunk R. Co. 227 Fed. 127.

Employment was back of the Mohney pass.

Doyle v. Fitchburg R. Co. 166 Mass. 492, 33 L.R.A. 844, 55 Am. St. Rep. 417, 44 N. E. 611; Gill v. Erie R. Co. 151 App. Div. 131, 135 N. Y. Supp. 355; Whitney v. New York, N. H. & H. R. Co. 50 L.R.A. 615, 43 C. C. A. 19, 102 Fed. 850; Dugan v. Blue Hill Street R. Co. 193 Mass. 431, 79 N. E. 748; Walther v. Southern P. Co. 159 Cal. 769, 37 L.R.A.(N.S.) 235, 116 Pac. 51; Eberts v. Detroit, Mt. C. & M. C. R. Co. 151 Mich. 260, 115 N. W. 43; Harris v. Puget Sound Electric R. Co. 52 Wash. 289, 100 Pac. 838; Indianapolis Traction Co. v. Isgrig. 181

Ind. 211, 104 N. E. 60; *Palmer v. Boston & M. R. Co.* 227 Mass. 493, 116 N. E. 899.

Plaintiff was entitled to some degree of care.

Chicago, R. I. & P. R. Co. v. Maucher, 248 U. S. 359, 63 L. ed. 294, 39 Sup. Ct. Rep. 108; *St. Louis, I. M. & S. R. Co. v. Pitcock*, 82 Ark. 441, 118 Am. St. Rep. 84, 101 S. W. 725, 12 Ann. Cas. 582.

In Ohio, a stipulation such as appears on the back of the Mohny pass, exempting a railroad from liability caused by the negligence of itself or its employees, when such contract is made and enforced within the state, is absolutely void.

Pittsburgh, C. C. & St. L. R. Co. v. Kinney, 95 Ohio St. 64, L.R.A.1917D, 641, 115 N. E. 505, Ann. Cas. 1918B, 286, 17 N. C. C. A. 269; *Cincinnati, H. & D. R. Co. v. Pontius*, 19 Ohio St. 221, 2 Am. Rep. 391; *Pittsburgh, C. C. & St. L. R. Co. v. Sheppard*, 56 Ohio St. 68, 60 Am. St. Rep. 732, 46 N. E. 61, 1 Am. Neg. Rep. 517; *Cleveland, P. & A. R. Co. v. Curran*, 19 Ohio St. 1, 2 Am. Rep. 362; *Knowlton v. Erie R. Co.* 19 Ohio St. 260, 2 Am. Rep. 395.

Even in jurisdictions where such a contract is held valid, to exempt a carrier from liability for ordinary negligence, it is generally held that the carrier will not be relieved from liability for gross negligence, or for wantonness, or for wilfulness.

Illinois C. R. Co. v. Read, 37 Ill. 484, 87 Am. Dec. 260; *Illinois C. R. Co. v. O'Keefe*, 63 Ill. App. 102; *Toledo, W. & W. R. Co. v. Beggs*, 85 Ill. 80, 28 Am. Rep. 613; *Indiana C. R. Co. v. Mundy*, 21 Ind. 48, 83 Am. Dec. 339; *Meuer v. Chicago, M. & St. P. R. Co.* 5 S. D. 568, 25 L.R.A. 81, 49 Am. St. Rep. 898, 59 N. W. 945; *Walther v. Southern P. Co.* 159 Cal. 769, 37 L.R.A. (N.S.) 235, 116 Pac. 51; *Turman v. Seaboard Air Line R. Co.* 105 S. C. 287, 86 S. E. 655; *Annas v. Milwaukee & N. R. Co.* 67 Wis. 46, 57 Am. Rep. 388, 30 N. W. 282, 10 Am. Neg. Cas. 546.

Mr. Justice Clarke delivered the opinion of the court:

The respondent, whom we shall refer to as the plaintiff, brought suit against the petitioner, defendant, to recover damages for severe injuries which he sustained in a rear-end collision on defendant's railroad, which

he averred was caused by the gross negligence of the engineer of the train following that on which he was a passenger, in failing to look for and heed danger signals which indicated that the track ahead was occupied. The plaintiff was employed by the defendant as an engineer, with a run between Air Line Junction, at Toledo, and Collingwood, a suburb of Cleveland, wholly within the state of Ohio. As an incident to his employment he was given an annual pass, good between Air Line Junction and Collingwood, which contained the release following:

"In consideration of receiving this free pass, each of the persons named thereon, using the same, voluntarily assumes all risk of accidents, and expressly agrees that the company shall not be liable under any circumstances, whether of negligence of itself, its agents, or otherwise, for any injury to his or her person, or for any loss or injury to his or her property; and that as for him or her, in the use of this pass, he or she will not consider the company as a common carrier, and liable to him or her as such.

"And, as a condition precedent to the issuing and use thereof, each of the persons named on the face of this pass states that he or she is not prohibited by law from receiving free transportation, and that the pass will be lawfully used."

Having been informed that his mother had died at her home near Pittsburgh, Pennsylvania, the plaintiff, desiring to attend her funeral, applied to the defendant for and obtained a pass for himself and wife from Toledo to Youngstown, Ohio, via Ashtabula, and was promised that another pass for himself and wife would be left with the agent of the company at Youngstown, good for the remainder, the interstate part, of the journey to Pittsburgh. But the line of the defendant via Ashtabula to Youngstown was much longer and required a number of hours more for the journey than it did to go via Cleveland, using the Erie Railroad from that city to

Youngstown, and for this reason, the record shows, the plaintiff Mohney, before leaving home, decided that his wife should not accompany him, and that he would make the journey by a train of the defendant, which used its own rails to Cleveland, and from Cleveland to Youngstown used the tracks of the Erie Railroad Company, and at Youngstown returned to the road of the defendant, over which it ran to Pittsburgh. The transportation which he had received via Ashtabula could not be used over the shorter route, and therefore the plaintiff presented his annual pass for transportation from Toledo to Cleveland, intending to pay his fare from Cleveland to Youngstown over the Erie Railroad, leave the train at the Erie station at Youngstown, inquire by telephone as to the time and place of the burial of his mother, and then go to the New York Central station, a half mile away, obtain the pass which was to be left there for him, and go forward to Pittsburgh on the next convenient train.

The train on which Mohney was a passenger was wrecked between Toledo and Cleveland. It had come to a stop at a station and the second section of the train ran past two block signals, indicating danger ahead, and collided with the rear car of the first section, in which Mohney was riding, causing him serious injury.

The case was tried on stipulated facts and the testimony of the plaintiff. The trial court concluded that Mohney, at the time he was injured, was on an intrastate journey, using an intrastate pass, and that by the law of Ohio, the release upon it was void as against public policy. Thereupon, a jury being waived, the court entered judgment in plaintiff's favor.

The state court of appeals, differing with the trial court, concluded that Mohney was an interstate passenger when injured, and that the release on the pass was valid, under the ruling in *Charlestown W. C. R. Co. v. Thompson*, 234 U. S. 576, 58 L. ed. 1476, 34 Sup. Ct. Rep. 964. But

the court went further and affirmed the judgment on two grounds; by a divided court, on the ground that the pass was issued to Mohney as part consideration of his employment, and, all judges concurring, for the reason that "we are clearly of the opinion that the negligence in this case, under the evidence, was wilful and wanton." For these reasons it was held that the release on the pass did not constitute a defense to the action.

The supreme court of the state denied a motion for an order requiring the court of appeals to certify the record to it for review, and the case is here on writ of certiorari.

The propriety of the use of the annual pass by Mohney for such a personal journey, and that the release on it was not valid under Ohio law, were not questioned, and the sole defense urged by the railroad company was, and now is, that his purpose to continue his journey to a destination in Pennsylvania rendered him an interstate passenger, subject to Federal law from the time he entered the train at Toledo, and that the release on the pass was valid, under 234 U. S. 576, supra.

The three freight cases on which the defendant relies for its contention that the plaintiff was an interstate passenger when injured, all proceed upon the principle that the essential character of the transportation, and not the purpose, or mental state, of the shipper, determines whether state or national law applies to the transaction involved.

Thus, in *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475, the owner's state of mind in relation to the logs, his intent to export them, and even his partial preparation to do so, did not exempt them from state taxation, because they did not pass within the domain of the Federal law until they had "been shipped, or entered with a common carrier for transportation to another state, or had been started upon such transportation in a continuous route or journey."

In *Southern P. Terminal Co. v.*

Interstate Commerce Commission, 219 U. S. 498, 527, 55 L. ed. 310, 320, 31 Sup. Ct. Rep. 279, the cotton-seed cake and meal, although billed to Galveston, were "all destined for export, and by their delivery to the Galveston, Harrisburg, & San Antonio Railway they must be considered as having been delivered to a carrier for transportation to their foreign destination. . . . The case, therefore, comes under *Coe v. Errol*, supra." The mental purpose of Young, and his attempted practice by intrastate billing, was to keep within the domain of the state law; but his contracts, express and implied, brought the discrimination complained of in the case within the scope of the Interstate Commerce Act.

In *Railroad Commission v. Worthington*, 225 U. S. 101, 56 L. ed. 1004, 32 Sup. Ct. Rep. 653, the Commission attempted to regulate the rate on "lake cargo-coal," because it was often billed from the mines to Huron, or other ports within the state, but this court found that the established "lake cargo-coal" rate was intended to apply, and in practice did apply, only "to such coal as was in fact placed on vessels for carriage beyond the state," and obviously, "by every fair test, transportation of this coal from the mines to upper lake ports is an interstate carriage." For this reason the enforcement of the order of the State Commission was enjoined as an attempt to regulate and control interstate commerce. Here again it was the committing of a designated kind of coal to a carrier for transportation in interstate commerce that rendered the Federal law applicable.

To what extent the analogy between the shipments of property and the transportation of passengers may profitably be pressed, we need not inquire, for in this case the only contract between the carrier defendant and the plaintiff was the annual pass issued to the latter. This written contract, with its release, is the sole reliance of the defendant. But that contract in terms

was good only between Air Line Junction and Collingwood, over a line of track wholly within Ohio, and the company was charged with notice when it issued the pass that the public policy of that state rendered the release upon it valueless. The purpose of the plaintiff to continue his journey into Pennsylvania would have been of no avail in securing him transportation over the Erie line to Youngstown; for that he must pay the published fare; and very surely the release on the pass to Collingwood would not have attached to the ticket to Youngstown. Whether there was a similar release on the pass to Pittsburgh, which Mohny expected to get at Youngstown, the record does not disclose, and it is of no consequence whether there was or not. The contract which the defendant had with its passenger was in writing and was for an intrastate journey, and it cannot be modified by the purpose of Mohny to continue his journey into another state, under a contract of carriage with another carrier, for which he would have been obliged to pay the

Carrier—
limitation of
liability—
employee riding
on pass—trans-
portation not
interstate.

published rate, or by an intended second contract with the defendant in terms which are not disclosed. The mental purpose of one of the parties to a written contract cannot change its terms. *Southern P. Co. v. Arizona*, 249 U. S. 472, 63 L. ed. 713, P.U.R.1919D, 462, 39 Sup. Ct. Rep. 313. For these reasons the judgment of the trial court was right and should have been affirmed.

But the court of appeals affirmed the judgment on two grounds, one of which was that all of the judges were "clearly of the opinion that the negligence in the case, under the evidence, was wilful and wanton." This court does not weigh the evidence in such cases as we have here, but it has been looked into sufficiently to satisfy us that the argument that there is no evidence whatever in the record to support such a finding cannot be sustained.

A carrier by rail is liable to a trespasser or to a mere licensee wilfully or wantonly injured by its servants in charge of its train (Thomp. Neg. §§ 3307, 3308, and 3309, and the same sections in White's Supplement thereto), and a sound public policy forbids that a less onerous rule should be applied to a passenger injured by like negligence when lawfully upon one of its trains. This much of protection was due the plaintiff as a human being, who had intrusted his safety to defendant's keeping. *Southern P. Co. v. Schuyler*, 227 U. S. 601, 603, 57 L. ed. 662, 43 L.R.A.(N.S.) 901, 33 Sup. Ct. Rep. 277; *Chicago, R. I. & P. R. Co. v. Maucher*, 248 U. S. 359, 363, 63 L. ed. 294, 296, 39 Sup. Ct. Rep. 108.

—wilful or
wanton negli-
gence—gratui-
tous passenger.

The evidence in the record as to the terms and conditions upon which the pass was issued to the plaintiff

is so meager that, since it is not necessary to a decision of the case, we need not and do not consider the extent to which the case of *Charleston & W. C. R. Co. v. Thompson*, 234 U. S. 576, 58 L. ed. 1476, 34 Sup. Ct. Rep. 964, is applicable to an employee using a pass furnished to him seemingly as a necessary incident to his employment.

The judgment of the Court of Appeals is affirmed.

Mr. Justice Day and Mr. Justice Van Devanter concur in the result, being of opinion that Mohney was using the annual pass in an interstate journey, and that to such a use of the pass the Ohio law was inapplicable, but that the releasing clause on the pass did not cover or embrace his injury, because the latter resulted from wilful or wanton negligence, as to which such a clause is of no force or effect.

ANNOTATION.

Stipulation releasing carrier from liability for injury to free passenger as affecting liability for gross negligence or wilful or wanton injury.

The annotation in 7 A.L.R. at page 852, on the question what amounts to gross negligence for which a carrier is liable to a free passenger, necessarily assumes a rule, not therein discussed, that a carrier is liable to such a passenger in case of gross negligence or, a fortiori, wilful injury. The purpose of the present discussion is to complement the annotation referred to by collating separately the decisions which directly maintain the rule previously assumed and apply it in the case of a passenger who travels not only without payment of fare, but under a contract containing a stipulation releasing the carrier from liability for injury.

Although there is considerable conflict of opinion as to whether a carrier may by stipulation in a free pass relieve itself from liability to the holder (see 5 R. C. L., title "Carriers," §§ 665 et seq.), the courts are unanimous in declaring that a carrier cannot in that manner relieve itself from

liability for acts done wantonly or wilfully, or for acts of gross negligence.

United States.—See *Northern P. R. Co. v. Adams* (1903) 192 U. S. 440, 48 L. ed. 513, 24 Sup. Ct. Rep. 408, reversing (1902) 54 C. C. A. 196, 116 Fed. 324. And see *New York C. R. Co. v. Mohney* (reported herewith) ante, 496.

California.—*Walther v. Southern P. R. Co.* (1911) 159 Cal. 769, 37 L.R.A. (N.S.) 235, 116 Pac. 51.

Illinois.—*Illinois C. R. Co. v. Read* (1865) 37 Ill. 484, 87 Am. Dec. 260; *Toledo, W. & W. R. Co. v. Beggs* (1877) 85 Ill. 80, 28 Am. Rep. 613; *Jacksonville Southeastern R. Co. v. Southworth* (1890) 135 Ill. 253, 25 N. E. 1093; *Illinois C. R. Co. v. O'Keefe* (1896) 63 Ill. App. 102, reversed in (1897) 168 Ill. 115, 39 L.R.A. 148, 61 Am. St. Rep. 68, 48 N. E. 294, 4 Am. Neg. Rep. 48. See also *Chicago, B. & N. R. Co. v. Hawk* (1890) 36 Ill. App. 327.

Indiana.—*Indiana C. R. Co. v. Munday* (1863) 21 Ind. 48, 83 Am. Dec. 339.

Kentucky.—*Louisville & N. R. Co. v. Brown* (1919) — Ky. —, 217 S. W. 686.

Missouri.—See also *Bryan v. Missouri P. R. Co.* (1888) 82 Mo. App. 228.

New York.—*Boswell v. Hudson River R. Co.* (1860) 5 Bosw. 699, 10 Abb. Pr. 442.

Oklahoma.—*Missouri, K. & T. R. Co. v. Zuber* (1919) 76 Okla. 146, 7 A.L.R. 840, 184 Pac. 452; *Atchison, T. & S. F. R. Co. v. Smith* (1913) 38 Okla. 157, 132 Pac. 494, Ann. Cas. 1915C, 620.

South Carolina.—*Turman v. Seaboard Air Line R. Co.* (1916) 105 S. C. 287, 89 S. E. 655.

Tennessee.—*Marshall v. Nashville R. & Light Co.* (1907) 118 Tenn. 254, 9 L.R.A. (N.S.) 1246, 101 S. W. 419, 12 Ann. Cas. 675.

Wisconsin.—*Annas v. Milwaukee & N. R. Co.* (1886) 67 Wis. 46, 57 Am. Rep. 388, 30 N. W. 282, 10 Am. Neg. Cas. 546.

Canada.—*Bergevin v. Quebec & L. St. J. R. Co.* (1912) Rap. Jud. Quebec 43 C. S. 38.

"By the great weight of authority, . . . in the absence of provision to the contrary, . . . a contract of exemption from liability for negligence is upheld, at least so far as any except what is called in the opinions wanton, or wilful, or gross negligence is concerned, in the case of a passenger who is carried solely as a matter of favor, and without any compensation or advantage whatever to the carrier. . . . We think that the question of public policy in regard to such contracts of exemption, even as to passengers carried gratuitously, has been settled in this state by legislative enactment. Section 2175 of the Civil Code provides: 'A common carrier cannot be exonerated, by any agreement made in anticipation thereof, from liability for the gross negligence, fraud, or wilful wrong of himself or his servants.'" *Walther v. Southern P. R. Co.* (Cal.) *supra*.

Similarly, in *Boswell v. Hudson River R. Co.* (N. Y.) *supra*, wherein the defense was interposed that the car-

rier was not liable inasmuch as the plaintiff, at the time of the injury, was traveling on a free pass by which he expressly released the company from all liability for injury to his person, it was said: "The counsel of the defendants does not deny that there may be a degree of gross neglect, amounting to wilful and fraudulent misconduct, for which they might be responsible, even under this contract."

The plaintiff in *Annas v. Milwaukee & N. R. Co.* (Wis.) *supra*, was at the time of injury traveling on a free pass providing that "the person accepting this pass assumes all risk of accident, and expressly agrees that the company shall not be liable, under any circumstances, whether of negligence of their agents or otherwise, for any injury to the person, or any loss or damage to the property, of the passenger using this pass." It was held that the carrier could not by the contract relieve itself from liability for gross negligence, either of itself or its agents or servants, nor could it stipulate against any negligence of its servants or agents which was expressly made a crime, even though such negligence might not be of that degree denominated gross carelessness or recklessness.

In *Illinois C. R. Co. v. Read* (1865) 37 Ill. 484, 87 Am. Dec. 260, an action for an injury to a person riding on a free pass including a contract similar to the one involved in *Annas v. Milwaukee & N. R. Co.* (Wis.) *supra*, the court said: "While we hold this agreement did not exempt the railroad company from the gross negligence of its employees, we are free to say that it does exempt it from all other species or degrees of negligence not denominated gross, or which might have the character of recklessness."

The case last cited was followed in *Toledo, W. & W. R. Co. v. Beggs* (1877) 85 Ill. 80, 28 Am. Rep. 613, the court holding that a free ticket containing conditions releasing the company from liability for injuries occurring through its negligence was "a perfect immunity to the company for such unavoidable accidents as will

happen to the best-managed railroad trains; not, however, shielding them from liability for gross negligence, or any degree of negligence having the character of recklessness."

So in *Missouri, K. & T. R. Co. v. Zuber* (1919) 76 Okla. 146, 7 A.L.R. 840, 184 Pac. 452, it was held that although the plaintiff was riding gratuitously on a pass by which he assumed "all risk of accident, injury, and damage, whether resulting from the negligence of the servants and agents of the companies, or otherwise," the company was liable for an injury caused by the gross negligence of its servants in leaving open a switch leading to a sidetrack.

And in *Louisville & N. R. Co. v. Brown* (1919) — Ky. —, 217 S. W. 686, wherein it appeared that a pass provided that "the person accepting and using this pass in traveling throughout assumes all risks of accident to person or property," it was said: "Without entering into a discussion of the multitudinous array of authorities on the proposition in issue, we are of the opinion that a railroad company cannot, by a stipulation such as is printed on the pass issued to appellee, relieve itself of liability for injuries received on account of gross negligence. Ky. Const. § 196."

Similarly, in *Marshall v. Nashville R. & Light Co.* (1907) 118 Tenn. 254, 9 L.R.A.(N.S.) 1246, 101 S. W. 419, 12 Ann. Cas. 675, it was held that to a person, riding on a free pass which stipulated against liability for negligence, a street railway company was liable for gross negligence. The court said: "We are of opinion that, in order to render the company liable to an individual using and riding on such a pass, there must be on the part of the company such negligence as may be denominated wilful, reckless, or wanton, or negligence so gross as to amount to wilfulness, recklessness, or wantonness, and for negligence short

of this the company is protected by the terms of the pass, which constitute the contract of carriage. In such case the company, as to such individual, occupies the position of a mandatary, and not that of a common carrier, so far as its liability for negligence is concerned."

In *Bryan v. Missouri P. R. Co.* (1888) 32 Mo. App. 228, it was held that a passenger traveling on a free pass, expressly conditioned that the person accepting it assumed all risks of accident and damages without claim against the company, could recover for an injury sustained, where he was free from negligence. The court took the view that in such a case any negligence on the part of the company was gross negligence.

In *Indiana C. R. Co. v. Mundy* (1863) 21 Ind. 48, 83 Am. Dec. 339, the pass in question provided in part that "the person accepting this ticket assumes all risk of personal injury." In affirming a judgment in favor of the plaintiff, the court said: "Without undertaking to determine precisely what risks the plaintiff assumed by this contract, we think it clear, under the authorities, that he did not assume any risks arising from the gross negligence of the servants of the defendant in running the train."

In *Bergevin v. Quebec & L. St. J. R. Co.* (1912) Rap. Jud. Quebec 43 C. S. 38, it was held that a stipulation in a free pass to the effect that the railroad company would not be responsible for accidents did not relieve the company from liability for accidents resulting from gross negligence of its servants or employees.

In the reported case (*NEW YORK C. R. Co. v. MOHNEY*, ante, 496) it is held that a clause in a pass releasing the carrier from liability for negligence did not cover the plaintiff's case, since the evidence disclosed that the negligence complained of was wilful and wanton.

W. F. F.

CATHERINE BAXTER

v.

PHILADELPHIA & READING RAILWAY COMPANY, Appt.

Pennsylvania Supreme Court — April 28, 1919.

(264 Pa. 467, 107 Atl. 881.)

Damages — injury to person engaged in business — value of other's services.

1. The compensation awarded one engaged in business for personal injury for loss of his services in the business should not exceed the amount usually paid to persons performing similar services for others.

[See note on this question beginning on page 510.]

Evidence — photograph — different light conditions — effect.

2. Photographs of the scene of a grade-crossing accident are not conclusive as to the extent of view of the person injured, where the conditions of light were not the same when they were taken as when the accident occurred.

[See 10 R. C. L. 1157, 1160.]

Damages — negligent killing — profits from capital.

3. Upon the question of damages for negligent killing, profits from invested capital or the labor of others are excluded in ascertaining earning capacity.

[See 8 R. C. L. 472, 473.]

— personal earnings.

4. Compensation for loss of earning power by negligent injuries should, so far as possible, be limited to earnings which are the result of personal efforts either physical or mental.

[See 8 R. C. L. 473.]

— net returns from business.

5. The net results of a business conducted by a person injured by another's negligence cannot be considered on the question of damages to be allowed for the injury, if it is impossible to distinguish between the personal earnings of the individual and the return from capital invested and the labor of others.

[See 8 R. C. L. 473, 474.]

— injured person dominating factor of business.

6. Where the directing intellectual or physical labor of a person injured by another's negligence is the predominating factor of his business, the mere fact that he has the assistance of some capital and labor of others does not prevent the consideration of his

net earnings upon the question of compensation to be awarded for the injury.

[See 8 R. C. L. 474.]

— allowance for loss of earning power.

7. If a business conducted by a person injured by another's negligence could not be continued with the same success after his injury, as before, a fair compensation may be made for loss of his earning power if it can be fairly and approximately measured.

[See 8 R. C. L. 474.]

— elements of problem of compensation.

8. How far compensation for injury to one engaged in business may include the value of his services in such business must depend upon the nature and extent of the business, the amount of his personal direction and labor in connection with the business, and the amount of capital invested and labor employed.

Evidence — injury to business man — elements of damages.

9. Upon the question of loss to a business by injury to the one conducting it, as an element of damages for his injury, evidence is admissible as to the pecuniary loss sustained by reason of the absence of his attention and labor, as an aid to the jury in determining what the measure of damages should be.

[See 8 R. C. L. 476.]

Damages — amount contributed to family support.

10. The amount contributed by a man in business to the support of his family may be considered by the jury in determining the loss to them from his negligent killing, if the business was the sole source of income, and the sum is contributed through his per-

sonal superintendence and direction, and was not beyond what his services would be worth if he were employed by another in like capacity in the same business.

— contribution by son — effect.

11. That the minor son of one killed by another's negligence contributed in a small way to the business conducted by the injured person does not pre-

vent an allowance as damages for the death, based upon the value of the services of the injured person to the business.

Trial — instruction — assumption of disputed facts.

12. An instruction should not be given which assumes as undisputed facts which are in dispute.

[See 14 R. C. L. 738.]

APPEAL by defendant from a judgment of the Court of Common Pleas, Number 1, for Philadelphia County (Patterson, J.) denying its motion for judgment notwithstanding a verdict for plaintiff, or for a new trial, in an action brought to recover damages for the death of plaintiff's husband, alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. William Clarke Mason, for appellant:

The measure of damage, if the plaintiff is entitled to recover at all, must be based upon evidence showing the earning capacity of the decedent during the year prior to his death.

Bogges v. Baltimore & O. R. Co. 234 Pa. 379, 83 Atl. 356; *Gilmore v. Philadelphia Rapid Transit Co.* 253 Pa. 543, 98 Atl. 698.

The learned trial judge erred in his answer to the jury, upon their request for additional instructions, without adding further instructions concerning the effect of such testimony.

Calhoun v. Holland Laundry, 220 Pa. 281, 69 Atl. 756.

It was error to refuse to charge as requested by the defendant with reference to the headlight upon the engine.

Lapinco v. Philadelphia & R. R. Co. 257 Pa. 344, 101 Atl. 767.

It was error to permit a witness to guess, after the witness had stated he had no knowledge concerning the distance in question.

McIntyre v. Pittsburgh, 238 Pa. 524, 86 Atl. 309.

Mr. Owen J. Roberts, for appellee:

The court's action in connection with the measure of damages was correct.

Buckman v. Philadelphia & R. R. Co. 227 Pa. 277, 75 Atl. 1069; *Simpson v. Pennsylvania R. Co.* 210 Pa. 101, 59 Atl. 693; *Wallace v. Pennsylvania R. Co.* 195 Pa. 127, 52 L.R.A. 33, 45 Atl. 685; *Bogges v. Baltimore & O. R. Co.* 234 Pa. 379, 83 Atl. 356; *McLane v. Pittsburgh R. Co.* 230 Pa. 29, 79 Atl. 237; *Gilmore v. Philadelphia Rapid Transit Co.* 253 Pa. 543, 98 Atl. 698;

Foster v. Butler County Light Co. 255 Pa. 591, 100 Atl. 452.

The court was right in refusing binding directions for the defendant, and in refusing judgment n. o. v.

Milligan v. Philadelphia & R. R. Co. 261 Pa. 344, 104 Atl. 657.

Kephart, J., delivered the opinion of the court:

The facts presented by this appeal are substantially the same as those contained in the appeal of *Milligan v. Philadelphia & R. R. Co.* 261 Pa. 344, 104 Atl. 657. *Baxter*, husband of the present appellee, was killed at Island road crossing, Philadelphia, by a collision between the appellant's train and a runabout in which he and *Milligan* were riding. *Milligan* was driving. From a verdict in the wife's favor this appeal was taken. The assignments of error, which complain of the refusal of the court below to direct a verdict for the defendant and to enter judgment on its motion n. o. v., are without merit.

An effort was made to show contributory negligence on the part of *Baxter* and his companion, *Milligan*. Mr. Justice Walling, in the case of *Milligan v. Philadelphia & R. R. Co.* supra, discusses this question, and there is no evidence in the present case to change the conclusion there reached. Whether *Baxter* could see the train coming, had he looked, or whether it was too dark to see it, were questions for the jury to determine. Photographs were received

in evidence, showing a view of the grade crossing and the tracks on a clear day. While this might have been helpful, the inquiry was more directly concerned with the conditions existing on the ground on the day of the accident, and the effect that the partial absence of daylight would have on the conditions as there presented. At the time the accident occurred it was evening—getting dusk—and a view along the tracks could not be obtained for more than several hundred feet. It was testified that the photographs did not represent all the physical conditions on the ground as they were when Baxter was killed. The photographs, then, would not be controlling, either as to the extent of the view, or that, under all the circumstances, due care had not been used by Baxter and Milligan. All this was for the jury under proper instructions from the court, which were given.

Evidence—
photograph—
different light
conditions—
effect.

had not been used by Baxter and Milligan. All this was for the jury under proper instructions from the court, which were given.

Baxter was a wagon builder and blacksmith; his only income was from that business. The machinery used in connection with the business consisted of a band saw, planer, drill press, emery wheel, and smoothing iron; these were driven by an electric motor, the current for which was purchased. Baxter, the decedent, worked in the shop like any other employee, and also acted as a superintendent in connection with the general work. He had the assistance of his minor son and four or five employees. The larger part of the business was repair work. While some new wagons were constructed, they were sold as rapidly as built. There was on hand, at the time of Baxter's death, material valued at \$2,200, and his plant equipment did not represent an investment above that figure. Out of the income he gave to his wife approximately \$1,800 yearly for the support of his family. Evidence of the foregoing facts was offered for the purpose of measuring his earning power, and, as such, was objected

to, for the reason that it did not properly show personal earnings as distinguished from the profits of the business. In the latter was included the return from a small amount of capital invested and the toil of others, which, with the deceased's earnings, less certain deductions for expenses, made up the net profits of the plant. It was from this sum the wife was given her allowance for maintenance.

In actions for personal injuries, the loss of earning power is an important element to be considered in estimating the damages suffered. As stated in many of our cases, the value of the earning power contemplated is that resulting from the intellectual or bodily labor of the injured party, in his business or profession. Profits derived from invested capital, or the labor of others, are clearly excluded. Earnings are the result of labor, the price of services performed. Profits are the net gains from an investment, or the prosecution of some business. *Goodhart v. Pennsylvania R. Co.* 177 Pa. 1, 15, 55 Am. St. Rep. 705, 35 Atl. 191. Profits should not be used as a safe guide for measuring earning power, although they may indicate the possession of business ability and qualifications. Strictly speaking, compensation for the loss of earning power, as far as possible, should be limited to earnings which are the result of personal effort, either physical or mental, in which profits from invested capital or profits from the labor of others must not be included. Where it is impossible, in a business enterprise, to distinguish between the personal earnings of the individual and the return from capital invested and the labor of others, the net income, or net result from such business, cannot be considered in determining the amount of damages to which the claimant is entitled. But where the

Damages—
negligent
killing—profits
from capital.

—personal
earnings.

—net returns
from business.

predominating factor is the direct-
ing intellectual and physical labor
of the individual, such business
may be characterized as personal
to that individual,
though others with
tools and equipment
may aid in the
work. It is much like dentists and
doctors with their instruments, or
lawyers with their books and stenog-
raphers and assistants. The per-
sonal feature prevails over the in-
vestment of an insignificant amount
of capital or labor employed. Such
capital and labor are incidental,
though important, to the perform-
ance of the personal services. It is
the latter which makes the prac-
tice successful; it is the service of
the individual that is the real life
of the business or the profession.

—injured person
dominating
factor of
business.

The idea of personal effort, physi-
cal and mental, is not confined to
professional or similar services. It
extends to a person engaged in a
business, as, when the neighborhood
blacksmith shoes a horse correctly,
he may count on the continued pat-
ronage of the horse owner, though
in his shop he may have such assist-
ants as his business demands, and
his business thrives not only
through services well done and be-
cause of personal friendship or rela-
tionship, but because it, or any other
like place, fills the community de-
mand. It is the worth of this in-
dividual's connection with the busi-
ness that causes the trouble in
ascertaining a fair criterion for es-
timating earning power. The diffi-
culty comes not from expressing the
rule to govern, but in applying it to
a given case. Difficulties, however,
should not prevent the application
of the rule to a just and reasonable
extent. It must be remembered the
general rule is that the worth of
earning power, as applied to a busi-
ness, must not be made up from
profits, which represent earnings
from invested capital, or the labor of
others, or both.

In all of the cases where earning
power may be measured in part by
profits, it cannot be done with the

certainly that a daily or monthly
wage is fixed, either in connection
with the business directly under con-
sideration or apart from and at-
tached to another business. The
yearly value of the services of one
who owns, manages, and labors with
others, with invested capital, is sub-
ject to many conditions which do not
confront us in the ascertainment of
the earning power, when we consid-
er a monthly wage, or the earnings
of professional men, or men engaged
in similar occupations. The owner
of a business encounters the con-
tinued financial requirements of his
undertaking; the effect of business
depression, with its attendant loss,
the destroying influence of competi-
tion, labor conditions, market sup-
ply, prices and loss through ordinary
business attention, such as loss
through unwise contracts, unused
supplies, or materials, etc.,—these,
with other factors, are the deterring
circumstances in business enter-
prises.

With these matters in view, the
question must then be put: Would
the business, if no accident had oc-
curred, have the same measure of
success as it always had; and would
that success continue during the re-
maining period of the probable life
of the owner? If the answer is in
the affirmative, then there is no loss
on that account; but, if in the nega-
tive, then, since the personal equa-
tion is concerned, —allowance for
loss of earning
power.
these uncertain fac-
tors will not be suf-
ficient to deprive the claimant of the
right to fair compensation for the
loss of earning power, where the
latter can be fairly and approxi-
mately measured.

The deceased was engaged in the
repair business, and occasionally in
the manufacture and sale of a com-
modity. From this business he
made a profit which was not subject
to the hazard of a strictly contract
price, with its accompanying liabil-
ity to errors of judgment, fluctua-
tions of cost, etc. This fair, average
return, or profit, was practically the
same for several years before the

accident, under varying conditions. It was made up, first, from the intellectual and physical labor of the individual as owner and manager; second, the uncertain return from the use of machinery and profits on materials sold, or the net return from invested capital; third, the net earnings from the labor of others. Was the business, then, of such character that it could be said the earnings were so mixed that it could not be determined what his services were worth to the conduct of the business that he was engaged in, or, in other words, the earning power of the deceased could not be fairly ascertained?

We have intimated that the right of the injured party to be compensated for loss of earning power is a substantial one, and some reasonable and trustworthy test must be adopted, else he will be wholly deprived of the value of this important element of damage. It was not due to the deceased's act that such test has been made necessary; but nevertheless it would be wrong to set up a standard for estimating damages which is fictitious, or that does not fairly represent what the services are worth. If all of the yearly profits in cases similar to the one under discussion were used in ascertaining the total or partial value of earning power, there would be included the earning power of others, as well as that of the individual under consideration, to say nothing of the return, large or small, from the capital invested.

"The loss of profits in conducting a business involving the labor of others is not a necessary consequence of personal injury to the plaintiff." *Silsby v. Michigan Car Co.* 95 Mich. 204, 54 N. W. 761.

Each case must depend on the nature and extent of the business, the amount of personal direction and labor of the party engaged in connection therewith, as well as the amount of capital invested and the labor employed. The ef-

fect of the loss of the individual's services to the business may be indicated by evidence pointing out the pecuniary loss sustained by reason of the absence, partial or total, of the personal attention and labor of the individual; not as definitely fixing the measure to value the earning power, but as an aid to the jury, after considering all the attendant circumstances involved in the business, in its effort to determine what the measure should be. Attention may be called to all the depressing influences to which a business is subjected. If, because of the magnitude and complexity of the business, or through death, or otherwise, this evidence be not available, then the claimant, after fully describing the business and the injured person's connection therewith, should be permitted to show what the services were worth, if employed under like circumstances by another in a similar capacity.

While the evidence to show this pecuniary loss, or the effect of the absence of the personal attention, need not be clear and indubitable, it should not be a mere guess, or a paper loss; it should be shown to exist as an actual loss. It must necessarily be the subject of substantive proof, and this evidence should be subject to criticism from him who must pay the loss, to the end that the pecuniary loss claimed as the standard should not exceed that usually paid to persons performing similar services for others.

Care must be taken not to make the responsible party an insurer of prospective profits. The jury should have the right to consider this criticism; otherwise, defendant would be powerless to oppose claims that might come within the rule, but which experience teaches are exorbitant. See *Goodhart v. Pennsylvania R. Co.* supra; *Wallace v. Pennsylvania R. Co.* 195 Pa. 127, 52

Evidence—
injury to business man—
elements of
damages.

Damages—
injury to person
engaged in
business—value
of other's
services.

—elements of
problem of
compensation.

L.R.A. 33, 45 Atl. 685; McLane v. Pittsburg R. Co. 230 Pa. 29, 79 Atl. 237; Buckman v. Philadelphia & R. R. Co. 227 Pa. 277, 75 Atl. 1069; McCracken v. Consolidated Traction Co. 201 Pa. 384, 50 Atl. 832; Boggess v. Baltimore & O. R. Co. 234 Pa. 879, 83 Atl. 356. A person who has personal knowledge of the plaintiff's business, and of the manner in which it was conducted, and the time and attention given to it, may testify as to what the services are worth. Simpson v. Pennsylvania R. Co. 210 Pa. 101, 59 Atl. 693.

In the case now under consideration, the deceased contributed approximately \$1,800 a year, for some years prior to his death, to the support and maintenance of his family. This did not represent the total amount of earnings that had been set aside as profits, for out of the profits he paid the instalments due on the building used in connection with his business and for his home. The evidence gives a detailed description of the character of the business and of the services performed by the deceased and his employees, statements from which might be found the gross volume of business and gross expenses, as they relate to the standard for measuring the earning power here claimed, the per cent of the whole fund as profit, and the part set aside from that per cent for some years prior to the deceased's death. The yearly pecuniary loss claimed was confined to this \$1,800 per year, or the amount set aside from profits regularly contributed toward the support of his family. Considering the capital invested, the labor employed, the character of the services performed by deceased, and the earning realized therefrom, with all the other evidence in the case, the yearly amount claimed could well have been found as a conservative estimate of the value of his services to his business; and, under the circumstances, this fairly represented a yearly amount which might be accepted by the jury as a safe aid in fixing the loss of earning power.

We do not wish to be understood as holding that sums given for the support of the family are evidence of earning power; but where a sum of money, claimed as a yearly value of earning power, is derived from a business from which the claimant had his sole source of income, and this sum represents a part of the net earnings which were produced through the claimant's personal direction and superintendency, and such sum is not beyond what his services would be worth if he were employed by another in like capacity in the same business, the amount so claimed would furnish some evidence which the jury might consider in fixing the value of earning power. That in point of fact this sum was given to deceased's family for support is not material; for the evidence as to what was done with the money was not specifically objected to on any such ground.

The fact that his son contributed to the business in a small way, and was not paid a salary or wage, does not affect the situation. His father supported him, and he was entitled to his services during minority; but this, as we have endeavored to show, like the services of others, is not included in his earning power. We do not think the court erred in admitting evidence, or in its charge to the jury.

The third and ninth points, as presented, assumed as undisputed evidence clearly, as we have already pointed out, in dispute. In fact, the case hinged to a great extent on this evidence. The points could not have been unqualifiedly affirmed. If the time of day had permitted a photograph to be taken that would represent the conditions as they were at the time of the accident, this evidence might have been more persuasive. The court did not err in its answer to these points. As the court had, in its general charge, instructed the

—amount contributed to family support.

—contribution by son—effect.

Trial—
instruction—
assumption of
disputed facts.

jury as to the headlight, it was not error then to refuse a point which was substantially a repetition of what was covered by that charge. We have considered the remaining

assignments of error, and find no merit in them; they do not require discussion.

All the assignments are overruled and the judgment is affirmed.

ANNOTATION.

Measure of damages for loss of earning capacity of person engaged in business for himself.

I. Generally, 510.

II. Particular occupations:

- a. Actor, 510.
- b. Automobile repair man, 511.
- c. Boarding house or restaurant keeper, 511.
- d. Contractor, 512.
- e. Cooper, 513.
- f. Dressmaker, 513.
- g. Employment agent, 514.
- h. Expressman, 514.
- i. Farmer or stock dealer, 514.

I. Generally.

As the title of this note presupposes, it is well settled that the loss of earning capacity forms an appreciable and necessary element of damages to be considered in an action for personal injuries, and the subject of the note is the measure of such damages where the injured person is engaged in business for himself.

In at least two cases it has been said, generally, that as an element of damages the jury might consider, among other things, the loss of the power of a person engaged in business for himself to earn money, without suggesting any means by which such damages were to be measured, or indicating the business in which the plaintiff was engaged. *Union Depot & R. Co. v. Londoner* (1911) 50 Colo. 22, 33 L.R.A. (N.S.) 433, 114 Pac. 316; *Storrs v. Los Angeles Traction Co.* (1901) 134 Cal. 91, 66 Pac. 72.

But the general rule deducible from the cases seems to be that the value of the earning power of one engaged in business for himself must be measured by the income or profit which is derived chiefly from his personal skill and knowledge. Profits derived from the labor of others, or returns on invested capital, cannot ordinarily be considered in arriving at the earning

II.—continued.

- j. Florist, 515.
- k. Gauger, 515.
- l. Manufacturer, 515.
- m. Merchant, 516.
- n. Midwife, 517.
- o. Music teacher, 517.
- p. Oil producer, 517.
- q. Peddler, or the like, 517.
- r. Professional man, 518.
- s. Saloon keeper, 520.
- t. Wigmaker, 520.

power of the owner of a business. See the reported case (*BAXTER v. PHILADELPHIA & R. R. Co.* ante, 504), and the cases cited throughout this note. However, difficulty arises in applying this rule to a particular case and determining when the personal element is paramount, since it must be left to the discretion of the jury to determine from all the attendant circumstances exactly what loss a person has sustained. The cases are, therefore, arranged in this note with reference to the particular business or profession with respect to which the question arose in each instance.

In *El Paso Electric R. Co. v. Murphy* (1908) 49 Tex. Civ. App. 586, 109 S. W. 489, it was held that proof of the plaintiff's earnings in a business which he had sold out twenty years before the injury could not be admitted in determining his earning capacity, being too remote, vague, and indefinite.

II. Particular occupations.

a. Actor.

It appeared in *Welch v. Ware* (1875) 32 Mich. 77, that the plaintiff and his wife were joint theatrical performers. On the question of damages for personal injuries to the plaintiff, the court, in holding evidence of earnings

to be admissible, said: "Evidence of the actual gains and engagements of a plaintiff, in actions of tort, is held admissible, as one means of reaching his probable profits and losses, in the cases before cited. And inasmuch as this actor's business was not local, but extended generally over the country, the opinions and proof of value could not be confined to Detroit, or any other locality."

b. Automobile repair man.

The plaintiff, in *Faber v. Gimbel Bros.* (1919), 264 Pa. 1, 107 Atl. 222, was engaged in repairing automobile radiators. The court, in allowing him to show the net profits derived from his business, as bearing on the damages for a personal injury, said: "The capital invested was nominal merely, and represented the purchase of tools and materials, and also such fixtures as were necessary and incident to the employment. The income derived depended solely upon the use of the tools for the purpose intended, and the element of personal labor and skill on part of plaintiff and his partner in performing the labor incident to the business. In other words, the income derived was substantially the fruit or reward of their labor,—the price for services performed. This does not conflict with the general rule laid down in *Goodhart v. Pennsylvania R. Co.* (1896) 177 Pa. 1, 15, 55 Am. St. Rep. 705, 35 Atl. 191, and followed in many subsequent cases, to the effect that loss of profits of a business cannot be considered as an element of damage, but it is a well-known exception, based on a recognition of the fact that in no other way can the earning power of one engaged in a small business, requiring his entire time, labor, and skill, and having no earnings except those resulting from profits derived from such labor and skill, be shown."

c. Boarding house or restaurant keeper.

The keeping of a boarding house is generally held to be a business so far dependent on personal effort that the profits thereof may be shown, in an action for personal injury to a person engaged in that business.

Thus, in *Comstock v. Connecticut R. & Light Co.* (1904) 77 Conn. 65, 58 Atl. 465, an action by a husband and wife for loss from injuries suffered by the latter, it appeared that the wife kept a boarding house, and that by reason of her injuries she was compelled to abandon her business for six months, and after that had not been able to take as many boarders as before. The court said, on the question of damages: "The business of the keeper of an established and 'fashionable' boarding house is one of this kind [receipts dependent on ability to conduct it successfully]. To prosecute it successfully requires special qualities. Whoever engages in it should have the gift of management, be a good buyer, know how to provide liberally, and not lavishly, possess tact, prudence, and discretion. Such assistance as it is necessary to have generally comes from those employed at fixed wages. There is a fixed rate of charge against each of the boarders. Rent is a fixed item, unless the house is owned by the one who keeps it, in which case the annual value of its use can easily be shown. The net returns, or profits, of such a business are quite as readily ascertained as those arising from the practice of a profession, and are equally a proper subject of proof, in a case like this. They are to be considered simply as bearing on the earning capacity of the person conducting it, and only such can be shown as are susceptible of estimation with reasonable certainty."

So, in *Woods v. Madison* (1913) 183 Ill. App. 616, evidence that the plaintiff, a married woman, was accustomed to take in boarders and do their washing, and that after the injuries she was unable to do their washing, was held to be competent.

In *Harmon v. Old Colony R. Co.* (1897) 168 Mass. 377, 47 N. E. 100, 2 Am. Neg. Rep. 717, wherein it appeared that the plaintiff was engaged in keeping restaurants and boarding houses, it was held to be competent for her to show what her services were worth. The court said: "But if the plaintiff's services had a market

value in the kind of business in which she was engaged, such market value might be proved to the jury as a fact which they might take into consideration in determining the amount of damages to be awarded to her, although she had not actually worked for others, but was engaged in business on her own account." To the same effect, see *George v. Haverhill* (1872) 110 Mass. 506.

So, where it was shown that the plaintiff, a married woman living with her husband, conducted a boarding house as her own separate business, it was held to be proper to show the income or profit therefrom. *Moran v. New York City R. Co.* (1905) 94 N. Y. Supp. 302.

In *Wallace v. Pennsylvania R. Co.* (1900) 195 Pa. 127, 52 L.R.A. 33, 45 Atl. 685, the plaintiff was a boarding-house keeper, and it was held to be competent for her to show a diminution of the profits of her business as proof of the loss of her earning capacity. The court said: "Profits derived from capital invested in business cannot be considered as earnings, but in many cases profits derived from the management of a business may properly be considered, as measuring the earning power. This is especially true where the business is one which requires and receives the personal attention and labor of the owner." However, the court held that, even though such evidence was admissible, it was not sufficient to warrant the submission thereof to the jury, and for this reason the judgment was reversed.

Likewise, in *Trinity & B. Valley R. Co. v. Geary* (1914) — Tex. Civ. App. —, 169 S. W. 201, reversed on another point in (1915) 107 Tex. 11, 172 S. W. 545, it was held that evidence of the plaintiff's profits in boarding a section crew was admissible, as bearing on his earning capacity.

But in *Lombardi v. California Street R. Co.* (1899) 124 Cal. 311, 57 Pac. 66, an action for personal injuries, it appeared that the plaintiff was engaged in the restaurant business with his partner, each having an equal share in the business, the plaintiff acting as chief cook, and his partner at-

tending to the other part of the business. Evidence as to the profits of the business was held to be immaterial and irrelevant in estimating the plaintiff's damages. The reason for the holding was said to be that the business, as conducted, depended on capital as well as on the services of other people, and that it might have been conducted without the personal attention or services of either or both of the owners. The extent of the plaintiff's damage from loss of time was said to be what his services were worth in the conduct of such a business as he was engaged in.

d. Contractor.

It is the prevailing opinion that the business of a contractor is not one in which personal skill and labor are involved, and proof of the profits arising therefrom is not admissible as bearing on the damages for a personal injury. *Chicago, R. L. & P. R. Co. v. Hale* (1911) 108 C. C. A. 490, 186 Fed. 626, reversing (1910) 99 C. C. A. 379, 176 Fed. 71; *Pryor v. Metropolitan Street R. Co.* (1900) 85 Mo. App. 367; *Gombert v. New York C. & H. R. R. Co.* (1909) 195 N. Y. 273, 133 Am. St. Rep. 794, 88 N. E. 382.

In *Chicago, R. L. & P. R. Co. v. Hale* (Fed.) supra, it appeared that the plaintiff, at the time of his injury, was engaged in loading cars under a contract with the defendant, the plaintiff furnishing all the necessary equipment and labor. On the trial he was allowed to testify as to his earnings and profits derived from the contract. In reversing a judgment in favor of the plaintiff, the court said: "It is obvious that this agreement could not be and was not being performed, and the profits from it were not being derived, without the combination of substantial capital with the personal labor or services of the plaintiff, and therefore the amount he was earning in the performance of the contract was not the true measure of his earning capacity. The profits of a business enterprise, or of the performance of a contract combining capital and labor, do not constitute a legitimate basis for estimating the earning pow-

er of one personally contributing the element of labor, where he has been wrongfully injured so as to be unable to furnish that element."

So, in *Pryor v. Metropolitan Street R. Co.* (1900) 85 Mo. App. 367, wherein the plaintiff, a contractor, sought to show what he had derived from his business, it was held that profits of a business with which one is connected may not be used to measure his earning power, since they depend largely on other circumstances than the earning capacity of the person employed. It was said, however, that evidence of earnings derived entirely from personal skill is competent.

In *Gombert v. New York C. & H. R. R. Co.* (N. Y.) supra, it was held that the business of a contractor is not one which depends on personal services, and therefore that evidence of his earnings is not admissible on the question of damages.

However, in *Schwartz v. North Jersey Street R. Co.* (1901) — N. J. L. —, 49 Atl. 676, wherein the plaintiff was a contractor, evidence that at the time he was injured he had a contract for a brewery was held to be admissible to show the extent of his business.

So, in *Markowitz v. Metropolitan Street R. Co.* (1900) 81 Misc. 175, 63 N. Y. Supp. 961, affirmed without opinion in (1900) 66 N. Y. Supp. 1137, it appeared that the plaintiff was a boss painter. It was held that he could show that his earnings and profits resulted from his personal services, and that prior profits could be shown in determining his earning capacity.

In *Grant v. Brooklyn* (1864) 41 Barb. (N. Y.) 381, the business of the plaintiff, it appeared, was that of putting up gas and calcium lights. In determining the plaintiff's loss from impairment of his earning capacity, the court said: "I see no other way of doing this so certainly and effectually as by showing the net income of the plaintiff for services for the preceding year. This received income was a fact, and although inconclusive, yet it afforded some data from which the jury might estimate the amount of the loss. Suppose that, in place of working for himself, the plaintiff had been

employed by others during the previous year at a fixed compensation, it would have been competent for him to prove how much that fixed compensation was. In principle, there is no difference between the two cases. Indeed where the damages are for the loss of services, I see no evidence so unobjectionable and so reliable as that which shows how much the party was earning from his business, or realizing from fixed wages, at the time to which the loss refers."

g. Cooper.

In an action for personal injuries suffered by a man engaged in buying second-hand barrels which he repairs and resells, the plaintiff, in order to prove his loss of earning capacity, may introduce evidence of his average earnings before and after the injury, and his diminished capacity to labor and earn money in the future. However, the cost of the services of employees who are engaged to perform work formerly done by the injured person is contingent on their own competency, and such evidence is not a measure of the decreased earning power of the injured person. It is his own earning power which is to be ascertained and valued. *Stynes v. Boston Elev. R. Co.* (1910) 206 Mass. 75, 30 L.R.A.(N.S.) 737, 91 N. E. 998.

f. Dressmaker.

In *Kankakee v. Steinbach* (1900) 89 Ill. App. 513, it appeared that the plaintiff was a dressmaker. In order to measure the damages for the loss of her earning capacity, it was held to be competent for her to state that before the injury she was able to earn from \$10 to \$15 per week, and that afterwards she was unable to earn anything.

So, in *Hopkins v. Chicago City R. Co.* (1913) 178 Ill. App. 656, an action for personal injuries to a dressmaker, it appeared that she employed from three to twenty people, and superintended their work. By reason of the injuries sustained her business decreased, and at the time of the trial she had abandoned it. The court held that, in assessing the damages, the jury were entitled to consider the ef-

fect of her injuries on her ability to pursue her ordinary trade or calling.

In *Elba v. Bullard* (1907) 152 Ala. 237, 44 So. 412, it appeared that the plaintiff was a seamstress and, because of an injury sustained, was unable to perform her usual amount of work. It was held that, in determining the plaintiff's earning capacity, her earnings before and after the injury could be shown.

g. Employment agent.

In *Griffith v. Utica & M. R. Co.* (1892) 43 N. Y. S. R. 835, 17 N. Y. Supp. 692, affirmed in (1893) 137 N. Y. 546, 33 N. E. 339, the plaintiff, who was in the employment business, was permitted to testify to the amount of her average income from that business.

h. Expressman.

In *Spreen v. Erie R. Co.* (1916) 219 N. Y. 533, L.R.A.1918C, 1086, 114 N. E. 1049, an action for the death of the plaintiff's intestate, resulting from negligence of the defendant, it appeared that the intestate was engaged in the express business. The court held that proof of profits of the business was admissible, saying: "There is a manifest difference between an individual express business, such as this was, and the business carried on by a great express company. While the decedent's income was, to some extent, derived from the amount he had invested in his horses and wagons, his earnings were chiefly personal, as is apparent from the fact that there ceased to be any net income from the business after his death. The case falls within the doctrine of *Kronold v. New York* (1906) 186 N. Y. 40, 78 N. E. 572, 20 Am. Neg. Rep. 690, where the element of personal earnings was held to predominate over a comparatively small and incidental investment of capital."

i. Farmer or stock dealer.

It is generally held that a farmer may show the extent of his business, and the profits arising therefrom, for the purpose of estimating his earning capacity. *Escher v. Carroll County* (1910) 146 Iowa, 738, 125 N. W. 810,

Chicago. R. I. & P. R. Co. v. Posten (1898) 59 Kan. 449, 53 Pac. 465; *Chicago, R. I. & P. R. Co. v. Scheinkoenig* (1900) 62 Kan. 57, 61 Pac. 414; *International & G. N. R. Co. v. Edwards* (1906) — Tex. Civ. App. —, 91 S. W. 640. Compare *Homan v. Franklin County* (1894) 90 Iowa, 185, 57 N. W. 703; *Normandin v. Kansas City* (1918) — Mo. App. —, 206 S. W. 913.

In *Escher v. Carroll County* (Iowa) supra, an action for personal injuries it was held that the plaintiff, a farmer, was properly permitted to testify as to the extent of his business prior to the accident, and as to the value of his services in superintending the business before and after the injury. But in an earlier Iowa case, *Homan v. Franklin County* (1894) 90 Iowa, 185, 57 N. W. 703, it was held that the plaintiff could not show loss to his business on his farm, since "profits of a farm depend upon many contingencies other than the personal services of the owner."

In *Chicago, R. I. & P. R. Co. v. Posten* (1898) 59 Kan. 449, 53 Pac. 465, it appeared that the plaintiff was a farmer and a feeder and shipper of stock, and he testified that in 1892 and 1893 (two years prior to the accident) his profits were \$2,000 and \$4,000, respectively. Such testimony was held to be proper in order that the jury might properly estimate the value of his time. It was said that while the jury could not include speculative profits, or profits on invested capital, it was for them to say what loss had resulted to his business because of his being incapacitated from attending to it, and to award to him as damages the value of his time and labor to himself in the transaction of his own business. See to the same effect, *Chicago, R. I. & P. R. Co. v. Scheinkoenig* (1900) 62 Kan. 57, 61 Pac. 414.

In *International & G. N. R. Co. v. Edwards* (1906) — Tex. Civ. App. —, 91 S. W. 640, wherein the plaintiff was a farmer on shares, there was no direct evidence as to the exact value of his services. It was held that this would not defeat the plaintiff's recovery, since the jury would be authorized to allow him such damages as they

might deem reasonable in view of the facts proven, and in accordance with their common knowledge and experience.

In *Normandin v. Kansas City* (1918) — Mo. App. —, 206 S. W. 913, an action for personal injuries, where the plaintiff, who was in partnership with another in the business of farming and hog raising, did all the work, and where there was no evidence as to the contract or conditions of the partnership, evidence of the net profits of the business was held to be inadmissible on the question of damages, since the profits were dependent on contingencies that could not be foreseen, and were too indefinite to be the subject of evidence.

In *Sinclair v. Columbia Teleph. Co.* (1917) — Mo. App. —, 195 S. W. 558, the plaintiff alleged that, by the injury he sustained, his earning capacity was seriously and permanently impaired. In determining the plaintiff's earning capacity, the court held that the average amount of his yearly profits in dealing in live stock could be shown.

J. Florist.

It was said in *Gilmore v. Philadelphia Rapid Transit Co.* (1916) 253 Pa. 550, 98 Atl. 678, that to show the profits of the plaintiff's business, the operation of a greenhouse was the only way, under certain circumstances, of determining the plaintiff's earning power; but that profits as showing earning power must be confined to profits which were the result of the plaintiff's labors and management of the business, and not profits which he derived from investments, which had no bearing on earning capacity.

K. Gauger.

In an action for personal injuries, wherein it appeared that the plaintiff was a gauger, in partnership with his father, the occupation requiring only the personal services of the parties, it was held to be proper to admit evidence of the plaintiff's earnings. *Thomas v. Union R. Co.* (1897) 18 App. Div. 185, 45 N. Y. Supp. 920.

1. Manufacturer.

It has been held in several cases that the profits of a manufacturer are so far derived from invested capital and from the labor of others as not to be an element of damages in case of disabling personal injury.

Thus, in *Silsby v. Michigan Car Co.* (1893) 95 Mich. 204, 54 N. W. 761, an action for personal injuries to a furniture manufacturer, the court held that loss of profits in conducting a business involving the labor of others was not a proper element of damages, and that the extent of the recovery on this ground would be what the plaintiff's services were worth in the conduct of such a business as he was engaged in. See to similar effect, the reported case (*BAXTER v. PHILADELPHIA & R. R. Co.* ante, 504), involving the earning capacity of a blacksmith and wagon builder.

So, it was held in *Marks v. Long Island R. Co.* (1886) 14 Daly (N. Y.) 61, that the plaintiff could not show the earnings of his business as a manufacturer of clothing. The holding seems to be based on the theory that, although such a business may depend to some extent on the fitness of a person connected with it, yet the profits depend to a great extent on other contingencies too remote to furnish a safe guide for estimating the damages.

Similarly, in *Blate v. Third Ave. R. Co.* (1898) 29 App. Div. 388, 51 N. Y. Supp. 590, an action for personal injuries, it was held that the plaintiff, a manufacturer of mattresses and bedding, could not state the gross receipts of his business for the year prior to the accident, since they did not depend entirely on his personal services, but depended to a considerable degree on the capital invested and the condition of the market.

In *Bierbach v. Goodyear Rubber Co.* (1882) 54 Wis. 208, 41 Am. Rep. 19, 11 N. W. 514, wherein it appeared that the plaintiff was engaged in manufacturing machines for cleaning feathers, it was held to be error to allow him to state what his business was worth per month. The court said: "These profits depend upon too many contingencies, and are altogether too uncertain,

to furnish a safe guide in fixing the amount of damages. . . . The plaintiff had the right to prove the business in which he was engaged, its extent, and the particular part transacted by him, and, if he could, the compensation usually paid to persons doing such business for others. These circumstances the jury have a right to consider in fixing the value of his time. But they ought not to be permitted to speculate as to the uncertain profits of commercial ventures in which the plaintiff, if uninjured, would have been engaged."

But in *Pill v. Brooklyn Heights R. Co.* (1898) 6 Misc. 267, 27 N. Y. Supp. 230, 6 Am. Neg. Cas. 75, affirmed without opinion in (1896) 148 N. Y. 747, 43 N. E. 989, it was shown that the plaintiff was a custom corset maker, and personally solicited orders from individuals, and then manufactured the corsets to fit the individuals from whom she had solicited the orders. She employed two girls, one of whom she paid \$10 per month and the other \$1 per day. The court held that the earnings of such a business depended on the personal efforts of the plaintiff, and was not such an investment of capital as to come within the limitation.

So, in *Ballou v. Farnum* (1865) 11 Allen (Mass.) 73, the plaintiff was allowed, in order to show his bodily and mental capacity before the accident, and the extent of his injury, to introduce evidence that before the accident he owned and carried on a large mill for the manufacture of fancy cassimeres; that he selected the patterns and colors, which required constant attention and thought; that he bought part of the stock, hired the workmen, and contracted with them for their wages; that he superintended the putting in of machinery; that he conducted an extensive correspondence, and twice a year took an account of stock; and that since the accident he had been able to do very little that required mental application or physical labor.

m. Merchant.

In *Dempsey v. Scranton* (1919) 264 Pa. 495, 107 Atl. 877, it appeared that

the plaintiff was engaged in the business of selling tea and coffee, having a store in which he employed three clerks. The plaintiff personally drove a wagon throughout the adjacent territory, from which he sold tea and coffee. There was no evidence of the capital invested. The court held that while inquiry into the nature and extent of the plaintiff's business might be made, in order to measure the value of the plaintiff's services, that value could not be measured by the profits of the business, inasmuch as others were employed in carrying it on, and capital was necessarily invested.

So, where the plaintiff was engaged in buying and selling teas, and it appeared that he made the purchases while his partner attended to the sales, the court held that it was error to allow the plaintiff to testify as to his profits year by year, since they depended on too many contingencies and were altogether too uncertain to furnish any safe guide in fixing the amount of loss from personal injury. *Masterton v. Mt. Vernon* (1874) 58 N. Y. 391.

But in *Heer v. Warren-Scharf Asphalt Paving Co.* (1903) 118 Wis. 57, 94 N. W. 789, it appeared that the plaintiff conducted a grocery business alone, except for trifling assistance from a boy, doing the buying and selling, and that the average net profits were \$1,500 per annum. It was held that such evidence was competent as a basis for the jury to estimate the damages from a loss of his earning capacity. To the same effect, see *Muench v. Heinemann* (1903) 113 Wis. 441, 96 N. W. 800, 15 Am. Neg. Rep. 221.

So, in *Lincoln v. Saratoga & S. R. Co.* (1840) 23 Wend. (N. Y.) 425, wherein it was shown that the plaintiff was a member of a mercantile firm, evidence that he had sustained loss in his business was held to be admissible. However, the court said that the jury must not "indulge in fanciful conjectures as to the probable gains which he would have made had the injury not happened," and held that opinions could not be resorted to in order to measure the extent of the

injury to the plaintiff's business. See to the same effect, *Blair v. Milwaukee & P. du C. R. Co.* (1866) 20 Wis. 254, 10 Am. Neg. Cas. 518.

Likewise, in *Burns v. Dunham, C. & H. Co.* (1905) 148 Cal. 208, 82 Pac. 959, 19 Am. Neg. Rep. 74, wherein the plaintiff was the owner of a hardware business, the defendant objected to the introduction of evidence as to the extent of the plaintiff's business, on the ground that his pecuniary circumstances were not to be considered by the jury. The court said: "But we think, in this, that appellant misconceives the reason for the ruling of the trial court in admitting this evidence. It was not addressed to his pecuniary ability or financial standing, but to the proposition advanced by plaintiff that, because of his injuries, he had been incapacitated from attending to his business, and was directed to show that plaintiff's business continued, that it was of considerable volume, and that he regularly attended to it after the injury."

It has been held that testimony tending to show the profits of a partnership business in dealing in produce was inadmissible as an element of damages in determining the earning power of one of its members. *Bogges v. Baltimore & O. R. Co.* (1912) 234 Pa. 379, 83 Atl. 356.

n. Midwife.

In *Luck v. Ripon* (1881) 52 Wis. 196, 8 N. W. 815, the plaintiff was a midwife. It was held not to be error to allow her to show that after the injury she was unable to pursue her business, and that she thereby suffered loss.

o. Music teacher.

In *Baker v. Manhattan R. Co.* (1887) 22 Jones & S. (N. Y.) 394, it appeared that the plaintiff was a music teacher. On the question of damages the court said: "Although the plaintiff gave no proof of a specific loss of business, she gave proof as to the physical consequence of the destruction of the end of her finger, in impairing the use of her hand in playing upon the piano. For this impairment the jury might assess a compensation

which would not necessarily include a compensation for a loss of business, and the plaintiff could not, in the nature of things, give testimony as to what would be compensation. It was, therefore, to be fixed, as in many other like cases it has to be, by the jury itself. The same is to be said of the other consequences of the injury that, according to the plaintiff's testimony, prevented her from attending to her usual business of a music teacher. Apart from the loss that might be suffered in her not getting money from her pupils, there was something to be compensated in her not being able to employ her time and her faculties in a way that she had lawfully chosen. In this case the jury could not have gone to a fanciful conjecture on this point, for the judge was most careful to instruct it that the plaintiff could recover what damages, only, were shown with certainty."

p. Oil producer.

In *Simpson v. Pennsylvania R. Co.* (1904) 210 Pa. 101, 59 Atl. 693, it appeared that the plaintiff was engaged in the business of producing oil. The court, in admitting testimony of the value of his services, said: "Profits derived from the management of a business, resulting from the personal attention and labor of the owner, as distinguished from profits arising from invested capital, may, in proper cases, be considered in determining earning power."

q. Peddler, or the like.

In *Wynne v. Atlantic Ave. R. Co.* (1895) 14 Misc. 394, 85 N. Y. Supp. 1034, affirmed in (1898) 156 N. Y. 702, 51 N. E. 1094, it appeared that the plaintiff was a junk dealer. The plaintiff in his complaint claimed as an element of damage that he "was prevented, and will be prevented, from attending to his business for a long space of time." He testified that he bought and sold goods, worked himself, kept books, and everything; that his purchases and sales were from \$300 to \$400 daily; and that by reason of his injuries his business had stopped. The court held that it was competent for the plaintiff to call as

a witness a person who had been in the business for over forty years, to testify that "a man who had the necessary capacity to conduct such a business as plaintiff's was worth \$4 to \$5 a day."

In *Hanover R. Co. v. Coyle* (1867) 55 Pa. 396, the plaintiff was a peddler and offered to prove the nature and character of his business, and the extent of his loss of time, and also the percentage of profit on the goods sold by him in his usual course of business, for the purpose of showing his damages, in consequence of being prevented from transacting his business. It was held that such evidence bore directly on the question of damages, as affording a means of computing his loss for the time he was confined by his injuries, and that it tended to show the amount he might have earned by his employment, if he had been able to attend to it.

Where the plaintiff was a huckster, it was held to be error for the court to exclude testimony of his mother that he had no other source of income, and that out of said income he had paid her from \$50 to \$60 each month for a period of a year or more prior to the injury. Profits derived from capital invested in business cannot, the court said, be considered as earnings, but in many cases profits derived from the management of business may properly be considered as measuring the earning power, especially when the business is one which requires and receives the personal attention and labor of the owner. *McLane v. Pittsburgh R. Co.* (1911) 230 Pa. 29, 79 Atl. 287.

v. Professional man.

In the case of injury to a doctor, lawyer, or other professional man, the personal and intellectual ability of the individual is the predominating feature, and it is universally held that the income and profits of his profession may be shown, in an action to recover damages for the injury, to enable the jury to estimate the value of his earning capacity.

Iowa.—*Stafford v. Oskaloosa* (1884) 64 Iowa, 251, 20 N. W. 174.

Maine.—*Holmes v. Halde* (1882) 74 Me. 23, 43 Am. Rep. 567.

Massachusetts.—*Nelson v. Boston & M. R. Co.* (1892) 155 Mass. 356, 29 N. E. 586.

Michigan.—*Marshall v. Wabash R. Co.* (1912) 171 Mich. 180, 137 N. W. 89.

Minnesota. — *Collins v. Dodge* (1887) 37 Minn. 503, 35 N. W. 368.

Missouri. — *Sluder v. St. Louis Transit Co.* (1905) 189 Mo. 107, 5 L.R.A. (N.S.) 186, 88 S. W. 648; *Grieveaud v. St. Louis Cable & W. R. Co.* (1889) 33 Mo. App. 453; *Mason v. St. Louis, I. M. & S. R. Co.* (1898) 75 Mo. App. 1.

New Jersey.—*New Jersey Exp. Co. v. Nichols* (1867) 33 N. J. L. 434, 97 Am. Dec. 722, 12 Am. Neg. Cas. 243.

New York.—*Walker v. Erie R. Co.* (1872) 63 Barb. 260; *Nash v. Sharpe* (1879) 19 Hun, 365.

Pennsylvania.—*Llewellyn v. Wilkes-Barre* (1916) 254 Pa. 196, 98 Atl. 886, 14 N. C. C. A. 113.

Texas.—*Gulf, C. & S. F. R. Co. v. Brown* (1897) 16 Tex. Civ. App. 93, 40 S. W. 608.

Architect.

In *New Jersey Exp. Co. v. Nichols* (N. J.) *supra*, the court said: "The plaintiff was an architect,—a business depending on his personal services as much as that of a common laborer, a clerk, or a mechanic,—and his emoluments were the result of his own earnings. By reason of the injuries he received, he was for a time incapacitated from pursuing his occupation, and sustained damages by reason thereof. These damages resulted proximately from the wrongful act of the defendant's servants, and obviously should be included in the compensation to be awarded to him. To what extent he had sustained pecuniary injury in that respect must depend upon the nature and extent of his business, and the jury would not be in a condition to reach any correct conclusion on that subject, unless they had before them some evidence of the value of the services to himself."

Attorney.

In *Walker v. Erie R. Co.* (N. Y.) *supra*, an action for personal injuries,

the plaintiff was allowed to show that his practice of the law yielded him \$18,500 for the year previous to the injury, the court saying: "But when it is remembered that the object of the law is to fairly compensate the party injured for the entire loss directly caused by the injury, it becomes apparent at once that the pecuniary consequences resulting from his inability to give his business his attention will form a proper item of the remuneration to be made."

So in *Llewellyn v. Wilkes-Barre* (Pa.) supra, the plaintiff, an attorney at law, was allowed to estimate his earnings, after having examined his bank books, check books, etc.

Dentist.

In an action by a dentist to recover for personal injuries, evidence of how much he was earning from his business is proper on the question of damages. *Nash v. Sharpe* (N. Y.) supra, wherein it was said: "If there is any distinction between the earnings of a professional man, and a mechanic or laborer, it is a question of fact to be considered by the jury, in connection with the surrounding circumstances. There is no good reason why a professional man should not be permitted to show what he was earning from his business at the time to which the loss refers, as well as a laboring man who is employed under fixed wages. This must be so from the nature of the case, otherwise a professional man could give no reliable and satisfactory evidence of his loss."

Physician.

In *Marshall v. Wabash R. Co.* (1912) 171 Mich. 180, 187 N. W. 89, it was held to be proper to allow the plaintiff, who was a physician, to estimate the losses sustained by him in his professional business, but it was said that the observations of witnesses, and comparisons made by them of the number of people visiting the plaintiff's office before and after the alleged injury, as a basis for estimating his damages, were of doubtful value and relevancy. So, in *Collins v. Dodge* (1887) 37 Minn. 503, 35 N. W. 368, the plaintiff stated in his complaint that by reason of the alleged injuries he

had been unable to attend to his business and professional duties, from which he had before been able to earn a "comfortable living." It was held that it was competent to show what his professional earnings were per month. Similarly, in *Sluder v. St. Louis Transit Co.* (1905) 129 Mo. 107, 5 L.R.A. (N.S.) 186, 88 S. W. 648, the plaintiff physician testified that his earnings "for the months corresponding of the previous year to the time he was disabled" were \$3,500. On appeal it was said: "The evidence had previously shown that the doctor was incapacitated to practise his profession eleven and one-half weeks, and we have heard no reason stated why it was not competent for the physician himself to testify what his actual monthly practice averaged him. It was not guesswork, but actual knowledge, to which he was testifying. It was not remote, but the value of his profession to him for the immediate month during which he was disabled, and we agreed with him that the best evidence was the actual earnings of the month in which he was injured." In *Griveaud v. St. Louis Cable & W. R. Co.* (1889) 33 Mo. App. 458, in determining the earning capacity of the plaintiff, a physician, the court held that the plaintiff might show what his professional earnings were in preceding years, and immediately preceding the accident, and to what extent his earnings were diminished by inability to attend to his patients. It was said: "It is certainly a proper item for the consideration of the jury, since otherwise professional men, whose probable earnings cannot be measured by a fixed money standard, would be at great disadvantage to prove any damages resulting from the loss of probable employment." Likewise, in *Gulf. C. & S. F. R. Co. v. Brown* (1897) 16 Tex. Civ. App. 93, 40 S. W. 608, it appeared that the plaintiff, a physician, was hindered by a personal injury from practising his profession. In determining the value of his lost earning capacity, it was held that his average annual income, as shown by his books, should be considered. In *Mason v. St. Louis, I. M. & S. R. Co.* (1898) 75 Mo.

App. 1, it appeared that the plaintiff physician had been permanently injured, and was compelled to give up his practice. It was held that the plaintiff could show that his annual profits averaged from \$1,000 to \$1,200 per year. So, in *Stafford v. Oskaloosa* (1884) 64 Iowa, 251, 20 N. W. 174, wherein suit was brought by a physician to recover for permanent injuries, it was held to be proper to instruct the jury that they should take into consideration the value of the plaintiff's business, and the returns therefrom, in order to determine the plaintiff's earning capacity. See to the same effect, *Nelson v. Boston & M. R. Co.* (1892) 155 Mass. 356, 29 N. E. 586. In *Holmes v. Halde* (1882) 74 Me. 28, 43 Am. Rep. 567, the judge instructed the jury to the effect that the plaintiff was not prevented from recovering for loss of business, as a physician, by the fact that he had no degree from the Maine medical association. Approving the instruction, the court said: "The action is for damages resulting from a personal injury. If, by the injuries received, the plaintiff was deprived of his capacity to perform his ordinary labor or attend to his ordinary business, the loss he sustained thereby is an element of damages. The true test is, what his services might be worth to him in his ordinary employment or business. It is not what sum he might legally recover for such services, but what he might fairly be expected to receive therefor. What he had previously been receiving for his services in his business is proper evidence on this point. A clergyman who has no fixed salary, but is dependent entirely upon voluntary contributions for his compensa-

tion for his services, as in some of our churches, may have an income, and, if by an injury he is deprived of his capacity to perform his duties, might lose that income, and suffer as much loss as if he were receiving a salary fixed by contract; and still he could not enforce the payment of anything from his church or society." But in *St. Louis Southwestern R. Co. v. Ball* (1902) 28 Tex. Civ. App. 287, 66 S. W. 879, it was held that where a physician received an injury which prevented him from carrying on his obstetrical practice, evidence by a physician from another neighborhood as to what proportion of his practice was obstetrical could not be considered, as it was too remote.

s. Saloon keeper.

It was held in *San Antonio Traction Co. v. Crisp* (1913) — Tex. Civ. App. —, 162 S. W. 422, that, in determining the lessened earning capacity of the plaintiff, who was in the saloon business but had engaged in his trade as a carpenter in order to retrieve his losses, his earning capacity should be determined in connection with the saloon business.

t. Wigmaker.

In *Singer v. Martin* (1917) 96 Wash. 231, 164 Pac. 1105, it appeared that the plaintiff was a wigmaker. The court held that it was competent for him to testify as to the character and magnitude of the business, the capital and assistance employed, and even the profits, not as elements of damage, but as circumstances to be considered by the jury in determining the value of the plaintiff's loss of his own services in the business, because of the injury.

R. G. R.

JAMES DWIGHT TRACEY
v.
STANDARD ACCIDENT INSURANCE COMPANY.

Maine Supreme Judicial Court — April 4, 1920.

(— Me. —, 109 Atl. 490.)

Insurance — accident — injury to eye by insect.

1. Injury to the eye of one riding a motorcycle by contact with an insect is accidental within the meaning of an accident insurance policy.

[See note on this question beginning on page 529.]

— notice of accident — use of form.

2. Notice of accident on a sickness blank instead of an accident blank, due to mutual mistake of the parties, is not ineffective to justify delay in furnishing proper notice, if insured had informed insurer's agent of the accident and requested blanks for formal notice, and the blank furnished had a question which might be regarded as covering the injury received.

— act of agent as that of insurer.

3. The act of an insurance agent in furnishing a blank form for notice of claim after receiving full information as to its character is the act of the insurer.

— estoppel to take advantage of delay.

4. An accident insurer is estopped to claim that notice of injury was not in time because not on the proper blank form, if it furnished the form on which the notice was given after receiving oral notice of the facts attending the accident.

[See 10 L. C. L. 696, 697.]

— sufficiency of notice — waiver of informality.

5. An accident insurer which receives and retains, without request for further information, notice of accident upon a blank form furnished by it, waives informalities and deficiencies,

and the notice will be regarded as sufficient.

[See 14 R. C. L. 1351-1353.]

— more hazardous employment — riding motorcycle.

6. That one insured in an accident policy as an office manager was, at the time of injury, riding a motorcycle for pleasure and recreation, does not show a more hazardous employment within the meaning of the policy.

[See 14 R. C. L. 1152.]

— exceptions in book of instructions — sufficiency.

7. Provisions in a book of instructions to agents deposited with the state insurance department are not sufficient to modify a contract of accident insurance under a statute requiring exceptions to be printed with the same prominence as the benefits to which they apply, and provisions reducing the indemnity promised to be printed in bold-faced type.

— meaning of loss of sight.

8. Entire loss of sight of an eye within the meaning of an accident insurance policy occurs when insured cannot distinguish colors or one object from another in strong light, although he can distinguish between light and darkness.

[See 14 R. C. L. 1318, 1319.]

EXCEPTIONS by defendant to rulings of the Supreme Judicial Court for Penobscot County, at law, made during the trial of an action brought to recover the amount alleged to be due on an accident and health insurance policy, which resulted in a verdict for plaintiff. *Overruled.*

The facts are stated in the opinion of the court.

Mr. A. S. Littlefield, for defendant:

The contract in question is to be construed in accordance with its language, and to carry out its purpose and intent.

Dunning v. Massachusetts Mut.

Acci. Asso. 99 Me. 390, 59 Atl. 535; Rumford Falls Paper Co. v. Fidelity & C. Co. 92 Me. 574, 43 Atl. 503; Philbrook v. New England Mut. F. Ins. Co. 37 Me. 146; Blinn v. Dresden Mut. F. Ins. Co. 85 Me. 390, 27 Atl. 263; Im-

perial F. Ins. Co. v. Coös County, 151 U. S. 452, 38 L. ed. 231, 14 Sup. Ct. Rep. 379; Fuller v. Locomotive Engineers' Mut. Life & Acci. Ins. Asso. 122 Mich. 548, 48 L.R.A. 86, 80 Am. St. Rep. 602, 81 N. W. 326.

There was no waiver of the notice required by the policy.

Kimball v. Mason's Fraternal Acci. Asso. 90 Me. 183, 38 Atl. 102; Hicks v. British America Assur. Co. 162 N. Y. 284, 48 L.R.A. 424, 56 N. E. 743; Travelers' Ins. Co. v. Myers, 62 Ohio St. 529, 49 L.R.A. 760, 57 N. E. 458; Smith v. Niagara F. Ins. Co. 60 Vt. 683, 1 L.R.A. 216, 6 Am. St. Rep. 144, 15 Atl. 353; Washburn v. United States Casualty Co. 106 Me. 416, 76 Atl. 902; Deer Trail Consol. Min. Co. v. Maryland Casualty Co. 36 Wash. 46, 67 L.R.A. 280, 78 Pac. 135; Kahn v. Traders' Ins. Co. 4 Wyo. 419, 62 Am. St. Rep. 47, 34 Pac. 1059.

Mr. P. L. Aiken, for plaintiff:

Plaintiff, in accordance with said policy and the laws of this state, seasonably gave to the defendant notice of said injury, and seasonably made proof of claim to entitle him to recover under said policy for the irrecoverable loss of sight of one eye.

Strickland v. Peerless Casualty Co. 112 Me. 100, 90 Atl. 974; Bigelow v. Granite State F. Ins. Co. 94 Me. 45, 46 Atl. 808; Guptill v. Pine Tree State Mut. F. Ins. Co. 109 Me. 325, 84 Atl. 529; Thorne v. Casualty Co. 106 Me. 278, 76 Atl. 1106; Washburn v. United States Casualty Co. 106 Me. 416, 76 Atl. 902; Marston v. Kennebec Mut. L. Ins. Co. 89 Me. 275, 56 Am. St. Rep. 412, 36 Atl. 389; Young v. Travelers Ins. Co. 80 Me. 249, 13 Atl. 896; Stimpson v. Monmouth Mut. F. Ins. Co. 47 Me. 379; Le Blanc v. Standard Ins. Co. 114 Me. 11, 95 Atl. 284; People's Mut. Acci. Asso. v. Smith, 126 Pa. 317, 12 Am. St. Rep. 870, 17 Atl. 605.

Even if the notice was insufficient, all effects were waived by the company when, late in the fall, they caused the plaintiff to go before Dr. Mason and submit to examination.

Hanscom v. Home Ins. Co. 90 Me. 333, 38 Atl. 324; Day v. Dwelling-House Ins. Co. 81 Me. 244, 16 Atl. 894.

Plaintiff sustained bodily injuries effected directly, exclusively, and independent of all other causes through accidental means within the meaning of the policy, which injuries resulted, within one hundred and eighty days from the date of the accident, in the

irrecoverable and entire loss of sight of one eye.

International Travelers' Asso. v. Rogers, — Tex. Civ. App. —, 163 S. W. 421; Routt v. Brotherhood of R. Trainmen, 101 Neb. 763, 165 N. W. 143; Kane v. Brotherhood of R. Trainmen, 102 Neb. 645, L.R.A.1918F, 1037, 168 N. W. 598; Murray v. Aetna L. Ins. Co. 243 Fed. 285; Thompson v. Columbian Nat. L. Ins. Co. 114 Me. 1, 95 Atl. 229.

The policy in question is a contract which was completed by the assent of both parties.

Loring v. Proctor, 26 Me. 29; Carleton v. Patrons' Androscoggin Mut. F. Ins. Co. 109 Me. 83, 39 L.R.A.(N.S.) 951, 82 Atl. 649; Miller v. Missouri State L. Ins. Co. 168 Mo. App. 330, 153 S. W. 1080.

The burden of showing that this verdict should be set aside rests upon the defendant.

Coombs v. King, 107 Me. 376, 78 Atl. 468, Ann. Cas. 1912C, 1121, 3 N. C. C. A. 167.

Spear, J., delivered the opinion of the court:

This is an action upon an insurance policy combining the phases both of accident and health indemnity. On the accident side the plaintiff was classified as "select" and described in his duties and occupation as "office manager, office duties only," in a business designated as "lumber."

On the 30th or 31st day of August, 1917, the plaintiff, while riding a motorcycle, ran through a swarm of flies or insects, one of which struck his right eye with such force as to give him immediate and continued annoyance and distress, but not sufficient at first to prevent him from the pursuit of his occupation as bookkeeper. It was not long, however, before it so impaired his capacity to work at his usual occupation that he had to give it up, and pursue a business that did not tax his eye. The eye grew gradually worse until at last it became so blind that he could only distinguish light from darkness, without any ability whatever to distinguish one object from another. In other words, the eye became what we call blind and

had continued so to the time of the trial, without hope of improvement or recovery. Upon this state of facts the case resolves itself into the following propositions:

(1) Was the injury to the eye accidental within the meaning of the policy?

(2) Was the notice of the accident invalid on account of delay in giving it?

(3) Was notice, when given, sufficient in substance and form, if given in time?

(4) Was the plaintiff engaged in an overhazardous employment?

(5) Did he lose the entire sight of his eye?

1. It is hardly necessary to consume any time to establish the affirmative of the first proposition. That the injury was accidental is amply proven.

2. The second proposition will be discussed upon the assumption that the notice, when given, was regarded by the plaintiff and agent as valid and sufficient.

3. The defendant contends that the first notice, being, in fact, erroneous, precludes the validity of the future notice by reason of delay.

In the present case the plaintiff within ten days informed Mr. Dyer, the agent of the company, of the accident with which he had met. On September 10th, not exceeding twelve days after the accident, he filled out and delivered to the agent a blank furnished by the company. This blank was the form to be filled out in case of sickness, instead of in case of accident. And the plaintiff so filled it out, stating in answer to the question, "What disease disables you?" "Inflammation of the right eye." This answer, we conceive, might follow from a condition of the eye produced by an accident as well as by disease. Hence no evidence is deducible from the answer, which convincingly shows that the plaintiff ought to have distinguished the sickness blank from the accident blank, especially as he

had no previous knowledge of either form.

This being the case, we think the plaintiff may have been fully justified in using the wrong blank. The uncontradicted evidence proves that the plaintiff, before he received the blank, and "within a day or two after the accident," had fully informed Mr. Dyer, the agent, what had happened; to put it in his own language, "I told him of my accident—told him what it was."

He then, as he testified, proceeded further, and gave the agent every detail of the accident and injury. Upon this full description the agent said:

"That is all right; if you have a claim, bring it in. That is what we are here for."

"In the next three or four days we had gone over the thing several times." He says: "You better get your claim in on time." The plaintiff said: "I will go right to your office and make it out now." In regard to making out the notice, the agent said: "Do as well as you can. We don't know the result. It is up to the company to come back and find out what was the matter."

Thereupon, the agent, of his own volition, without any request from the plaintiff, "reached in his drawer and gave me that blank." There was evidently no purpose or disposition on the part of the agent to mislead or defraud. He simply made a mistake, but his mistake was the mistake of the company, as will later appear.

Assuming still that both parties regarded the notice as proper in form, the plaintiff then had the same right to rely upon it as if it was proper in form, until the contrary appeared.

Matters stood in statu quo until the 8th of February following, when the plaintiff, as he states it, "made a formal report and the application on February 8th, and explained fully the whole details to the company, and right away after that, as I remember it, they sent me the blanks."

insurance—
accident—
injury to eye
by insect.

—notice of
accident—
use of form.

This communication, called a "report," is prefaced by the following statement: "You have already been advised that claim was to be made under policy A D C-R 2075, delay being due to the fact that the ultimate result of the accident was uncertain. The time has now come when the condition seems reasonably definite and final."

Then follows a detailed statement of the accident, the cause, the injury, the progression, impairment of the sight of the eye, the treatment, and the final result.

This report, and, it may be here said, all other papers given to the agent, were at once forwarded by him to the company.

After making this report, the plaintiff received blanks for proof of claim, as near as may be ascertained from the record, about March 6th. About this time, probably upon receipt of the blanks, the plaintiff discovered "that the health blank was not what he wanted." We place no stress in the decision of this case upon the legal construction that the sending of the blank proofs was a waiver, on the part of the defendant, of any question of liability.

On March 25th, the plaintiff sent to the agent a proof of claim or notice upon the accident blank furnished by the company.

From the rehearsal of the facts we are of the opinion that the voluntary production of the health blank on September 10th by the agent was the act of the company. The agent

—act of agent as that of insurer. knew all the facts, in detail, of the injury, and, in law, is charged with knowledge that the blank was the wrong one. The company is charged with the knowledge of the agent. *Thorne v. Casualty Co.* 106 Me. 274, 76 Atl. 1106, and cases there cited. The plaintiff had a right to rely on the agent to furnish him with the proper blank. Rev. Stat. chap. 53, § 119, applies.

As was said in *Le Blanc v. Standard Ins. Co.* 114 Me. 6, 95 Atl. 284:

"There is no limitation in the stat-

ute, and we perceive none in the reason of the thing.

"The statute recognizes what common experience teaches. Men commonly do all their insurance business with agents. . . . They have no direct dealings with the companies. . . . They go to the agents when losses have occurred, and pursue the steps pointed out by them in proving the losses."

This is precisely what the plaintiff did. He was led into error and consequent delay by the act of the agent in furnishing the wrong blank. The error, however, in filing the sickness blank may be regarded, not inappropriately, as a mutual mistake. The agent mistook the proper form of blank, else his act was a fraud. The plaintiff confided in the honor and knowledge of the agent, who knew all the facts, to furnish him the proper blank. Hence the plaintiff's mistake. But a mutual mistake always excuses. It therefore follows that the only effect of the first notice purporting to be a proof of disease instead of injury, although believed to be right, was to operate in causing a reasonable excuse for mutual delay upon the part of both the plaintiff and defendant. It would be clearly wrong for the defendant to have the advantage of this delay to the detriment of the plaintiff, under the admitted facts of the case. The company knew that it was a case of accident, not of disease; of injury, not of sickness; that it required an accident, not a health, form of notice; voluntarily furnished the form; intended the plaintiff to act upon it; received the notice; retained it; made no objection; requested no further information; had full opportunity to examine the form of blank before furnishing it; was in duty bound to see that it was correct, and not misleading; in fine, knew all the facts, regardless of any form of notice. Whatever the intention, in voluntarily passing out the wrong form, it led the plaintiff to do to his injury what he would not have done but for the negligent act of the defendant by

its agent. The plaintiff by this act was induced to do what defeated the entire indemnity of his policy, if the defendant's contention prevails, and inured in equal measure to the benefit of the company. We have already noted that the plaintiff was not at fault; that he had a right to rely on the conduct of the agent. We are accordingly of the opinion

—estoppel to
take advantage
of delay.

that the doctrine of estoppel aptly applies. The very essence of estoppel

is to prevent a party from taking advantage of or misleading another party to his injury, when injury will result if estoppel is not declared. 10 R. C. L. Estoppel, § 25. The law will not stand by in silence and see one party mislead another to his injury, whether by ignorance, negligence, or design. 10 R. C. L. Estoppel, § 24, upon this point says: "Yet ordinarily he will be estopped though he has acted or spoken in forgetfulness or ignorance of the facts, particularly when he had the means at hand of knowing all the facts, or when he was in such a position that he ought to have known them."

This case therefore comes directly within the rule of negligence that, when one of two innocent parties must suffer, he whose negligence caused the injury must bear the burden. In 10 R. C. L. Estoppel, § 23, this rule is thus stated: "This is an application of the general principle that when one of two innocent persons, that is, persons each guiltless of an intentional moral wrong, must suffer a loss, it must be borne by that one who by his conduct has rendered the injury possible."

An erroneous notice, given upon an erroneous form, furnished by the error of the one producing it, and misleading the one required to give it, to the belief that it is correct, may be relied upon by such person as correct, and fulfilling the office for which it was required to be given, until such error is detected.

We are therefore of the opinion that the defendant is estopped to

deny that the paper, filed March 25th upon the proper form of blank, was seasonably filed, under the law and the facts as disclosed in this case.

3. Was the accident blank of March 25th, as finally filled out and executed, in accordance with the requirements of the policy and sufficient in law? As seen, the blank was furnished by the company, filled out by the plaintiff, delivered to the agent, and sent to the company, which received it, according to the notation on the blank, March 29th. The plaintiff also sent affidavits of his employer, and the physicians who attended him, explaining, in every detail, the beginning, progress and result of his injuries.

The company did not return the paper purporting to be proof or notice of the accident and injuries, nor request any further information. It must be held,

—sufficiency of
notice—waiver
of informality.

therefore, to have waived all informalities and deficiencies.

We are of the opinion that the final proof was sufficient.

4. Was the plaintiff at the time of the accident and injury engaged in an extrahazardous or forbidden employment?

There is no contention in the case that the plaintiff had changed his employment as a bookkeeper to the vocation of a motorcycle rider. He was using his motorcycle for exercise and pleasure. It is well settled that a temporary diversion from that stated is not held to be an engagement in a more hazardous employment, unless plainly stated in the contract. This question is fully discussed in Thorne v. Casualty Co. supra.

—more hazard-
ous employment
—riding
motorcycle.

Paragraph A (1) of the policy before us is identical in meaning, and almost so in language, with article 3 of the policy considered in the Thorne Case, quoting Eaton v. Atlas Acci. Ins. Co. 89 Me. 570, 36 Atl. 1048, in which it is said: "This pro-

vision [3] relates to the occupation, employment, or business—a vocation, and not an avocation, occasional, exceptional and outside his regular vocation.”

The reasons for the rule are also discussed in that opinion.

But it would seem necessary to revert to rules of interpretation to find that the plaintiff, in the case at bar, was exempt from the “more hazardous” clause, as the paragraph in which it is contained expressly excepts him therefrom when engaged in the “ordinary duties about his residence, or while engaged in recreation.” But defendant urges, although it may be regarded as a temporary diversion, and not construed as overhazardous, under the doctrine of the Thorne Case, that, nevertheless, riding a motorcycle is specified, by reference, in the plaintiff’s policy, as an occupation, though temporary, that changes the classification of his risk from “special” to “medium” and, correspondingly, either reduces the amount recoverable in case of an accident, or requires a motorcycle permit at an increased annual premium. The language in the policy claimed to work this modification is a part of the last paragraph of the provision designated as A (1), and reads as follows: “If the law of the state in which the insured resides at the time this policy is issued requires that prior to its issue a statement of the premium rates and classification of risks pertaining to it shall be filed with the state official having supervision of insurance in such state, then the premium rates and classification of risks mentioned in this policy shall mean only such as have been last filed by the company in accordance with such law.”

To carry this clause into effect, a red book is offered, the contents of which, excerpts from pages 4, 41, 67, and 85, it is claimed, are required by statute to be filed with the insurance commissioner, and thereby become official. The statute requirement is as follows: “No policy of insurance . . . shall be issued or delivered . . . until a copy of the

form thereof and of the classification of risks and the premium rates pertaining thereto have been filed with the insurance commissioner.” [Me. Rev. Stat. chap. 53, § 11.]

From an inspection of the red book it will be observed that the parts offered to show a modification contain matters of instruction to its agents, are not required to be filed with the insurance commissioner, and to become effective should be put in force by riders, attached by the agents, at the time the policy is written. The book is denominated: “The Red Book and Agent’s Rate Book (Third Edition). A book of ready reference on all points connected in any way with the soliciting and sale of the personal accident and sickness policies of the company. Compiled and published in the interest of its agents.”

The caption of page 3 is, “General Instructions.” Under this caption is found the paragraph on page 4, headed, “Prohibited Risks,” which is the paragraph offered to show the modification claimed to be contained, by reference, in A (1), and reads as follows: “Persons who are blind in both eyes, deaf, compelled to use a crutch or cane, insane, demented, feeble-minded, subject to fits; who have lost a foot or leg, who have suffered paralysis or are paralyzed, who are notoriously intemperate, reckless, disreputable, or without visible means of support, are not to be insured under any terms. Riders of motorcycles will not be insured unless in connection with the motorcycle permit described under heading ‘Riders.’ ”

Although the last sentence only refers to motorcycle riding, we have quoted the whole paragraph to show how conclusively it appears to be nothing but an instruction to the agent, as it emphatically instructs him not to insure a blind man at all, nor a motorcycle rider, except upon a permit, as appears from page 41, which is offered by the defendant as the complement of page 4.

Upon page 41 of this red book is found this caption, “Riders or Sup-

plementary Agreements." Under this a paragraph headed, "Motor-cycle Permit." This paragraph is offered and relied upon to carry into effect, by reference, the paragraph on page 4. But instead of giving it effect it gives it an express negation. The paragraph on page 41 explicitly instructs the agent not to issue a policy "unless this contingency (riding a motorcycle) be provided for by the attachment to the policy of one of the two following indorsements." As neither was attached, they became nugatory as far as the present contract is concerned.

It further appears from this paragraph that it does not apply to the present case, as only "where it is known (to the agent or company) that the insured uses a motorcycle that the company will not issue." In the present case this fact was not known, as the plaintiff did not at the date of the policy use or own one of these machines. There is no requirement that the insured shall inform the company of taking up such use, for recreation or pleasure. Furthermore, it should be observed that the only reference to a motorcycle in this contract is an inhibition to use it in "a race or speed contest," plainly warranting the inference that the assured could use it in any other way. The rule of exclusion might well apply.

Nor does the record show that a word ever passed between the plaintiff and the agent concerning the use of a motorcycle, as prescribed in the red book, or any other way, whereby the plaintiff had any knowledge whatever of any objection to the use he was making of it when injured. The red book (pages 4 and 41) contains instructions only to the agent, and in no sense relates to or modifies the language of this or any other contract, unless attached as riders to the policy.

Pages 67 and 85 are but tables of rates and have no relation whatever to the modification of the plaintiff's contract.

But the red book was the only evidence offered in defense. We are

therefore of the opinion that the plaintiff was not engaged in an over-hazardous occupation, nor violating any of the terms of this contract, while temporarily riding a motor-cycle.

Rev. Stat. chap. 53, § 11, contains this caption, "Standard Provisions for Accident and Health Insurance Policies." Section 12, "Conditions under Which Policy may be issued." Under this section 5 conditions are imposed, all enacted for the protection of the policyholder against deception, misunderstanding, or fraud, of which the following is one: No. 5. "Unless the exceptions of the policy be printed with the same prominence as the benefits, to which they apply; provided, however, that any portion of such a policy which purports, by reason of the circumstances under which a loss is incurred, to reduce any indemnity promised therein to an amount less than that provided for the same loss occurring under ordinary circumstances, shall be printed in bold-faced type and with greater prominence than any other portion of the text of the policy."

The latter part of subdivision 5 relates specifically to an exception that has, for its purpose, a change that reduces the amount of the indemnity named in the policy and applies directly to the exception claimed in the case at bar.

In view of the object and purpose of this explicit statute, the legislature undoubtedly intended that any exception contained in the policy should be so conspicuously printed that it would attract the attention of the insured, and so plainly expressed as to leave no doubt as to its meaning and application. In other words, the exception should refer, in terms contained in the policy, to the subject-matter to which the exception is intended to apply, so that the insured may at least be put upon inquiry as to what, under the exception, he is to do or not to do, in order to preserve the integrity of his indemnity and prevent any diminution thereof, which is to him the sole ob-

ject of his contract. We do not believe that a "red book" deposited in the archives of the insurance department, at the state house, requiring a pilgrimage to that shrine to find, and an examination of its contents to discover, if possible, the import of the exceptions, scattered upon pages 4, 41, 67, and 85, as the pages referred to in the offer of the red book as evidence, meets the requirement of the statute.

Regardless of any statute, it was held in *Miller v. Missouri State L. Ins. Co.* 168 Mo. App. 330, 153 S. W. 1080, as expressed in the syllabus: "To make the 'manual' of an accident insurance company, defining the classifications of risks," etc., "a part of the contract of insurance, it should have been plainly referred to therein and made a part thereof, or should have been actually written into the contract."

We are accordingly of the opinion that paragraph A (1) of the policy fails to comply with the requirement of the statute, or the interpretation to be given by the common law, so far as it is invoked as an exception intended to effect a reduction of the plaintiff's indemnity, under the present state of facts.

5. Finally, did the plaintiff suffer the "entire loss of sight" of his eye? This depends upon the condition of his eye and the interpretation of the word "entire."

Dr. Woods described the condition as follows:

Q. Will you tell the jury, in simple language, what condition you find his eye in now?

A. Mr. Tracey's vision is no better than it was when I saw him last February. He has no perception of color. He, by holding a bright red glass before his eye, or between his eye and a bright light, he couldn't tell—I had two, in fact, three glasses, a yellow glass, a blue one, and a red one. He couldn't tell the color of those glasses, whether it was red, blue, or yellow. I carried my hand back and forth across his eye,

with his left eye entirely covered from the light, and he couldn't see my hand go back and forth by the eye, in my office.

The meaning of the word "entire" should be determined in the light of the purpose and intent of the policy; why the plaintiff bought it; and with a construction most favorable to him. The intent and purpose of the policy as a business proposition was to indemnify the plaintiff for the loss of the complete or "entire" use of his eye. The "loss of the entire sight" of an eye, and the loss of the entire use of an eye, by blindness, in practical effect, are precisely the same. Being a business contract, this policy should be construed, like any other contract, with reference to the object, purpose, conditions, and circumstances.

The eye has earning capacity as well as the hand. To indemnify the complete loss of the sight of the eye as an earning factor was undoubtedly one of the controlling reasons for taking the policy.

We feel that it would be unfair to the company, as well as the plaintiff, to impute to it the intention, by the artful employment of a word, to base its liability upon the frail and frivolous distinction between ocular ability to discriminate a flood of light from total darkness, and without the power to distinguish one object from another in the strongest light.

We have little doubt that the company used the strong word "entire" to protect itself against any possible fraud regarding the degree of vision that might be claimed to come within the terms of the policy, short of what might be declared a total loss of sight, based upon inability to see or distinguish one object from another. Accordingly, the phrase "loss of entire sight" should be so construed as to give the plaintiff what he bought and paid for, and not to defeat the whole purpose and intent of the contract. It should be held to mean that the entire loss of the use of an eye from blindness is a loss of the entire sight of that

eye. But if technicalities were to be invoked, then the meaning of the word "sight" becomes as important as the meaning of the word "entire." "Sight" is defined in Webster's Standard Dictionary: (1) The power of seeing; the faculty of vision or of perceiving objects. (2) Act of seeing; perception of objects by the instrumentality of the eyes; view. To "see" is defined: To perceive with the eye; to have knowledge of the existence and apparent qualities of by the organs of sight; to examine with the eyes; to behold; descry; view; observe; inspect. It is too plain for further discussion that the

—meaning of
loss of sight.

plaintiff had met with an entire loss of power to "see," to "behold," "descry," "view," "observe," or "inspect," as these terms are defined.

He had, therefore, met with a "loss of entire sight," according to the etymology of the words "entire" and "sight," as employed in the policy.

This interpretation is supported by authority as well as reason.

International Travelers' Asso. v. Rogers, — Tex. Civ. App. —, 163 S. W. 421, holds that "entire" does not mean total blindness, but is suffi-

ent if the insured has practically lost the sight of the eye. *Murray v. Aetna L. Ins. Co.* (D. C.) 243 Fed. 285, is precisely in point. "An accident policy providing for payment for the loss of the entire sight of an eye, if irrevocably lost, should be reasonably interpreted; and the sight of an eye will be deemed lost where there is no ability to distinguish and recognize objects, though light from darkness can be distinguished"—is the language of the rescript which accurately states the result of the opinion. It is further said in the opinion: "If this ability is so far destroyed that what remains will not to practical and useful extent confer any of this benefit, entire sight, within the construction of analogous terms in insurance law, is lost. So would it be in popular phrase or sense. The interpretation must be reasonable and relative, not literal. The ability to perceive light and objects, but no ability to distinguish and recognize objects, is not sight, but blindness."

We are of the opinion that the plaintiff lost the "entire sight of his eye" within a rational and practical interpretation of the language of the policy.

Exceptions overruled.

ANNOTATION.

Accident insurance: injury by insect.

There is little authority on the above question. In the three cases which have involved losses under accident policies for injury sustained by contact with or stings of insects, the courts have taken the view that the risks were covered by the policies.

It will be observed that in the reported case (*TRACEY v. STANDARD ACCI. INS. CO.* ante, 521), an injury to the insured's eye by coming in contact with an insect while he was riding a motorcycle was held to be accidental within the meaning of an accident insurance policy.

In *Omberg v. United States Mut. Acci. Asso.* (1897) 101 Ky. 303, 72 Am. St. Rep. 413, 40 S. W. 909, the evidence

was held sufficient to warrant the submission to the jury of the question whether the insured's death was caused by blood poisoning, superinduced by the bite or sting of a mosquito; and it was held that if they so found his death was effected through "external, violent, and accidental means." The court said: "Whether the death of Omberg was caused by blood poisoning, itself superinduced by the bite or sting of some insect, was a question of fact for the jury; the affirmative of these propositions was supported by the evidence of the two attending physicians, and which is confessedly entitled to much weight. Even if we discard the statement of

the patient that the spot on the foot was the result of the bite of a mosquito, we still have the condition of the inflamed part, which, in the opinion of an expert, presented such an appearance as might have been caused by the sting or bite of an insect. The jury might have reasonably concluded, from this evidence, that the injury to the toe was so caused, especially as such a condition is shown not to be an unusual result of such sting or bite. The jury might also have believed that death was caused by blood poisoning induced by the sting or bite—they certainly might have so believed from the evidence of the attending physicians. When these conclusions on the facts are reached, we are of the opinion that, as a matter of law, the death of the assured could be as truly said to have been effected through 'external, violent, and accidental means' as though death had been caused by the sudden, unforeseen, and unexpected bite of a poisonous snake. The bite was external, violent, and accidental. If a bite at all, it was certainly external. It came from without, and its marks were even visible to the naked eye. The force of it was not as great, perhaps, as if inflicted by a rattlesnake; but the means were not the less violent, within the meaning of the policy. It was also accidental, because unexpected, unforeseen, and happened as by chance. It was not designed or brought about voluntarily. But for it, the blood poisoning and death would not have resulted. The blood poisoning was consequent on the wound; the bite would, therefore, be the proximate cause of death.

And it was further held in the *Omberg* Case that if death was caused by blood poisoning, resulting from the sting of a mosquito, it was not the

result of "poison in any form or manner," or "contact with poisonous substances," within the meaning of a provision excluding liability in case of death from such causes. With reference to this the court said: "We are further satisfied in this case that the death of the assured, if it occurred as claimed by the appellant, was not the result of 'poison in any form or manner,' or 'contact with poisonous substances,' within the meaning of those provisions of the policy. If so, then, if blood poisoning were the immediate cause of death from an accidental gunshot, the clause would prevent recovery,—a conclusion wholly at war with the manifest purpose of the contract. So, death from a rattlesnake bite is clearly from poison and contact with poisonous substances; but we presume no one will contend that recovery in such a death could be denied. Such causes of death as are last mentioned are not understood to be causes of 'death from poisoning' or 'contact with poisonous substances,' in the ordinary meaning of those terms."

And in *Preferred Mut. Acci. Asso. v. Beidelman* (1889) 1 *Monaghan* (Pa.) 481, where the plaintiff was stung or bitten by some venomous insect, and sought to recover under a certificate providing that it did not insure against injury resulting from poison in any form or manner, the court refused to instruct the jury that there could be no recovery because the evidence showed that the injury resulted from poison, but left it to the jury to say whether or not the injury so resulted in the sense in which the term poison was used in the contract of insurance, and a verdict for the plaintiff was affirmed by the supreme court.

J. T. W.

WILLARD M. BURLESON, Plff. in Err.,
v.
HUGH BLAIR.

Michigan Supreme Court—October 6, 1919.

(207 Mich. 222, 174 N. W. 167.)

Contract — necessity of writing — representation of credit — sale of ground.

1. A statute prohibiting an action to charge a person by reason of a representation as to another's credit unless the representation is in writing does not apply in the case of representations to effect a sale, by the person making the representations, of bonds belonging to himself or from which he profits.

[See note on this question beginning on page 536.]

Appeal — question for jury.

2. The appellate court cannot say that where the evidence in this case is conflicting, there was no proof to go to the jury.

Contract — representations as to other's credit — interest.

3. The cashier of a bank who has resigned his position to accept a position with a brokerage firm to sell bonds

has such an interest in a sale of bonds as to make inapplicable, so far as his representations as to bonds are concerned, the statute prohibiting an action to hold one for representations as to another's credit unless they are in writing, although when the sale is made he is still acting as cashier and receives no direct credit for the sale.

[See 25 R. C. L. 442.]

ERROR to the Superior Court of Grand Rapids (Dunham, J.) to review a judgment in favor of defendant notwithstanding a verdict for plaintiff in a suit brought to recover the purchase price of irrigation district bonds which plaintiff was induced to purchase by defendant's alleged false representations as to their value. *Judgment for defendant vacated.*

The facts are stated in the opinion of the court.

Messrs. Louis T. Herman and Charles E. Ward for plaintiff in error. Messrs. Butterfield & Keeney, Myron H. Walker, and Charles B. Blair, for defendant in error:

The trial judge properly entered judgment for defendant non obstante veredicto, for, upon the undisputed proofs, a verdict for him should have been directed.

Getchell v. Dusenbury, 145 Mich. 197, 103 N. W. 723; Hubbard v. Long, 105 Mich. 449, 63 N. W. 644; St. Johns Nat. Bank v. Steel, 135 Mich. 165, 97 N. W. 704; Third Nat. Bank v. Steel, 129 Mich. 434, 64 L.R.A. 119, 88 N. W. 1050; Hicks v. Steel, 142 Mich. 292, 4 L.R.A.(N.S.) 279, 105 N. W. 767; Pasley v. Freeman, 3 T. R. 51, 100 Eng. Reprint, 450, 1 Revised Rep. 634, 12 Eng. Rul. Cas. 235; Evans v. Bicknell, 6 Ves. Jr. 174, 31 Eng. Reprint, 998, 5 Revised Rep. 245; Tapp v. Lee, 3 Bos. & P. 367, 127 Eng. Reprint,

200; Huntington v. Wellington, 12 Mich. 10; Knight v. Rawlings, 205 Mo. 412, 13 L.R.A.(N.S.) 212, 104 S. W. 38, 12 Ann. Cas. 325; Hess v. Culver, 77 Mich. 602, 6 L.R.A. 498, 18 Am. St. Rep. 421, 43 N. W. 994; Maxwell v. Bay City Bridge Co. 46 Mich. 278, 9 N. W. 410; Porter v. Goudzwaard, 162 Mich. 158, 127 N. W. 295; Huntington v. Wellington, 12 Mich. 13; Bush v. Sprague, 51 Mich. 41, 16 N. W. 222; Robins v. Hope, 57 Cal. 495; Central Nat. Bank v. Connecticut Mut. L. Ins. Co. 104 U. S. 54, 26 L. ed. 693; Barnard v. Sykes, 72 Miss. 297, 18 So. 450; Smith v. Ogilvie, 127 N. Y. 143, 27 N. E. 807; 18 Am. & Eng. Enc. Law. 11.

The representations claimed by plaintiff relate to the ability of the irrigation district to pay its bonds, and hence are representations concerning the credit and ability of another within the provisions of the statute.

Bush v. Sprague, 51 Mich. 46, 16 N. W. 222; Massey v. Luce, 158 Mich. 130, 122 N. W. 514; Getchell v. Dusenbury, 145 Mich. 198, 108 N. W. 723; Hubbard v. Long, 105 Mich. 449, 63 N. W. 644; Kelly v. Clements, 175 Mich. 98, 140 N. W. 1006; Cook v. Churchman, 104 Ind. 152, 3 N. E. 759; Norris v. Montezuma Valley Irrig. Dist. 160 C. C. A. 379, 248 Fed. 369; Walker v. Russell, 186 Mass. 69, 71 N. E. 86, 1 Ann. Cas. 688; Huntress v. Blodgett, 206 Mass. 318, 92 N. E. 427; Hunnewell v. Duxbury, 157 Mass. 1, 31 N. E. 700; McKee v. Rudd, 222 Mo. 344, 138 Am. St. Rep. 529, 121 S. W. 312; Knight v. Rawlings, 205 Mo. 412, 13 L.R.A. (N.S.) 212, 104 S. W. 38, 12 Ann. Cas. 325.

Bird, Ch. J., delivered the opinion of the court:

Plaintiff brought suit in assumpsit to recover the purchase price of eight Laramie municipal district bonds of \$500 each, which he purchased from defendant in April, 1909, on the ground that the purchase was induced by false representations as to their value. Plaintiff was successful in establishing his claim before the jury, they finding a verdict for him in the sum of \$5,285.33. Subsequently a judgment was entered for defendant by direction of the court, notwithstanding the verdict. The main question discussed is whether the trial court was justified in so doing.

1. At the time the parties had their dealings, both were residents of Grand Rapids. Plaintiff was practising his profession as physician and surgeon, while the defendant held the position of cashier of the City Trust & Savings Bank. Plaintiff claims that by invitation of the defendant he visited the bank on April 8, 1909, and when he arrived there he found that defendant wanted to talk with him about purchasing some irrigation bonds. Referring to the false representations, plaintiff testified, in substance, that defendant said to him: "You have a certificate of deposit here for \$3,000, drawing 3 per cent. I have got some bonds as good as government bonds, drawing 6 per cent interest,

that I want to sell you. They are bonds of the Laramie valley municipal irrigation district of Wyoming. They are municipal bonds, the same as municipal bonds in a city, such as sewer taxes and improvement. The government built this irrigation project in Wyoming, and then turned it over to the district, and the district had issued these bonds, and they are a first lien on everything, including all the land and all of the irrigation project. I have been out there and have been all over this project." (Here defendant brought out seven or eight loose-leaf productions of photographs of harvest scenes and growing crops, such as would only be seen on exceptionally fertile soil.) Defendant then said: "I have seen those conditions, and those pictures were taken while I was there, and I can vouch for their correctness. I have seen the James Lake system, and it is all completed and in use. The land in this irrigation district is selling from \$80 to \$100 an acre. Everything is completed and in use. The land is all under irrigation in this district and improved; everything is all settled and all under cultivation; all prosperous farmers. The bonds, being a first lien on all of this valuable improved land and irrigation system, are very valuable, and therefore are selling above par, at 101."

Plaintiff testified that, relying on defendant's representations concerning the bonds and the security behind them, he purchased eight \$500 bonds; that defendant computed the interest due him on the certificate of deposit; that he then went to his place of business, secured a check from his brother for the balance, came back and delivered the same to defendant, and the defendant delivered to him the bonds, after which he redelivered them to defendant as collateral security for the loan, in place of the certificate of deposit, and took a receipt therefor.

Defendant's version of what took place is in serious conflict with plaintiff's version on many of the mate-

rial matters. It is the claim of defendant that he himself did not own any of the bonds. He admits having an interview with plaintiff concerning the purchase of the bonds, but denies that he sought it. His version is that it came about by the suggestion of Mr. Sibley, the father-in-law of plaintiff's brother, and that his first interview with plaintiff took place on the 7th of April, upon which date the plaintiff signed an order for the bonds, directed to Child, Hulswit, & Company, brokers of Grand Rapids; that the order was handed over by him to that company, and in pursuance of said order the bonds were ordered from Chicago and delivered to him the next day, April 8th; and that later in the day he delivered them to the plaintiff. He further testified that he received nothing as commission for bringing about the sale.

Plaintiff introduced testimony tending to show that certain material representations made by defendant with reference to the security and value of the bonds were untrue; but we need not dwell upon that phase of the case, as defendant conceded that if the claimed representations were made by him they were untrue.

The principal defense was that, even if the statements were made as testified to by plaintiff, they were not admissible in evidence by reason of the Statute of Frauds, which provides that "no action shall be brought to charge any person, upon or by reason of any favorable representation or assurance, made concerning the character, conduct, credit, ability, trade or dealings of any other person, unless such representation or assurance be made in writing, and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized." Comp. Laws, 1915, § 11,983.

Plaintiff meets this defense by the assertion that the statute does not apply when the property about which the representations were made belonged to the one making the representations, nor when the

party making the representations profits by the transaction.

Defendant does not seriously dispute this, but he insists that there is no competent proof that he was the owner of the bonds, neither is there any proof that he profited by the transaction, but, on the other hand, there is positive proof that he did not own the bonds and that he did not profit by the sale of the bonds, and it is argued that with these representations eliminated by the statute there is nothing left of plaintiff's case.

We think it is clear that if defendant were the owner of the bonds or profited by the transaction, the statute does not apply. In construing this statute, Mr. Justice Campbell said: "The legal provision concerning the necessity of representations in writing to sustain an action upon favorable assurances concerning the character, conduct, ability, trade, or dealings of another person, was intended to reach cases where the plaintiff has dealt with and given credit to the person favorably mentioned, and done so on the faith of the assurances. That statute cannot apply to conspiracies or frands where the representation is made to enable the party making it to profit by it." *Hess v. Culver*, 77 Mich. 598, 6 L.R.A. 498, 18 Am. St. Rep. 421, 43 N. W. 994.

Contract—
necessity of
writing—
representation
of credit—sale
of ground.

And this construction was later approved in the case of *Massey v. Luce*, 158 Mich. 183, 122 N. W. 514.

The material questions, therefore, to be determined, are: (a) Was the question of defendant's ownership of the bonds one for the jury? (b) Does the record show that defendant profited by the transaction?

(a) Was defendant's ownership of the bonds an issue for the jury? The plaintiff testified that defendant represented that he was the owner of the bonds, and that he delivered them to him. Mr. Sibley's testimony tends to corroborate plaintiff's testimony in this respect. Defendant

denied that he owned the bonds and denied that he so represented to plaintiff. He claims plaintiff signed an order, addressed to Child, Hulswit, & Company, for the bonds, and claims that he read it to plaintiff in Sibley's presence. Both Burleson and Sibley deny this, and plaintiff denies that he signed the order. The question as to whether the signature to the order was the genuine signature of the doctor was much controverted. Several business people and experts gave it as their opinion that it was the genuine signature of the doctor. One expert thought it was not. The twelve jurors who examined it concluded it was not the doctor's signature, and they answered a special question propounded by defendant that it was not the doctor's signature.

While the testimony of defendant as to his ownership of the bonds and as to the signature of the doctor is quite convincing, we do not feel that it is within the province of this court to say that the positive testimony of Dr. Burleson, the corroborating evidence of Mr. Sibley, the opinion of Mr. Patterson, the expert, and the ocular inspection by twelve jurors, in connection with the other testimony in the case, did not make an issue of fact. We are of the opinion that the trial court was in error in holding that

Appeal-question for jury. as between the parties there was no proof to go to the jury on the question of defendant's ownership of the bonds.

(b) We are also of the opinion that under the uncontradicted testimony the defendant did profit by the transaction to such an extent that the provisions of the statute do not apply.

Contract-representations as to other's credit-interest. When the defendant made the sale to plaintiff, he was not only a stockholder of Child, Hulswit, & Company, but had an arrangement with that company to become its treasurer and director and take charge of the sale of irrigation bonds, and within ten days after the sale he was

elected director and treasurer of the company, with an advance of salary over what he was receiving as cashier of \$1,600, and on May 1st he assumed these duties. When the sale was made, he had already resigned his position in the bank. On April 8th, he and Mr. Child had just returned from a trip to Denver to inspect the irrigation projects in that vicinity which had issued, or was about to issue, bonds. On this trip defendant was the guest of, and his expenses were paid by, Trowbridge & Niver, Chicago brokers, who were handling these irrigation issues.

The following excerpts taken from the testimony of defendant, Blair, tend to show his interest in his future employer:

When I went to Denver, I knew I was going to quit the bank, and I knew at that time that I was going with Child, Hulswit, & Company, and so at the invitation of Trowbridge & Niver I went West and took Mr. Child with me. That was the last week in March, 1909, and I was going to engage in the sale of irrigation bonds if the project looked good to me. I was going for the purpose of making a personal investigation of the Denver-Greeley projects and the other two projects for Child, Hulswit, & Company. I was going to be the active man in charge; I was going to be the bond man. I wanted to go out there and satisfy myself that all was well. . . .

The reason they took us out there was to close the deal with us so we would take on the sale of the bonds. That was the understanding. . . .

Q. Witness, you have said on direct examination, didn't you, that you went out there for the purpose of preparing yourself on the sale of these bonds?

A. That, and to see whether I wanted to enter into it, as Trowbridge & Niver had suggested our doing. After resigning from the bank, I had an understanding with Child, Hulswit, & Company that I was to go out West. There it was all arranged before I went West, except

the formal meeting electing me director and treasurer.

Mr. Child, of Child, Hulswit, & Company, referring to the \$4,000 of bonds sold to plaintiff, testified, upon cross-examination, as follows:

Q. Do you recall personally of this order coming in there on the 7th of April?

A. Yes, I do.

Q. It was quite a shock to you to get an order like that unsolicited?

A. It was not a shock.

Q. A surprise?

A. No, it was a pleasant thing to have come in, because it was one of the first sales, a sale of any amount of irrigation bonds, and naturally I noticed it.

Q. You learned a little later on—in fact you learned from a letter—that it did come through the instrumentality of Hugh Blair?

A. Yes, sir. I saw the City Trust & Savings Bank on there, and I saw it was his handwriting. Prior to that time, Hugh Blair and I had been out West to look over the irrigation projects; that was about the latter part of March, 1909. At that time we were contemplating taking on the sale of irrigation bonds in addition to other bonds. We were contemplating putting Hugh Blair in charge of that field.

Q. You were a little bit pleased to know Hugh Blair on this day had sold the highest amount of irrigation bonds that had ever been sold by your firm?

A. Yes, I was pleased to get the order, naturally.

Q. You were so pleased that you made considerable commission out of it?

A. I do not see that that has anything particular to do with the pleasure.

Q. You were in the business for the money you made?

A. Yes, we were, surely. The profit on the sale of \$4,000 of bonds, that profit would not be sufficient to give any great amount of pleasure. The fact, as stated before, we were expecting Mr. Blair was coming with

us, this was an indication to me that—

Q. He would make good?

A. Yes, and possibly this, that he knew people who could buy bonds.

Q. During that month, when he was still in the bank, whenever he would send you any of these customers, he did it purely out of personal motives, I suppose, because he was a friend of yours?

A. Sure, because he was planning then to come with us, and he wanted to do anything he could to develop the business, naturally. I think he was elected director and officer of our association about the 17th of April, 1909.

Q. Prior to that time you had concluded, by reason of the fact that you elected him to this position to handle your bonds, you had concluded that he had demonstrated his ability to make good hadn't you?

A. Well, I would not exactly say that. We felt he could make good, but I think it would be rather a difficult thing for a man in making a few sales of bonds to demonstrate that he could make good.

Later, on direct examination, the witness testified: "When I replied to Mr. Herman that I felt, when Mr. Blair came with our company, he could make good, I meant by that, that he would be able to sell and negotiate the sale of securities in such amounts as would make it worth while to have him associated with our association; that is, that he would develop ability in that regard and command the confidence of the community."

Occupying the position that Mr. Blair did during this transaction, can it be said that he did not profit by the sale of the bonds, which netted a commission of \$240 to Child, Hulswit, & Company, because that company did not hand him a check for 2 per cent, or some other reasonable amount, as commission?

Does anyone believe that Mr. Blair would have sold these, and other bonds, netting the company a commission of \$1,334, without compensation, if there had been no ar-

rangement for him to ally himself with that company in less than thirty days thereafter? Men who work for a living are not ordinarily as liberal as that. It is not unusual for men to grow liberal when they have some ulterior purpose to serve. Blair was reaching for a position and for an advance in salary, which had not yet been fixed. He was trying to convince Child, Hulswit, & Company that he was the man they were after, that he could make good, and, instead of accepting the check for his proportion of the commission of the sales, he waived it in order to secure something of more importance. During the days when these sales were made, Mr. Blair manifested the same interest in Child, Hulswit, & Company that he did afterward when he became a part of it. He admits that he did the same work afterwards as before. He demonstrated his fitness for the position and succeeded in getting what he was after.

It is also worthy of comment that plaintiff did not seek defendant and solicit information concerning the credit and ability, etc., of the Laramie irrigation district, as is usually

the case when this statute is invoked; but Blair sought plaintiff, knowing he had money on deposit in the trust company. He tried to reach him through Mr. Sibley. Failing in this, he communicated directly with him. After he reached him, he deliberately advised him to withdraw deposits from the bank he himself was paid to serve and invest it in bonds from which Child, Hulswit, & Company, his future employer, could reap a commission of \$240. This evinces his eagerness to please Child, Hulswit, & Company, and to demonstrate his fitness for the position he was about to fill. In this he succeeded, and in his success he found his compensation. By refusing to make a direct charge for services which are ordinarily compensated, for the purpose of capitalizing it, in another direction, he cannot be heard to say that he received no profit from the transaction.

The judgment for defendant must be vacated, and judgment entered for plaintiff on the verdict of the jury.

The late Justice Ostrander took no part in this decision.

Petition for rehearing denied.

ANNOTATION.

Construction of statute requiring representations as to credit, etc., of another to be in writing.

- I. Introductory, 536.
- II. Representations within statute, generally, 537.
- III. Fraudulent representation, 540.
- IV. Representation for benefit of person making same, 544.
- V. Representation partly in writing, 547.
- VI. Authority of corporate agent to make representation, 548.

I. Introductory.

Before Lord Tenterden's Act (9 Geo. IV. chap. 14) it was not necessary, in order to fix one's liability for a false and fraudulent representation respecting another's credit, that such representation should be in writing.

By that act it was provided that "no action shall be brought after the first of January, 1829, whereby to charge any person, upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods, unless such representation or assurance be made in writing, signed by the party to be charged therewith." See the note to Lord v. Colley, 25 Am. Dec. 445. That act, which was supplementary to the original Statute of Frauds (29 Car. II.).

has in substance been enacted into law in Canada and in many of the states of the Union.

See 25 R. C. L. 441.

The design of statutes of this class has been said to be to extend to a person sought to be charged with the debt of a third person because of representations as to the solvency of that person, the same protection as is given in case of an attempt to charge him by proof of a guaranty of the debt of a third person. *Walker v. Russell* (1904) 186 Mass. 69, 71 N. E. 86, 1 Ann. Cas. 688. See to the same effect, *Clark v. Dunham Lumber Co.* (1888) 86 Ala. 220, 5 So. 560.

Such a statute is to be strictly construed to prevent it from operating as a protection to fraud. *Nevada Bank v. Portland Nat. Bank* (1893) 59 Fed. 342; *Stauffer v. Hulwick* (1911) 176 Ind. 410, 96 N. E. 154, Ann. Cas. 1914A, 951. See also *infra* subdivision, III.

Statutes of this kind were, however, enacted to prevent frauds, and should be so construed as to accomplish that purpose. *Hunnewell v. Duxbury* (1892) 157 Mass. 7, 31 N. E. 700.

So, in *McKee v. Rudd* (1909) 222 Mo. 344, 133 Am. St. Rep. 529, 121 S. W. 312, it was said: "This statute is of English origin and has found its way into the statutes of many of our states. Its purpose is a beneficial one. It withdraws from the public the temptation of saying that we would not have credited A, except for the fact that B said he was solvent, unless the representation of B was in writing. . . . A statute could not be broader in terms than is ours. It was enacted for the purpose of relieving parties from uncertainties of litigation which might follow loose language, by requiring all statements to be in writing before the same should be actionable."

In *Hearn v. Waterhouse* (1855) 39 Me. 96, the effect of such a statute was said to be "to withhold legal protection from all who are so heedless or inconsiderate as to rely upon verbal statements or representations."

II. Representations within statute, generally.

A statute prohibiting recovery on

oral representations as to the credit of another does not apply to representations which constitute a contract, such as a warranty by a seller of notes that they are collectable. *Huntington v. Wellington* (1863) 12 Mich. 14.

In *Sprague v. Dun* (1878) 12 Phila. (Pa.) 310, it was held that a similar statute had no reference to the liability of a mercantile agency to a subscriber, since the information was given pursuant to a contract, and the liability was for a breach thereof. But in *McLean v. Dun* (1877) 1 Ont. App. Rep. 153, reversing (1876) 39 U. C. Q. B. 551, it appeared that the defendant, in consideration of a yearly subscription, furnished the plaintiff and other subscribers with information as to the mercantile standing and credit of the subscriber's customers. Information was furnished orally by the defendant as to the standing of one of the plaintiff's customers, which proved to be erroneous, and resulted in large losses to the plaintiff. The statute (U. C. Consol. Stat. chap. 44, § 10) provided as follows: "No action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain money, goods, or credit thereupon, unless such representation or assurance be in writing, signed by the party to be charged therewith." In holding the case to be within the statute, the court said: "The injury in the present case arises from the defendant's having given certain unreliable information to the plaintiff as to the credit of another, on which he acted, and whereby he has lost the amount for which credit was given. . . . This statute, relied on by the defendants, seems clearly to cover the present case, and I do not think we can get over its effect, except by adding to it a clause declaring that it shall not apply to dealings with such a mercantile agency as that represented by the defendants."

It has been held in several cases that a representation as to a specific

matter of fact is not within the Statute of Frauds though the fact is one affecting the credit of a third person. Thus, in *Walker v. Russell* (1904) 186 Mass. 69, 71 N. E. 86, 1 Ann. Cas. 688, a statute providing that no action should be brought to charge a person on, or by reason of, a representation or assurance made concerning the character, conduct, credit, ability, or dealings of another, unless such representation is made in writing and signed by the party to be charged, was held not to include representations as to the financial credit of a corporation, made for the purpose of inducing the plaintiff to subscribe for shares of stock to be paid in cash, since such statements were representations of fact bearing on the value of the shares. Similarly, in *Com. v. Coe* (1874) 115 Mass. 481, it was held that a false representation that a certificate of stock offered as collateral was good, valid, and genuine was not a representation as to the ability of the person making it to repay money obtained thereby, within the meaning of the statute. So, in *Stauffer v. Hulwick* (1911) 176 Ind. 410, 96 N. E. 154, Ann. Cas. 1914A, 953, it appeared that the defendant, a real estate agent, represented to the plaintiff that certain land "was good land, and was of ample value to secure the repayment of such loan." The plaintiff, relying on such statement, took a mortgage on the land for \$600. The land was, in fact, mostly swamp land, and had practically no value. The defendant claimed that the complaint was insufficient under the statute (Burns's Anno. Stat. 1908, § 7468), which provided that "no action shall be maintained to charge any person by reason of any representation made concerning the character, conduct, credit, ability, trade or dealings of any other person, unless such representation be made in writing and signed by the party to be charged thereby or by some person thereunto by him legally authorized." In holding the case not to be within the statute, the court said: "We are of the opinion that the statute does not apply to the alleged facts of this case. No representation was made

concerning the character, credit, conduct, ability, trade, or dealings of Hopkins. The statements complained of were representations of the quality and value of the land. An investment in a real estate mortgage was contemplated, and only such a one as would be amply secured by the value of the land mortgaged, regardless of the character, conduct, ability, or dealings of the person who was to mortgage the land as security for the loan. The object of this statute was to prevent fraud, and not to shield the perpetrators thereof." Likewise, in *Daniel v. Robinson* (1887) 66 Mich. 296, 33 N. W. 497, wherein it appeared that the plaintiff was induced to deliver material to subcontractors to be used in erecting buildings for the defendant, through the false representations of the defendant that there was money enough under the control of the defendant to pay for all material, it was held that the statute requiring all representations concerning the character, conduct, credit, ability, trade, or dealings of any other person to be in writing in order to support an action thereon, had no application. To the same effect is *Norton v. Huxley* (1859) 18 Gray (Mass.) 285, wherein it appeared that a contractor working for the defendant became financially embarrassed and applied to the plaintiff for aid. The plaintiff inquired of the defendant as to the situation of the contract, and the defendant, by oral statements, represented to the plaintiff that there was an abundance of money left to pay all concerned. This proving to be false, in an action to recover of the defendant, the court held the case not to be within the statute, saying: "It may be difficult to mark with precision the exact limits of the operation of the statute under consideration. It is sufficient, in the present case, to say that these representations were not of such a character as are required by the statute to be in writing, to be made the subject of an action. They were representations as to particular facts in the knowledge of the defendant, which, as they might exist or not, might influence the plaintiff in reference to his taking an as-

signature of Thompson's contract with the defendant; but not representations made with the intent stated in the statute."

In *Hicks v. Steel* (1905) 142 Mich. 292, 4 L.R.A. (N.S.) 279, 105 N. W. 767, it was held that no action may be maintained upon oral false representations that the notes of a third person are good and that he is financially responsible, whereby a bank is induced to discount the notes.

On the other hand, in *Swann v. Phillips* (1838) 8 Ad. & El. 457, 112 Eng. Reprint, 912, it appeared that the defendant, an attorney desirous of having credit extended to his client, represented to the plaintiff that she might safely advance the money as he held deeds belonging to the client. In holding this representation to be within the statute, the court said: "The defendant, an attorney, wants to get money advanced to his client; and, to induce the plaintiff to make the advance, tells her that she may safely do so, taking no further security than the client's promissory note, because he, the defendant, has possession of that party's title deeds. I think that is within the statute. The representation is entire: no one part can be separated from the rest. In the ordinary course of things, if a man states another to be a man of ability, he is asked why he says so; he may answer, 'Because he has had a legacy left to him,' by way of enforcing his representation as to the ability. Here, the substance of the conversation is similar; the defendant says, 'You may trust him; and my reason for saying so is, that I know the estate which he has bought, and have his title deeds.' That is one entire representation concerning his credit." So, in *Hunnell v. Duxbury* (1892) 157 Mass. 1, 81 N. E. 790, it appeared that the defendant, a director of a corporation, told a creditor of the corporation that "they had filed a declaration and were now prepared to go on and push the business of advertising." The court held that the statement was a representation concerning the "credit, ability, trade, or dealings" of another, and was within the provisions of the stat-

ute requiring such representations to be in writing. Similarly, in *Gains v. Massey* (1915) 190 Mo. App. 199, 176 S. W. 427, it was shown that the plaintiff, on receiving a check, presented the same at his bank, and was assured by the bank cashier that the check was good. It was held that the representation was one as to the maker's credit and was within the provisions of the statute (Rev. Stat. 1909, § 2785), which prohibited an action on any representation as to the credit of another, unless the same was in writing and signed by the party to be charged.

Likewise, the defendant in *Lyde v. Barnard* (1836) 1 Gale (Eng.) 388, falsely represented that the life interest of another in certain trust funds was charged with only three annuities, whereby the plaintiff was induced to advance a sum of money for the purchase of an annuity from the third person, and subsequently it appeared that the funds were charged with other liens. It was held that the representations were made concerning the credit of a third person, and therefore came within the statute providing that "no action shall be brought to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon, . . . unless such representation or assurance be made in writing, signed by the party to be charged therewith." In *Clark v. Dunham Lumber Co.* (1888) 86 Ala. 220, 5 So. 560, where the action was based on an alleged false representation made by the defendant as to the credit and business of the Wetumpka Lumber Company, a corporation of which the defendant was president, by which representation credit was given to the company by the plaintiff, resulting in the loss of certain goods sold. The substance of the alleged representation was that the corporation had already negotiated for the sale of such large quantities of lumber that it was unable to carry out its contracts, without obtaining lumber from other

mills; and that the lumber proposed to be purchased from the plaintiff would be appropriated to filling these contracts. It was alleged that this representation was false; that the defendant in fact consigned the lumber thus purchased to lumber brokers, to be sold on its account, in pursuance of a previous intention to do so, which intention was known to the defendant. The insolvency of the defendant corporation was also alleged. Holding the representation to be within the statute, the court said: "Section 1374 of our Code, which constituted § 1553 of Code 1852, is substantially in the same language as Lord Tenterden's Act (9 Geo. IV. chap. 14, § 6.) Its object seems to have been to put ordinary misrepresentations in mercantile transactions upon the same footing with guaranties; and it has accordingly been construed to embrace every incorrect or untrue misrepresentation unaccompanied by a fraudulent intent, and no other. . . . In other words, no representation made by a defendant, as to the character, conduct, ability, trade, or dealings of a third person, even though false, can be made the basis of an action, unless reduced to writing and signed by the party sought to be charged; or unless it is fraudulently made. In the latter case, such right of action exists outside of, and independently of, the Statute of Frauds, the restriction of the statute having no reference to such cases. . . . The representations made by the defendant Clark involved by implication the credit of the Wetumpka Lumber Company. It was an implied assertion of an extensive business, large sales, and correspondingly great commercial prosperity in business. Its falsity, accompanied by the purchase and sale of the plaintiff's goods to meet its own want of cash, especially by an insolvent company if established, would tend to prove the reverse. Such, at least, might reasonably be inferred by the jury to have been implied by the representation in question. The tendency of the representation, if believed, would, moreover, be to procure credit for the company, which might not

otherwise have been extended. It was material, if interpreted as above suggested, and may have proximately contributed to the loss sustained by the plaintiff by inducing the desired credit."

III. *Fraudulent representation.*

By the weight of authority a statute requiring a writing to make effective a representation as to the credit of another does not apply to representations made with the intention to defraud. *Coulter v. Clark* (1902) 160 Ind. 311, 66 N. E. 739; *Grover v. Cavanagh* (1907) 40 Ind. App. 340, 82 N. E. 104; *Warren v. Baker* (1865) 2 Duv. (Ky.) 155; *Vertrees v. Head* (1910) 138 Ky. 83, 127 S. W. 523; *Bush v. Sprague* (1883) 51 Mich. 41, 16 N. W. 222; *Hess v. Culver* (1889) 77 Mich. 598, 6 L.R.A. 498, 18 Am. St. Rep. 421, 43 N. W. 994; *Hubbard v. Long* (1895) 105 Mich. 442, 63 N. W. 644; *McDonald v. Smith* (1905) 139 Mich. 211, 102 N. W. 668; *Massey v. Luce* (1909) 158 Mich. 128, 122 N. W. 514. Compare *Cook v. Churchman* (1885) 104 Ind. 141, 3 N. E. 759.

In *Coulter v. Clark* (1902) 160 Ind. 311, 66 N. E. 739, it appeared that a banker fraudulently represented to the plaintiff that stock in a proposed corporation was valuable and a good investment. By reason of these representations the plaintiff was induced to purchase the stock, which proved to be worthless. The court held that the representations were not within the statute, but were part of a scheme to defraud the plaintiff, and a recovery could be had although the representations were made orally.

In *Grover v. Cavanagh* (1907) 40 Ind. App. 340, 82 N. E. 104, overruling *Heintz v. Mueller* (1898) 19 Ind. App. 240, 49 N. E. 298, it appeared that the promoters of a corporation represented to the plaintiff that the stock was worth par and a good investment, and that the company had valuable assets, when in fact it had nothing. In holding the defendants to be liable, the court said: "The representations averred in the complaint before us were not made to induce the extension of credit. They were representations of material, existing facts that went

to establish primarily the value of the property appellees were seeking to sell. That the representations incidentally conveyed the impression that the corporation was worthy of credit, since they were to the effect that the corporation had assets, was solvent, and was prosperous, etc., does not affect the question. They were not made for such purpose and were not acted upon in such manner. The purpose and effect of the representations were to convince appellant that the preferred stock of said corporation was valuable and a good investment; and, acting upon the belief thus induced, she made the purchase, to her damage. . . . The conception of the scheme, the organization of the company, the false representations, all are charged as a part of one general plan of fraud and deception for the benefit of all the conspirators. That one link of the scheme of fraud involved representations as to the value of the assets and stock of a corporation ought not in all good conscience to entitle the wrongdoers to the protection of a statute that was enacted solely to protect against fraud, and not as a shield for fraud."

Where it appeared that the defendant, by collusion with another, obtained property from the plaintiff by having a colorable sale made to his co-conspirator, who was falsely represented to be solvent, and whose note was taken by the seller, the court held that, there being a conspiracy to defraud, there was more than an oral representation as to the solvency of the purchaser, so that the case was not within the Statute of Frauds. *Hodgin v. Bryant* (1888) 114 Ind. 401, 16 N. E. 815.

In *Vertrees v. Head* (1910) 138 Ky. 83, 127 S. W. 523, it was held that the statute did not embrace representations that were deceitfully or fraudulently made, but only such as were made in good faith respecting the credit or standing of another. The fraudulent representations, therefore, of an insurance agent, in regard to the good standing of the company he represented, were not, it was held, within the statute, and need not be in writing in order to support an action for dam-

ages caused thereby. The court said: "If a person, in violation of law, or deceitfully or fraudulently, or with knowledge of its falsity, makes a representation or assurance concerning the character or credit of another, it is not essential to maintain a cause of action against him that such representation or assurance shall be in writing. The statute does not embrace assurances or representations that are deceitfully or fraudulently made, or that are made with knowledge of their falsity, or in violation of a statute. It was not intended to save harmless from the consequences of false and fraudulent statements wrongdoers, or those who, for purpose of gain or other motive, would cheat or mislead. It was designed to protect persons who honestly and in good faith make assurances respecting the credit or standing of another, and should be confined to this character of cases."

In *Bush v. Sprague* (1883) 51 Mich. 41, 16 N. W. 222, the court, in holding the case at bar not to be within the statute, said: "If we hold the statute applicable so strictly as is claimed here, and hold that all unwritten representations must be disregarded, it needs very little reflection to see that the statute would operate as a most convenient cover for fraud, and could seldom fail to further it. And I am not prepared to hold that it reaches the multifarious contrivances of conspirators, or any cases where the fraud is not confined, at least substantially, to tangible verbal misrepresentations in which the defendants unite. Wherever any substantial gain accrues to the wrongdoers by the machinery of conspiracy, it cannot be said that the parties sued are charged upon mere representations or assurances. Neither can this be said where they have acted in concert, but by each one's choice of means, verbal or acted, to reach damaging results to the party defrauded. If mere words are sued upon, the words may come within the statute. But if they are but a part of the evil machinery, I cannot think the statute meant that they should lend cover to the fraud." See to the same effect, *Hubbard v. Long* (1895) 105

Mich. 442, 68 N. W. 644; Massey v. Luce (1909) 158 Mich. 128, 122 N. W. 514.

In *Hess v. Culver* (1889) 77 Mich. 598, 16 L.R.A. 498, 18 Am. St. Rep. 421, 43 N. W. 994, it appeared that the plaintiff, by means of false representations, was induced to give his notes to the defendant in consideration of the bonds of what purported to be, but was not, a Michigan corporation. In holding the representations not to be within the statute, the court said: "The other point suggested has no support in the statute. The legal provision concerning the necessity of representations in writing to sustain an action upon favorable assurances concerning the character, conduct, ability, trade, or dealings of another person, was intended to reach cases where the plaintiff has dealt with and given credit to the person favorably mentioned, and done so on the faith of the assurances. That statute cannot apply to conspiracies or frauds, where the representation is made to enable the party making it to profit by it. Moreover, in the present case, the false showing was not concerning the responsibility of an existing person whose personality was known, but concerning an alleged corporation that was no corporation, and whose pretense of legal existence was itself a fraud."

In *McDonald v. Smith* (1905) 189 Mich. 211, 102 N. W. 668, it appeared that the defendants, through false representations, induced the plaintiff to purchase worthless stock of a corporation. The court held the statute not to be applicable, saying: "As the evidence in this case justified the inference that the corporation whose worthless stock plaintiff acquired was only an instrument in the scheme of fraud by which defendants and their confederates obtained plaintiff's property for their own exclusive use, the statute 3 Comp Laws, § 9518, requiring representations 'made concerning, etc., any other person . . . be made in writing,' has no application."

However in *Cook v. Churchman* (1885) 104 Ind. 141, 3 N. E. 759, it was sought to hold Churchman on an oral statement of his to the effect that

one Cottrell was a man of property, and that under his guaranty the plaintiffs would be perfectly safe in selling goods to Cottrell's son. The Statute of Frauds provided as follows: "No action shall be maintained to charge any person by reason of any representation made concerning the character, conduct, credit, ability, trade, or dealings of any other person, unless such representation be made in writing and signed by the party to be charged thereby, or by some person thereunto by him legally authorized." It was held that Churchman was not liable on the oral representations made, though the statement was made fraudulently in pursuance of a conspiracy to defraud. The court said: "The intent and purpose of the statute was to cut off all such actions and to place representations of the character therein referred to upon the same basis as special promises to answer for the debt of another. It would hardly be contended that if the action was to recover on an oral promise to answer for the debt, default, or miscarriage of another, the case could be taken out of the operation of the statute by averring a conspiracy, or that the promise was made by preconcert or prearrangement between two or more. . . . That the promise was oral, and that it was to answer for the debt, default, or miscarriage of another, would be sufficient to end the inquiry. So, in this case, when it is admitted that the representations were by parol, that they related to the credit and ability of a third person, and were made with the intent that money, goods, or credit should be obtained by such third person, the case falls within the statute, and the motive with which they were made beyond that of obtaining credit is immaterial."

In other jurisdictions the view seems to obtain that since the Statute of Frauds contains no exception with respect to fraudulent representations as to the credit of a third person no such exception can be introduced by the courts. *Ball v. Farley* (1886) 81 Ala. 288, 1 So. 258; *Hunter v. Randall* (1873) 62 Me. 426, 16 Am. Rep. 490; *Bates v. Youngerman* (1886) 142 Mass.

120, 7 N. E. 549; *Knight v. Rawlings* (1907) 205 Mo. 412, 13 L.R.A. (N.S.) 212, 104 S. W. 38, 12 Ann. Cas. 325; *Haslock v. Fergusson* (1837) 7 Ad. & El. 86, 112 Eng. Reprint, 403, 2 Nev. & P. 269, 6 L. J. K. B. N. S. 247, 1 Jur. 689; *Banbury v. Bank of Montreal* [1917] 1 K. B. (Eng.) 409, 86 L. J. K. B. N. S. 380, 33 Times L. R. 104, 61 Sol. Jo. 129.

In *Ball v. Farley* (1886) 81 Ala. 238, 1 So. 253, it appeared that the plaintiff entered into a partnership with another, but before doing so, he inquired of the defendant as to the character and ability of his intended partner. The defendant replied orally that the intended partner was a man of honesty and integrity. The plaintiff contended that the statement was part of a scheme to defraud him. It was held that as the representation was not in writing and signed by the party sought to be charged it came within the statute (Code of 1876, § 2128).

The Statute of Frauds was held, in *Hunter v. Randall* (1873) 62 Me. 426, 16 Am. Rep. 490, to be a defense to an action for money had and received, brought against one who, by means of false and fraudulent oral representations concerning the credit of another, induced the plaintiff to give money to the defendant, which he immediately turned over to the one concerning whom the representations were made.

Where the plaintiffs offered in evidence oral representations or assurances fraudulently made by the defendant, with regard to the credit and pecuniary responsibility of a third person, the court held that they were properly excluded as being within the provisions of the statute requiring such representations to be in writing. *Bates v. Youngerman* (1886) 142 Mass. 120, 7 N. E. 549.

The Missouri statute (Rev. Stat. 1899, § 3422), providing that "no action shall be brought to charge any person upon or by reason of any representation or assurance made concerning the character, conduct, credit, ability, trade or dealings of any other person, unless such representation or assurance be made in writing, and

subscribed by the party to be charged thereby, or by some person thereunto by him lawfully authorized," was held in *Knight v. Rawlings* (1907) 205 Mo. 412, 13 L.R.A. (N.S.) 212, 104 S. W. 38, 12 Ann. Cas. 325, to be a complete bar to an action for damages for false verbal representations made with respect to the credit of a third person, regardless of whether such representations were made in good faith or were made with knowledge of their falsity in order to deceive and defraud the plaintiff or in pursuance of a conspiracy with the person in regard to whose credit the representations were made.

In *Haslock v. Fergusson* (1837) 7 Ad. & El. 86, 112 Eng. Reprint, 403, it appeared that a merchant, who was indebted to the defendant, requested a sale of goods on credit from the plaintiff and referred him to the defendant as to the credit and standing of the merchant. On inquiring, the defendant informed the plaintiff that the merchant's character was fair, whereupon the plaintiff trusted the merchant with a bill of goods. The evidence showed that the merchant never paid for the goods, but sold them and paid the proceeds to the defendant. In holding the representations to be within the statute, the court said: "The question in this case was, whether the representation which it was proposed to give in evidence came within Stat. 9 Geo. IV. chap. 14, § 6, so as to be inadmissible unless in writing. It is suggested, on the part of the plaintiff, that the representation was fraudulent, and that the defendant caused it to be made for the purpose of fraud. The case does not appear to us to raise any doubt in point of law. The question is, whether the action is brought, according to the terms of the statute, 'to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person?' . . . The only fact on which the case of fraud rested at the time of offering the evidence was, that the defendant had authorized Hobson to give Mrs. Barnes a fair character.

We think that a representation made under those circumstances is within the very terms of the sixth section of Stat 9 Geo. IV. chap. 14, and therefore could not be received in evidence, unless put into writing."

In *Banbury v. Bank of Montreal* [1917] 1 K. B. (Eng.) 409, it appeared that the plaintiff, while visiting in Canada, was presented by the general manager of the defendant bank with a letter of introduction to its various branches. On a subsequent trip to Canada the plaintiff visited a branch of the defendant bank, and through the verbal representations of the local manager made investments, which were lost. The court held that the case fell within the statute, saying: "But we have had a long and interesting argument upon § 6 of Lord Tenterden's Act, which it is said prevents the action from being maintained because the representation or assurance is not in writing, signed by the party to be charged therewith. And as this case may go elsewhere, I think it right to express my opinion upon the point. Sec. 6 is in the following words: 'That no action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon [sic] unless such representation or assurance be made in writing signed by the party to be charged therewith.' . . . The language of the section is perfectly general. It is not to be confined to a fraudulent representation, or to such a representation as would have justified an action of deceit. It follows that in my opinion the plea of Lord Tenterden's Act is an answer to Captain Banbury's action, which must fail without proof of Galletly's verbal representations or assurances."

IV. Representation for benefit of person making same.

Statutes providing that no action may be based on an oral representation as to the credit of a third person are construed as applicable to

such representations only as operate to induce the person to whom they are made to enter into contract relations with the third person. They do not apply to representations tending to induce action for the benefit of the person making them.

Thus, in *Dent v. McGrath* (1867) 3 Bush (Ky.) 174, it appeared that the defendant, as auctioneer, sold to the plaintiff, as highest bidder, a buggy as the property of one Wilson. The persons present at the sale, distrustful of the title of Wilson, who was a nonresident stranger, seemed reluctant to bid, and the auctioneer, to inspire confidence and procure a good price, announced that "he knew Wilson well, and he was all right, and he would warrant that his title was good." Subsequently it was learned that the property had been stolen by Wilson. The court held the representation not to be within the statute, saying: "The 1st section of chapter 22, page 264, Stanton's Revised Statutes, is relied on as a bar. That section is not applicable to this case. It only provides that 'no action shall be brought to charge any person for a representation or assurance concerning the character, conduct, credit, ability, trade, or dealings of another made with intent that such other may obtain thereby credit, money, or goods,' 'unless the representation' or 'assurance be in writing.' The representation in this case was made, not to enable Wilson to obtain credit, or goods, or money, in the sense of the statute, for his own sole benefit: it was made more for the benefit of the appellant himself."

So, in *Ruddy v. Gunby* (1915) — Mo. App. —, 180 S. W. 1043, it was held that the statute (Rev. Stat. 1909, § 2785), providing that no action should be brought to charge any person for any representation as to the financial standing of any other person unless the representation was in writing, did not apply to representations made by the defendant as to the financial standing of the maker of a note, by which the plaintiff was induced to trade with the defendant and accept the note in part payment of the purchase price.

Similarly, in *Stannard v. Kingsbury* (1901) 179 Mass. 174, 60 N. E. 552,

it was held that an action could be maintained for oral misrepresentations made by an investment broker concerning the credit of a certain investment association in order to induce the plaintiff to place a sum of money in the defendant's hands for investment.

In *Belcher v. Costello* (1877) 122 Mass. 189, the court held that an action would lie in a case in which the defendant gave the plaintiff certain notes of a third person in part payment for goods delivered by the plaintiff to the defendant, orally representing that the notes and the persons who made them were good, which representations were false. It was held that the provisions of the statute applied only when the purpose of the representations was to enable a third person to obtain credit, in which case they must be in writing.

In *French v. Fitch* (1887) 67 Mich. 492, 35 N. W. 258, it was held that the statute requiring representations concerning the character, etc., of any other person to be in writing, did not apply to representations as to value made by a stockholder in a manufacturing company on the sale of his stock. See to the same effect, *Hubbard v. Oliver* (1912) 173 Mich. 337, 139 N. W. 77; *Diel v. Kellogg* (1910) 163 Mich. 162, 128 N. W. 420. And see the reported case (*BURLESON v. BLAIR*, ante, 521). And in *Newman v. Lyman* (1914) — Tex. Civ. App. —, 165 S. W. 136, it appeared that the defendant made representations as to the solvency, etc., of a corporation, whose stock he sold to the plaintiff. The stock sold was owned by the defendant, and, as a part of the purchase price, the defendant was released from personal liability on commercial paper. The transaction took place in Missouri, and the court, in construing the statute (Mo. Rev. Stat. 1909, § 2785) of that state, held that the case was not within the statute, as the statute was limited in its application to cases in which the representation was made for the purpose of obtaining credit for a third person, and was not applicable to a case where the defendant sought to sell his own property.

But if the representations are other-

9 A.L.R.—35.

wise within the statute, they are not affected by the fact that the person making them also makes false representations concerning himself at the same time. *Brown v. Kimball* (1892) 84 Me. 280, 24 Atl. 847. Nor does the fact that an incidental benefit accrues to the person making the representations withdraw them from the operation of the statute, if the primary object is to procure credit for a third person. *Hunter v. Randall* (1873) 62 Me. 426, 16 Am. Rep. 490; *Mann v. Blanchard* (1861) 2 Allen (Mass.) 386. In *Mann v. Blanchard* (Mass.) supra, it was held that false representations concerning the ability and credit of another, by which the plaintiff was induced to indorse a note signed by such other person, which the defendant received and used for his own benefit, would not subject the defendant to liability, unless the representations were in writing, since the object and purpose of the representations were, in the first instance, to induce the plaintiff to give credit to a third person. The court said: "Where the benefit to be obtained by the defendant is to be gained wholly through the credit given to another in consequence of the alleged representations, the primary object of those representations must be regarded as the procurement of the credit."

A corporation is a "third person" within the meaning of the Statute of Frauds (*Hirst v. West Riding Union Bkg. Co.* [1901] 2 K. B. (Eng.) 560, 70 L. J. K. B. N. S. 828, 49 Week. Rep. 715, 85 L. T. N. S. 3, 17 Times L. R. 629), and, accordingly, representations by the officers of a corporation as to its credit or solvency must be in writing.

Thus, in *Heintz v. Mueller* (1898) 19 Ind. App. 240, 49 N. E. 293, it appeared that the defendant represented to the plaintiff that a certain salt mining company was in a prosperous condition, thereby inducing the plaintiff to purchase stock in the company. It was held that the case was within the statute, the court saying: "If it can be said, as we think it may, that it is shown that the representations were made by the appellant to establish the general credit or ability of the cor-

poration with the intent that it should obtain money thereon, such representations not being in writing, signed by appellant or by some person thereunto by him legally authorized, they cannot be the basis of an action against him. If the elements of fraud be sufficiently shown, as to which we make no decision, this would not alter the case. The words 'any other person' in this statute include a private corporation. The word 'person' is a generic term, including both natural and artificial persons. It does not always in statutes embrace corporations, but where, as here, there is nothing in the subject-matter or in the context to indicate a purpose to use it in the limited sense of natural persons, and the object of the statute is fully subserved only by applying the general meaning and including therein artificial persons, this general application should be made." See to the same effect, *Grover v. Cavanagh* (1907) 40 Ind. App. 340, 82 N. E. 104.

In *Getchell v. Dusenbury* (1906) 145 Mich. 197, 108 N. W. 723, it was held that representations made by the officers of a corporation as to its credit and ability were within the provisions of the statute, and were not actionable unless in writing. See to the same effect, *Diel v. Kellogg* (1910) 163 Mich. 162, 128 N. W. 420; *McKee v. Rudd* (1909) 222 Mo. 344, 138 Am. St. Rep. 529, 121 S. W. 312.

So, in *Bradfield v. Elyton Land Co.* (1890) 93 Ala. 527, 8 So. 383, it appeared that the president of a land company, acting as its agent, represented to a prospective purchaser that the company was then constructing a belt line of railroad, which would run in front of the property. It was held that the representations so made, being oral, would not form the basis of an action for the rescission of the contract under the statute (Code 1889, § 1734), which provided as follows: "No action can be maintained to charge any person by reason of any representation or assurance made concerning the character, conduct, ability, trade or dealings of any other person, when such action is brought by the person to whom such representation or assurance was made, unless

the same be in writing, signed by the party sought to be charged."

Likewise, in *Wells v. Prince* (1860) 15 Gray (Mass.) 562, the court held that the statute applied so as to defeat an action against an insurance agent for oral representations concerning the solvency of an insurance company, alleged to have been made in order to enable the agent to receive the commissions, by which representations the plaintiff was induced to take out a contract of insurance, it appearing that a loss was suffered, and the insured was unable to collect from the company.

And the Statute of Frauds was held in *Brown v. Kimball* (1892) 84 Me. 280, 24 Atl. 847, to be a defense to an action for deceit, brought against the leading officer of a corporation for oral misrepresentations as to the credit of the corporation, made to enable it to purchase goods on credit from the person to whom the representations were made.

But where the plaintiff was fraudulently induced to buy stock and become manager of a company by the defendant and his wife, who were practically the owners of the company, it was held that estimates of corporate assets submitted to the plaintiff were not required to be in writing within the provisions of the statute, as the statute could not apply to conspiracies or frauds, where the representations were made to enable the persons making them to profit thereby. *Andrews v. Osius* (1918) 203 Mich. 195, 168 N. W. 1032.

Referring to representations by an officer of a corporation, the court, in *Huntress v. Blodgett* (1910) 206 Mass. 318, 92 N. E. 427, said: "In the present case the representations were not made with an intent or purpose that the party concerning which the defendant was speaking should obtain credit, money, or goods upon the representations. They were made to induce the plaintiff to become a stockholder in a corporation and to put in money in payment for his stock, which corporation was expected to succeed to the business of the H. J. Blodgett Company, concerning which a large part or all of the representations were

made. The question is fully covered by the decision in *Walker v. Russell*, 186 Mass. 69, in which it was held that the statute applies only to representations made to induce the plaintiff to enter into a transaction which will result in a debt due to the plaintiff from a third person, concerning whose character, conduct, credit, ability, trade, or dealings the representations were made."

In *McKinney v. Whiting* (1864) 8 Allen (Mass.) 207, it appeared that the treasurer and managing director of a corporation induced the plaintiff to accept certain notes of the corporation signed by him as treasurer, in payment for property sold by the plaintiff to the corporation. The defendant orally represented to the plaintiff that the corporation was perfectly good and did not owe anything, but was short of funds at the time on account of the condition of the weather, whereas the company was insolvent. It was held that the case fell within the provisions of the statute as the allegations in the case were not that the plaintiff was led to give credit to the defendant by reason of such representations, but to the corporation. The court said that an action might have been maintained on parol proof of such representations if they had been made by the defendant concerning the credit of the corporation, with the intent and design to induce the plaintiff to sell to the defendant on credit.

In *Howard v. Allgood* (1915) 148 Ga. 550, 85 S. E. 757, an action for damages, the petition alleged that a corporation agreed to sell stock to the plaintiff, with a covenant to resell it at a stated price if, at the expiration of one year, the purchaser should be dissatisfied and desire to have it resold. As a guaranty of this contract, certain officers and directors of the corporation undertook to take up the shares in question at the end of the year. The persons negotiating the trade represented to the plaintiff that these officers and directors were solvent and in good financial standing, which representations were false. The court held that the statute (Civil Code 1910, § 4411) dealing with repre-

sentations to obtain credit for another did not apply to the transaction involved. See to the same effect, *Culbreth v. Allgood* (1915) 148 Ga. 551, 85 S. E. 758.

V. Representation partly in writing.

Where both written and oral representations are made as to the credit of a third person, the writings must be "mainly and substantially" relied on, in order to support an action therefor. *Weil v. Schwartz* (1886) 21 Mo. App. 372.

So, in *Tatton v. Wade* (1856) 18 C. B. 371, 139 Eng. Reprint, 1413, it appeared that one Case, who proposed to hire of the plaintiff certain furniture, made to her certain representations concerning his employment and salary, and gave the defendant as reference. Thereupon the plaintiff wrote to the defendant a letter of inquiry as to the truth of the statement, and requested the defendant to guarantee the rent. The defendant made answer by letter, avouching the truth of the representations, but declined to guarantee the debt. This did not seem to be satisfactory to the plaintiff, who then called in person on the defendant, and in the course of the interview the defendant made verbal assurances of the most positive character as to Case's reliability and statements. At the trial the plaintiff testified that she relied on the verbal statements made to her by the defendant in closing the contract with Case. On re-examination she so far rectified this as to say that she also relied on the defendant's letter, and would not have let the furniture but for that letter. The trial judge charged the jury that from the evidence it appeared that the inducement to the contract rested partly on the verbal statements, and partly on the letter; "but that if they were of the opinion that the plaintiff was substantially and mainly induced by the letter to part with her furniture, the plaintiff was entitled to a verdict." The common bench sustained the charge on the ground that although there were verbal representations conspiring with the letter to induce the assent to plaintiff, yet, if she substantially relied on the letter,

the defendant ought not to escape the responsibility of the written assurance, which substantially produced the injury.

But in a case wherein it was alleged that reliance was placed on both oral and written representations, it was held that a demurrer should not be sustained if a cause of action was stated after the oral representations were stricken out *Clark v. Edgar* (1884) 84 Mo. 166, 54 Am. Rep. 84, affirming (1882) 12 Mo. App. 345.

VI. Authority of corporate agent to make representation.

If it is sought to charge a corporation by reason of a written representation as to the credit of a third person, it must appear that the agent making the writing was authorized so to do; otherwise it is ineffective to take the case out of the Statute of Frauds.

In *Liggett v. Levy* (1910) 233 Mo. 590, 136 S. W. 299, Ann. Cas. 1912C, 70, it was said that a court will not take judicial notice that the duties of a second vice president of a bank are of a sort permitting him to bind the bank and cast liability on it by false statements made in letters of recommendation. If he has such authority, it is a matter of allegation and proof, and in the absence of these the Statute of Frauds bars a recovery against the bank under the clause that the written representations or assurances must be "subscribed by the party to be charged thereby, or by some person thereunto by him lawfully authorized."

So, in *Clark v. Alexander* (1844) 8 Scott N. R. (Eng.) 147, it appeared that the representations made were in the form of annual statements of account transmitted from the defendant to the plaintiff, in regard to the financial standing of another. The accounts were signed with the initials of the defendant's firm. In holding this not to be within the statute, the court said: "It is left completely in uncertainty whether it was the handwriting of a clerk in the house, or of a partner; and although such signature, whether by a clerk or a partner, might be fully sufficient to bind the firm in any ordinary case between them and

a customer, not arising under this statute, yet the signature of the clerk would not be sufficient, as was decided by this court in *Hyde v. Johnson* (1836) 3 Scott, 289, 2 Bing. N. C. 776, 132 Eng. Reprint, 299, 2 Hodges, 94, 5 L. J. C. P. N. S. 291, to bring the case within the exception of the 1st section of the statute."

Similarly in *Nevada Bank v. Portland Nat. Bank* (1893) 59 Fed. 343, it appeared that the defendant bank had for one of its customers an insolvent lumber company, which was indebted to the bank. With intent to defraud the plaintiff and induce it to forward money to the company, it wrote a letter to the plaintiff, representing the lumber company as being "prosperous," "well organized," and "doing a large business." This letter was signed by the bank cashier. The statute (1 Hill's Code, § 786) provided as follows: "No evidence is admissible to charge a person upon representation, as to the credit, skill or character of a third party unless such representation or a memorandum thereof be in writing and either subscribed by or in the handwriting of the party to be charged." The court held that the signature of the bank cashier with his official title appended was the signature of the bank, within the meaning of the term "party to be charged" found in the statute.

In *Swift v. Jewsbury* (1874) L.R. 9 Q. B. (Eng.) 301, it appeared that a customer at a bank inquired as to the financial standing of a prospective purchaser of material, and was informed in writing by the manager that the credit of the third person was good. The plaintiff, in consequence of this letter, supplied the purchaser with goods, for which he was never paid, as the purchaser was insolvent. The court said: "The argument on behalf of the banking company is, that this is an action within § 6 of 9 Geo. IV. chap. 14, which enacts that 'no action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purport that

such other person may obtain credit, money, or goods upon, unless such representation or assurance be made in writing signed by the party to be charged therewith.' Mr. Benjamin says this representation is in writing, not signed by the party charged therewith, as indeed it is not, because, so far as the banking company is concerned, when it is signed by Goddard it is not signed as a matter of fact by the party to be charged therewith.

Justice points out, and authority supports justice in maintaining, that where a corporation takes advantage of the fraud of their agent, they cannot afterwards repudiate the agency and say that the act which has been done by the agent is not an act for which they are liable. If Parliament should so enact, well and good, but Parliament not having so enacted, the

courts have held what seems to me, if I may venture to say so, exceeding good sense as well as justice, and which in no manner conflicts with the judgment I am pronouncing to-day. Therefore, whether one looks at the strict construction of the statute, or at the interpretation which the statute may derive from antecedent reasoning, or from subsequent parliamentary legislation, or from the authority, not only of one court, but of several courts, before this case was brought to appeal here, it seems to me that the reason, the construction, and the authorities are all one way, namely, that in this case the bank cannot be made liable, because the document on which they are sought to be made liable does not come within the statutory terms under which alone they can be liable."

E. C. B.

COMMONWEALTH OF MASSACHUSETTS

v.

ALEX FRISHMAN et al.

Massachusetts Supreme Judicial Court — April 5, 1920.

(— Mass. —, 126 N. E. 838.)

Riot — unlawful parade.

1. Persons participating in a common purpose by force and violence to march and parade on a public street without permission and in violation of law are guilty of riot.

[See note on this question beginning on page 552.]

Indictment — riot — sufficiency.

2. An allegation that defendant did unlawfully, riotously, and tumultuously assemble with thirty or more other persons charges the offense of riot.

[See 8 R. C. L. 333.]

Definition — parade.

3. The passing of fifteen hundred or more persons along a public street in a city from one public hall to another, carrying flags, singing, and shouting, is a procession or parade within the meaning of a municipal regulation requiring a permit for such purpose.

Parade — unlawfulness.

4. A parade in violation of municipal regulations is unlawful.

[See 13 R. C. L. 264; 19 R. C. L. 848.]

Riot — necessity of physical act.

5. All present need not commit some physical act to constitute a riot if all present are acting in concert for the accomplishment of a common unlawful purpose.

[See 8 R. C. L. 331.]

— lack of proof — effect.

6. Proof of the stabbing of a police officer is not necessary to conviction of riot, although the indictment charging riot contains an allegation of such stabbing.

— necessity of command to disperse.

7. One may be convicted of riot at common law although there is no proof of command to disperse by officers named in the statute covering such offense.

EXCEPTIONS by defendants to rulings of the Superior Criminal Court for Suffolk County (Fessenden, J.) made during the trial of complaints charging them with rioting, which resulted in their conviction. *Overruled.*

The facts are stated in the opinion of the court.

Messrs. Thomas G. Connolly and Edward J. Casey for defendants.

Mr. Daniel M. Lyons, for the Commonwealth:

There is sufficient evidence of the existence of a riot.

Com. v. Gibney, 2 Allen, 150; State v. Mizis, 48 Or. 165, 85 Pac. 611, 86 Pac. 361; United States v. McFarland, 1 Cranch, C. C. 140, Fed. Cas. No. 15,674; United States v. Peaco, 4 Cranch, C. C. 601, Fed. Cas. No. 16,018; People v. Judson, 11 Daly, 1; Com. v. Runnels, 10 Mass. 518, 6 Am. Dec. 148; State v. Snow, 18 Me. 346; State v. Straw, 33 Me. 554; State v. Connolly, 37 S. C. L. (3 Rich.) 337; Lycoming F. Ins. Co. v. Schwenk, 95 Pa. 89, 40 Am. Rep. 629, 8 Mor. Min. Rep. 53; Reg. v. Soley, 11 Mod. 115, 88 Eng. Reprint, 935; Fost. C. L. 353.

There is sufficient evidence of the participation by these defendants in the riot.

Williams v. State, 9 Mo. 270; Green v. State, 109 Ga. 536, 35 S. E. 97, 12 Am. Crim. Rep. 542; State v. Brazil, 24 S. C. L. (Rice) 257; State v. Blair, 47 S. C. L. (13 Rich.) 93; Com. v. Knapp, 9 Pick. 518, 20 Am. Dec. 491; Bell v. Mallory, 61 Ill. 167; Newby v. Territory, 1 Or. 163; Pennsylvania v. Craig, Addison (Pa.) 190; Rex v. Royce, 4 Burr. 2073, 98 Eng. Reprint, 81; Rex v. Hunt, 1 Ld. Kenyon, 108, 96 Eng. Reprint, 933.

The opposition by the police was in performance of a lawful duty, and that which the paraders with whom the defendants were associated sought to do by violence was unlawful.

Reg. v. Howell, 9 Car. & P. 437; Redford v. Birley, 3 Starkie, 76; Clifford v. Brandon, 2 Campb. 370, 11 Revised Rep. 731.

The crime charged in the complaints is in substance a riot, and is sufficiently proven though there was no evidence that the assault alleged was committed with a knife.

Com. v. Wellington, 7 Allen, 299; Com. v. Cox, 7 Allen, 577; Com. v. Robertson, 162 Mass. 90, 38 N. E. 25; Com. v. Cody, 165 Mass. 133, 42 N. E. 575; Com. v. O'Brien, 107 Mass. 208; White v. People, 32 N. Y. 465; Com. v. Hall, 142 Mass. 454, 8 N. E. 324; Com. v. Hunt, 4 Pick. 252; Com. v.

Randall, 4 Gray, 36; Com. v. Gibney, 2 Allen, 150.

No exception will lie to a refusal to rule on a matter not material to the issue.

Com. v. Bailey, 11 Cush. 415; Com. v. Lincoln, 9 Gray, 288; Com. v. Blood, 11 Gray, 74; Com. v. Kimball, 108 Mass. 473; Fallon v. Clifton Mfg. Co. 207 Mass. 491, 93 N. E. 800; Marschall v. Aiken, 170 Mass. 3, 48 N. E. 845; Laking v. French, 183 Mass. 9, 66 N. E. 602.

The common-law offense of riot still exists in this commonwealth. The statute, Revised Laws, chap. 211, presupposes the existence of a riot and provides merely for a method of suppressing it.

State v. Russell, 45 N. H. 83; Newby v. Territory, 1 Or. 163; Com. v. Knapp, 9 Pick. 514, 20 Am. Dec. 491.

One person may be convicted of a riot in which he participated with two or more other persons, even though they are not named in the indictment nor tried together with him.

Com. v. Berry, 5 Gray, 93.

Crosby, J., delivered the opinion of the court:

These complaints, in the second counts, charge that the defendants on May 1, 1919, "did unlawfully, riotously, and tumultuously assemble with thirty or more persons, and while so unlawfully assembled as aforesaid, with a certain weapon dangerous to life, to wit, a knife, did . . . wound . . . one Samuel C. Hutchins, a police officer of said city, lawfully engaged in dispersing and suppressing such unlawful assembly. . . ." The allegations in the second counts fully and sufficiently charge the defendants with the common-law offense of a riot. **Indictment—riot—sufficiency.** Com. v. Runnels, 10 Mass. 518, 6 Am. Dec. 148; Com. v. Gibney, 2 Allen, 150; Train & H. Precedents of Indictments & Special Pleas, 456; 3 Bishop, New Crim. Proc. § 992 (2).

On May 1, 1919, a meeting of Socialists was held in the Dudley

Street Opera House in Boston. The record recites that it was an orderly meeting held for a lawful purpose; that it was largely attended, both sexes and various nationalities being present; that there were music, and speaking from the platform; that the meeting adjourned to International Hall, so called, which was more than a mile distant from the opera house; that those at the meeting and others went from the opera house up Warren street on the way to International Hall; that up to that time there were about fifteen hundred men and women and some children present; that nearly all wore some article of red, and a large number of red flags were carried, on some of which were printed words in a foreign language; that as the crowd went up Warren street there was singing in one or more foreign languages; that no American flag was carried; that from various parts in this body, there were shouts, singing, and loud cries of "Down with the millionaires! Kill the cops! To hell with the police! Hurrah Bolsheviks! To hell with the American flag!"

From this evidence it is plain that the jury were warranted in finding that the crowd of men and women walking along Warren

**Definition—
parade.**

street constituted a "procession or parade," and that the persons so participating were "marching" on a public street, as those words are used in a regulation of the board of street commissioners of the city of Boston, which regulation was in force on that day and provided that "no procession or parade containing two hundred or more persons . . . shall . . . march on any public street of the city except in accordance with a permit issued by the board of street commissioners." Stat. 1854, chap. 448, § 35; Stat. 1908, chap. 447.

No permit had been issued to this body. There was further evidence that, when the crowd reached the corner of Warren and Copeland

streets, Police Officer Wiseman stood in front of the advancing crowd and asked the man in front leading the parade if he had a permit, "and a fellow standing right behind him said, 'No, to hell with the permit!'" that the officer said, "Don't you know you ain't allowed to parade the streets without the American flag?" and he said, "To hell with the American flag, and the cops, too." The officer testified that thereupon he was wheeled around, jostled, and someone tried to trip him, and the crowd kept right on past him. There was also evidence tending to show that threats were made to police officers; that soon after a patrol wagon containing six or seven officers in charge of Sergeant Casey came up; the men jumped out of the wagon and formed a line across Warren street in front of the paraders, and Casey asked the man who appeared to be a leader if he had a permit; that none was produced; that he thereafter commanded the crowd to disperse; that the crowd surged forward and forcibly assaulted the policemen, who drew their clubs and pushed back the crowd; that the latter did not separate, but went down Bower street and threw stones and other missiles at the officers; that two shots were fired in the direction of the police; that shots were fired by both the policemen and the paraders; that one of the officers was mortally wounded, and Samuel C. Hutchins, another officer, was struck by one of the paraders with a flagstaff and was stabbed and permanently injured; that many persons were hit by blows from clubs, missiles, and shots coming from the paraders.

There was evidence that Hutchins was ordered by Casey to arrest the men with the flags, "it being Sergeant Casey's object in giving this order to thereby have under arrest the men who were leading in the parade;" that Hutchins went through the crowd to arrest one of the men with a flag "five or six rows back;" that while struggling

with this man for possession of the flag he was assaulted by the paraders and struck from behind, and also struck across the head and shoulder with a flagstaff, and was stabbed, but did not know that he had been stabbed until afterwards.

The parade, being in violation of the regulations, was unlawful. There

**Parade—
unlawfulness.**

was evidence from which it could have been found that all these defendants were in the parade and formed a part thereof. Without reciting in detail the evidence relating to the acts of each defendant, it is plain that all could have been found to have participated in a common purpose by force and violence to march and parade on a public street without per-

mission and in violation of law, and with such a finding

**Riot—unlawful
parade.**

they could have been found guilty of a riot. If the defendants were acting in concert with the others for the accomplishment of a common unlawful purpose, it is not necessary to constitute a riot that all should commit some physical act; it is

**—necessity of
physical act.**

enough if they were present, aiding and abetting by their presence. *State v. Straw*, 33 Me. 554; *State v. Snow*, 18 Me. 346. If, as the jury could have found, the defendants were present consenting to the unlawful acts, and in a position where they might render aid and assistance, they are guilty as principals. *Com. v. Knapp*, 9 Pick. 496, 518, 20 Am. Dec. 491; *Clifford v. Brandon*, 2 Campb. 358, 370, 11 Revised Rep. 731. It follows that the first and fourth requests were rightly refused.

The second request for a ruling that "there is no evidence to justify

a finding that Officer Hutchins was stabbed with a knife" could not properly have been given. While there was evidence that the officer was stabbed, there was no direct evidence that the weapon used was a knife. It would not seem to be an unwarrantable inference that a stab wound was caused by a knife; however that may be, the offense charged is a riot, a specific offense; the allegation of the assault is merely incidental to and a part of the charge of a riot, but it was not an essential part of that offense. It was not necessary to convict of a riot to show that the officer was stabbed by one of the paraders with a <sup>—lack of proof—
effect.</sup> knife, or that he

was stabbed at all. *Rev. Laws*, chap. 218, §§ 21, 34, 35; *Com. v. Hunt*, 4 Pick. 252; *Com. v. Randall*, 4 Gray, 36; *Com. v. Hall*, 142 Mass. 454, 8 N. E. 324; *State v. Russell*, 45 N. H. 83, 86. See cases collected in 18 Enc. Pl. & Pr. p. 1204. The decision in *Com. v. McCarthy*, 145 Mass. 575, 14 N. E. 643, is not at variance with the conclusion reached.

It was not necessary to convict to prove that the persons who took part in the parade were commanded to disperse by any of the officials named in *Rev. Laws*, chap. 211, § 1; the offense

**—necessity of
command to
disperse.**

charged, being a riot at common law, exists wholly independent of the statute. *State v. Russell*, *supra*. Accordingly the sixth request was rightly refused.

The presiding judge accurately instructed the jury upon the issues of law presented, and as the rights of the defendants seem to have been fully protected, the entry must be exceptions overruled.

ANNOTATION.

Unlawful parade as riot.

There seems to be comparatively little directly on this subject.

It will be seen that it is held in the reported case (*COM. v. FRISHMAN*,

ante, 549) that where 1,500 people have participated in a common purpose by force and violence to march and parade on a public street, with-

out permission and in violation of law, that purpose having been carried out, the participants are guilty of riot.

In *State v. Brazil* (1839) 24 S. C. L. (Rice) 257, it was held to be a riot where eight or ten disguised men at night paraded the street armed, and marched backwards and forwards shooting guns or pistols and blowing horns from 9 P. M. till after midnight, arousing some people, especially females, who were terrified thereby.

In *Reg. v. Soley* (1707) 11 Mod. 116, 88 Eng. Reprint, 936, Holt, Ch. J., said: "If threc come out of an alehouse and go armed, it is a riot."

In charging the jury in a murder case, King, P. J., said that if a meeting "was convened under a notification to those who attended it to come armed; if, in pursuance of such suggestion, it was attended by persons armed with deadly weapons; if the meeting so summoned and assembled adjourned to march in a body to a place principally inhabited by citizens notoriously opposed to its objects, openly exhibiting arms, and displaying banners containing inscriptions lacerating to the feelings of such citizens,—the assembly sank from the dignified position of a body of free-men exercising a great constitutional right, into a mere riot." *Com. v. Daley* (1844) 2 Clark (Pa.) 361.

In *People v. Burman* (1908) 154 Mich. 150, 25 L.R.A. (N.S.) 251, 117 N. W. 589, it was held upon trial of an information for carrying a red flag in a parade and thereby infuriating the public, in violation of an ordinance providing for the punishment of any person who shall make, aid, abet, countenance, or assist in making any riot, etc., that evidence was admissible as to how such flag was regarded by the public.

It may be noted that in *Reg. v. Clarkson* (1892) 66 L. T. N. S. (Eng.) 297, 17 Cox, C. C. 483, 56 J. P. 375, the court quashed a conviction for unlawful assembly when nine members of the Salvation Army, carrying musical instruments, but without use of them except two or three beats of a drum and two or three notes of a horn,

marched through a street on Sunday, Sunday processions accompanied by instrumental music being prohibited, although the presence of the defendants caused jeering, blows, and insults, by a large crowd, the defendants not knowing that their presence was likely to lead to a breach of the peace. In *Beatty v. Gillbanks* (1882) L. R. 9 Q. B. Div. (Eng.) 308, 51 L. J. Mag. Cas. N. S. 117, 47 L. T. N. S. 194, 31 Week. Rep. 275, 15 Cox, C. C. 138, 46 J. P. 789, it was held that a parade of a Salvation Army, the leaders knowing that it will probably bring on riots and disturbance of the peace by those opposed to such a parade, is not an unlawful assembly.

In *Re Frazee* (1886) 63 Mich. 396, 6 Am. St. Rep. 310, 30 N. W. 72, Campbell, Ch. J., in holding unconstitutional an ordinance prohibiting unlicensed parades with musical instruments, banners, and flags, or with singing and shouting (a Salvation Army case), the court said: "It has been customary, from time immemorial, in all free countries, and in most civilized countries, for people who are assembled for common purposes to parade together, by day or reasonable hours at night, with banners and other paraphernalia, and with music of various kinds. These processions for political, religious, and social demonstrations are resorted to for the express purpose of keeping up unity of feeling and enthusiasm, and frequently to produce some effect on the public mind by the spectacle of union and numbers. They are a natural product and exponent of common aims, and valuable factors in furthering them. They are only found to any appreciable extent in places having collected inhabitants, for spectators are generally as important as members. They are among the incidental conditions of city life, and are as much to be expected, on suitable occasions, as any other public meetings, and not necessarily any more dangerous. They are, however, capable of perversion to bad uses, and, when so perverted, may be dangerous. When people assemble in riotous mobs, and

move for purposes opposed to private or public security, they become unlawful, and their members and abettors become punishable. These dangers are as well known as the customs themselves are, and are sometimes very great dangers. There may be times and occasions when such assem-

blies may for a while be dangerous in themselves, because of inflammable conditions among the population. All of these things are as ancient as the law, and are generally within reach of the law, unless the law itself is, for the time, suspended by military necessity." B. B. B.

A. C. BECK, Appt.,
v.
WILKINS-RICKS COMPANY.

North Carolina Supreme Court — February 25, 1920.

(— N. C. —, 102 S. E. 813.)

Evidence — burden of proof — negligence of repair man.

1. One seeking to hold another liable for destruction by fire of an automobile left with him for repair has the burden of showing negligence on his part.

[See note on this question beginning on page 559.]

Bailment — repair man — liability for returning property.

2. One with whom an automobile is left for repairs does not assume liability as insurer and is not liable for the destruction of the machine by fire if he observed ordinary care for its safe-keeping.

[See 3 R. C. L. 94, 116.]

— destruction by fire — liability.

3. One with whom an automobile is left for repairs is not relieved from his liability to return it by its destruction by fire, unless he exercised ordinary care for its protection.

[See 2 R. C. L. 1210.]

Evidence — duty to go forward with proof.

4. After the owner of an automobile left with another for repair shows that it was destroyed by fire while in the possession of the repair man, the latter must go forward with evi-

dence that he used proper care in the bailment in order to escape liability for the loss.

[See 2 R. C. L. 1210; 3 R. C. L. 151-153.]

Bailment — failure to return goods — effect.

5. Failure of a bailee to return the goods in good condition is a breach of the contract of bailment which, if unexplained, entitles the bailor to recover.

[See 2 R. C. L. 1210; 3 R. C. L. 151.]

Appeal — nonsuit — taking evidence as true.

6. Upon appeal from a nonsuit in an action against a bailee for failure to return the property bailed, evidence tending to show negligence, with all just inferences that can be drawn therefrom, must be taken as true.

(Allen, J., dissents.)

APPEAL by plaintiff from a nonsuit granted by the Superior Court for Lee County (Connor, J.) in an action brought to recover damages for the destruction of his automobile by fire while in defendant's garage for repairs. *Reversed.*

Statement by Clark, Ch. J.:

Action for damages for the destruction of an automobile while in the defendant's garage for repairs. It was in evidence that the plaintiff carried his car to the garage for certain minor repairs, and was to call for it at noon, it being understood that he would need it at that time. When he called for it at that time he was told that it would take only a short time longer, not more than thirty minutes. The plaintiff then stated that he would call for it when he came back from dinner, but, being delayed, he went at 5 P. M., and found his automobile torn down and the defendant's employees grinding the valves, which had not been authorized by plaintiff. The answer admits that the machine was not in such condition that it could be removed that afternoon. It is alleged in the complaint and admitted in the answer that during that night the building was destroyed by fire, and the car with it. The complaint alleges the liability for negligence, and also for departure from the terms of the bailment, and also a promise to pay by the company after the destruction of the machine. At close of plaintiff's evidence the court sustained a motion for judgment as of nonsuit, and the plaintiff excepted and appealed.

Messrs. E. L. Gavin, Williams & Williams, and Hoyle & Hoyle for appellant.

Messrs. Seawell & Milliken, for appellee:

A bailee for hire is not an insurer of the property in his possession, but is only liable for a failure to use ordinary care.

Henderson v. Bessent, 68 N. C. 223, 1 Am. Neg. Cas. 925; Ashford v. Pittman, 160 N. C. 45, 75 S. E. 943.

The burden was on plaintiff to plead and prove the existence of negligence as the cause of the fire.

Levi v. Missouri, K. & T. R. Co. 157 Mo. App. 536, 138 S. W. 699; Claffin v. Meyer, 75 N. Y. 260, 31 Am. Rep. 467; Kahn v. Atlantic & N. C. R. Co. 115 N. C. 638, 20 S. E. 169; Young v. Wilmington & W. R. Co. 116 N. C. 932, 21 S. E. 177.

Clark, Ch. J., delivered the opinion of the court:

The defendant as bailee assumed liability of ordinary care for the safe-keeping and the return of the machine to the bailor in good condition. The bailee did not assume liability as insurer, and therefore did not become liable

for the nonreturn of the property in good condition if he observed the ordinary care devolved upon him by reason of the bailment. If the machine had been injured or stolen or destroyed by fire while in his custody, the defendant would not be liable if such care had been observed. On the other hand, the mere fact that the property had been destroyed by fire or stolen did not absolve him from responsibility,

**Bailment—
repair man—
liability for
returning
property.**

any more than he would have been absolved if it had been injured in his custody, unless he had shown that he had used the care required of him by virtue of his bailment. The burden of proving negligence was on the plaintiff, and this burden does not shift; but when it was shown, or admitted, that the machine was not returned by reason of its being destroyed or stolen, or that it was returned in injured condition, it was the duty of the defendant to "go forward" with proof

**—destruction by
fire—liability.**

to show that it had used proper care in the bailment. Therefore it was error for the court to withdraw the case from the jury, and thus to hold, as a matter of law, that the defendant had exercised proper care.

**Evidence—
burden of
proof—negli-
gence by
repair man.**

The law is admirably summed up and stated, upon a review of all the authorities, in 6 C. J. pp. 1157-1160, as follows:

"Sec. 156. In an action to recover the bailed property the burden of proof is on the bailor to establish the bailment and the failure to return the property in accordance with the contract."

"Sec. 158. The rule is undoubted

that in all actions founded upon negligence, or a culpable breach of duty, the burden is on plaintiff to establish negligence by proof. This principle is recognized by all the authorities as applicable between bailor and bailee, and the only conflict is on the question whether the loss of, or damage to, the goods while in the bailee's possession raises such a presumption of negligence on his part as to establish a *prima facie* case against him.

"Sec. 159. In some of the older decisions it was held that the loss or injury raised no presumption of negligence. The bailee is not an insurer of the goods, and when they are lost or damaged it was said that the law, which never presumes any man negligent, would rather attribute the loss to excusable causes. It was not enough for plaintiff to prove the loss or injury, but it was held that he must go further and must show that the same had occurred by defendant's negligence.

"Sec. 160. Modern Rule:—The rule adopted in the more modern decisions is that the proof of loss or injury establishes a sufficient *prima facie* case against the bailee to put him upon his defense. Where chattels are delivered to a bailee in good condition and are returned in a damaged state, or are lost or not returned at all, the law presumes negligence to be the cause, and casts upon the bailee the burden of showing that the loss is due to other causes consistent with due care on his part. But if the possession of the bailee has not been exclusive of that of the bailor the rule does not apply. In order to throw the burden of evidence upon the bailee it is sufficient that the bailor has shown damage to the bailed article that ordinarily does not happen where the requisite degree of care is exercised."

The above is sustained by the almost uniform authorities cited in the notes to the above, and the reasons are thus summed up: "Reasons of Rule:—(1) 'Since the bailor is generally at a disadvantage in

obtaining accurate information of the cause of the loss or damage, the law considers he makes out a case for the application of the rule of *res ipsa loquitur* by proof of the bailment and the failure of the bailee to deliver the property on proper demand.' *Corbin v. Gentry & F. Cleaning & Dyeing Co.* 181 Mo. App. 151, 155, 167 S. W. 1145. (2) 'The rule rests upon the consideration that where the bailee has exclusive possession the facts attending loss or injury must be peculiarly within his own knowledge. Besides, the failure to return the property, or its return in an injured condition, constitutes the violation of a contract, and it devolves upon the bailee to excuse or justify the breach.' *Nutt v. Davison*, 54 Colo. 586, 588, 44 L.R.A.(N.S.) 1170, 131 Pac. 391. (3) 'The rule is founded in necessity and upon the presumption that a party who, from his situation, has peculiar, if not exclusive, knowledge of facts, if they exist, is best able to prove them. If the bailee, to whose possession, control, and care the goods are intrusted, will not account for the failure or refusal to deliver them on demand of the bailor, the presumption is not violent that he has been wanting in diligence, or that he may have wrongfully converted or may wrongfully detain them; or, if there be injury to or loss of them during the bailment, it is but just that he be required to show the circumstances, acquitting himself of the want of diligence it was his duty to bestow.' *Davis v. Hurt*, 114 Ala. 146, 150, 21 So. 469, quoted in *Hackney v. Perry*, 152 Ala. 626, 633, 44 So. 1031."

In 6 C. J. 1160, the conclusion from the long list of authorities and citations in the notes is thus summed up: "The burden of proof of showing negligence is on the bailor, and remains on him throughout the trial. The presumption arising from the injury to the goods or failure to redeliver is sufficient to satisfy this burden and make out a *prima facie* case against the bailee; but the bailee may overcome this

presumption by showing that the loss occurred through some cause consistent with due care on his part."

This summing up is based, among other citations, upon the very clear statement of this court by Walker, J., in *Hanes v. Shapiro*, 168 N. C. 31, 84 S. E. 37, in which, after stating that some of the old authorities were somewhat different, Walker, J., says: "But the better opinion, supported by the weight of authority, holds that while the burden of proving negligence rests upon the plaintiff and does not shift throughout the trial, the burden of proceeding does shift; and that where the plaintiff has shown that the bailee received the property in good condition and failed to return it, or returned it injured, he has made out a prima facie case of negligence."

He further says (168 N. C. 32) "Unless the bailee overcomes this prima facie case by satisfying the jury that the loss or damage was consistent with the absence of fault on his part, the plaintiff may prevail."

And he further says (168 N. C. 33): "But those rules are, of course, subject to the qualification that the bailee is bound, in all proper instances, when intrusted with the bailee's property, to exercise due care with respect to the subject."

This entitled the plaintiff to have the facts of this case submitted to the jury. The authorities to the above effect are numerous, and the more recent authorities are uniform to that effect.

While the destruction or loss of property is not conclusive of negligence, the failure to return the property does devolve upon the defendant the burden of going forward with proof to show that it discharged its duty of

-duty to go forward with proof.

requisite care of the property while in its custody. It would be singular if the mere fact that the property was destroyed or stolen or injured was conclusive that the bailee had exercised proper care. It had the best

knowledge of the facts, and if proof thereof was not forthcoming, the presumption is that it could not produce it.

To the same effect are the other textbooks and authorities. In 3 R. C. L. 151 (Bailment, § 74), when explaining the apparent conflict of the later with the older cases on this point as due to the confusion between "the burden of the proof" and "duty of going forward," it is said: "The general rule, at least in the United States, seems to be that where a bailor alleges and proves simply the delivery of the property to the bailee and the latter's failure to return it on demand, a prima facie case is made out against the bailee."

In 3 R. C. L. p. 152, § 75, it is said that there are authorities which support the broad doctrine that "the burden of proving freedom from negligence by a preponderance of the evidence, where the property is damaged or destroyed, . . . is on the bailee, although it would seem that some of the cases containing language which in itself might indicate such a doctrine must, in view of other decisions in the same state, be taken simply as authority for the proposition that, in case of injury to or loss of the property, the burden of overcoming a presumption of negligence rests on the bailee."

In 2 R. C. L. 1210 (Automobiles, § 46), it is said: "It may be accepted as settled that persons operating a garage are required to exercise reasonable care to protect and preserve automobiles placed in their custody for storage or repairs, and if an automobile so placed is injured or destroyed on account of negligence of the garage keeper or his servants while acting within the scope of their authority, the garage keeper is liable therefor. . . . On proof of the delivery of a car into a garage, . . . if the garage keeper is unable, by reason of the destruction of a car, to make return thereof, the burden is cast on him

to show that the car was not destroyed by his negligence."

In *Hale on Bailments*, p. 241, it is said that "a failure or refusal by a warehouseman to deliver on demand goods intrusted to him, or a return of the goods in a damaged condition, is prima facie evidence of negligence sufficient to cast upon him the burden of accounting for nondelivery. In other words, the burden of proving negligence rests on plaintiff throughout, but the weight of evidence may shift"—citing authorities.

It is further said that "the burden of the proof does not shift, but the failure to return, or the destruction or injury of the property, is such prima facie evidence of negligence that there devolves upon the bailee the duty of going forward with proof that he exercised proper care."

This is simply another way of saying that the failure to return the goods in good condition is a breach of the contract of bailment, which, if unexplained, entitles the bailor to recover, and that when the bailee claims that the property has been destroyed or stolen or injured without any fault on its part, it is called on to put on some proof of the circumstances thereof. These occurrences being out of the ordinary course of events, and the facts being peculiarly in the knowledge of the bailee, are sufficient evidence of negligence to carry the case to the jury.

The whole subject is exhaustively discussed in the text and notes to 6 C. J. and R. C. L. above cited, and we think the present doctrine on the subject and the reason of the thing are nowhere more clearly set out than in the quotation from *Hanes v. Shapiro*, above set out in *Corpus Juris*, from the opinion of Mr. Justice Walker, which we think states accurately the correct conclusion.

It would be a singular proposition if the plaintiff, who has intrusted his property to the care of the de-

fendant, should find the latter protected from liability for loss of or injury to the property without any proof of the discharge of his duty as bailee, though such evidence is in his special knowledge, unless the plaintiff (who is often a stranger) shall grope around among the defendant's employees to find evidence of the negligence of their employer or of their coemployees. The destruction or theft of the property, or injury thereof, not being in the ordinary course, calls upon the bailee to explain it, just as a collision or derailment is prima facie negligence which carries the case to the jury. *Marcom v. Raleigh & A. Air Line R. Co.* 126 N. C. 200, 35 S. E. 423, and citations in annotated edition.

In this case there was some additional evidence tending to show negligence; among others, the fact that there was, on the day the machine was left in the garage, remains of half-smoked cigarettes lying around, and that after the fire the representative of the defendant promised to pay for the loss of the machine. This evidence must be taken as true upon a nonsuit, with all just inference that can be drawn therefrom, as, for instance, that the agent of the company had information that negligence caused the fire.

We need not, however, discuss (as the case goes back for a new trial) whether the defendant is bound by such promise, for the authority of the party making such agreement is not fully brought out in the evidence. For the same reason, also, we need not consider the exceptions by the plaintiff to the evidence.

It is sufficient to say, upon the above authorities, that the failure of the bailee to return the property, with the admission that it has been burned, made out a prima facie case, which devolved upon the defendant the duty of going forward with proof that it had discharged its duty of proper care while intrusted

**Bailment—
failure to return
goods—effect.**

**Appeal—
nonsuit—taking
evidence as true.**

with the custody of the plaintiff's automobile. Upon the evidence, this was the proper subject of inquiry which the plaintiff was entitled to have investigated by the jury.

The judgment of nonsuit is reversed.

Allen, J., dissenting:

The plaintiff delivered his automobile to the defendant to be repaired in its garage, and it was destroyed by fire. There is no evidence as to the origin of the fire, or of negligence on the part of the defendant. I think the rule applicable to these facts is correctly stated by Associate Justice Walker in *Hanes v. Shapiro*, 168 N. C. 31, 84 S. E. 37, as follows: "But the better opinion, supported by the weight of authority, holds that while the burden of proving negligence rests upon the plaintiff, and does not shift throughout the trial, the burden of proceeding does shift; and that where the plaintiff has shown that the bailee received the property in good condition and failed to return it, or returned it injured, he has made out a prima facie case of negligence. When he has shown a situation which could not have been produced except by the operation of abnormal

causes, the onus rests upon the defendant to prove that the injury was caused without his fault.' *Res ipsa loquitur*. Unless the bailee overcomes this prima facie case by satisfying the jury that the loss or damage was consistent with the absence of fault on his part, the plaintiff may prevail. Where the bailee makes such showing, however, as where it appears that the property was stolen or injured by vis major, the burden of proceeding shifts back to the plaintiff, and he must show that the bailee was negligent in exposing the property to risk of harm, or in failing to avoid the danger after it was known. In other words, the weight of the evidence may be in favor first of one party and then the other, but the burden of establishing the issue in his favor rests on plaintiff throughout. *Hale, Bailm.* pp. 31 & 32."

It is not disputed that the automobile was destroyed by fire, vis major, and, if so, the prima facie case made by showing delivery and failure to return was destroyed, and he could not recover without furnishing evidence of negligence, which he has failed to do.

As it appears to me, the judgment of nonsuit ought to be sustained.

ANNOTATION.

Presumption and burden of proof where subject of bailment is destroyed or damaged by fire.

I. Introduction, 559.

II. Burden of proof:

a. In general, 561.

b. Under statutes, 568.

III. Presumptions; duty to "go forward" with the evidence, 569.

IV. Rule as affected by pleadings or form of action, 575.

I. Introduction.

The note does not purport to include carrier cases except those dealing with questions of presumption and burden of proof common to carriers and bailees generally, so that, as a rule, cases involving carriers are included only where the responsibility of the carrier was that of warehouseman. Nor does the note include such cases as *Leland v. Chicago, M. & St. P. R.*

Co. (1885) — *Iowa*, —, 23 N. W. 390, which deal merely with the degree of care on the part of the bailee to guard the property against fire.

The questions under annotation as to the burden of proving negligence and as to presumptions of negligence, where the subject-matter of the bailment is destroyed by fire, are not free from difficulty, due in part to differences of opinion of the different

courts, but more especially to confusion in the use of the phrase "burden of proof," and to the fact that there is usually some evidence as to the circumstances of the fire, and the question whether negligence may be presumed from the fact of the fire arises in connection with the circumstances of the particular case. The terms "burden of proof" and "going forward" with the evidence are, of course, quite distinct, when properly used, a duty to go forward with the evidence frequently resting on one who does not have the ultimate burden of proof.

The rule seems to be well settled that a prima facie case is ordinarily made out for the bailor when he proves the bailment and a failure to return the property on demand. The duty then devolves on the bailee to "go forward" with evidence to rebut this prima facie case. The important question for the purposes of this note would seem to be whether proof of destruction by fire is in itself sufficient in rebuttal, or whether an inference may be drawn from the mere fact of the fire that the bailee was negligent, imposing on the bailee the duty of producing evidence as to the circumstances of the fire sufficient to show, at least prima facie, that he exercised due care. If no such inference arises, as the majority of the cases holds, then it would seem that, the failure to return the property being accounted for by a cause not in itself tending to show negligence, the bailor's prima facie case disappears and he still has the duty of going forward with the evidence, as at first, to prove that the loss was due to the bailee's negligence. This is the view sustained, apparently, by the weight of authority.

It must be apparent that, on the question under consideration, cases of loss by other causes than by fire, while valuable sometimes for argumentative purposes, are by no means conclusive authority. Losses by theft would appear to be closely analogous. But the cause of the loss, if such as in its very nature usually occurs only through the bailee's negligence, may clearly be insufficient to rebut the bailor's prima facie case. For in-

stance, in an action against a warehouseman to recover damages to goods caused by the collapse of the warehouse, the court in *Kaiser v. Latimer* (1899) 40 App. Div. 149, 57 N. Y. Supp. 833, in holding that the complaint was erroneously dismissed at the conclusion of the plaintiff's evidence, since the collapse of the warehouse from no external violence made out a prima facie case requiring submission to the jury of the question of negligence, said: "The accident which caused the loss here is of a different character from that of fires or thefts by burglary. Fires are very numerous, especially in cities. . . . Though at times occasioned by negligence, it is in very many cases impossible to discover their origin, and often, when discovered, it appears that the fires were not occasioned by fault or negligence on the part of anyone. It is almost equally difficult to guard against thefts and burglaries. But the collapse or fall of a building from no external violence, nor earthquake or similar cause, is almost invariably the result of negligence, either in the construction of the building or in overloading it. It is so exceptional an occurrence that it is difficult to imagine a case to which the rule '*res ipsa loquitur*' would more forcibly apply."

See also *Noel & Co. v. Schuur* (1918) 140 Tenn. 245, 204 S. W. 632, where the court distinguishes, as respects the burden of proof, between cases where the property bailed was lost by fire or theft while in the possession of the bailee, and a case where perishable goods were damaged while in cold storage.

A distinction should be observed between the question of burden of proving negligence and burden of proving that the property was in fact destroyed by fire. While the bailee, on the latter question, may have the burden of proof, it does not follow necessarily that the burden of proof as to negligence is upon him. See *Stone v. Case* (1912) 34 Okla. 5, 43 L.R.A. (N. S.) 1163, 124 Pac. 960. In this case the court approved the rule that the bailee has the burden of proving an affirmative defense set up by him

that the property was destroyed by fire, although holding that the ultimate burden of proving facts necessary to recovery was on the plaintiff, the bailor.

And the question of burden of proof that the property was in fact burned arose in *Marshall v. Andrews* (1899) 8 N. D. 364, 79 N. W. 851, where the plaintiff delivered wheat at the defendant's warehouse for storage. More than a month later the warehouse, with its contents, was destroyed by fire. The plaintiff, after demand and refusal to redeliver the property, brought an action for its delivery or for its value. The answer set up the destruction of the warehouse and the plaintiff's wheat by fire, and the reply, while admitting the destruction of the warehouse, denied that the plaintiff's wheat was therein at the time. It was held that the burden of proof that the property had been destroyed by fire was on the defendant, especially in view of the custom of shipping out grain soon after arrival. But irrespective of this custom, the burden of proof that the property was destroyed, it was held, rested on the bailee.

In this connection it may be observed that the bailee's proof that the property bailed has been in fact destroyed by fire will ordinarily, it seems, disclose something as to the circumstances of the fire, as, for instance, whether the building in which the property was stored was burned, or only the contents, and these additional circumstances may either aid or tend to repel the inference of a non-negligent origin. Thus, in *International Film Traders v. Shapiro* (1914) 150 N. Y. Supp. 96, it was held error to dismiss an action for damages for loss of a moving picture film which the defendant, as bailee, failed to return, on the defendant's mere allegation that the film had been destroyed by fire by reason of its defective condition, without evidence even that a fire had occurred or that the film had been destroyed, since the *prima facie* case made by the plaintiff in proving that the film, when delivered to the defendant, was in good condition, and

9 A.L.R.—36.

was not returned, had not been rebutted by the bailee, who should have proved that it had been destroyed without his negligence.

Of course, the bailee's mere allegation, without proof, that he is unable to return the property because it has been destroyed by fire, will not excuse him from liability. In view of the fact that the bailee has the burden of proving that the property was in fact destroyed by fire, and that to do so he must ordinarily prove something as to the nature of the fire, and that his proof usually shows *prima facie* that the fire, if it originated on his premises, was of unknown or at least uncertain origin, there seems to be less injustice than would otherwise appear in the rule, supported by the majority of the cases, that the bailor has the burden of proving negligence of the bailee, and that no presumption or inference of negligence arises from the mere fact of the fire.

II. Burden of proof.

a. In general.

See in this connection, as to the distinction between burden of proof as to negligence and burden of proof that the property was destroyed by fire, *supra*, I.

Using the term "burden of proof" in the sense of ultimate burden of establishing facts necessary to recovery, and not in the sense merely of a duty to "go forward" with the evidence, the authorities in general hold that the burden of proof to establish negligence on the part of the bailee, where the property is destroyed by fire, is on the bailor.

United States.—*De Grau v. Wilson* (1883) 17 Fed. 698, affirmed in (1884) 22 Fed. 560; *Strauss v. Wilson* (1883) 17 Fed. 701.

Alabama.—*Seals v. Edmondson* (1882) 71 Ala. 509; *Bricken v. Sikes* (1915) 14 Ala. App. 187, 68 So. 801.

Arkansas.—*St. Louis, I. M. & S. R. Co. v. Bone* (1889) 52 Ark. 26, 11 S. W. 958; *Kansas City, Ft. S. & M. R. Co. v. Sharp* (1897) 64 Ark. 115, 40 S. W. 781; *James v. Orrell* (1900) 68 Ark. 284, 82 Am. St. Rep. 293, 57 S. W. 931. See also *Little Rock, M. R. & T. R. Co.*

v. Talbot (1882) 39 Ark. 523 (action against carrier exempted by contract from loss by fire).

California.—Wilson v. Southern P. R. Co. (1882) 62 Cal. 164 (see other California cases under IV. *infra*).

Illinois.—Standard Brewery v. Hales & C. Malting Co. (1897) 70 Ill. App. 363, affirmed in (1898) 171 Ill. 602, 49 N. E. 507; Chicago, R. I. & P. R. Co. v. Kendall (1897) 72 Ill. App. 105; Ford Motor Co. v. Osburn (1908) 140 Ill. App. 633; Bryan v. Chicago & A. R. Co. (1912) 169 Ill. App. 181; Nichols v. Union Stock Yards & Transit Co. (1915) 193 Ill. App. 14.

Iowa.—Denton v. Chicago, R. I. & P. R. Co. (1879) 52 Iowa, 161, 35 Am. Rep. 263, 2 N. W. 1093; Hunter v. Ricke Bros. (1905) 127 Iowa, 108, 102 N. W. 826, 18 Am. Neg. Rep. 68.

Louisiana.—McCullom v. Porter (1865) 17 La. Ann. 89.

Maine.—Dinsmore v. Abbott (1896) 89 Me. 373, 36 Atl. 621; Sanford v. Kimball (1910) 106 Me. 355, 138 Am. St. Rep. 345, 76 Atl. 890 (rule approved).

Massachusetts.—Cox v. Central Vermont R. Co. (1898) 170 Mass. 129, 49 N. E. 97.

Mississippi.—Meridian Fair & Exposition Asso. v. North Birmingham Street R. Co. (1893) 70 Miss. 808, 12 So. 555; Yazoo & M. Valley R. Co. v. Hughes (1908) 94 Miss. 242, 22 L.R.A.(N.S.) 975, 47 So. 662.

New York.—Lamb v. Camden & A. R. & Transp. Co. (1871) 46 N. Y. 271, 7 Am. Rep. 327; J. Russell Mfg. Co. v. New Haven S. B. Co. (1872) 50 N. Y. 121; Claflin v. Meyer (1878) 75 N. Y. 260, 31 Am. Rep. 467 (rule approved); Draper v. Delaware & H. Canal Co. (1889) 118 N. Y. 118, 23 N. E. 131; Stewart v. Stone (1891) 127 N. Y. 500, 14 L.R.A. 215, 28 N. E. 595; Labowitz v. Frankfort (1893) 4 Misc. 275, 23 N. Y. Supp. 1038, 1 Am. Neg. Cas. 916; Liberty Ins. Co. v. Central Vermont R. Co. (1897) 19 App. Div. 509, 46 N. Y. Supp. 576; Grieve v. New York C. & H. R. R. Co. (1898) 25 App. Div. 518, 49 N. Y. Supp. 949; Allen v. Fulton Motor Car Co. (1911) 71 Misc. 190, 128 N. Y. Supp. 419. See also Cochran v. Dinsmore (1872) 49 N. Y. 249 (carrier

under fire exception clause); Whitworth v. Erie R. Co. (1882) 87 N. Y. 413 (same); Sutro v. Fargo (1876) 9 Jones & S. 231 (same).

North Carolina.—Kahn v. Atlantic & N. C. R. Co. (1894) 115 N. C. 638, 20 S. E. 169; Lyman v. Southern R. Co. (1903) 132 N. C. 721, 44 S. E. 550; Eley v. Atlantic Coast Line R. Co. (1914) 165 N. C. 78, 80 S. E. 1064; Hanes v. Shapiro (1914) 168 N. C. 24, 84 S. E. 33; J. L. Hemphill & Co. v. Southern R. Co. (1915) 170 N. C. 454, 87 S. E. 336; BECK v. WILKINS-RICKS Co. (reported herewith) ante, 554.

Oklahoma.—Stone v. Case (1912) 34 Okla. 5, 43 L.R.A.(N.S.) 1168, 124 Pac. 960; Standard Marine Ins. Co. v. Traders Compress Co. (1915) 46 Okla. 356, 148 Pac. 1019.

Pennsylvania.—Farnham v. Camden & A. R. Co. (1867) 55 Pa. 53; National Line S. S. Co. v. Smart (1884) 107 Pa. 492; Tower v. Grocers Supply & Storage Co. (1893) 159 Pa. 106, 28 Atl. 229; Light v. Miller (1909) 38 Pa. Super. Ct. 408.

Tennessee.—Lancaster Mills v. Merchants' Cotton-Press & Storage Co. (1890) 89 Tenn. 1, 24 Am. St. Rep. 536, 14 S. W. 317; Noel & Co. v. Schuur (1918) 140 Tenn. 245, 204 S. W. 632 (obiter). See also Louisville & N. R. Co. v. Manchester Mills (1890) 88 Tenn. 653, 14 S. W. 314.

Texas.—Texas & P. R. Co. v. Morse (1883) 1 Tex. App. Civ. Cas. (White & W.) 179; Texas & P. R. Co. v. Capps (1883) 2 Tex. App. Civ. Cas. (Willson) 35; Texas & P. R. Co. v. Wever (1885) 3 Tex. App. Civ. Cas. (Willson) 85; Thornton v. Daniel (1916) — Tex. Civ. App. —, 185 S. W. 585; American Exp. Co. v. Duncan (1917) — Tex. Civ. App. —, 193 S. W. 411.

The fact that in some of the authorities above cited the "burden of proof" is spoken of as shifting, and that the court did not limit the use of the term directly to the meaning herein attached to it, does not, apparently, necessarily impair the authority of the case on the above proposition.

The burden of proof, it was said in Liberty Ins. Co. v. Central Vermont R. Co. (1897) 19 App. Div. 509, 46 N. Y. Supp. 576, *supra*, is on the plaintiff

who alleges negligence against a warehouseman, if the latter accounts for his failure to deliver the goods by showing their destruction by fire, and the burden is never shifted; so that while a demand and a refusal to deliver, if unexplained, are sufficient *prima facie* to show negligence, if it appears either in the plaintiff's or defendant's proof that the goods were lost by fire, the evidence must show that the fire arose from the warehouseman's negligence.

And where it appeared, in an action against a railway company warehouseman for goods destroyed by fire at destination, that the railway company was in no manner responsible for the origin of the fire, which started some blocks away from the place where the property was located, but there was no evidence to show whether proper watchman service was provided, it was held in *Chicago, R. I. & P. R. Co. v. Kendall* (1897) 72 Ill. App. 105, *supra*, that the burden to show affirmatively that the defendant was guilty of negligence was on the plaintiff.

In *Texas & P. R. Co. v. Capps* (1883) 2 Tex. App. Civ. Cas. (Willson) 35, *supra*, it was said: "Where goods in the care of a warehouseman are destroyed by fire, and this fact is shown, the warehouseman is not liable for the loss of the goods unless it be proved that the loss was occasioned by the neglect of the warehouseman, his agents, employees, or servants, and the burden of proving such negligence devolves upon the plaintiff."

And in an action against a railroad company holding goods as warehouseman, for the value of the goods destroyed by a fire which consumed the warehouse and its contents, the court in *Texas & P. R. Co. v. Morse* (1883) 1 Tex. App. Civ. Cas. (White & W.) 179, *supra*, said: "In actions against warehousemen, as against other bailees, the onus of proof rests with the party holding the affirmative on the pleadings. . . . Negligence is a wrong and not to be presumed. . . . Where the proof shows a total default in delivering the goods, or a failure to account for their nondelivery, a *prima facie* case of negligence is made

out, and the burden of proof is then shifted to the defendant to rebut their *prima facie* negligence by evidence that the loss did not happen in consequence of his neglect to use all that care and diligence that a prudent or careful man would exercise in relation to his own property. . . . In this case the loss of the goods was accounted for, when demanded, by appellants showing they had been destroyed by fire, and the burden was upon the plaintiff to show that the fire was the result of want of ordinary care on part of defendant or its employees."

It was held in *Stone v. Case* (Okla.) *supra*, that in an action against the bailee for loss of property, where it is alleged that the loss was caused by fire, and that the fire was due to the negligence of the bailee, it is error to instruct the jury that the burden is on the defendant to prove that he was not negligent. The court said: "In alleging a loss by fire, the defendant was relieved of the presumption of negligence, and in alleging that the fire was caused by negligence, plaintiff assumed the burden of proving such negligence. Her right of recovery is based upon defendant's negligence. She must prove this negligence in order to fix a liability on him. For under the great weight of authority, and under the light of reason, where the loss of bailor's property is occasioned by fire, robbery, burglary, or theft, or by any means which would ordinarily and reasonably seem to be unavoidable, the bailee is relieved of the presumption of negligence in the loss, and of the consequent burden of interposing an affirmative defense."

So, in *James v. Orrell* (1900) 68 Ark. 284, 82 Am. St. Rep. 293, 57 S. W. 931, *supra*, where the destruction by fire of property bailed seems to have been conceded, the bailor, in an action for damages against the bailee, alleging the destruction through the bailee's negligence in permitting certain conditions to exist which rendered fire more probable, and the bailee denying the allegations of negligence, it was held, on appeal by the bailee, that an instruction was errone-

ous that, the loss of the property being admitted, the burden was on the defendant to show that the loss was not caused by his negligence, and to refuse to instruct the jury, as requested by the defendant, that the burden of proving negligence was on the plaintiff.

Also, in *Lamb v. Camden & A. R. & Transp. Co.* (1871) 46 N. Y. 271, 7 Am. Rep. 327, supra, an action against a railroad company whose responsibility was that of a bailee for hire, for failure to deliver cotton which the defendants proved had been destroyed when their dock was burned, the defendants, after proving that the loss had occurred by fire, the evidence in this connection showing that the fire originated on a boat of the defendants lying at the dock, proposed to rest its case; but the court ruled that the defendants would not be exonerated by proof that the loss was occasioned by fire, unless they also showed that the destruction by fire was not due to their negligence, and also instructed the jury that the defendants "were not relieved from the burden of satisfying the jury that the loss which, it is beyond doubt, happened by fire, was not occasioned by negligence on their part." On appeal by the defendants these rulings were held to be error. It was said: "The question is whether, in case of loss by a bailee for hire, the bailor can recover upon simple proof of loss unless the bailee shall prove that he was free from all negligence contributing to such loss, or whether the bailor must go further, and prove that the loss was caused by the negligence of the bailee. . . . So stated, no one will hardly insist that the bailor can recover without affirmatively proving that the loss was caused by the negligence of the bailee. . . . In the present case, to entitle the plaintiffs to recover, they were bound to prove that the fire which consumed the cotton resulted from the negligence of the defendants. . . . The plaintiffs' counsel insisted that the defendants were bound to prove that they had not been guilty of negligence, and that the defendants' case must then be exhausted. The court

thereupon decided that the burden of proof was on the defendants, to show that the destruction of the cotton by fire was not caused by negligence on their part. This was error. Although in proving the destruction of the cotton by fire, it appeared that the fire originated on a boat of the defendants lying at their dock, this was only evidence tending to show negligence of the defendants. Whether sufficient prima facie to entitle the plaintiffs to a verdict is a question not necessary to decide, as no ruling thereon was made by the court. Be that as it may, the burden was still upon the plaintiffs to establish, to the satisfaction of the jury from all the evidence, that the fire was the result of the negligence of the defendants. Other evidence was given making the question of the defendants' negligence, in respect to the fire, proper to be decided by the jury."

On the authority of *Lamb v. Camden & A. R. & Transp. Co.* (N. Y.) supra, a ruling in an action against an express company for the nondelivery of property received by it for transportation, and destroyed by fire which consumed the vessel at destination, that the burden of proof rested on the defendants, or that, at least, they must present some testimony as to the circumstances occasioning the loss, so that the jury might say whether it happened by the defendants' fault or gross negligence, was held erroneous in *Cochran v. Dinsmore* (1872) 49 N. Y. 249.

And where a railroad company's liability as a common carrier had ceased when the property was destroyed by a fire which consumed its depot, it was held in *Kahn v. Atlantic & N. C. R. Co.* (1894) 115 N. C. 638, 20 S. E. 169, supra, that the court erroneously instructed the jury, in an action for damages, that the burden of proof was on the defendant to show that the property had not been lost or destroyed by its negligence, it being said that in an action for damages from the negligence of the defendant the plaintiff must prove negligence, and that there was nothing to take this case out of the general rule.

In holding that the burden of proof of negligence of a bailee, in whose factory milk and its products are destroyed by fire, is on the party alleging it, the court in *Stewart v. Stone* (1891) 127 N. Y. 500, 14 L.R.A. 215, 28 N. E. 595, *supra*, said: "As a general rule, when a bailee fails, on demand, to deliver to the bailor property to which the latter is entitled, the presumption of liability arises; and, if the goods cannot be found, it furnishes the imputation of negligence as the cause. . . . But such *prima facie* case may be overcome when it is made to appear that the loss was occasioned by some misfortune or accident not within the control of the bailee; then the onus continues upon the bailor to prove that it was chargeable to the want of care of the bailee. . . . And although it may be that the proof given by him explanatory of the reason for nondelivery may disclose circumstances which, in their nature, permit or require the inference of negligence on his part, . . . the affirmative of the issue is not shifted to the defendant, but remains through the trial with the plaintiff. . . . In the present case the plaintiff alleged in his complaint, and it appeared, that the loss resulted from the destruction of the factory by fire. From that fact alone no presumption arose to furnish a *prima facie* case against the defendant. But upon the main issue, whether it was attributable to the negligence of the defendant, the burden was with the plaintiff."

In the case of *De Grau v. Wilson* (1883) 17 Fed. 698, affirmed in (1884) 22 Fed. 560, and *Strauss v. Wilson* (1883) 17 Fed. 701, *supra*, where the property was destroyed by fire after being placed on a pier at destination, the carrier having possession of the goods as warehouseman, there was evidence that the fire broke out in a quantity of oakum, which constituted a part of the shipment, but the cause was not shown unless it might be inferred from the fact that a watchman on the pier was, at the time, using a torch for the purpose of lighting up the pier. The court held that an in-

ference that the cause of the fire was in a negligent use of the torch by the watchman was unwarranted from the mere fact that the torch was being used at the time, and dismissed the libel on the ground that, considering the case as one for damages caused by negligence of a warehouseman, the burden was on the libellant to show that the fire which destroyed the goods was caused by the defendant's negligence, and that such negligence did not appear from the evidence.

In an action for the value of horses destroyed in a livery barn by fire which consumed the barn and its contents, the action being based on the theory that the destruction was due to the bailee's negligence, it was held in *Hunter v. Ricke Bros.* (1905) 127 Iowa, 108, 102 N. W. 826, 18 Am. Neg. Rep. 68, *supra*, that the burden of proving negligence was on the plaintiff, and did not shift, and that the court properly directed a verdict for the defendant at the close of the evidence, where the plaintiff proved the bailment, the destruction by fire, and consequent failure to return, and the defendant introduced evidence that the fire occurred during the night from an unknown cause, since, even if the plaintiff's proof raised a presumption of negligence, this was overcome by the defendant's evidence, and the plaintiff did not sustain the burden of proving the alleged negligence.

And in an action against a stockyards company to recover damages for the loss of cattle by fire while in the defendant's possession as bailee, there being no evidence as to the origin of the fire except that it did not start in the pens in which the cattle of the plaintiff were kept, the court in *Nichols v. Union Stockyards & Transit Co.* (1915) 193 Ill. App. 14, held that proof of the loss by fire rebutted the presumption of negligence arising from a failure to return the property, and that it thereafter devolved on the plaintiff to prove that the bailee failed to exercise due care. The court, however, expressed dissatisfaction with this rule, but considered it as settled by authorities. It was said: "There is no doubt that in a case of bailment

like the present one, where there is a total default in delivering or accounting for the property bailed, this fact is treated as *prima facie* evidence of negligence on the part of the bailee, and it devolves upon him to show that he has exercised the degree of care required by the nature of the bailment. This rule proceeds upon the theory that the facts surrounding the care of the property by a bailee are peculiarly within his knowledge and power to prove, and that the enforcement of any other rule would impose great difficulties upon bailors. But it would also seem to be the law that where the failure to deliver is explained by the fact appearing that the goods bailed have been lost, stolen, or destroyed by fire, and the bailee is therefore unable to deliver them, the law will not presume negligence, and the onus or burden of proving the same passes to the bailor. . . . We think that the rule that appears to govern the burden of proof in this case is not a good one, and we agree with Mr. Justice Peckham (dissenting opinion, *Lamb v. Camden & A. R. & Transp. Co.* (1871) 46 N. Y. 271, 7 Am. Rep. 327, *supra*) that it is illogical and unreasonable to hold that the presumption of negligence in cases of this kind is rebutted by the bailee, by simply proving that the property bailed was destroyed by an ordinary fire which broke out on the bailee's own premises, without regard to the care exercised by the latter to prevent the fire, or to save the property after the commencement of the fire. All the authorities seem to agree that the rule that there shall be a presumption of negligence in bailment cases like the present one, where there is a default in delivery or accounting for the goods, is a just and necessary one, and we think that it works a destruction of this wholesome rule to permit the presumption to be overcome by mere proof that the goods were destroyed by fire. But we must enforce the law as we find it, and we are therefore compelled to hold that the position of the defendant on the question now before us for consideration is sustained by the authorities."

In *Cox v. Central Vermont R. Co.* (1898) 170 Mass. 129, 49 N. E. 97, the court instructed the jury that the burden was on the plaintiff, the bailor, to satisfy them that the fire was due to the defendant's negligence, that in order to find this they must be satisfied where and how it originated, and that, unless they were so satisfied, they should return a verdict for the defendant. But the question of the correctness of these instructions was not directly presented on appeal.

Although obiter so far as the precise question under annotation is concerned, the action being one for negligence for injury to a horse while in the defendant's possession as bailee, attention is called to *Sanford v. Kimball* (1910) 106 Me. 355, 138 Am. St. Rep. 345, 76 Atl. 890, *supra*, in which the court laid down the rule as well settled in that state that in an action for negligence against a bailee, not a common carrier, the general burden of proving negligence rests upon the plaintiff; that if he proves the bailment and a failure to return the property on demand, he has ordinarily made out a *prima facie* case, and it is then incumbent on the bailee to explain the cause of the refusal, as by showing the loss of the property by fire or theft; and that it then devolves on the plaintiff to show that such fire or theft was due to the failure of the bailee to use such a degree of care of the property as, under the circumstances, the law requires, the final burden being on the bailor to prove negligence, and not on the bailee to prove due care.

In affirming a judgment for the defendant in an action against a warehouseman for damages for the loss of cotton destroyed when the warehouse in which it was stored was burned, the court in *Seals v. Edmondson* (1882) 71 Ala. 509, *supra*, said: "If the bailee, in whose possession and under whose care and control goods are, will not account for the refusal or failure to deliver them on demand of his principal, it is not a violent presumption that he has wrongfully converted or wrongfully detains them. Or, if there was injury to, or loss of, them during his possession, it is for him to show

the circumstances, acquitting himself of a want of the care in keeping them it was his duty to bestow. But where, as in the present case, there is full explanation of the failure to deliver on demand, and it is shown that the goods have been lost by a cause not involving him in liability, as by fire or by theft or by the violence of nature, it cannot be justly pronounced that he has been wanting in care—that he has been negligent, and his negligence was the proximate cause of the loss. . . . But . . . it must not be understood that a warehouseman or other bailee, bound to the duty of taking care of and delivering goods, can excuse a failure or refusal to deliver, or impose upon his principal any necessity of proof, by merely alleging as an excuse that they have been lost by causes which relieve him from liability, if he has not been negligent. The fact of the loss from such causes must appear with reasonable certainty, or his failure to deliver will be regarded as *prima facie* evidence of negligence." In this case there was no direct evidence, so far as appears, as to the cause of the fire, the plaintiff's theory being that the cotton in the warehouse had been fired from the explosion of fireworks in the streets, and that the warehouseman was negligent in failing to employ a watchman to guard against the danger of the fire, which occurred on the night of a holiday, when the city authorities had refused to prohibit the explosion of fireworks in the streets.

There are several cases in which conclusions have been reached in conflict with the above rule. Thus, in *Rustad v. Great Northern R. Co.* (1913) 122 Minn. 453, 142 N. W. 727, an action against a railroad company, whose responsibility was that of warehouseman, for goods burned in the defendant's car, it appearing that the fire burst out suddenly in the interior of the car, which was not occupied entirely by the plaintiff's merchandise, the court held that it was error to direct a verdict for the defendant in an action for damages for the loss, and laid down the following rule as to the burden of proof: "There is

some confusion and conflict in the cases and among text-writers as to the burden of proof of negligence. When the carrier contracts against liability for an excepted risk, the burden is upon it to show by a preponderance of the evidence that the loss came from such risk and its own freedom from negligence in respect of it. This has been held many times. . . . When the liability of the carrier as such has ceased, and it has become that of a warehouseman, the determination of where the burden of proof rests is affected by other considerations, but a like result is reached. This court has held that the burden of proof is upon the bailee to prove that he exercised the degree of care required of him. *Davis v. Tribune Job-Printing Co.* (1897) 70 Minn. 95, 72 N. W. 808. Considerations of fairness put upon the warehouseman the burden of proving his own freedom from negligence. The goods are intrusted to him. He has charge and control of them. He determines the manner of keeping them. He is in possession of such evidence as there is, as to the circumstances attending the loss. The bailor trusts the warehouseman, and has no proof. It is not unjust to the warehouseman to require him to sustain the burden of proving his freedom from negligence. Where the burden of proof should rest 'is merely a question of policy and fairness, based on experience in the different situations.' 4 Wigmore, Ev. § 2486. We hold that, when the liability of the carrier has become that of a warehouseman and the loss of the goods shipped is established, the burden of proof is upon it to show its freedom from negligence. This burden is not merely the burden of going forward with the evidence, nor a shifting burden, but a burden of establishing before the jury absence of negligence."

The Minnesota court in *Rustad v. Great Northern R. Co.* (Minn.) *supra*, seemingly fails to distinguish between cases where the bailee fails entirely to account for the property, which was the situation in the case of *Davis v. Tribune Job-Printing Co.* (Minn.) *supra*, cited by it, and cases where the

bailee accounts for the failure to deliver the property by proving that it has been destroyed by some cause not in itself giving rise to an inference of negligence. In the Davis Case, where a printer wholly failed to account for electrotyped plates of the plaintiff kept by him after use in printing, the court laid down the rule in an action for conversion of the plates that when the bailee failed or refused on demand to deliver the goods, the burden was on him to prove, not only their loss, but also that he exercised that degree of care required by the nature of the bailment. But it does not follow that where the goods are destroyed by fire, and thus the failure to return the property is accounted for by the bailee, the burden of proving freedom from negligence should be upon him.

The statement in *Plesser v. Appel* (1909) 113 N. Y. Supp. 1034, an action to recover for the value of lace left with a cleaner and while in his possession destroyed by fire, that the burden of showing freedom from negligence was on the bailee, seems opposed to the weight of authority. And this case illustrates the view, previously stated, that cases in which the loss of the property bailed was due to some agency other than fire cannot safely be relied upon as authority in the class of cases under consideration. The court in the *Plesser Case* cited as authority for its statement the case of *Ouderkirk v. Central Nat. Bank* (1890) 119 N. Y. 263, 23 N. E. 875, which was an action against a bank for failure to return collateral, no evidence being given to show the cause of the disappearance of the plaintiff's bonds deposited as collateral, except such as might be inferred from the defalcation of the cashier who alone had a key to the safe in which they were kept. The court very properly stated, on this evidence, that the burden of showing the circumstances of the loss rested on the bailee.

And the statement in *Gibbons v. Yazoo & M. Valley R. Co.* (1912) 130 La. 671, 58 So. 505, an action against a carrier as warehouseman for property destroyed by fire, that a warehouseman, in order to avoid responsibility

for the loss of goods intrusted to his care, must show that the loss did not occur through his fault, if interpreted to mean that the burden of proof is on the warehouseman to show freedom from negligence, does not seem in accord with the weight of authority. In this case, however, a judgment for the warehouseman was affirmed, on the ground that the evidence was insufficient to show negligence, there being different theories as to the cause of the fire, but its origin not being proved, so that the result of the decision does not appear to be in accord with this interpretation of the statement.

Where the bailee is seeking affirmative relief against a bailor, there seems ground for holding that he should prove affirmatively freedom from negligence, under such circumstances as arose in *Crocker v. Monroe* (1841) 18 La. 553, 36 Am. Dec. 660. In this case the pledgee sued for the sum advanced on articles pledged, which he alleged were destroyed by the burning of his house through an inevitable accident. And it was held that, to entitle him to recover, he must prove not only that the subject-matter of the pledge was destroyed, but also that he unsuccessfully used all necessary care and diligence to preserve it.

b. Under statutes.

Under a statute providing that in case the warehouseman refuses or fails to deliver goods on demand the burden is on the warehouseman to establish the existence of a lawful excuse for such refusal, it was held in *Caldwell v. Skinner* (1917) 100 Kan. 587, 164 Pac. 1166, that where goods are delivered in good condition to a warehouseman for hire, and it is shown that they have not been delivered on demand and payment of charges by the depositor, but have been destroyed by fire while in the custody of the warehouseman, the burden is upon him to absolve himself from negligence. In this case the warehouseman's answer that the goods of the plaintiff were destroyed by fire was held subject to demurrer, the con-

tention being overruled that it was sufficient for the defendant to allege the destruction by fire while the goods were stored in his warehouse, without alleging that the fire and consequent loss were without his fault. The court cited *Wiley v. Locke* (1909) 81 Kan. 143, 24 L.R.A.(N.S.) 1117, 105 Pac. 11, 19 Ann. Cas. 241, where, in an action against a warehouseman for damages for the loss of goods by fire, it was stated, without express reference to statute, that when the plaintiff proved he had intrusted the goods to defendant, who was unable to return them because they were burned, it then devolved upon the defendant to show that the loss did not occur through any want of care on his part.

III. *Presumptions; duty to "go forward" with the evidence.*

See in this connection, I. *supra*; and see *Hunter v. Ricke Bros.* (Iowa) under II. *supra*.

The reported case (*BECK v. WILKINS-RICKS Co.* ante, 554), while holding that the burden of proof of negligence is on the bailor, holds that the bailee must, in order to avoid liability where the property is destroyed by fire, do more than merely prove the loss by fire; in other words, the bailor's *prima facie* case is not rebutted by evidence merely of the fire, but it is the bailee's duty to "go forward" with proof that he used proper care. This conclusion, while commendable, it seems, from some points of view, in that the bailee may perhaps be better able than the bailor to prove the circumstances of the fire, and to show that he used due care, seems opposed to the weight of authority. It is supported by the conclusions of the South Carolina court which, in *Fleischman v. Southern R. Co.* (1907) 76 S. C. 237, 9 L.R.A.(N.S.) 519, 56 S. E. 974, in affirming a judgment for the plaintiff in an action for the value of trunks destroyed by a fire which consumed the station, no evidence being offered as to the origin of the fire, laid down the following rule as the law in that state: "The rule in this state, as indicated by the cases above referred to, is that the bailor must prove delivery

to the bailee and his refusal to return as required by the contract of bailment. The burden is then on the bailee to prove that he has not converted the property, and this he may do by showing its loss and the manner of its loss; but by the manner of loss is meant not only the isolated fact of destruction by fire, or loss by theft or otherwise, but the circumstances connected with the origin of the fire or other cause of loss or injury, as far as known to the bailee, and the precautions taken to prevent the loss or injury. From these facts, coupled with any testimony on the subject the bailor may introduce, it is for the jury to say whether the bailee was negligent. This rule is entirely reasonable. The facts surrounding the loss, particularly the precautions taken against it, are usually known to the bailee, or ascertainable by him. On the other hand, the owner of the property cannot be supposed to know the details of a warehouseman's business, for he is often hundreds of miles away. With the great modern development of the warehouse business, we venture to think the injustice of the rule which exempts a warehouseman from responsibility to the owner on the bald proof of loss or injury to the goods by fire, by theft, or otherwise, will become more and more apparent. In most cases, to require the owner to assume the burden of showing that the fire or theft was due to the lack of ordinary care is to impose an impossible task, and place him more than ever at the mercy of the warehouseman. We are satisfied, therefore, to adhere to the somewhat exceptional rule laid down in this state, notwithstanding the great number of opposing authorities in other jurisdictions."

To a similar effect is *McCord v. Atlantic Coast Line R. Co.* (1906) 76 S. C. 469, 57 S. E. 477, where, in an action against a railroad company, as warehouseman, for property destroyed by fire which originated within the warehouse, it was held not erroneous to instruct the jury that if the property was lost by fire "the railroad company must come before you and show

how it was lost, and must show that it exercised ordinary care."

The language in the opinion in *Brunson v. Atlantic Coast Line R. Co.* (1907) 73 S. C. 9, 9 L.R.A. (N.S.) 577, 56 S. E. 538, an action against a railroad company to recover the value of flour destroyed by fire while in the defendant's depot at destination, seems also to imply that the railroad company, as warehouseman, must show, in order to avoid liability, not only the fact of fire, but that it exercised due care.

And in an earlier decision in the same state, *Wardlaw v. South Carolina R. Co.* (1858) 45 S. C. L. (11 Rich.) 337, on appeal by the railroad company in an action against it for loss by the burning of cotton in the defendant's yard, the responsibility of the railway company being regarded as that of a warehouseman, and the origin of the fire not appearing, the court, in denying a motion for a new trial, said: "In this case the goods were lost, and defendant, having shown the loss to have been occasioned by fire, insists that this fact was sufficient to discharge from liability, unless plaintiff should show by direct proof that the fire was the result of negligence. On the contrary, the presiding judge in his instructions said: 'It was right to require the company to show how the fire occurred; in the absence of such proof, it might be that the jury would think them liable.' The question of negligence was of course submitted to the jury, the facts were before them, the circumstances were peculiar, the suggestion was appropriate, and the presumption was fair and legitimate. . . . The omission to prove what a party should at all times be prepared to establish may well raise a presumption often against him. The place where this loss occurred was in the yard of the company, and surrounded by their employees, who were at all times under their control and within their knowledge. Such witnesses would generally be unknown to the owners or consignees, and but little disposed to implicate themselves in a charge of negligence. In reference to

such an inquiry as the one on foot in this case, ordinarily proof by one of the parties would be easy and proper, by the other impracticable and uncertain. Hence the rules to be found in our books under such circumstances. In this state the rule on the subject of limiting the liability of a carrier has been relaxed, though the onus still rests to bring himself within the exceptions and to discharge himself of negligence. . . . The standard of diligence in such a case as this would imply the presence of employees acting as watchmen or otherwise, who should be able to speak, and silence of defendant became an element in the inquiry."

The reported case (*BECK v. WILKINS-RICKS Co.* ante, 554), seems also to be in accord with the statements in the opinion in an earlier decision by the same court, in *Hanes v. Shapiro* (1914) 168 N. C. 24, 84 S. E. 33, which are sufficiently broad to imply that the court considered it to be the duty of the bailee to offer some evidence of the circumstances of the fire.

The courts of a majority of the states which have directly discussed the question have held that no presumption or inference of negligence on the part of the bailee arises from the mere fact of the fire.

United States.—*De Grau v. Wilson* (1883) 17 Fed. 698, affirmed in (1884) 22 Fed. 560; *Strauss v. Wilson* (1883) 17 Fed. 701.

Illinois.—*Nichols v. Union Stock Yards & Transit Co.* (1915) 193 Ill. App. 14; *Bryan v. Chicago & A. R. Co.* (1912) 169 Ill. App. 181. See also *Cumins v. Wood* (1867) 44 Ill. 416, 92 Am. Dec. 189.

Mississippi.—*Meridian Fair & Exposition Asso. v. North Birmingham Street R. Co.* (1893) 70 Miss. 808, 12 So. 555; *Yazoo & M. Valley R. Co. v. Hughes* (1908) 94 Miss. 242, 22 L.R.A. (N.S.) 975, 47 So. 662.

New York.—*Clafin v. Meyer* (1878) 75 N. Y. 260, 31 Am. Rep. 467 (rule approved); *Whitworth v. Erie R. Co.* (1882) 87 N. Y. 418; *Stewart v. Stone* (1891) 127 N. Y. 500, 14 L.R.A. 215. 28 N. E. 595; *Liberty Ins. Co. v. Central Vermont R. Co.* (1897) 19 App.

Div. 509, 46 N. Y. Supp. 576. See also *Sutro v. Fargo* (1876) 9 Jones & S. 231 (carrier under fire exception clause).

North Carolina.—*Lyman v. Southern R. Co.* (1903) 132 N. C. 721, 44 S. E. 550.

Oklahoma.—*Stone v. Case* (1912) 84 Okla. 5, 43 L.R.A. (N.S.) 1168, 124 Pac. 960 (see quotation from this case under II. *supra*).

Pennsylvania.—*Farnham v. Camden & A. R. Co.* (1867) 55 Pa. 53; *Tower v. Grocers Supply & Storage Co.* (1893) 159 Pa. 106, 28 Atl. 229.

Tennessee.—*Louisville & N. R. Co. v. Manchester Mills* (1890) 88 Tenn. 653, 14 S. W. 314; *Lancaster Mills v. Merchants' Cotton-Press & Storage Co.* (1890) 89 Tenn. 1, 24 Am. St. Rep. 586, 14 S. W. 317.

Texas.—*Thornton v. Daniel* (1916) — Tex. Civ. App. —, 185 S. W. 585; *American Exp. Co. v. Duncan* (1917) — Tex. Civ. App. —, 193 S. W. 411.

It was said in *Bryan v. Chicago & A. R. Co.* (1912) 169 Ill. App. 181, *supra*, that, when it appeared from the evidence that the property bailed was destroyed by fire, this was sufficient to relieve the bailee from liability unless it was further made to appear by the evidence that the loss by fire was attributable to the negligence of the bailee.

In *McKeever v. Kramer* (1920) — Mo. App. —, 218 S. W. 403, it is said that it is the duty of the bailee to account for the loss of the goods and to show that it was occasioned by some acts, such as theft or fire, in which event *prima facie* there is an exoneration, and it is not his duty further to prove affirmatively that he was guilty of no negligence. The case, however, is not one where the property was destroyed by fire, but was an action against an innkeeper, as a gratuitous bailee, for money deposited for safe-keeping.

A good statement of the rule appears to be that of *Claffin v. Meyer* (1878) 75 N. Y. 260, 31 Am. Rep. 467, *supra*, although the defense of the bailee in this case was theft. It was said: "Where the refusal to deliver is explained by the fact appearing that

the goods have been lost, either destroyed by fire or stolen by thieves, and the bailee is therefore unable to deliver them, there is no *prima facie* evidence of his want of care, and the court will not assume, in the absence of proof on the point, that such fire or theft was the result of his negligence."

"There is no natural presumption," it was said in *Louisville & N. R. Co. v. Manchester Mills* (Tenn.) *supra*, "that a fire, the origin of which is unknown, was the result of the want of care of the owner or occupant of the premises of its origin. The ancient rule of the common law which presumed negligence in such cases was pronounced in the reported cases to be harsh and unreasonable, and was, by the Statute of 6 Anne, chap. 31, abrogated."

The doctrine of "*res ipsa loquitur*" is inapplicable to a loss by fire of goods in possession of a bailee. *Liberty Ins. Co. v. Central Vermont R. Co.* (1897) 19 App. Div. 509, 46 N. Y. Supp. 576, *supra*. The action was for loss of grain by a fire which consumed the elevator in which it was stored, the burden of proof being held to be on the plaintiff, who alleged that the fire was due to negligence. The court said: "Neither do I think that the doctrine of '*res ipsa loquitur*' applies to this case. The occurrence of fires without negligence is frequent, and the mere fact of a fire does not justify the inference or constitute a *prima facie* case of negligence. . . . The attendant or surrounding circumstances may characterize the fire as one caused by negligence, but the fire alone does not speak for itself, and proof of the circumstances showing the fire to have occurred through the negligence of the defendants must be given by the plaintiff; he cannot rest by merely proving the fire, and then call upon the defendants to show that it did not occur through their negligence."

In *Whitworth v. Erie R. Co.* (1882) 87 N. Y. 413, *supra*, where the bill of lading contained a general exemption from liability for loss by fire, and a loss occurred from this cause, it was

contended by the plaintiff in an action against the railroad company that, since it was shown that the fire originated on the defendant's premises, in the roof of the passenger depot, from which it was communicated to the freight house where the goods were stored, and no explanation was given of the origin of the fire, the presumption of negligence attached, and the question of the defendant's negligence should have been submitted to the jury. In overruling this contention the court said: "The bills of lading contain a general exemption from liability for loss by fire, and, the loss having occurred from this cause, it was incumbent on the plaintiff, in order to avoid the effect of the exemption, to show that the fire was the result of the defendant's negligence, or that the loss resulted from some breach of the defendant's duty. The burden was upon the plaintiff to show facts taking the case out of the operation of the exemption clause. . . . We think there was no evidence tending to show negligence on the part of the defendant in respect to the origin of the fire. It was first discovered about midday, in the roof of the depot, which was situated about 100 feet east of the freight house, where the cotton was stored. The depot had been in use twelve years. There was no evidence how the fire originated, nor did it appear that there were any persons in the employment of the defendant who had, or might have had, any knowledge upon the subject. . . . There was no omission of diligence in the efforts to save the freight houses and property, after the fire was discovered. Accidental fires, occurring without negligence, are frequent. The occurrence of a fire does not alone justify the inference of negligence. In the absence of all explanation of the origin of the fire, or of evidence tending to show that it was in the power of the defendant to have made such explanation, or that, by the exercise of reasonable care, the fire would not have occurred, no presumption of negligence was raised so as to justify the submission of the question to the jury."

And it was said in *De Grau v. Wilson* (1883) 17 Fed. 698, affirmed in (1884) 22 Fed. 560, *supra*, that proof of the occurrence of fire in goods upon the defendants' pier does not raise the presumption that the fire was caused by the negligence of the defendants or their servants.

In *Yazoo & M. Valley R. Co. v. Hughes* (1908) 94 Miss. 242, 22 L.R.A. (N.S.) 975, 47 So. 662, *supra*, an action against a railroad company whose responsibility was that of warehouseman, for negligently permitting the property to be destroyed by fire which consumed the warehouse, it was held that, in the absence of proof as to the circumstances of the fire, the defendant was improperly held to be *prima facie* negligent, since the destruction of the property by fire was entirely consistent with ordinary care, and the burden of proving negligence was on the plaintiff. The declaration, the court stated, was framed on the theory that the company had carelessly allowed the property to be destroyed by fire, and had negligently failed to exercise that degree of care which it, as bailee, was bound to exercise. But the decision is not placed, so far as appears, on the nature of the action or the allegations of the petition, the case supporting the broad rule that the bailor of property in an action against a warehouseman has the burden of proving negligence, where it appears only that the property has been destroyed by fire. There was the additional circumstance in this case that the bailee's property was also destroyed by the same fire, the court stating that some of the authorities, very properly, in discussing the question of presumption, attached importance to this consideration. But it seems that the same conclusion would probably have been reached, apart from this feature of the case. It was established or conceded that the goods were destroyed by fire which consumed the depot in which they were stored. No evidence was introduced by the defendant, and there was no testimony as to the circumstances and incidents of the fire, the railroad company relying merely

as an excuse for nondelivery, upon the fact that the property was burned. It was held to be error for the trial court to give a peremptory instruction in behalf of the plaintiff as to liability, leaving to the jury only the question of damages. The contention was overruled that the bailee should be required to produce evidence to prove that the fire was without its negligence, since it might properly be regarded as in possession of such evidence, if any, the court stating that the argument was not convincing in the light of the overwhelming weight of authority to the contrary, and that there should be no difficulty for the bailor to prove the origin and circumstances of the fire, since the agent of the bailee, who was in charge of the warehouse, was doubtless available as a witness.

And in *Meridian Fair & Exposition Assn. v. North Birmingham Street R. Co.* (1893) 70 Miss. 808, 12 So. 555, *supra*, where the defendant became liable to the owner of a balloon for its return after use in an ascension, and during the ascension the balloon was destroyed by fire from some cause not explained, the court, in reversing a judgment for the plaintiff in an action for failure to return the balloon, said that there was no evidence of culpability on the part of the aeronaut, or anyone else, unless the mere fact of fire raised a presumption of negligence, which it did not; that "when a bailee, in any action for nonreturn of an article, shows that it was destroyed by fire under circumstances fully disclosed, and not suggestive of any want of due care, it devolves on the bailor seeking to hold him responsible to turn the scale by some evidence inculpatory of the defendant. The law does not intend or presume negligence. It does make the reasonable requirement of the bailee, who fails to return the thing bailed, to show that he cannot return it, and why; and when he discloses fully the facts showing the impossibility of a return because of the destruction of the thing, with the attendant circumstances, and nothing connected with his showing in this respect inculcates him, the plaintiff

must show liability or fail in his action. . . . Upon the facts disclosed, as shown by the record, the defendant sufficiently accounted for the nonreturn of the balloon, and the plaintiff was not entitled to recover." It will be observed that the court refers to destruction by fire under "circumstances fully disclosed," and to the impossibility of a return because of the destruction of the property with a showing of the "attendant circumstances." But, referring to this case, the same court, in the later decision of *Yazoo & M. Valley R. Co. v. Hughes* (1908) 94 Miss. 242, 22 L.R.A.(N.S.) 975, 47 So. 662, *supra*, stated that the aeronaut, the only one who could have explained the accident, was not examined as a witness, and that nothing was really disclosed in the proof except that the balloon was burned; that an examination of the facts of the case and the authorities on which the decision was based convinced the court that the mere fact of the property being destroyed by fire, in the absence of explanation, *prima facie* acquitted the bailee of the charge of negligence.

Where the cause of a fire which destroyed a cold storage warehouse was not shown, and was apparently not known, it appearing only that the fire originated on the second floor of the building, it was held error to submit to the jury the question of the warehouseman's negligence, in an action for loss based on failure safely to keep the goods of the plaintiff destroyed in the warehouse by the fire, since the evidence did not justify an inference of negligence. *Tower v. Grocers Supply & Storage Co.* (1893) 159 Pa. 106, 28 Atl. 229.

In some of the cases cited above, which have held that from the fire itself no presumption of negligence arose, there was some evidence as to the place of origin of the fire and as to the care exercised by the bailee to guard the property. Thus, in *Farnham v. Camden & A. R. Co.* (1867) 55 Pa. 53, the special verdict included the statement that, while the goods were on the wharf at destination, ready for delivery to the consignee, a

fire broke out on a steamboat belonging to the defendants and lying at the wharf, which consumed the wharf and all the goods thereon, and that the origin of the fire was unknown, although the defendants had watchmen on duty on the wharf and boat. The court, assuming that the defendants were liable only as a bailee for hire, said: "This case shows that where a bailee accounts for a loss in a way not to implicate himself in a charge of negligence, this is a sufficient defense, unless the plaintiff proves negligence. This is the plaintiff's reply to the plea in excuse of performance. It is an affirmative position and must be proved by the party alleging it. It is true the plaintiffs in the first instance, taking the present case as illustration, must have shown, if it had been tried in the ordinary way, that they delivered the goods to the defendants to be carried to New York, that their agent called for them, and could not get them. There they might have rested to hear the reply, and that would be proof that the goods were accidentally consumed by a fire breaking out on the steamboat at the wharf, which consumed the boat, the wharf, and buildings of the defendants, and the goods in them, including the plaintiffs'; that the boat had its complement of men on board, and the defendants four watchmen on the wharf. Out of these facts negligence could not be inferred. The plaintiffs' reply would be, therefore: 'All that may be true; but the fire originated in your negligence.' Is it not perfectly clear that, as that was not inferable from the defendants' case, that the plaintiffs must prove it? This is not to be doubted."

And while the weight of authority appears to be that the burden of proving negligence is on the bailor in an action by him against the bailee, where the goods have been destroyed by fire and an inference of negligence does not arise from the mere fact of the fire itself, it is important to note that if the fire originates on premises exclusively in the bailee's control, and it fails to call those as witnesses who were in charge at the time, and offers

no evidence that they performed their duty, this failure may be a circumstance, it seems, against the bailee, and, with little other evidence, as, for example, that he failed to adopt any means for protection against fire, be sufficient to make out a *prima facie* case for submission to the jury on the question of the bailee's negligence. *J. Russell Mfg. Co. v. New Haven S. B. Co.* (1872) 50 N. Y. 121, where goods transported by a carrier by water were destroyed by fire at destination, on a pier in the occupation of the carrier, and in charge of a private watchman, who was not called as a witness, the fire occurring soon after midnight. The court said: "We think that enough was shown to call upon the defendant to explain the circumstances attending the destruction of the property, and that, in the absence of any such explanation, the jury would have been authorized to infer that proper precautions for its safety had not been taken. Whether due caution required that the wharf should be furnished with the means of extinguishing fire, or that a watchman should be kept there during the night, were questions for the jury, dependent upon the circumstances of danger which may have surrounded the premises. The plaintiff's evidence of the absence of the means of extinguishing fire was not of the most satisfactory character; but the defendant, although possessing the best means of proof upon the subject, did not controvert it; while the fact of the fire originating on the defendant's premises, in connection with the failure of the defendant to offer any explanation of its origin, or even to produce any of the persons said to have been left in charge, or to show that they performed their duty, or that any effort was made to take the goods out of the reach of the fire, were circumstances from which the jury might have drawn inferences unfavorable to the defendant on the question of negligence. The nature of an accident may itself afford *prima facie* proof of negligence, . . . and we think, as the case stood, the judge erred in not sub-

mitting the question of negligence to the jury. . . . Negligence may be inferred from the circumstances of the case. Where the accident is one which in the ordinary course of events would not have happened but for the want of proper care on the part of the defendant, it is incumbent upon him to show that he had taken such precautions as prudence would dictate, and his failure to furnish the proof, where, if it existed, it would be within his power, may subject him to the inference that such precautions were omitted."

But in *Allen v. Fulton Motor Car Co.* (1911) 71 Misc. 190, 128 N. Y. Supp. 419, where there was no evidence as to the cause of the fire which destroyed the plaintiffs' automobile, which had been left with the defendant for repairs and, by defendant's direction, had been stored in a barn not connected with the garage, the court in holding that the burden of proving negligence on the part of the defendant, as alleged by the plaintiff, was on the latter, distinguished the case of *J. Russell Mfg. Co. v. New Haven S. B. Co.* (N. Y.) *supra*, on the ground that in the case before it the fire did not originate, so far as appeared, on the defendant's premises, as was true in the latter case, where also the defendant had employed watchmen to guard the wharf against just such an accident, and should have produced such watchmen or accounted for the origin of the fire. The court said: "When called upon for the return of the car, it was the duty of the defendant to deliver it to its owner, or account for its default by showing a loss by some violence, theft, or accident. It seems to me in this case that, when the evidence disclosed the fact that this car was lost by fire, or, in other words, its loss was accounted for, the burden continued upon the plaintiff to show that its loss was occasioned by some negligence or want of ordinary care upon the part of the defendant." The court said that in this case there was no evidence whatever showing that the fire originated upon the property of the defendant, and that it appeared that the confli-

gration was quite general, other adjacent property also being destroyed.

Assuming that a presumption of negligence arose from the fact that the fire which consumed the bailor's goods originated on the bailee's premises, the court in *Johnson v. Smith* (1893) 54 Minn. 319, 56 N. W. 37, held that the evidence was sufficient to rebut the presumption of negligence, it being quite as reasonable to suppose that the fire, which broke out in the defendant's furniture shop about an hour after it was locked for the night, was of incendiary origin, as that it arose from any condition existing on the premises. And the court stated that whether the burden of proving negligence in respect to the origin of the fire was on the plaintiff or defendant was not of practical importance in the case.

IV. Rule as affected by pleadings or form of action.

Some of the decisions in which the point is not expressly made are influenced, perhaps, by the form of the action and the pleadings in the particular case, and in several cases distinctions in these regards have been pointed out.

In California, a distinction has been made, with respect to the burden of proving negligence in actions against a railroad company, between cases where the action is based on breach of contract to carry and deliver, and where it is based on negligence, although the measure of responsibility of the company in both cases was that of warehouseman.

Thus, in an action against a railroad company as warehouseman, for failure to return goods stored with it, which, with the warehouse, had been consumed by fire, the court in *Wilson v. Southern P. R. Co.* (1882) 62 Cal. 164, laid down the following rules: "A *prima facie* case of negligence is made out against a warehouseman who refuses to deliver property stored with him, upon proof of demand and refusal. Upon such proof alone the burden is on him to account for the property; otherwise he shall be deemed to have converted it to his

own use. But if it appears that the property, when demanded, was consumed by fire, the burden of proof is then on the bailor to show that the fire was the result of the negligence of the warehouseman. . . . The negligence of the appellant, as the proximate cause of the loss of the property by fire, thus became the essential fact to recovery; and the burden of proof was upon the plaintiff in the action. It was incumbent on him to prove that the defendant had, by some act of omission, violated some duty, by reason of which the fire originated; or that some negligence, or want of care such as a prudent man would take under similar circumstances of his own property, caused or permitted, or contributed to cause or permit, the fire by which the property was destroyed." In this case the court affirmed a judgment for the plaintiff, holding that there was sufficient evidence that the fire originated through the warehouseman's negligence with respect to the use or extinguishment of a lamp on the evening of the fire, to warrant submission of the issues to the jury and to sustain the judgment.

But in *Wilson v. California C. R. Co.* (1892) 94 Cal. 166, 17 L.R.A. 685, 29 Pac. 861, although the court considered the responsibility of the carrier, after the arrival and proper storage of the goods, as being the same as that of warehousemen generally, it was held that the burden of proof was on it, in an action to recover the value of the goods, to prove a defense set up that the goods had been destroyed by fire without its negligence. It was held that an instruction was error that, "when the defendant shows that the goods sued for were destroyed by fire, then the burden of showing that such fire was the result of defendants' want of care is upon the plaintiff, and, unless such want of ordinary care is shown, your verdict should be for the defendant."

The court referred to statutes requiring each party to prove his own affirmative or negative allegations, when they are an essential part of the statement of the right or title on which

the cause of action or defense is founded; that the party holding the affirmative of an issue must produce the evidence to prove it, and that the burden of proof lies on the party who would be defeated if no evidence were given on either side. The action, as indicated was against a carrier to recover the value of goods delivered to it for transportation and lost while in its possession, and the court distinguished the case of *Wilson v. Southern P. R. Co.* (Cal.) supra, where the action was against the railway company as warehouseman for negligence, as follows: "Had the defendant been sued as a tort-feasor, and charged in the complaint with negligence whereby plaintiff's goods were destroyed by fire, the burden of proving the alleged negligence would have been upon the plaintiff, . . . but not so where, as in this case, the action is upon the carrier's contract to carry and deliver goods, the alleged breach being a failure to carry away and deliver according to the contract, and the defense being that the goods were destroyed by fire without the carelessness or negligence of the defendant. As a general rule, the burden is on the defendant to prove new matter alleged as a defense, . . . even though it requires the proof of a negative."

A case showing further the position of the California court on this question is *Dieterle v. Bekin* (1904) 143 Cal. 683, 77 Pac. 664, an action against a warehouseman for conversion of the property. The complaint alleged delivery, and a failure to return the property on demand. The answer set up as a defense that the property was destroyed by fire before demand for return, without the fault or negligence of the defendant. There was a finding by the trial court that the origin and cause of the fire were unknown. But it was also found that the warehouseman was negligent in storing the goods in a building which was in danger of fire, because on the third floor there was a paper-box factory which used kerosene lamps in the manufacture of boxes. On these findings the trial court rendered judg-

ment for the defendant. In holding that this judgment should be reversed, the court, on appeal, said: "The plaintiffs made out their case when they established to the satisfaction of the court the allegations of their complaint. It was then for the defendant to establish the allegations of his affirmative defense, if he could do so. The court has found that he was grossly negligent in the matter of exposing the property to loss by fire, and that the property was destroyed by fire of an unknown origin. The facts found suggest at least a probability that the fire came from the same source from which emanated the 'more than ordinary risk' under which the property was so negligently placed by the defendant. Under the circumstances disclosed by the findings, the burden which the defendant had assumed in his affirmative defense was upon him to satisfy the court that the fire did not come from this source. It is not necessary to hold that the burden of proof was upon the defendant solely for the reason that he had assumed it in his answer. Irrespective of any consideration upon whom the burden of proof lay, the issue before the court was to determine whether the defendant had exercised the ordinary care required of him as a warehouseman, and whether his negligence in that respect had contributed to the loss of the plaintiffs' property, and upon this issue the court has not made any finding. Whether the fire occurred without his knowledge, or whether the origin of the fire was unknown, were not in themselves conclusive of this question. The character of the building provided by him for the storage of the property, the character of the business for which he had permitted a portion of the building to be used, and, in view thereof, the precautions taken by him for the prevention of fire and for its extinguishment, were also elements proper to be considered in determining the issue. . . . It is evi-

9 A.L.R.—37.

dent from the findings above quoted that there was evidence before the court tending to show that the defendant did not exercise the ordinary care required of him as a warehouseman. This was sufficient to cast upon him the burden of showing that the loss did not arise from his negligence, but was the result of some agency with which he was entirely disconnected. . . . As this was a material issue in the case, and there was evidence relative thereto, the court should have made a finding thereon, and until such finding was made no judgment could be properly rendered." The court distinguished the case of *Wilson v. Southern P. R. Co.* (Cal.) *supra*, on the ground that there the plaintiff assumed in his complaint the burden of showing the negligence of the defendant, and the question whether the defendant was at all negligent was in grave doubt; whereas the defendant in the case before it assumed in his answer the burden of showing that the loss was not the result of his negligence, and the evidence showed that he did not use due care in storing the property.

The court in *Denton v. Chicago, R. I. & P. R. Co.* (1879) 52 Iowa, 161, 35 Am. Rep. 263, 2 N. W. 1093, regarded the question of burden of proof in an action by the bailor against the bailee, where the property is destroyed by fire, as one which may perhaps depend on the nature of the action and the pleadings, although it seemingly failed to distinguish between the question of burden of proof as to negligence and burden of proof that the property was destroyed by fire.

See also in this connection, among other cases not involving loss by fire, *Cass v. Boston & L. R. Co.* (1867) 14 Allen (Mass.) 448, which distinguishes, as respects the burden of proving negligence, between cases where the action is based on negligence and where it is not. R. E. H.

ANDREW VETTER et al.
v.
NATHAN BROADHURST, Appt.

Nebraska Supreme Court — November 17, 1916.

(100 Neb. 356, 160 N. W. 109.)

Eminent domain — Irrigation of private land.

1. Where, in an appeal from the dismissal of certain condemnation proceedings, it appears that the purpose of the proposed condemnation is to take a part of the land of A against his will as a site for a reservoir from which to irrigate the land of B, the proceedings being brought for B's sole benefit, a judgment of the district court, dismissing such proceedings, will be upheld.

[See note on this question beginning on page 583.]

— private purpose.

2. The right of eminent domain cannot be exercised for a purely private purpose.

[See 10 R. C. L. 17, 27.]

Headnotes by LETTON, J.

APPEAL by applicant from a judgment of the District Court for Dawes County (Westover, J.) dismissing certain condemnation proceedings brought to obtain a reservoir site on lands of defendants for purposes of irrigation. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. J. E. Porter for appellant.

Messrs. E. D. Crites and F. A. Crites, for appellees:

There can be no taking of private property for public use against the will of the owner, without direct authority from the legislature.

Aldridge v. Tuscumbia, C. & D. R. Co. 2 Stew. & P. (Ala.) 199, 23 Am. Dec. 307; *Hayford v. Bangor*, 11 L.R.A. (N.S.) 940, and note, 102 Me. 340, 66 Atl. 731; *Jeter v. Vinton-Roanoke Water Co.* 114 Va. 769, 76 S. E. 921, Ann. Cas. 1914C, 1029; *State ex rel. Wanconda Invest. Co. v. Superior Ct.* Ann. Cas. 1913E, 1076, and note, 68 Wash. 660, 124 Pac. 127; *Pittsburgh, W. & K. R. Co. v. Benwood Iron Works*, 2 L.R.A. 680, note; *Barre R. Co. v. Montpelier & W. River R. Co.* 4 L.R.A. 786, note.

A taking of property for private use or without just compensation is a deprivation of property without due process of law.

Hairston v. Danville & W. R. Co. 208 U. S. 598, 52 L. ed. 637, 28 Sup. Ct. Rep. 331, 13 Ann. Cas. 1003; *Fee v. Cowdry*, 45 Ark. 410, 55 Am. Rep. 560;

Atchison, T. & S. F. R. Co. v. Campbell, 61 Kan. 439, 48 L.R.A. 251, 78 Am. St. Rep. 328, 59 Pac. 1051; *Ten Eyck v. Delaware & R. Canal Co.* 18 N. J. L. 200, 37 Am. Dec. 233; *Cochran v. Van Surlay*, 20 Wend. 365, 32 Am. Dec. 570; *Gilman v. Tucker*, 128 N. Y. 190, 13 L.R.A. 304, 26 Am. St. Rep. 464, 28 N. E. 1040; *Nash v. Clark*, 27 Utah, 158, 1 L.R.A. (N.S.) 208, 101 Am. St. Rep. 953, 75 Pac. 371, 1 Ann. Cas. 300; *Huber v. Merkel*, 117 Wis. 355, 62 L.R.A. 589, 98 Am. St. Rep. 933, 94 N. W. 354.

It does not lie in the power of a state to authorize the taking of the property of an individual without his consent, for the private use of another, even on the payment of full compensation.

Cole v. La Grange, 113 U. S. 1, 28 L. ed. 896, 5 Sup. Ct. Rep. 416; *Salisbury Land & Improv. Co. v. Com.* 215 Mass. 371, 46 L.R.A. (N.S.) 1196, 102 N. E. 619; *Taylor v. Porter*, 40 Am. Dec. 274, and note, 4 Hill, 140; *Witham v. Osburn*, 4 Or. 318, 18 Am. Rep. 287; *Nash v. Clark*, 27 Utah, 158, 1 L.R.A. (N.S.) 208, 101 Am. St. Rep. 953, 75

Pac. 371, 1 Ann. Cas. 300; Chicago & N. W. R. Co. v. Morehouse, 88 Am. St. Rep. 929, note; Pittsburgh, W. & K. R. Co. v. Benwood Iron Works, 2 L.R.A. 680, note; Barre R. Co. v. Montpelier & W. River R. Co. 4 L.R.A. 787, note; Owensboro & N. R. Co. v. Todd, 11 L.R.A. 285, note; Mifflin Bridge Co. v. Juniata County, 13 L.R.A. 431, note; Re Tuthill, 49 L.R.A. 781, note; Henderson v. Lexington, 22 L.R.A.(N.S.) 23, note; Jones v. Venable, 1 Ann. Cas. 188, note.

The prohibition against the taking of property for public use without just compensation impliedly but definitely forbids a taking of property for private uses.

Arnsperger v. Crawford, 101 Md. 247, 70 L.R.A. 497, 61 Atl. 413; Re Albany Street, 11 Wend. 149, 25 Am. Dec. 618; Bloodgood v. Mohawk & H. River R. Co. 18 Wend. 9, 31 Am. Dec. 313; Embury v. Conner, 3 N. Y. 511, 53 Am. Dec. 325; Re Barre Water Co. 62 Vt. 27, 9 L.R.A. 195, 20 Atl. 109; Gainesville, H. & W. R. Co. v. Hall, 22 Am. St. Rep. 49, note.

A state statute which provides for the taking of property for a private use, though specifically authorized by the Constitution of the state, would be overturned by the Supreme Court of the United States.

Clark v. Nash, 198 U. S. 361, 49 L. ed. 1035, 25 Sup. Ct. Rep. 676, 4 Ann. Cas. 1171; Hairston v. Danville & W. R. Co. 208 U. S. 598, 52 L. ed. 637, 28 Sup. Ct. Rep. 331, 13 Ann. Cas. 1008; Chicago & N. W. R. Co. v. Morehouse, 88 Am. St. Rep. 930, note; Re Tuthill, 163 N. Y. 133, 49 L.R.A. 781, 79 Am. St. Rep. 574, 57 N. E. 303.

Where an easement is taken for a public use, it must be a public easement, and a statute allowing any member of the public to acquire a certain private easement is unconstitutional.

Hartman v. Tresise, 36 Colo. 146, 4 L.R.A.(N.S.) 872, 84 Pac. 685; Brewster v. J. & J. Rogers Co. 169 N. Y. 73, 58 L.R.A. 495, 62 N. E. 164.

Letton, J., delivered the opinion of the court:

This is an appeal from the judgment of the district court dismissing certain condemnation proceedings brought by the applicant Broadhurst, to obtain a reservoir site on the lands of defendants for irrigation purposes.

The petition to the county judge

stated, in substance, that applicant was the owner of 160 acres of land, and that the defendants owned an adjoining 160-acre tract; that a creek flows through the land of both, and that during the winter season and during freshets in the summer a large amount of unappropriated water of the creek goes to waste; that by its storage and conservation the same can be used in the irrigation of the lands of the applicant; that he had procured a permit from the state board of irrigation to store the flood waters; that the construction of the dam will cause water to cover 5 acres of land belonging to defendants, and the defendants have refused to permit him to use the land for reservoir purposes, or to agree as to the amount of damages. Objections were made in the county court by motion and answer, on the ground that the purpose of the applicant was to impound the water for his own private use, and not for a public purpose, and for other reasons. The objections were overruled. Appraisers were appointed, who viewed the premises and awarded defendants compensation in the sum of \$420. An appeal was taken to the district court, where a motion was made to dismiss the proceedings on the same grounds, which was at first overruled, but during the trial leave was given to renew the motion, which was then sustained and the proceedings dismissed.

The sections of the statutes under which applicant asserts the right to take defendants' property are § 3444, Rev. Stat. 1913, which provides in part as follows: "Every person, corporation or association intending to construct and maintain a storage reservoir for irrigation or any other useful purpose, shall make an application to the state board of irrigation, highways and drainage as hereinbefore provided. . . . Upon the approval of such application the applicant shall have the right to impound any and all waters not otherwise appropriated and any appropriated water

not needed for immediate use, to construct and maintain necessary ditches for the purpose of conducting water to such storage reservoir and to condemn land for such reservoir and ditches in the same manner as is provided by law for the condemnation of rights of way for other ditches"—and §§ 3428, 3430, 3431, Rev. Stat. 1913, which specify the manner of obtaining rights of way for other ditches.

The principal ground set forth in the motion, and that upon which the district court acted, is that the attempted appropriation and condemnation is not for a public purpose, but for a private purpose, being for the sole benefit and advantage of the applicant, and the power

**Eminent domain
—private
purpose.**

of eminent domain cannot be exercised to take defendants' property for private use. Is the proposed taking for a public use? It is pointed out in 10 R.C.L., p. 25, that though some courts hold that "anything which tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the inhabitants of a section of the state, or which leads to the growth of towns and the creation of new resources for the employment of capital and labor, contributes to the general welfare and the prosperity of the whole community, and, giving the Constitution a broad and comprehensive interpretation, constitutes a public use," yet other courts have held, and the common-law rule and the generally accepted doctrine is, that in order to constitute a public use the property taken must be placed within the control of the public, or of a public agency or instrumentality, and its use or the rates charged for its use be subject to public control, or it must be within the right of the public to use and enjoy. A citation of cases holding to each of these views may be found in 10 R. C. L., notes, p. 22. A full and able discussion of the whole subject may be found, beginning on page 24 of the same volume, and in 1 Wiel,

Water Rights, 3d ed. § 606. The proper limits of this opinion lead us to refer the reader to these articles and the authorities cited therein. One of the clearest statements justifying the doctrine that a public advantage or benefit—the general welfare, to use another term—may justify the taking of private property against the consent of the owner, is given in the opinion by Mr. Justice Peckham in the case of *Clark v. Nash*, 198 U. S. 361, 49 L. ed. 1085, 25 Sup. Ct. Rep. 676, 4 Ann. Cas. 1171. In that case it was held by the supreme court of Utah that on account of the peculiarly arid climate of Utah, where agriculture is practically impossible without irrigation, the use of water, even by a private owner, for agricultural purposes, was a public use, and was of such value to the commonwealth that a statute permitting condemnation of the right of way for a ditch for the use of a private individual was not unconstitutional. This was upheld by the Supreme Court of the United States. The opinion, after saying that probably in most states the contention of plaintiff in error would be sound, proceeds: "Where the use is asserted to be public, and the right of the individual to condemn land for the purpose of exercising such use is founded upon or is the result of some peculiar condition of the soil or climate, or other peculiarity of the state, where the right of condemnation is asserted under a state statute, we are always, where it can fairly be done, strongly inclined to hold with the state courts, when they uphold a state statute providing for such condemnation. The validity of such statutes may sometimes depend upon many different facts, the existence of which would make a public use, even by an individual, where, in the absence of such facts, the use would clearly be private. Those facts must be general, notorious, and acknowledged in the state, and the state courts may be assumed to be exceptionally familiar with them."

And again: "But we do not desire to be understood by this decision as approving of the broad proposition that private property may be taken in all cases where the taking may promote the public interest and tend to develop the natural resources of the state. We simply say that in this particular case, and upon the facts stated in the findings of the court, and having reference to the conditions already stated, we are of opinion that the use is a public one."

It is practically on the same principle that the Maine, Massachusetts, and New Hampshire and Connecticut milldam statutes were held to be constitutional, although there is no doubt that these decisions were largely influenced by the facts that such legislation had been in force in the colonies long before the Revolution, and that the Constitutions of those states must have been adopted in view of the ancient customs and general state policy as shown by former and existing statutes.

Tested by the criteria laid down in the Utah case, is there such a peculiar condition of the soil or climate, or is there any other peculiarity of circumstances, in Nebraska, which would justify the taking of the land of one farmer for the benefit of his neighbor? There is a vast difference between the physical configuration and the climatic conditions of the state of Utah, of other states in the arid region of the United States, and of the rocky New England states, and the physical configuration, climate, and soil of the state of Nebraska. According to the United States census report of 1910, that part of Utah in which the heaviest rainfall prevails has about the same amount of precipitation as the very driest and most arid portion of the state of Nebraska; viz., 16 inches per annum; while in the driest portion of Utah only about 7 inches of rain fall in a year. The rainfall in Nebraska varies from over 32 inches in the extreme southeastern portion to about 16 inches in the extreme western portion. The general feature of the state is that

of a rolling plain, sloping upward from the Missouri river to its western boundary. The elevation above the sea level varies from 842 feet in Richardson county, in the southeast, to over 5,000 feet in the extreme northwest corner of the state. In the eastern portion of the state the public welfare requires the construction of drainage ditches to carry off the surplus waters, while in the valleys of the extreme western portion irrigation is necessary to agriculture. Taken as a whole, the state of Nebraska is one of the richest agricultural states in the Union. Its crops are shown by official reports to be of such magnitude that many million dollars' worth are exported every year. It is "a land flowing with milk and honey," far surpassing the land shown the messengers from Israel. In 1915 the state produced over 71,000,000 bushels of wheat; over 73,000,000 bushels of oats (Bulletin 33, Nebraska Department of Labor), and over 230,000,000 bushels of corn and other grain. This vast yield was produced upon 15,293,335 acres of cultivated land, of which only 230,848 acres were under irrigation. Bulletin 166, Nebraska Board of Agriculture. The argument from necessity fails in the face of such facts.

But similar questions have already been adjudicated in this state. This court has held that condemnation cannot be availed of to take the property of another for a private road, so as to permit one whose lands are wholly inclosed or surrounded by the lands of others to have access to a public highway. *Welton v. Dickson*, 38 Neb. 767, 22 L.R.A. 496, 41 Am. St. Rep. 771, 157 N. W. 559. It has also been held that a statute providing that not less than three owners of wet lands may form a corporation to drain the same, and providing for condemnation of a right of way for a ditch, for such purpose, was unconstitutional, the opinion saying: "Any number of persons, not less than three, being the owners of wet and overflowed lands, whenever it is for their interest, may lo-

cate a ditch across the lands of others. There is no requirement in the act that the corporation shall act only in cases where the public welfare would be advanced. And there are no conditions upon which their right to locate a ditch depends, except that they are the owners of wet or overflowed lands. A ditch may be located and opened across the lands of individual owners merely to subserve private interests. Three individuals, by forming a corporation, may locate and open a drain across the property of others without their consent, and compel them to bear the burden of constructing the same. This is an infringement of the right of private property, and is unauthorized and void." *Jenal v. Green Island Draining Co.* 12 Neb. 163, 167, 10 N. W. 548.

In *Paxton & H. Irrigating Canal & Land Co. v. Farmers' & M. Irrig. & Land Co.* 45 Neb. 884, 29 L.R.A. 853, 50 Am. St. Rep. 585, 64 N. W. 343, it was declared: "Public use, in a constitutional sense, may be confined to the inhabitants of a restricted locality or neighborhood, but the use must be common, and *not to a particular individual.*"

Furthermore, the statute under which the applicant asserts the right to take his neighbor's land allows condemnation for other purposes than irrigation. If this section is valid, then anyone who desires to use water for power to run a private factory or for any other private use may condemn the land of his neighbor for a reservoir site and for ditches. In *Traver v. Merrick County*, 14 Neb. 327, 45 Am. Rep. 111, 15 N. W. 690, the status of water gristmills in this state was examined and upon a consideration of the statute allowing such mills the right to flow the lands of others, it was held that since the tolls charged by such mills were subject to public control, such mills were works of internal improvement, under the statute allowing counties to vote bonds in aid of such works.

In *State ex rel. Bowen v. Adams County*, 15 Neb. 568, 20 N. W. 96, it was held that bonds could not be voted in aid of a steam gristmill, and it was said: "But for the provisions of the statute authorizing the exercise of the power of eminent domain in behalf of watermills, and thereby placing their regulation under legislative control, they would not be held to be works of internal improvement."

The right of eminent domain is thus held to rest on the right to control of rates by the public. But we are not alone in this view. In *Ryerson v. Brown*, 35 Mich. 333, 24 Am. Rep. 564, in an interesting and able opinion by Chief Justice Cooley, the earlier cases in this country are reviewed, and it is held that a statute permitting the exercise of the right of eminent domain to flow lands of others for water power purposes, for private use, is unconstitutional and void.

The operation of a general statute covers the state. The taking of property for the use of another cannot be lawful and proper in the western portion of the state, and unlawful and wrongful in the eastern portion. There is no condition, there is no necessity, there is no prevailing public opinion or sentiment or demand, over the greater portion of the state, for any such invasion of the right of private property. Even if it should be held that a great and general public advantage may, in some cases, constitute a public use, we take judicial notice of the fact that neither climatic, agricultural, industrial, nor social conditions in this state indicate that any such advantage will accrue by permitting such a taking as this statute authorizes.

It may be thought to be rather an artificial distinction to say that an irrigation district, or a canal company created to furnish water to landowners for agricultural purposes for compensation, may exercise the right of eminent domain, but that a private owner of a single tract of

land may not have such a privilege. But this difficulty rests on the nature of the matter. Such agencies are in a sense common carriers of water, and the right of control and of regulation of rates exists in the public, so that all courts would agree that such agencies are formed for a public purpose. If a carrier of goods only carries one package of goods, but offers to carry for all, the public is interested; but if he carries for himself alone, the public has no concern with his business.

It is not intended by this opinion to declare that the sections of the statutes mentioned are null and void

in toto, as in violation of the Constitution, but only to declare that they ^{—irrigation of private lands.} cannot, with due regard to the right of private property, be applied to circumstances in which a merely private interest is subserved.

The taking of defendants' property against their will under such proceedings is without due process of law, and cannot be justified. The judgment of the District Court is therefore affirmed.

Fawcett, J., not sitting.

Petition for rehearing denied.

ANNOTATION.

Exercise of eminent domain for purpose of irrigating land of private owner.

I. Generally, 583.

II. Irrigation as public use:

- a. General rule, 583.
- b. Exceptions to rule, 587.
- c. Rule in Colorado, 588.
- d. Rule in Texas, 588.

I. Generally.

There must be a statute expressly or impliedly conferring the right of eminent domain in order that the power may exist to condemn land for irrigation purposes, and the statute must be strictly pursued. *Dalton v. Water Comrs.* (1874) 49 Cal. 222; *Aliso Water Co. v. Baker* (1892) 95 Cal. 268, 30 Pac. 537; *Lindsay Irrig. Co. v. Mehrtens* (1893) 97 Cal. 676, 32 Pac. 802; *San Joaquin & K. River Canal & Irrig. Co. v. Stevinson* (1912) 164 Cal. 221, 128 Pac. 924.

But a statute declaring irrigation to be a public use is valid (see the following subdivision of this note), and the right of condemnation thus created has been held to extend to individual landowners. *Ellinghouse v. Taylor* (1897) 19 Mont. 462, 48 Pac. 757; *Nash v. Clark* (1904) 27 Utah, 158, 1 L.R.A. (N.S.) 208, 75 Pac. 371, 101 Am. St. Rep. 953, 1 Ann. Cas. 300; *State ex rel. Galbraith v. Superior Ct.* (1910) 59 Wash. 621, 140 Am. St. Rep. 893, 110 Pac. 429.

It has likewise been held that private corporations, both foreign and

domestic, may condemn property for the purpose of obtaining a water supply for the irrigation of land. *San Joaquin & K. River Canal & Irrig. Co. v. Stevinson* (1912) 164 Cal. 221, 128 Pac. 924; *Denver Power & Irrig. Co. v. Denver & R. G. R. Co.* (1902) 30 Colo. 204, 60 L.R.A. 383, 69 Pac. 563; *Helena Power Transmission Co. v. Spratt* (1907) 35 Mont. 108, 8 L.R.A. (N.S.) 567, 88 Pac. 773, 10 Ann. Cas. 1055; *Spratt v. Helena Power Transmission Co.* (1908) 37 Mont. 60, 94 Pac. 631; *Borden v. Trespalacios Rice & Irrig. Co.* (1904) — Tex. Civ. App. —, 82 S. W. 461, affirming (1905) 98 Tex. 494, 107 Am. St. Rep. 640, 86 S. W. 11; *Cotulla v. La Salle Water Storage Co.* (1913) — Tex. Civ. App. —, 153 S. W. 711; *State ex rel. Golden Valley Irrig. Co. v. Superior Ct.* (1912) 67 Wash. 556, 122 Pac. 19.

II. Irrigation as public use.

a. General rule.

It is generally held that it is within the power of the legislature to declare that the irrigation of private land is a public use to which private property may be appropriated, and the courts will not hold contrary to the decision of the legislature unless it clearly appears that the use is not public. *Oury v. Goodwin* (1891) 3 Ariz. 255, 26 Pac. 376; *Lux v. Haggin* (1886) 69 Cal. 255,

10 Pac. 674; *Re Madera Irrig. Dist. Bonds* (1891) 92 Cal. 296, 14 L.R.A. 755, 27 Am. St. Rep. 106, 28 Pac. 272, 675; *Aliso Water Co. v. Baker* (1892) 95 Cal. 268, 30 Pac. 537; *Lindsay Irrig. Co. v. Mehrtens* (1893) 97 Cal. 676, 32 Pac. 802; *Lake Koen Nav. Reservoir & Irrig. Co. v. Klein* (1901) 63 Kan. 484, 65 Pac. 684; *Paxton & H. Irrigating Canal & Land Co. v. Farmers' & M. Irrig. & Land Co.* (1895) 45 Neb. 884, 29 L.R.A. 853, 50 Am. St. Rep. 585, 64 N. W. 343; *Alfalfa Irrig. Dist. v. Collins* (1895) 46 Neb. 411, 64 N. W. 1086; *Cummings v. Hyatt* (1898) 54 Neb. 35, 74 N. W. 411; *Umatilla Irrig. Co. v. Barnhart* (1892) 22 Or. 389, 30 Pac. 37.

The fact that the use will promote private gain and operate to the financial advantage of individuals or private corporations is immaterial if the use is in fact a public use. *Eastern Oregon Land Co. v. Willow River Land & Irrig. Co.* (1913) 122 C. C. A. 636, 204 Fed. 516; *Spratt v. Helena Power Transmission Co.* (1908) 37 Mont. 60, 94 Pac. 631.

In the majority of jurisdictions the courts have taken a liberal view of the term "public use" when used in connection with the irrigation of lands, holding it to be synonymous with public benefit, utility, or advantage. In those jurisdictions the rule is that irrigation of privately owned lands is a public use when it will promote the public interest, and develop the natural resources of the commonwealth. It is not essential that the direct benefit should extend to the whole public, or to any considerable portion thereof.

United States.—*Eastern Oregon Land Co. v. Willow River Land & Irrig. Co.* (1913) 122 C. C. A. 636, 204 Fed. 516, writ of certiorari denied in (1914) 234 U. S. 761, 58 L. ed. 1581, 34 Sup. Ct. Rep. 777; *Burley v. United States* (1910) 33 L.R.A. (N.S.) 807, 102 C. C. A. 429, 179 Fed. 1, affirming (1909) 172 Fed. 615; *Miocene Ditch Co. v. Jacobsen* (1906) 77 C. C. A. 106, 146 Fed. 680; *Clark v. Nash* (1905) 198 U. S. 361, 49 L. ed. 1085, 25 Sup. Ct. Rep. 676, 4 Ann. Cas. 1171; *Fallbrook Irrig. Dist. v. Bradley* (1896) 164 U. S. 112, 41 L. ed. 369, 17 Sup.

Ct. Rep. 56, reversing (1895) 68 Fed. 948.

Alaska.—*Miocene Ditch Co. v. Lyng* (1904) 2 Alaska, 265, affirmed in (1905) 70 C. C. A. 458, 138 Fed. 544.

Arizona.—*Oury v. Goodwin* (1891) 3 Ariz. 255, 26 Pac. 376.

California.—*San Joaquin & K. River Canal & Irrig. Co. v. Stevinson* (1912) 164 Cal. 221, 128 Pac. 924; *Rialto Irrig. Dist. v. Brandon* (1894) 103 Cal. 384, 37 Pac. 484; *Lindsay Irrig. Co. v. Mehrtens* (1893) 97 Cal. 676, 32 Pac. 802; *Re Madera Irrig. Dist. Bonds* (1891) 92 Cal. 296, 14 L.R.A. 755, 27 Am. St. Rep. 106, 28 Pac. 272, 675; *Lux v. Haggin* (1886) 69 Cal. 255, 10 Pac. 674; *Lorenz v. Jacobs* (1883) 63 Cal. 73; *Cummings v. Peters* (1880) 56 Cal. 593.

Idaho.—*Idaho-Iowa Lateral & Reservoir Co. v. Fisher* (1915) 27 Idaho, 695, 151 Pac. 998; *Washington Water Power Co. v. Waters* (1911) 19 Idaho, 595, 115 Pac. 682; *Portneuf Irrigating Co. v. Budge* (1909) 16 Idaho, 116, 100 Pac. 1046, 18 Ann. Cas. 674.

Kansas.—*Lake Koen Nav. Reservoir & Irrig. Co. v. Klein* (1901) 63 Kan. 484, 65 Pac. 684.

Montana.—*Spratt v. Helena Power Transmission Co.* (1908) 37 Mont. 60, 94 Pac. 631; *Helena Power Transmission Co. v. Spratt* (1907) 35 Mont. 108, 8 L.R.A. (N.S.) 567, 88 Pac. 773, 10 Ann. Cas. 1055; *Helena v. Rogan* (1902) 26 Mont. 452, 68 Pac. 798.

Nebraska.—*Crawford Co. v. Hathaway* (Crawford Co. v. Hall) (1903) 67 Neb. 325, 60 L.R.A. 889, 108 Am. St. Rep. 647, 93 N. W. 781; *Cummings v. Hyatt* (1898) 54 Neb. 35, 74 N. W. 411; *Alfalfa Irrig. Dist. v. Collins* (1895) 46 Neb. 411, 64 N. W. 1086; *Paxton & H. Irrigation Canal & Land Co. v. Farmers' & M. Irrig. & Land Co.* (1895) 45 Neb. 884, 29 L.R.A. 853, 50 Am. St. Rep. 585, 64 N. W. 343.

New Mexico.—*Young v. Dugger* (1918) 23 N. M. 613, 170 Pac. 61; *Albuquerque v. Garcia* (1913) 17 N. M. 445, 130 Pac. 118; *Albuquerque Land & Irrig. Co. v. Gutierrez* (1900) 10 N. M. 177, 61 Pac. 357.

Oregon.—*Umatilla Irrig. Co. v. Barnhart* (1892) 22 Or. 389, 30 Pac. 37.

Utah.—Salt Lake City v. East Jordan Irrig. Co. (1911) 40 Utah, 126, 121 Pac. 592; State ex rel. Lundberg v. Green River Irrig. Dist. (1911) 40 Utah, 83, 119 Pac. 1039.

Washington.—State ex rel. Golden Valley Irrig. Co. v. Superior Ct. (1912) 67 Wash. 556, 122 Pac. 19; Prescott Irrig. Co. v. Flathers (1899) 20 Wash. 454, 55 Pac. 635; Lewis County v. Gordon (1898) 20 Wash. 80, 54 Pac. 779.

Wyoming.—Grover Irrig. & Land Co. v. Lovella Ditch, Reservoir & Irrig. Co. (1913) 21 Wyo. 204, L.R.A.1916C, 1275, 131 Pac. 43, Ann. Cas. 1915D, 1267.

"In a state like California, where so great a portion of the land is susceptible of agriculture, it may well be said, in view of the climatic peculiarities and topographical distribution of the land, that the legislature is acting for public welfare in making provision for supplying its many farming neighborhoods with water." Lindsay Irrig. Co. v. Mehrtens (1898) 97 Cal. 676, 32 Pac. 802.

In the leading case of Clark v. Nash (1905) 198 U. S. 361, 49 L. ed. 1085, 25 Sup. Ct. Rep. 676, 4 Ann. Cas. 1171, it was contended by the plaintiffs in error that the proposed use of a ditch across their land for the purpose of conveying water to the land of the defendant in error was not a public use, on the theory that although the use of water in the state of Utah for the purpose of irrigation might be a public use where the right to use it was common to the public, yet that no individual had the right to condemn land for the purpose of conveying water across his neighbor's land, to irrigate his own land alone. The court, however, decided against this contention, saying: "In some states, probably in most of them, the proposition contended for by the plaintiffs in error would be sound. But whether a statute of a state permitting condemnation by an individual for the purpose of obtaining water for his land or for mining should be held to be a condemnation for a public use, and, therefore, a valid enactment, may depend upon a number of considerations relating to the situation of the state and its possibilities for land

cultivation, or the successful prosecution of its mining or other industries. Where the use is asserted to be public, and the right of the individual to condemn land for the purpose of exercising such use is founded upon or is the result of some peculiar condition of the soil or climate, or other peculiarity of the state, where the right of condemnation is asserted under a state statute, we are always, where it can fairly be done, strongly inclined to hold with the state courts, when they uphold a state statute providing for such condemnation."

In Fallbrook Irrig. Dist. v. Bradley (1896) 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56, reversing (1895) 68 Fed. 948, it was held that the California Irrigation Act of 1887, and the several amendatory acts, having been repeatedly declared constitutional by the supreme court of that state, the Supreme Court of the United States would not hold to the contrary. What is a public use, the court declared, must depend on the particular facts and circumstances as applied to the subject-matter. In commenting on the question of public use in the state of California the court said: "While the consideration that the work of irrigation must be abandoned if the use of the water may not be held to be or constitute a public use is not to be regarded as conclusive in favor of such use, yet that fact is in this case a most important consideration. Millions of acres of land otherwise cultivable must be left in their present arid and worthless condition, and an effectual obstacle will therefore remain in the way of the advance of a large portion of the state in material wealth and prosperity. To irrigate and thus to bring into possible cultivation these large masses of otherwise worthless lands would seem to be a public purpose and a matter of public interest, not confined to the landowners, or even to any one section of the state. The fact that the use of the water is limited to the landowner is not, therefore, a fatal objection to this legislation. It is not essential that the entire community or even any considerable portion thereof should directly enjoy or participate in an improvement in

order to constitute a public use. All landowners in the district have the right to a proportionate share of the water, and no one landowner is favored above his fellow in his right to the use of the water. It is not necessary, in order that the use should be public, that every resident in the district should have the right to the use of the water."

So, in *Oury v. Goodwin* (1891) 3 Ariz. 255, 26 Pac. 376, proceedings were brought under an "eminent domain" statute to condemn land of the defendant for the purpose of a canal or ditch for irrigating purposes. It appeared that the plaintiffs owned a certain amount of land; that each owned stock in the ditch company in proportion to their land; that the water to be carried through the ditch, passing through the land which they wished to be condemned, was owned by all of them, and they were to be the exclusive owners of the ditch, and the general public was to have no rights in the ditch, or in the water passing through it. It was contended by the defendants that under these facts it would be a taking of private property for private use. It was held, however, that the taking was for a public use, the court saying: "This territory is vast in extent, and rich in undeveloped natural resources. . . . The one great want is water. With this resource of nature made available, the mountains and the deserts may be made to yield fabulous wealth, and Arizona become the home of a vast, prosperous, and happy people. But with water in this territory 'cribbed, cornered and confined,' it will continue and remain the mysterious land of arid desert plains, and barren hillsides, and bleak mountain peaks."

Similarly, in *San Joaquin & K. River Canal & Irrig. Co. v. Stevinson* (1912) 164 Cal. 221, 128 Pac. 924, action was brought to condemn the interests of the defendants in certain water alleged by the plaintiff to be necessary for the purpose of irrigating lands. It was held that in order to constitute a public use it was not necessary that the person in charge of the use should propose to supply all the inhabitants of a county, but it was sufficient if

water was furnished generally to the inhabitants of a particular section of the county, and it was not even necessary that the water should be obtainable by all the inhabitants of the immediate territory to which it was taken. It was further held that it might be a public use, although all persons within that territory could not enjoy it; it was sufficient if all who were capable of enjoying it claimed an equal right to it.

Likewise, in *Re Madera Irrig. Dist. Bonds* (1891) 92 Cal. 296, 14 L.R.A. 755, 27 Am. St. Rep. 106, 28 Pac. 272, a petition was filed by the board of directors of an irrigation district to have the court confirm proceedings for the issue and sale of certain bonds of the district. In holding the act under which the district was organized to be constitutional, the court said: "Whatever tends to an increased prosperity of one portion of the state, or to promote its material development, is for the advantage of the entire state; and the right of the legislature to make provision for developing the productive capacity of the state, or for increasing facilities for the cultivation of its soil according to the requirements of the different portions thereof, is upheld by its power to act for the benefit of the people in affording them the right of 'acquiring, possessing, and protecting the property' which is guaranteed to them by the Constitution."

In *Lake Koen Nav. Reservoir & Irrig. Co. v. Klein* (1901) 63 Kan. 484, 65 Pac. 684, proceedings were instituted to condemn land on which to accumulate water to be used for irrigating purposes. The court, in holding irrigation to be such a public use as to warrant the exercise of the power of eminent domain for its accomplishment, said: "Agriculture is by far the most important of our industries. It engages the attention of a very large part of our people. In it a vast amount of capital is employed. Heretofore a scarcity of moisture when most needed for the growth of crops has been a thing most dreaded by our farmers. . . . Any scheme which has as its legitimate purpose the alleviation of these condi-

tions is of general use and benefit. It is not necessary that all portions of the state be equally benefited by a given enterprise to constitute it a public use, or even all persons living within the limited area to which its operations are confined. All that is necessary is that the use and benefit be common to all within the designated area, not to particular individuals or estates."

In *Umatilla Irrig. Co. v. Barnhart* (1892) 22 Or. 389, 30 Pac. 37, it was sought to condemn riparian rights for the purpose of acquiring water for irrigation, and the action was brought under a statute which expressly declared that the use of the water for the purposes specified in the act was a public use. It was held that, the legislature having declared the use of water for the purposes named in the act to be a public use, the court could not declare it to be otherwise unless the facts clearly showed it not to be such. "We cannot say," said Strahan, Ch. J., "from the facts before us, that this case is of that character. It is well known that there are extensive tracts of arid land in eastern Oregon, unproductive and almost worthless without irrigation, but which could be made productive by the use of water. The reclamation of this class of lands is the object of the act in question; and we cannot say that it is a misapplication of the power of eminent domain to accomplish such results."

b. Exceptions to rule.

While there is a strong presumption in favor of a legislative declaration of the necessity for irrigation (see the preceding subdivision of this note), and it has been said that the courts will take judicial notice that soil of a certain quality will not produce agricultural crops without artificial irrigation (*Prescott Irrig. Co. v. Flathers* (1899) 20 Wash. 454, 55 Pac. 635), if it appears clearly that irrigation is sought for the benefit of the premises of a single owner in a district which is not arid, but is capable of full agricultural development without irrigation, irrigation is held not to be a public use. See the reported case (*VETTER v. BROADHURST*, ante, 578).

So, in *Gravelly Ford Canal Co. v. Pope & T. Land Co.* (1918) 36 Cal. App. 556, 178 Pac. 150, the plaintiff corporation sought to condemn a right of way for a canal to enable it to obtain water for the purpose of irrigating its own lands. The court, in construing the Statute of 1911, entitled, "An Act Regarding Irrigation, and Declaring the Same to Be a Public Use," held that the plaintiff was not entitled to exercise the right of eminent domain to obtain water to irrigate its own lands exclusively. In this connection the court said: "There are large portions of the state along the coast where the humidity is so great as to make irrigation wholly unnecessary; there are other extensive portions of the state where excellent crops are produced by the natural rainfall, as is well known; still other regions are arid, and irrigation is necessary to the production of crops. It seems to us that if the legislature had intended, in declaring irrigation to be a public use, that eminent domain may be exercised in its behalf, 'whether,' as respondent contends, 'the irrigation be by the public generally or by an individual for his own private use,' such an intention would have been clearly stated." In *Aliso Water Co. v. Baker* (1892) 95 Cal. 268, 30 Pac. 537, the plaintiff sought to obtain by condemnation certain water rights, and to use and distribute the water in supplying, for irrigation, a certain farming neighborhood. It did not appear from the complaint whether the "farming neighborhood" which it was proposed to supply with water was inhabited, or that it was composed of more than one farm. It was held that, as the pleading must be construed most strongly against the pleader, the court would have to assume that there was but one farm; and the complaint, therefore, failed to show that the use for which it was proposed to condemn the property was a public use, but it in fact showed affirmatively that it was not.

Property already devoted to a public use cannot be condemned for another public use when the taking would defeat the purposes to which the property sought to be condemned

is devoted, unless the proposed project is more necessary than the project to which the property is devoted, and unless there is an overwhelming public need for this project. *Helena v. Rogan* (1902) 26 Mont. 452, 68 Pac. 798; *Albuquerque v. Garcia* (1913) 17 N. M. 445, 130 Pac. 118.

It has been held that land situated in one state cannot be condemned for the purposes of irrigation in another state. *Grover Irrig. & Land Co. v. Lovella Ditch, Reservoir & Irrig. Co.* (1913) 21 Wyo. 204, L.R.A.1916C, 1275, 131 Pac. 43, Ann. Cas. 1915D, 1207.

In New Mexico, under statute, the power to condemn water in a stream or lake to obtain a supply for irrigation purposes is dependent on the existence of surplus water in the stream or lake. *Albuquerque Land & Irrig. Co. v. Gutierrez* (1900) 10 N. M. 177, 61 Pac. 357; *Young v. Dugger* (1918) 23 N. M. 613, 170 Pac. 61.

c. Rule in Colorado.

Under statute in Colorado any number of farmers cultivating separate tracts of land, whenever it becomes necessary for them to bring water through the lands of another, lying above, in order to obtain a sufficient fall for the purpose of irrigation, may each condemn a right of way for the construction of a separate ditch through the latter lands. However, improved or occupied land cannot be burdened with two or more ditches for the purpose of conveying water without the owner's consent; but a ditch already constructed on the land may be enlarged and used by the owner of other land when necessary. *Downing v. More* (1888) 12 Colo. 316, 20 Pac. 766; *Sand Creek Lateral Irrig. Co. v. Davis* (1892) 17 Colo. 326, 29 Pac. 742; *Gibson v. Cann* (1901) 28 Colo. 499, 66 Pac. 879; *Denver Power & Irrig. Co. v. Denver & R. G. R. Co.* (*Denver Power & Irrig. Co. v. Colorado & S. R. Co.*) (1902) 30 Colo. 204, 60 L.R.A. 383, 69 Pac. 568; *Ortiz v. Hansen* (1905) 35 Colo. 100, 83 Pac. 964; *San Luis Land, C. & Improv. Co. v. Kenilworth Canal Co.* (1893) 3 Colo. App. 244, 32 Pac. 860; *De Grafenried v. Savage* (1897) 9 Colo. App. 131, 47 Pac. 902.

The right to enlarge and use the ditch of another, conferred by a statute of 1881, applies only to such ditches as have been constructed through lands for the purpose of irrigating lands of adjoining owners, and has no application to a case where the owner of land has constructed a ditch to irrigate his own land exclusively. *Downing v. More* (Colo.) *supra*, modifying *Tripp v. Overocker* (Colo.) *infra*.

Under the Statute of 1881, no tract of improved or occupied land may, without the written consent of the owner thereof, be subjected to the burden of two or more irrigating ditches when the same object can be obtained by uniting and conveying the water necessary to be conveyed through the property in one ditch. *Tripp v. Overocker* (1883) 7 Colo. 72, 1 Pac. 695.

The necessity for the taking may be inquired into by the courts. *Sand Creek Lateral Irrig. Co. v. Davis* (1892) 17 Colo. 326, 29 Pac. 742; *Thompson v. De Weese-Dye Ditch & Reservoir Co.* (1898) 25 Colo. 243, 53 Pac. 507; *Gibson v. Cann* (1901) 28 Colo. 499, 66 Pac. 879; *Schneider v. Schneider* (1906) 36 Colo. 518, 86 Pac. 347; *Kern v. Minekime* (1909) 45 Colo. 378, 101 Pac. 341.

d. Rule in Texas.

The liberal view of the term "public use," taken by the majority of jurisdictions where irrigation is an important factor in the development of the natural resources of the state, has not been adopted in Texas. In that jurisdiction it is held that the mere fact that the use for which private property is sought to be condemned will conduce to public benefit does not, of itself, justify the exercise of the power of eminent domain; and the fact that the property of a citizen may be put to a use more beneficial to the public than the use to which the owner has devoted it does not authorize the taking of the property by another, unless such taking be for the use of or by the public, as distinguished from a use merely beneficial or advantageous to the public. *Borden v. Trespalacios Rice &*

Irrig. Co. (1906) 204 U. S. 667, 51 L. ed. 671, 27 Sup. Ct. Rep. 785, affirming (1905) 98 Tex. 494, 107 Am. St. Rep. 640, 86 S. W. 11; Imperial Irrig. Co. v. Jayne (1911) 104 Tex. 395, 138 S. W. 575, Ann. Cas. 1914B, 822; Cotulla v. La Salle Water Storage Co. (1913) — Tex. Civ. App. —, 153 S. W. 711.

In *Borden v. Trespalacios Rice, & Irrig. Co.* (1905) 98 Tex. 494, 107 Am. St. Rep. 640, 86 S. W. 11, it was contended that the law under which the defendant irrigation company was formed, in effect authorized the creation of purely private corporations and associations of persons, for carrying on a business wholly private, and attempted to empower them to take private property for use in that business, without being required to assume any duty to, or to respect any right in, the public. The court, however, held that the plaintiff was charged with duties to the public, and, referring to the defendant's contention, said: "If this were true, we should feel constrained to sustain the attack upon those provisions granting the right of condemnation, for we are not inclined to accept that liberal definition of the phrase 'public use' adopted by some authorities, which makes it mean no more than the public welfare or good, and under which almost any kind of extensive business which promotes the prosperity and comfort of the country might be aided by the power of eminent domain. With the court of civil appeals and counsel for plaintiffs and those authorities which they follow, we agree that property is taken for public use, as intended by the Constitution, only when there results to the public some definite right or use in the business or undertaking to which the property is devoted."

Under statute in Texas the right to exercise the power of eminent domain for irrigation purposes is limited to

the arid portions of the state. *McGhee Irrig. Ditch Co. v. Hudson* (1893) 85 Tex. 587, 22 S. W. 398, 967, reversing (1893) — Tex. Civ. App. —, 21 S. W. 175; *Borden v. Trespalacios Rice & Irrig. Co.* (1904) — Tex. Civ. App. —, 82 S. W. 461.

The questions what portions of the state are arid and what amount of land is necessary are judicial questions, to be determined by the court. *Cotulla v. La Salle Water Storage Co.* (1913) — Tex. Civ. App. —, 153 S. W. 711.

In *Borden v. Trespalacios Rice & Irrig. Co.* (1905) 98 Tex. 494, 107 Am. St. Rep. 640, 86 S. W. 11, the defense was made that the statute under which the plaintiff sought to exercise the right of eminent domain was indefinite as to territory. The court said: "It is next urged that the act is void because of the indefiniteness of the designation of the territory in which it is to operate, the supposed designation being of 'those portions of the state of Texas in which, by reason of the insufficient rainfall, or by reason of the irregularity of the rainfall, irrigation is beneficial for agricultural purposes.' We do not understand that it was the purpose of the legislature to designate any part of the state as a territory to which the act is to be restricted in its effect. It is to operate throughout the state wherever the conditions prescribed may exist. We do not know that this, of itself, invades any constitutional right of the citizens. The citizens' property cannot be taken except for public use, nor without compensation. The conditions under which this may be done must exist to justify a taking as for a public use; and, where they do exist, we do not see that the additional requirement that irrigation be beneficial to agriculture because of the insufficient rainfall prejudices the property owner."

W. F. F.

EDWARD C. MOORE, JR., Appt.,
v.

CITY OF YONKERS.

United States Circuit Court of Appeals, Second Circuit — April 18, 1916.

(149 C. C. A. 31, 235 Fed. 485.)

Public improvement — waiver of objection to assessment.

1. Objection to an assessment for a local improvement is deemed to be waived, if not presented at the time and in the manner provided by law.

[See note on this question beginning on page 634.]

— power to create assessment district.

2. The legislature has power to create an assessment district, and fix its boundaries, and charge the cost of a local improvement in whole or in part on the property within the defined area in accordance with the valuation or frontage or superficial area.

[See 25 R. C. L. 108.]

Legislature — power to delegate authority.

3. The legislature may delegate to a municipal corporation the power to create assessment districts, fix their boundaries, and charge upon property within their limits the cost of local improvements.

[See 25 R. C. L. 108-110.]

Courts — power over assessment districts.

4. The question of what territory is to be included in an assessment district for the construction of local improvements and the extent to which it is benefited is a legislative, and not a judicial, question.

[See 25 R. C. L. 108, 109.]

Constitutional law — discrimination — omission of property from assessment district.

5. No right under the Federal Constitution of one whose property is included in an improvement district is infringed by the omission of benefited property from the assessment district.

[See 25 R. C. L. 131, 132.]

— excessive assessment — due process of law.

6. Property is unconstitutionally taken without due process of law by assessing it for a public improvement in ex-

cess of the benefit conferred upon it by the improvement.

[See 25 R. C. L. 141, 142.]

Public improvement — collateral attack on confirmation of assessment.

7. Confirmation of an assessment for public improvements by a tribunal having jurisdiction of the parties and subject-matter is not subject to collateral attack.

[See 25 R. C. L. 170.]

— waiver of right to question assessment.

8. One whose property is assessed for a local improvement waives his right to relief from the assessment if he fails to appear before the tribunal provided by law for hearing complaints, and takes no steps to have the action of that tribunal reviewed by the courts in a direct proceeding.

[See 25 R. C. L. 180.]

Estoppel — to question assessment.

9. A property owner who stands by and permits a public improvement to be made to the benefit of his property, under authority of a tribunal having authority to levy an assessment, is estopped from raising objections which, if raised in time, would have rendered the assessment invalid.

[See 10 R. C. L. 723; 25 R. C. L. 181.]

Public improvement — delay in questioning assessment — excuse.

10. One is not excused from delay in questioning an assessment upon his property for a public improvement by the fact that he was ignorant of its invalidity.

[See 25 R. C. L. 182.]

APPEAL by plaintiff from a decree of the District Court of the United States for the Southern District of New York in favor of defendant in a suit to vacate assessments against plaintiff's premises and to enjoin their collection. *Affirmed.*

The facts are stated in the opinion of the court.

Argued before Coxe and Rogers, Circuit Judges, and Hough, District Judge.
Messrs. Dunlop & Smith for appellant.

Mr. Thomas F. Curran for appellee.

Rogers, Circuit Judge, delivered the opinion of the court:

This case arises out of special assessments levied by the defendant against certain premises in the city of Yonkers in the state of New York. The action is in form a suit in equity to remove a cloud upon the title to appellant's premises. The alleged cloud consists of two assessments levied in certain proceedings for the laying out, opening, and extending of Convent place from Convent avenue to Palisade avenue in the city aforesaid. It is alleged in the complaint and contended on the trial that, while the proceedings resulting in the assessment were entirely regular on their face, nevertheless the assessment was void as a taking of private property for public use without compensation in contravention of the 14th Amendment to the Constitution of the United States. The complaint prays for a decree vacating the assessments and enjoining their collection. The court below dismissed the bill for want of equity, but filed no opinion.

In this case the plaintiff was the owner in fee of a parcel of land in the city of Yonkers, lying between Palisade avenue on the west and Park avenue on the east, and fronting on Shonnard place on the north. The land had a frontage of some 800 feet on Palisade avenue and Park avenue, and of some 440 feet on Shonnard place. The common council of Yonkers on August 1, 1910, adopted a resolution initiating proceedings to open Convent place between Convent avenue and Palisade avenue. Convent avenue ran parallel with Palisade avenue and Park avenue, and was the second avenue east of Park avenue. To do this it was necessary to take a part of the tract of plaintiff's land, and for the portion of his lands appropriated for this purpose plaintiff was awarded the sum of \$10,203.

The city council adopted an ordinance directing the proper officers to assess the whole cost of the opening of this avenue upon the property included within the boundaries of the district of assessment as fixed by the council; and a portion of the premises designated by the council as deemed to be benefited by the opening of Convent place included the plaintiff's property, as above described. The board of assessors of the city accordingly prepared an assessment roll, assessing the entire cost of the proceedings upon the property within the designated district. This assessment was presented to the council, and on November 10, 1913, was confirmed by it, and the various assessments thereupon became liens upon the parcels of land affected thereby. The amount assessed against the property of the plaintiff amounted to \$14,175.88, being \$6,952.85 on lot 9 and \$7,222.53 on lot 10. The aggregate amount of all the assessments on the property within the taxing district was \$22,410.17. More than one half of the whole amount thus fell upon the property of the plaintiff.

The plaintiff claims that the assessments on his premises are in excess of the benefit conferred upon the whole of his premises; that in fixing the limits of the assessing district property has been included which was not benefited, and property excluded which was benefited; that the proceeding is illegal and erroneous, in that it was not made in accordance with the benefit received; that, to the extent the assessments exceeded the benefit conferred, his property has been taken from him for public use without just compensation, and in contravention of the Constitution of the United States.

The plaintiff alleges that on December 27, 1913, "being ignorant of the fact that said assessment was invalid," he was compelled to pay and did pay to the defendant under coercion of law \$5,250 on account of the assessment on lot 9, and that the balance of the assessment on that

lot, \$1,702.85, remains unpaid, and is a lien on the lot, and constitutes a cloud upon the title; and he also alleges that he paid \$5,250 on account of the assessment on lot 10, and that the balance of that assessment, \$1,972.53, is unpaid and a lien on the premises, and constitutes a cloud on the title. He also alleges that on August 22, 1914, and as soon as he became aware of the illegality of the assessment, he presented to the common council a petition in which he prayed that the council would reverse and correct the assessment roll to make it accord with the benefit conferred on each parcel. His petition for relief was denied.

Thereupon he filed his bill in the court below, asking that the defendant be directed to repay to him so much of the sums received from him as may be found to be in excess of the benefits conferred upon his premises, the assessments to be vacated and set aside in so far as they exceed the benefits received. He also asks an injunction restraining and enjoining the defendant from taking any steps to enforce its lien upon his land, or to collect the amount of the assessment still unpaid.

The legislature has power to create an assessment district and fix its boundaries, and charge the cost of a local improvement in whole or in part on the property within the defined area, either according to valuation or frontage or superficial area. Instead of exercising the power directly, it may delegate the right to a municipal corporation, and when the power is so delegated the municipal corporation exercises its discretion in determining what property should be included in the assessment district and the extent to which the property therein is benefited.

The question of what territory is

to be included in the area to be assessed is legislative, and not judicial. **Courts—power over assessment districts.** And the action of the legislature, or of the common council, to which body the legislative discretion may have been delegated, is ordinarily conclusive. *Williams v. Eggleston*, 170 U. S. 304, 311, 42 L. ed. 1047, 1049, 18 Sup. Ct. Rep. 617. But the power of a common council or of a legislature is not in these matters altogether unlimited. *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187. In *Norwood v. Baker*, the Supreme Court laid down the law respecting assessments as follows: "In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation. We say 'substantial excess,' because exact equality of taxation is not always attainable, and for that reason the excess of cost over special benefits, unless it be of a material character, ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment."

In that case land was taken for street purposes without compensation, and, in addition, the property owner was assessed \$218.58 to pay the costs of condemnation proceedings. The court below held that the complainant was deprived of his property without due process of law, and issued a permanent injunction enjoining the village from enforcing the assessment.

In the case at bar the assessment against the complainant's lots aggregated \$14,175.38, and exceeded the award made to him by the sum of \$3,972.38. In other words, not only was the complainant not compensated by the city for surrendering a strip of land containing more than half an acre, but, on the contrary, was required to pay \$3,972.38 for the privilege of giving up his land;

Public improvement—power to create assessment district.

Legislature—power to delegate authority.

and of this sum of \$3,972.38 the sum of \$1,966.21 was paid in awards to other property owners, who appear to have received a benefit from the street, but who were not required to pay any portion of the expense of the proceeding, as their property was not included in the assessment district. Moreover, the annual assessment of complainant's property, the year after the improvement was made and the special assessment was laid, was no greater than it was before the improvement was made. The tax law of the state requires the assessors each year to assess all the taxable property in their district at its value. The same assessors, therefore, who levied a special assessment of \$14,175.38 against complainant's property for benefits created by the improvement, swore nine months later that the value of the property had not increased over its value of a year before. The case is a much more aggravated one than that of *Norwood v. Baker*, supra. The complainant's expert testified that in his opinion complainant's property was benefited by the opening of the street by an amount some \$9,000 less than the assessments levied on the property. The experts of the defendant testified, however, to the contrary, and according to their testimony the plaintiff derived a net benefit of \$2,388.48.

As to the assessment district, the district judge was satisfied that there was injustice in fixing its limits, and that property which ought plainly to have been included was left out of it. He said: "There is no question at all about it, if you take the physical situation that has been described here, the great advantage of opening this street was not to the property through which it was cut, but to those people up there who wanted to get down to the trolley line," etc.

What was done in *Norwood v. Baker* and in the case at bar was not a legitimate exercise of the taxing power, but was an act of confiscation of this complainant's property.

The question, however, is whether
9 A.L.R.—38.

the courts of the United States can afford the plaintiff the relief which he seeks, in view of the situation in which he stood at the time he instituted his action in the court below. In this case the plaintiff failed to appear and to make objection at the public hearing given by the common council on the question as to the area of the assessment district. He also failed to appear before the board of assessors at the time fixed pursuant to law for hearing objections to the assessment; and in like manner he failed to appear before the common council at the public hearing on the confirmation of the assessment. At each of these hearings an opportunity was afforded him to be heard on all pertinent and available questions. As he did not appear at any of the hearings, and made no objection until after the common council had confirmed both the assessing district and the assessment roll, it is necessary to inquire whether he is now entitled to come into court to question the validity of the assessment.

The general rule is that objections to an assessment are deemed to be waived, if not presented at the time and in the manner prescribed by law. *Public improvement—waiver of objection to assessment.*

Betts v. Naperville, 214 Ill. 380, 73 N. E. 752; *Ottawa v. Chicago & R. I. R. Co.* 25 Ill. 43; *Stewart v. Detroit*, 137 Mich. 381, 100 N. W. 613; *Pabst Brewing Co. v. Milwaukee*, 126 Wis. 110, 105 N. W. 563; *Leavenworth v. Jones*, 69 Kan. 857, 77 Pac. 273; *Morse v. Omaha*, 67 Neb. 426, 93 N. W. 734; *State, Wilkinson, Prosecutor, v. Trenton*, 35 N. J. L. 485, affirmed in 36 N. J. L. 499; *State v. Norton*, 63 Minn. 497, 65 N. W. 935.

In *Brown v. Grand Rapids* (1890) 83 Mich. 103, 47 N. W. 117, a bill was filed to remove a cloud on complainant's title under circumstances somewhat similar to the case at bar. The city of Grand Rapids had made an assessment for the opening and widening of a street and had levied

an assessment therefor on complainant's property. The complainant insisted in that case, as in the case now before us, that the taxing district did not include all the property benefited; that the assessors had acted illegally and arbitrarily in fixing the assessment; that the effect was to compel him to donate his property to public use without compensation. The court reversed the court below and dismissed the bill. The court in its opinion said: "He did not appear, and does not pretend that he made any effort to have the assessment corrected, before the council. The determination of these two bodies, the commissioners who made the assessment roll, and the common council of the city of Grand Rapids, cannot now be inquired into, unless it appears that they acted in bad faith. . . . Where provision is made by law for a review of assessment proceedings, and a body appointed with the power to set the assessment aside or correct the error complained of, and the party wholly fails to appear before such body, or take any steps to have such correction made, he is not in position to appeal to the courts for redress in the absence of fraud or bad faith."

See *Brown v. Saginaw*, 107 Mich. 643, 65 N. W. 601.

In *Terre Haute v. Mack*, 139 Ind. 99, 110, 38 N. E. 472, the court declared that "the act of the engineer in making his report and ascertaining and fixing the amount of liability on the lots or parcels, and that of the common council in making the assessment, were each ministerial, and not judicial, acts. From such acts no appeal lies unless given by the statute. *Vigo County v. Davis*, 136 Ind. 503, 22 L.R.A. 515, 36 N. E. 141."

In *Wright v. Forrestal*, 65 Wis. 341, 27 N. W. 52, the action was brought to declare void and set aside certain tax certificates issued upon a tax sale for the nonpayment of special assessments for a local street

improvement. The complaint was dismissed, and the court said: "Certainly the record does show that quite a large number of the lots were not charged with benefits to an amount equal to the estimated cost of the work in front of the same, nor anything near that sum. Any mistakes which the board may have made in charging lots with a greater sum as benefits than it might be made to appear they would receive from the construction of the street would furnish no ground of relief, so long as such charge was not made fraudulently and for the purpose of making the owners pay more than their just proportion of the costs of such improvements. Mistakes of judgment or opinion in this respect can only be corrected by appearing before the board at the proper time, and having them corrected by an appeal to the board or to the common council, as provided by the charter. After the time for reviewing the assessment has passed, the legality or justice of the award of benefits can only be impeached by showing that the award was not made upon the proper basis, or that it was fraudulently made. Mere mistake of judgment cannot avail to vitiate the proceedings."

See also *Lambert v. Bates*, 148 Cal. 146, 82 Pac. 767; *Re Twenty-eighth Street Sewer*, 158 Pa. 464, 467, 27 Atl. 1109.

The proceedings taken by the municipal authorities of Yonkers were not void. The city had authority to open this street, and to assess the cost of the improvement upon the property benefited. Two errors are alleged to have been committed. The first relates to the limits of the assessing district, which it is claimed failed to include property which should have been embraced within it. The second relates to the character of the assessment, which it is claimed substantially exceeded the benefits which accrued to the complainant's property.

As to the first of these questions

the complainant is not at liberty to raise it. A legislature, or a common council exercising an authority delegated to it by the legislature, is not, by the Constitution of the United States, required to include within the assessing area all the property benefited by a local improvement. It could assess the whole cost upon the abutting property alone, if it thought best. In *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56, the court, speaking through Mr. Justice Peckham, said: "Assuming for the purpose of this objection that the owner of these lands had by the provisions of the act, and before the lands were finally included in the district, an opportunity to be heard before a proper tribunal upon the question of benefits, we are of opinion that the decisions of such a tribunal, in the absence of actual fraud and bad faith, would be, so far as this court is concerned, conclusive upon that question. It cannot be that upon a question of fact of such a nature this court has the power to review the decision of the state tribunal, which has been pronounced under a statute providing for a hearing upon notice. The erroneous decision of such a question of fact violates no constitutional provision. . . . It has been held in this court that the legislature has power to fix such a district for itself without any hearing as to benefits, for the purpose of assessing upon the lands within the district the cost of a local, public improvement. The legislature, when it fixes the district itself, is supposed to have made proper inquiry and to have finally and conclusively determined the fact of benefits to the land included in the district, and the citizen has no constitutional right to any other or further hearing upon that question. The right which he thereafter has is to a hearing upon the question of what is termed the apportionment of the tax, i. e., the amount of the tax which he is to

pay. *Paulsen v. Portland*, 149 U. S. 30, 37 L. ed. 637, 13 Sup. Ct. Rep. 750."

It is nowhere alleged in the complaint that in fixing the assessment district the common council was actuated by fraud or bad faith. It is simply averred that certain premises actually and substantially benefited by the opening of the street were excluded, and that certain premises which were not benefited were included. This raises no constitutional question which will enable a United States court to review the decision of the state tribunal—in this case the common council—which has been rendered under an act which provided for a hearing upon notice. Complainant did not avail himself of his opportunity to attend, and cannot now raise the question here.

The second error is one of a different nature. It is that the assessment upon the complainant's property is in excess of the benefit conferred upon the premises. That raises a constitutional question, and if the allegation is true then the assessment is contrary to the Constitution. That the assessment is in excess of the benefits we have already pointed out. But is the plaintiff entitled to raise the question under the circumstances of this case? Where an assessment is confirmed by proceedings in a court, and a judgment is entered to that effect, such judgment is controlled as to its effect and validity by the principles of law applicable to judgments in general. Confirmation is not always by a court, but is sometimes by a common council or other corresponding body, the action of which body is by statute to have the same effect as the judgment of a court. And in such cases the action taken cannot be attacked collaterally, if the tribunal had jurisdiction, but is conclusive upon the parties.

Constitutional law—discrimination—omission of property from assessment district.

—excessive assessment—due process of law.

Public improvement—collateral attack on confirmation of assessment.

2 Page & J. Taxn. by Assessment, § 927. That the common council of Yonkers had jurisdiction in the matter of this assessment is clearly disclosed.

In this case it is not contended that the statute under which the assessment was laid is unconstitutional. It provided fully for notice and hearing, and it is immaterial that such hearing was to be had before the tribunal laid the assessment. *Fallbrook Irrig. Dist. v. Bradley*, supra; *Hibben v. Smith*, 191 U. S. 310, 48 L. ed. 195, 24 Sup. Ct. Rep. 88; *Seattle v. Kelleher*, 195 U. S. 351, 49 L. ed. 232, 25 Sup. Ct. Rep. 44. Appellant, as already stated, never appeared before that tribunal, and he has never sought through the courts any correction of this assessment, other than that proposed by this suit. If he had been so disposed he might by certiorari, or by original action, have procured review in the courts of the state of New York, and there raised the constitutional objections here insisted on. *Re New York*, 190 N. Y. 350, 16 L.R.A. (N.S.) 335, 83 N. E. 299, 13 Ann. Cas. 598. In our opinion, a property owner who deems himself injured by an assessment, and who has an opportunity of seeking correction before the tribunal pointed out in the assessment law, is under an obligation to appear there and urge his objections in order that the municipality may correct its proposed error. That waiver of the most lawful objections to a proposed assessment is possible has been pointed out in *Wight v. Davidson*, 181 U. S. 371, 45 L. ed. 900, 21 Sup. Ct. Rep. 616; *Chadwick v. Kelley*, 187 U. S. 540, 47 L. ed. 293, 23 Sup. Ct. Rep. 175.

The conclusion we have reached is that the complainant, not having appeared before the tribunal the New York law provided for the confirmation of these assessments, at the hearings before that body, and not having taken steps to have the action taken by that tribunal reviewed in a direct proceeding by the

courts, and not having shown any reason why that course was not open to him and why it was not taken, is now precluded from attacking in this collateral proceeding the validity of the assessment.

Moreover, a property owner who thinks himself injured by a wrongful assessment is, if he has knowledge of what is being done, under obligation to act promptly in interposing his objections, so that the municipality may correct the defects in its proposed action. Many courts have held that, if a public corporation has jurisdiction to levy an assessment, a property owner who makes no objection, but waits until the improvement has been made and his property has received the benefit therefrom, will not be permitted to raise objections which, if raised in time, would have rendered the assessment invalid. His conduct estops him, or amounts to a waiver of his rights, or shows such laches as debars him from relief. The public interests demand prompt objection to be made. In the case at bar the assessment was confirmed by the council on October 14, 1913, and complainant commenced his suit in the court below more than a year thereafter, on November 20, 1914. He alleges that he was ignorant of the invalidity of the assessment; but ignorance of the law does not excuse him, for he is assumed to know what the law is. The complaint was rightly dismissed.

Judgment affirmed.

NOTE.

The general subject of "Loss of right to contest an assessment in proceeding for street or sewer improvement, by waiver, estoppel, or the like," is treated in the annotation fol-

-waiver of
right to
question
assessment.

Estoppel—
to question
assessment.

Public
improvement—
delay in
questioning
assessment—
excuse.

lowing **BARTLESVILLE v. HOLM**, post, 634. Specifically, as regards the point considered in the reported case (**MOORE v. YONKERS**, ante 590), as to estoppel or waiver to complain that the assessment is in excess of the bene-

fit conferred upon the owner's premises, by failure to appear and object at the time prescribed by law, see subd. V. a, 6, b. And as to objections as to the area or boundaries of assessment district, see subd. V. a, 6 (n).

BARBER ASPHALT PAVING COMPANY, Appt.,
v.
CHARLES JURGENS, Respnt.

California Supreme Court (Dept. No. 2) — May 28, 1915.

(170 Cal. 273, 149 Pac. 560.)

Public improvement — estoppel to contest improvement lien — failure to raise objection before municipal council.

1. Failure of a property owner to present to the common council which has ordered improvement of a street the objection that the street has been accepted by the city, and therefore cannot be improved at the expense of abutting owners, does not estop him from contesting the enforcement of a lien upon his property for the cost of the improvement.

[See note on this question beginning on page 634.]

Evidence — burden of proof — publication of ordinance.

2. Formal proof of the publication of an ordinance as required by statute need not be made by one seeking advantage of the ordinance, where another statute permits it to be pleaded by its title and day of passage.

Highway — adoption — validity of ordinance.

3. An ordinance adopting a street under a statute permitting such adoption when it has been fully constructed to the satisfaction of the common council is not insufficient because reciting merely that the street had been constructed to the satisfaction of the council.

— recital as to condition of street.

4. A municipality having power to adopt a street when it is in good condition throughout need not, in the ordinance of adoption, recite that such good condition existed.

— description of road — mention of curbing.

5. An ordinance accepting a public street need not expressly mention the curbing, where the statute provides that the city shall not accept any portion of the street less than the entire

width of the roadway including the curbing.

— exception of zone under jurisdiction of railroad.

6. The exception in the acceptance of a street by a city of the portion of it which a railroad is bound to keep in repair does not nullify the acceptance, although the statute provides that the council shall not accept any portion of the street less than the entire width of the roadway, where, by another statute, the zone which the railroad is bound to keep in repair is not part of the roadway.

— failure to establish datum plane — effect.

7. An ordinance accepting a street, which obligates the municipality to keep it in repair, is not invalidated by the failure to establish a datum plane from which the grade of the street can be established, where the street is completed as such when accepted.

Exemption — repeal — adoption of freeholder's charter.

8. A statutory exemption of abutting property from liability for maintenance of a street after it has been fully constructed and accepted by the municipi-

pality is not repealed by adoption by the municipality of a freeholder's charter under constitutional authority.

Constitutional law — abrogation of pre-existing rights.

9. Rights existing under a statute in

force when a constitutional amendment is adopted are not affected by it unless it contains some provision which expressly abrogates such pre-existing rights.

[See 6 R. C. L. 34.]

APPEAL by plaintiff from a judgment of the Superior Court for Alameda County (Ogden, J.) in favor of defendant, and from an order denying a new trial, in an action brought to foreclose the lien of an assessment for work done on a city street abutting on his property. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Snook & Church and J. A. Cooper, for appellant:

The ordinance introduced in evidence by defendant to prove that San Pablo avenue was an accepted street at the time of the letting of the contract to plaintiff is not a valid ordinance, and does not constitute an acceptance of the street.

Nicolson Pav. Co. v. Painter, 35 Cal. 705; Zottman v. San Francisco, 20 Cal. 102, 81 Am. Dec. 96; McCoy v. Briant, 53 Cal. 250; Murphy v. Napa County, 20 Cal. 503; French v. Teschemaker, 24 Cal. 550; Herzo v. San Francisco, 33 Cal. 145; People v. Tomlinson, 35 Cal. 507; Dill. Mun. Corp. §§ 372, 373; De Haven v. Berendes, 135 Cal. 181, 67 Pac. 786; Capron v. Hitchcock, 98 Cal. 430, 33 Pac. 431; Ryan v. Altschul, 103 Cal. 176, 37 Pac. 339; Beaudry v. Valdez, 32 Cal. 269; Oakland Paving Co. v. Rier, 52 Cal. 271; Ladd v. Portland, 32 Or. 271, 67 Am. St. Rep. 526, 51 Pac. 654; Carstens v. Fond du Lac, 137 Wis. 465, 119 N. W. 117; Bradley v. McAtee, 7 Bush, 668, 3 Am. Rep. 309.

Plaintiff's contract was not prematurely entered into.

San Francisco Paving Co. v. Egan, 146 Cal. 635, 80 Pac. 1076; Raisch v. Hildebrandt, 146 Cal. 721, 81 Pac. 21; Beckett v. Morse, 4 Cal. App. 228, 87 Pac. 408; Berkeley Development Co. v. Marx, 10 Cal. App. 410, 102 Pac. 278; De Haven v. Berendes, 135 Cal. 180, 67 Pac. 786; Jones, Ev. 2d ed. § 438; Moffitt v. Jordan, 127 Cal. 622, 60 Pac. 173; Clarke v. Mead, 102 Cal. 518, 36 Pac. 862; Dyer v. Bradley, 88 Cal. 590, 26 Pac. 511; Swasey v. Adair, 83 Cal. 136, 23 Pac. 284; Vincent v. Pacific Grove, 102 Cal. 405, 36 Pac. 773; Perine v. Forbush, 97 Cal. 309, 32 Pac. 226; District of Columbia v. Camden Iron Works, 181 U. S. 453, 45 L. ed. 948, 21 Sup. Ct. Rep. 680; United States v. Le Baron, 19 How. 73, 15 L. ed. 525; Barber v. Burrows, 51 Cal. 473; Burke v.

Turney, 54 Cal. 486; Cotton v. Watson, 134 Cal. 424, 66 Pac. 490; Shipman v. Forbes, 97 Cal. 572, 32 Pac. 599; Shaughnessy v. Lewis, 130 Mass. 355; Byrne v. Luning Co. 4 Cal. Unrep. 895, 38 Pac. 454; Haughwout v. Raymond, 148 Cal. 311, 83 Pac. 53; Dyer v. Bradley, 88 Cal. 590, 26 Pac. 511.

The assessment is not invalid because the contract as recorded is not a correct copy of the original contract on file.

Perine v. Lewis, 128 Cal. 240, 60 Pac. 422, 772; Moffitt v. Jordan, 127 Cal. 622, 60 Pac. 173; San Francisco v. Certain Real Estate, 50 Cal. 188; Gillis v. Cleveland, 87 Cal. 214, 25 Pac. 351; Labs v. Cooper, 107 Cal. 657, 40 Pac. 1042; Reid v. Clay, 134 Cal. 207, 66 Pac. 262; Witter v. Bachman, 117 Cal. 318, 49 Pac. 202; Diggins v. Hartshorne, 108 Cal. 154, 41 Pac. 283; Wells v. Wood, 114 Cal. 255, 46 Pac. 96; Cotton v. Watson, 134 Cal. 424, 66 Pac. 490; Burns v. Casey, 13 Cal. App. 154, 109 Pac. 94; Warren v. Riddell, 106 Cal. 353, 39 Pac. 781; Girvin v. Simon, 116 Cal. 604, 48 Pac. 720; Lambert v. Bates, 137 Cal. 676, 70 Pac. 777; Jennings v. Le Breton, 80 Cal. 8, 21 Pac. 1127; San Francisco Paving Co. v. Dubois, 2 Cal. App. 42, 83 Pac. 72; Petaluma Paving Co. v. Singley, 136 Cal. 616, 69 Pac. 426; Oak Hill Water Co. v. Gillette, 13 Cal. App. 605, 110 Pac. 316; Harney v. Benson, 113 Cal. 314, 45 Pac. 687; Buckman v. Landers, 111 Cal. 350, 43 Pac. 1125; Ryan v. Altschul, 103 Cal. 174, 37 Pac. 339; Pierce v. Los Angeles, 15 Cal. App. 702, 115 Pac. 746; United Real Estate & T. Co. v. Barnes, 159 Cal. 242, 113 Pac. 167; Perine v. Forbush, 97 Cal. 311, 32 Pac. 226.

Mr. R. M. F. Soto, amicus curiæ, for appellant.

Messrs. Mortimer Smith and Chapman & Trefethen for respondent.

Messrs. Beggs & McComish and D. C. Murphy, amici curiæ, for respondent.

Melvin, J., delivered the opinion of the court:

Plaintiff appeals from a judgment in favor of defendant and from an order denying plaintiff's motion for a new trial. The action was to foreclose the lien of a street assessment for work on San Pablo avenue, in the city of Oakland. The findings of the court were in substantial compliance with the defendant's answer, and, in brief, were to the effect that the contract between the superintendent of streets and the plaintiff was made before the expiration of ten days after the posting and publication of the notice of award of contract; that the contract as recorded was different from the one actually signed, the lands within the district described in the recorded contract never having been subjected to an estimate as required by law; and that San Pablo avenue was an accepted street when the contract for the work was let. If the finding last mentioned be correct, and if the force and effect attributed to it by the court be warranted, we need not consider the other findings which are questioned by the appellant, because in that event we must hold that land of defendant abutting on San Pablo avenue was not subject to assessment for street work. The finding with reference to the ordinance accepting San Pablo avenue is as follows: "That on the 4th day of February, A. D. 1889, the said city council of the said city of Oakland, by Ordinance No. 1071, entitled, 'An Ordinance Providing for the Acceptance of the Roadway of San Pablo Avenue from its Intersection with the Westerly Line of Broadway to the Northern Boundary Line of the City of Oakland,' duly accepted said San Pablo avenue as a public street, and that ever since said 4th day of February, A. D. 1889, the said San Pablo avenue was and now is an accepted public street of the said city of Oakland."

Appellant attacks the ordinance mentioned in the finding quoted above upon several grounds. Certain informalities in the adoption of

the ordinance are discussed in the briefs and are said by appellant to be fatal to its validity. By the terms of the by-law that portion of the roadway "required by law to be kept in order or repair by any person or company having railroad tracks thereon" is excepted from the city's acceptance. This, according to appellant's views, was an unlawful deviation from the powers of the city. The ordinance purports to accept the "roadway" of San Pablo avenue, and the alleged failure to include the curbing in that designation is relied upon by plaintiff as a fatal defect therein. The ordinance is also attacked because it contains no recital that the part of San Pablo avenue sought to be accepted had been fully constructed to the satisfaction of the superintendent of streets and of the city council. Appellant also condemns the ordinance because at the time of its adoption no datum plane had been officially adopted by the city of Oakland, and no official grade had been established thereon. As a consequence, it is argued, the work approved and adopted was, in contemplation of law, no improvement at all. The argument is also advanced that by the change in the Constitution giving cities full control over "municipal affairs" the status of San Pablo avenue, established by the mandate of a general statute, ceased to be of any avail as against the city of Oakland, which was not bound by a condition which by a declaratory ordinance the city had recognized as being in existence; and, furthermore, that the city, after the said amendment to the Constitution, was not bound, under the law, to refrain from assessing property abutting on San Pablo avenue for the improvement of that street. It was also urged against the position of respondent that by failing to appeal to the city council for relief because of the existence of "Ordinance No. 1071," he waived his defense based thereon, and is estopped upon principles of equity from setting it up in this action.

Section 20 of the General Street

Law (Stat. 1885, p. 160) is substantially as follows: "Whenever any street . . . has been or shall hereafter be fully constructed to the satisfaction of the superintendent of streets and of the city council, and is in good condition throughout, and a sewer, gas pipes and water are laid therein, under such regulations as the city council shall adopt, the same shall be accepted by the city council, by ordinance, and thereafter shall be kept in repair and improved by the said municipality; the expense thereof, together with the assessment for street work done in front of city property, to be paid out of a fund to be provided by said council for that purpose: Provided, that the city council shall not accept of any portion of the street less than the entire width of the roadway (including the curbing), and one block in length, or one entire crossing. . . . The superintendent of streets shall keep in his office a register of all streets accepted by the city council under this section, which register shall be indexed for easy reference thereto."

The court found the history of the passage of the ordinance as follows: "Said ordinance was passed on the 7th day of January, 1889, and from the minutes of the city council of said city it appears that on the 21st day of January, 1889, the mayor of said city vetoed said ordinance, whereupon the consideration of the same was made a special order for the next regular meeting of said city council, to wit, February 4, 1889, upon which last-named date the city council of said city of Oakland, by a vote, did not sustain said veto of said mayor, but at that time and place said city council of said city passed said ordinance, six (6) councilmen voting in the affirmative, and one (1) councilman voting in the negative; and that at said time seven (7) members constituted the city council of the said city of Oakland."

Appellant makes the point that the ordinance was not "reconsidered" and passed over the mayor's

veto, but we think the records of the city council do show that the action of the council was substantially a reconsideration and passage of the by-law.

There was no formal proof of the publication of the ordinance as required by law (Stat. 1862, p. 353, § 53), but there was proof of all of the usual formalities of the passage of an ordinance over the mayor's veto. Mr. Thompson, the city clerk, testified that the exhibit which was received in evidence was the original record. Evidently there was no written entry of the publication of the ordinance. Respondent's counsel contend that formal proof of publication was not a prerequisite to the admission of the ordinance in evidence. In this behalf he quotes from the opinion written by Mr. Justice Van Fleet in *Santa Rosa City R. Co. v. Central Street R. Co.* 4 Cal. Unrep. 950, 38 Pac. 988. That opinion is not authoritative, for the reason that the case was reheard and the judgment was affirmed by reason of a failure of the court to agree. Originally Justices McFarland and Fitzgerald concurred in the opinion of Justice Van Fleet, and Justice Garoutte concurred in the judgment, while Justices Harrison and De Haven dissented. After a change in the personnel of the court, Justices Van Fleet, Garoutte, and McFarland adhered to their belief that the judgment should be reversed for the reasons given in Justice Van Fleet's opinion, while Justices Henshaw, Harrison, and Temple were of the opinion that it should be affirmed. As the chief justice was disqualified, the judgment stood affirmed by reason of the failure of a majority of the associate justices to agree. It does not appear, however, that the matter of failure to prove publication of the ordinance and Justice Van Fleet's discussion of that phase of the case caused the diversity of views. *Santa Rosa City R. Co. v. Central Street R. Co.* 112 Cal. 436, 44 Pac. 733. In the opinion of the dissenting justices (*Rabjohns v.*

Sorenson, 5 Colo. App. 425, 38 Pac. 992), their dissent is based solely upon their belief that a forfeiture of plaintiff's franchise occurred by reason of its failure to complete its road within the prescribed time. Therefore, while the opinion published in the Pacific Reporter does not stand as an authoritative declaration of the law on this subject, we think it is worthy of adoption upon the point here involved. Before quoting from said opinion it may be well to refer to the provisions of the charter of Oakland existing at the time of the passage of the ordinance. It was provided that "all ordinances shall be published by written advertisements posted up at the mayor's office and at three other public places in the city or in a newspaper published in the city." Stat. 1862, p. 353.

Also that "every ordinance passed by the city council shall be presented to the mayor for his approval; if he approve, he shall sign it; if not, he shall return it within five days thereafter, or if the city council be not then in session, at its next meeting, when said city council shall reconsider said ordinance; and if approved by two thirds of all the members elected to such board, it shall take effect and stand as an ordinance of the city." Stat. 1862, p. 342, § 8.

There was no provision as in the Santa Rosa charter that proof of the passage and publication of ordinances might be made in "the usual way," but § 61 of the Practice Act (the predecessor of § 459, Code Civ. Proc.) was then in force, and under it one seeking the advantage of an ordinance might plead it (and consequently prove it *prima facie*) by referring to it by its title and the day of its passage. This was "the usual way;" consequently, the language of

the learned justice in the Santa Rosa Case, which we quote below, is entirely applicable to the condition presented by this record. He said: "There can be no doubt that publication in a newspaper or by post-

ing is made by that statute a condi-

tion precedent to the taking effect of any ordinance; but it does not follow that direct proof of that fact is essential in any case. The statute expressly allows the passage and publication of ordinances to be proved 'in the usual way;' that is, by such proof as would be sufficient to prove such facts in any other case.

As was said in *Atchison v. King*, 9 Kan. 550, 556: "The city having passed the ordinance four or five years before it was offered in evidence, and having acted upon it as valid, will not now be allowed in such an action to deny its publication. Such a rule would be a great inducement to cities to disobey the law. They get the benefits and escape the inconveniences of the law by such a course, as it would in most cases be impossible for a stranger to prove a publication four or five years after the passage of the ordinance, when the publication is by posted notices. Nor would the difficulty be much less where it was published in a newspaper, in a country where newspaper changes are as frequent as they are in this state. It was the duty of the city authorities to publish the ordinance. As they acted on it, the presumption is that it was duly published; and at least this presumption is sufficient till the contrary appears." "

In *Van Buren v. Wells*, 53 Ark. 377, 22 Am. St. Rep. 214, 14 S. W. 38, it was held that the burden of proving publication was not placed upon the person asserting a right under the statute, but upon the one denying its validity. See also *Muir v. Bardstown*, 120 Ky. 750, 87 S. W. 1096; *Missouri P. R. Co. v. Chick*, 6 Kan. App. 482, 50 Pac. 605, 3 Am. Neg. Rep. 380; *McQuillin, Mun. Corp.* § 864.

Proceedings for the assessment of property for street improvements being in invitum, it follows that after the defendant has proven, in the usual manner, the existence of an ordinance preserved in the city's official records as the true and genuine act of its common council, purporting to cast upon the city the burden

Evidence—
burden of proof
—publication
of ordinance.

of paying for the work, facts tending to invalidate such ordinance must be proven by the city or the person seeking to deny the city's liability.

But appellant attacks the ordinance on the ground that it fails to recite that the work on San Pablo avenue had been *fully constructed to the satisfaction of the superintendent of streets and of the city council*, or that the street was *in good condition throughout*. The ordinance does recite the construction of the roadway to the satisfaction of the superintendent of streets and the city council. The omission of the word "fully" before "constructed" we deem not important. Satisfac-

Highway—
adoption—
validity of
ordinance.

tion sufficient to cause the councilmen to vote to accept the street must be regarded as full satisfaction for all practical purposes. There was no recital that at the date of the passage of the ordinance the street was "in good condition throughout." It is argued that where the jurisdiction of an inferior tribunal depends upon facts to be ascertained by such tribunal, its records must affirmatively show the existence and determination of such facts. *Bedell v. Scott*, 126 Cal. 675, 59 Pac. 210, and similar cases, are cited in support of this position, and appellant asserts that a finding of the good condition of the road was not only a prerequisite to acceptance, but that such finding must be recited in the ordinance in order to give validity to that enactment. The doctrine announced in *Bedell v. Scott* has been somewhat modified by the later decision in *Gardella v. Amador County*, 164 Cal. 561, 129 Pac. 993. This court said in *Chase v. Trout*, 146 Cal. 369, 80 Pac. 81: "Where a legislative body is given power to act whenever it shall find a given fact to exist, it is not necessary, as a condition to the exercise of the power, that such body should previously or contemporaneously make a declaration that the fact exists. The fact that it takes the action raises the presump-

tion that it had upon inquiry ascertained the existence of the fact, unless the statute giving the power explicitly requires an express finding or declaration of the conditions precedent."

Section 20 of the Vrooman Act (Stat. 1885, p. 160) does not require that an ordinance accepting a street should show upon its face that the street was "in good condition throughout." Therefore the omission of that recital from the ordinance did not nullify its force and effect.

In the ordinance in question that part of the street which, according to law, was required to be kept in order by a railroad company was excepted from the operation of the by-law, and the curbing was not specifically mentioned as a part of the "roadway" which the city accepted. Both of these omissions are specified by appellant as fatal to the efficacy of the ordinance. *Beaudry v. Valdez*, 32 Cal. 276, is cited as authority for the proposition that curbing may not be considered a part of the "roadway." That case merely holds that the term "macadamizing" does not include "curbing." Section 20 of the Vrooman Act was evidently drawn with the intention of specifying curbing as a part of the roadway, because the city is therein inhibited from accepting any portion of the street "less than the entire width of the roadway (including the curbing)." The curbing is therefore, for the purposes of the act, included within the definition of the term "roadway," and an acceptance of a "roadway" in compliance with that section is an acceptance of the whole of the roadway, including the curbing. Nor did the exception from the ordinance of that part of the street which the railroad company is bound to repair make the ordinance a nullity. It is consistent and proper to read, § 20 of the Vrooman Act in connection with

—recital as to
condition of
street.

—description of
road—mention
of curbing.

—exception of
some under
jurisdiction of
railroad.

(170 Cal. 273, 149 Pac. 560.)

§ 498 of the Civil Code. While it is true that the former statute requires the council to accept the entire roadway, if any part, it is equally true that for the purposes of street assessment the zone which the railroad company is bound to keep in repair is not a part of the roadway. In *San Francisco Paving Co. v. Egan*, 146 Cal. 638, 80 Pac. 1076, which was an action to foreclose the lien of a street assessment, the board of supervisors had in the resolution of intention specifically excepted "that portion required by law to be kept in order by the railroad company having tracks thereon," although the statute only authorized the omission of those portions of the street on which work previously had been performed by owners of land fronting thereon. It was held that the board of supervisors had the right to except in its resolution that part of the street which the railroad company was bound under its franchise to keep in order. While *Oakland Paving Co. v. Rier*, 52 Cal. 276, is in seeming conflict with this conclusion, we are not favored with the text of the resolution of the council there reviewed. The opinion merely says that the council did not accept the full width of the street. The resolution was also held of no effect under § 20 of the *Vrooman Act*, because it sought to express acceptance of work done, rather than of the street upon which the material and labor had been bestowed.

Because no datum plane had been established and officially adopted by the city of Oakland prior to the adoption of Ordinance No. 1071, appellant insists that the attempted acceptance of San Pablo avenue was beyond the power of the city council. It is true that without a datum or basis fixed for the grade of a street a contractor may not know how far he may be compelled to go in filling or grading, and therefore it is proper that a grade should be fixed before the letting of public contracts for street work. But this is not a question between the city and a contractor or a prospective bidder

whose rights are in danger of being violated because of the nonexistence of an official grade. When a municipality engages with the owners of property to keep the roadway of a street in repair, it makes such engagement in view of the existing facts, and the existence or nonexistence of an official datum plane is entirely immaterial to the force and validity of its ordinance of acceptance.

—failure to establish datum plane—effect.

It is also suggested that respondent's failure to appeal to the council for relief estopped him from maintaining this defense, that, being presumed to know of the existence of the ordinance, he remained silent while the work was being done, and the failure to present his objections and his defense to the city council precluded him from an assertion of such defense before any other tribunal.

But the presumption of knowledge did not attach to the respondent with any greater strength

Public improvement—estoppel to contest improvement lien—failure to raise objection before municipal council.

than it applied to the city or to the contractor. What could the council have done to remedy the situation? It could not have removed the effect of the ordinance. The council had the right to order the improvement, and the property owner could not question that right, but he could contest the contractor's right to collect from him after the work was completed. In *Flickinger v. Fay*, 119 Cal. 590, 51 Pac. 855, the facts were these: The common council of the city of San Jose had ordered certain work done on a street, and had entered into a contract with the respondent, but the appellant, who owned property abutting on the street, sought by injunction to restrain prosecution of the improvement on the ground that he would be charged with a proportion of the cost in violation of a resolution of the council by which the street had been accepted in accordance with the provisions of the street improvement act. This court held that the

injunction was properly denied, and said, among other things: "Whether the cost of that work shall be borne by the city, or be assessed upon the adjacent lands, will be determined after the work under the contract has been completed. If, for any reason, an assessment therefor cannot be legally made upon the lands of the plaintiffs, they will then be entitled to relief against such procedure, or can successfully defend any proceeding to enforce the assessment."

Besides, it has been held that the doctrine of estoppel has no application in proceedings to enforce liens for street work. *Heft v. Payne*, 97 Cal. 110, 31 Pac. 844; *Union Paving & Contracting Co. v. McGovern*, 127 Cal. 639, 60 Pac. 169.

In opposition to the superior court's conclusion that no lien could attach upon the property for the improvement made, for the reason that at the time the contract was made San Pablo avenue was an accepted street, we are favored with an elaborate brief by one of the amici curiæ, wherein it is argued that no exemption existed by reason of the ordinance provisions. In support of this contention counsel insists that § 20 of the Vrooman Act, before its repeal in 1911 (which was subsequent to the completion of the work here considered), created no vested or contractual right when it was complied with, and that the exemption therein provided for was a mere gratuity, revocable at the will and pleasure of the power bestowing the gratuity. The question whether or not exemptions of this sort create a contractual relation has been twice before this court, but it was not decided either time. *San Francisco v. Certain Real Estate*, 42 Cal. 521; *Oakland Paving Co v. Rier*, *supra*. Generally speaking, however, the principles of taxation are not those of contract, and it has frequently been decided in other jurisdictions that payment by a property owner for improvements to a street in no wise constitutes a consideration moving from him to the city which

would support a contractual obligation. See *Ladd v. Portland*, 32 Or. 271, 67 Am. St. Rep. 526, 51 Pac. 654, and cases cited. On the other hand, there are authorities which hold that, where an assessment has been made under powers properly exercised, and has been duly paid, a second assessment should be borne by the general public, for the reason that the benefits to the owner of abutting property of such second improvement is reduced to a minimum, and that, the real benefit being to the community generally, the municipal treasury should bear the burden. *Hammett v. Philadelphia*, 65 Pa. 146, 3 Am. Rep. 615. The principle upon which owners of abutting property are charged with the cost of street improvements, in the first instance, is that their property is benefited in a special manner. In recognition of this doctrine, statutory provision is often made for exempting property from the operation of an assessment where a prior improvement had been ordered and constructed, or for the giving of some credit for the value of such prior improvement, and when such exemption or credit has been ordered in conformity with statute or ordinance, it has usually been sustained. The policy of the legislature of this state has been to recognize that the special benefit which an abutting owner has received by reason of street improvements has been satisfied by the payment of one assessment, and that under a second improvement an owner of property abutting thereon does not derive any advantage beyond that enjoyed by all other citizens. Section 20 of the Vrooman Act is a legislative recognition of a right to exemption which ought to exist under all conditions of fairness and justice. Irrespective of the question of what rights might or might not accrue under the exemption, it is admitted that the section provides for the creation of a certain status by the adoption of an ordinance of acceptance, and that the moment this status is brought into existence the sovereign power of

the state operates, through the act, to create an exemption. It is contended, however, that while this exemption continued to exist after the adoption of a freeholders' charter, the provisions of which were consistent with the Vrooman Act, this situation was changed in November, 1896, by the amendment to § 6 of article 11 of the Constitution, under which cities and towns theretofore or thereafter organized, and the charters of such cities and towns, were freed in all "municipal affairs" from any further subjection to or control by general laws, and that upon the adoption of the amendment the freeholders' charter became exclusively operative in matters of street improvements and acceptance, and that accordingly any exemption created under general laws became extinguished. In support of this theory it is argued that to hold otherwise would have the effect of interfering with the power of taxation by the city, by increasing the burden on the general taxpayers by reason of the fact that the exemption would augment the area of land relieved from assessment for street purposes by acceptances under § 20 of the Vrooman Act. This contention cannot be maintained. The delegation of exclusive authority by constitutional provision to municipalities in municipal affairs does not of itself have the effect of repealing all general laws with reference to such affairs. Rights existing under a statute in force when a constitutional amendment is adopted are not affected by it, unless it contains some provision which specifically abrogates such pre-existing rights. 1 Page & J. Taxn. § 166. Unless intent to repeal the terms of a special law is evident from the language of a constitutional provision, courts should assume as a rule of construction that

**Exemption—
repeal—adoption
of freeholder's
charter.**

**Constitutional
law—abrogation
of pre-existing
right.**

only a prospective operation of the constitutional provision was contemplated. State ex rel. Harrison v. Frazier, 98 Mo. 426, 11 S. W. 973. Constitutional provisions do not affect laws in existence unless the words employed show a clear intention that the provisions shall have a retroactive effect. Mestas v. Diamond Coal & Coke Co. 12 Wyo. 414, 76 Pac. 567; Hamilton, Assessments, §§ 196, 201, note. The constitutional amendment here invoked to defeat the asserted exemption contains no such provision, nor was any ordinance ever adopted, under this grant, so far as this record discloses, attempting to revoke the exemption provided for in the Vrooman Act and declared by the ordinance of the city of Oakland which we have been here reviewing. Both the act and the ordinance having been in force at the time of the improvement for which plaintiff seeks payment from the defendant, it follows that, as the street had been duly accepted, the assessment was void.

Our conclusion with reference to this branch of the case makes it unnecessary for us to discuss the other alleged errors.

The judgment and order from which plaintiff has appealed are affirmed.

Henshaw and Lorigan, JJ., concur.

Petition for rehearing denied June 26, 1915.

NOTE.

The general subject of the loss of right to contest assessment in proceeding for street or sewer improvement by waiver, estoppel, or the like, is considered in the annotation following BARTLESVILLE v. HOLM, post, 634. More particularly, for the point considered in the reported case (BARBER ASPHALT PAVING CO. v. JURGENS, ante, 597) as to estoppel by failure to object, see V. a, and the various subdivisions thereof.

L. P. PARTEE, Plff. in Err.,
v.
CLEVELAND TRINIDAD PAVING COMPANY.

Oklahoma Supreme Court — May 7, 1918.

(— Okla. —, 172 Pac. 945.)

Public improvement — estoppel to contest assessment.

When a city acquires jurisdiction by the proper preliminary proceedings to pave certain of its streets, the owner of property within the improvement district who sees such improvements made with the knowledge that the city authorities intend to levy and collect a special tax against his property, and that those who do such work cannot be compensated in any other way, and fails to prosecute a suit testing the validity of the ordinance creating the paving district or an assessment made thereunder within the time provided by the charter of the city enacting said ordinance, cannot thereafter maintain an action to enjoin the collection of the assessment against his property on the ground of alleged irregularities.

[See note on this question beginning on page 634.]

Headnote by HOOKER, C.

ERROR to the District Court for Tulsa County (Linn, J.) to review a judgment in favor of plaintiff in an action brought to foreclose an alleged tax lien. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Messrs. G. W. Hutchins and Gregg & Martin for plaintiff in error.

Messrs. Randolph, Haver, & Shirk, for defendant in error:

Defendant cannot raise the question as to the quantum of benefits conferred upon his property by the improvements, after having failed to make his objection before the commissioners of the city of Tulsa at the proper time, and after having failed to institute proceedings in a court of competent jurisdiction within the ten days' time allowed by the charter of the city.

Chickasha v. O'Brien, — Okla. —, 159 Pac. 282; Grier v. Kramer, 62 Okla. 151, 162 Pac. 490; Norman v. Allen, 47 Okla. 74, 147 Pac. 1002; Muskogee v. Rambo, 40 Okla. 672, 138 Pac. 567; Byram v. Foley, 17 Ind. App. 629, 47 N. E. 351; Atchison, T. & S. F. R. Co. v. Montgomery County, 93 Kan. 319, 144 Pac. 209; Paulsen v. El Reno, 22 Okla. 734, 98 Pac. 958; Goodholm & S. Invest. Co. v. Cleveland-Trinidad Paving Co. 48 Okla. 38, 160 Pac. 109; Dowling v. Altschul, 4 Cal. Unrep. 58, 33 Pac. 495; Lonsinger v. Ponca City, 27 Okla. 397, 112 Pac. 1006; Muskogee v. Rambo, 40 Okla. 672, 138 Pac.

567; Norris v. Lawton, 47 Okla. 213, 148 Pac. 123; Coalgate v. Gentilini, 51 Okla. 552, 152 Pac. 95.

Hooker, C., filed the following opinion:

This action was brought by the defendant in error to foreclose a certain tax bill issued by the city of Tulsa to it, same being designated as special tax bill No. 2190, in street improvement district No. 52-A, and alleged to be a first and prior lien against all that part of lot 1 in block 54 lying westerly of the westerly line of the right of way of the Missouri, Kansas, & Texas Railway in said city.

The answer of the plaintiff in error sets up two defenses against this action; namely, (1) that the resolution providing for the improvement in said district and the ordinance passed in pursuance thereof included not only the grading, curbing, paving, and guttering of the street, but included as well the construction of the catch basins at the intersections of the streets and the storm-

sewer drainage, which, under the law, the plaintiff in error contends, cannot be combined in one assessment, but must be made under separate ordinances and by a separate and distinct proceeding as provided by the provisions of the charter of the city of Tulsa and the statutes of the state of Oklahoma; (2) that all of the improvements placed in Archer street under the resolution and ordinance involved here, consisting of grading, curbing, and guttering, were made upon that portion of Archer street and Greenwood avenue occupied by the right of way of the said railroad company where the same crosses Archer street, with the exception of a small portion of the intersection formed by the crossing of Archer street and Greenwood avenue, and that all of the cost of said grading, curbing, guttering, and paving of the right of way of said company, which right of way was 100 feet wide and entirely across Archer street, with the exception of 2 feet on the outside of the track of said railroad company crossing said street, was in fact taxed against the property in the abutting blocks, and as a result thereof one half of the cost of making said improvements was taxed against the north half of block 54 in said city, which included the fractional part of lot 1 owned by the plaintiff in error.

The record herein discloses that Archer street runs east and west and Greenwood avenue north and south; that blocks 46 and 54 are west of Greenwood avenue; and that said blocks are separated by Archer street. Lot 1 in block 54 fronts north on Archer street 140 feet and east on Greenwood avenue 100 feet. The right of way of said company as found by the court takes a triangular piece of ground out of the northeast corner of lot 1 of about 81 feet facing on Greenwood avenue and 75 feet facing north on Archer street.

It appears further from the evidence that the improvements in district No. 52-A involved in this ac-

tion commenced at the westerly line of the right of way of the said company and extended easterly on Archer street, and it is contended by the plaintiff in error that his property involved here, that is, that part of lot 1 in block 54 not occupied by the right of way of said company, does not abut, any of the improvements made in said district No. 52-A, but it is conceded by him that his property is liable for a certain part of said improvements caused by the improvements at the intersection of Greenwood avenue and Archer street for catch basins and storm-sewer drainage.

Upon the trial of this cause in the court below the court made the following findings of fact:

"That all of that portion of Archer street lying west of the center of the alley running north and south through blocks 54 and 46 of the city of Tulsa up to the intersection of the west line of the right of way of the Missouri, Kansas, & Texas Railway had been paved under a prior ordinance, and its portion of the cost thereof assessed against lot 1 in block 54, belonging to the defendant; that of the paving done under the ordinance providing for the improvement of Archer street by paving the unpaved portion of said street from the east intersection of Archer street and Greenwood avenue westerly to the center of the alley running north and south through blocks 54 and 46 of the city of Tulsa, and under which tax certificate No. 2190 was issued, 100 feet of the said paving on said Archer street was included within the right of way of the Missouri, Kansas, & Texas Railway Company, and should, under the city charter, have been taxed and assessed against said railroad company.

"The court further finds from the proof offered that a portion of the improvements of the intersection formed by the crossing of Archer street and Greenwood avenue were properly taxable against the property in the northeast quarter of block 54, and that some portion of the

expense of said improvement of said intersection was properly taxable against lot 1, the property of the defendant.

"The court further finds that proper notice was given of the making of said improvements and the apportionment of the costs; that the defendant, L. P. Partee, appeared and filed his protest with the city commissioners of the city of Tulsa, protesting against the apportionment of the cost of said improvements made by said city and assessed against his property, being lot 1 in block 54 of the city of Tulsa, and that a hearing was had thereon before the city commission holding against said defendant; that the said L. P. Partee failed and neglected to appeal from the decision of the commissioners of the city of Tulsa and from the apportionment made by them, upon which apportionment certificate No. 2190 was duly issued.

"The court further finds that under the charter of the city of Tulsa that portion of the cost of paving of the right of way of the Missouri, Kansas, & Texas Railway Company should be assessed against the Missouri, Kansas, & Texas Railway Company.

"The court further finds that because of the failure of the defendant, L. P. Partee, to prosecute his appeal from the decision of the city commissioners in making the apportionment of the expense of the improvements on Archer street, as made by them, and upon which the certificate No. 2190 was issued by the city of Tulsa to the paving company, the rights of the holder of said certificate have become absolute, and the defendant, L. P. Partee, is estopped from questioning the validity of said apportionment, because he did not prosecute his appeal within ten days thereafter as provided by the city charter, and that he cannot in this proceeding try out the question of the equitable or inequitable apportionment made by the city of Tulsa of the expense of said improvement on Archer

street and upon which apportionment certificate No. 2190 was issued,

"The court further finds that under the facts as proven and the law applicable thereto plaintiff is entitled to recover judgment against the defendant, L. P. Partee, for the amount due on said certificate No. 2190, and that the same is a first lien on all the right, title, estate, and interest of defendant, L. P. Partee, in and to lot 1 in block 54, original town, now city, of Tulsa; that the plaintiff is entitled to a foreclosure of its lien and to an order for the sale of said property to secure its said judgment in event the same is not paid."

It is now asserted that the court did not properly apply the law to the facts as found by the court in the trial of said cause; that under the provision of § 14 of article 9 of the charter of the city of Tulsa it is mandatory and compulsory upon the city to tax the entire expense of the improvements of this nature on the right of way against the railway company; and that under the provisions of the charter the city had no authority or right to apportion the expense therefor to private property abutting the street crossed and occupied by said right of way, but that the entire cost thereof must be paid by the railway company, and no part can be assessed against the abutting property.

The provisions of the charter applicable here are as follows:

"Sec. 4. The cost of grading, paving, curbing, and guttering any street, avenue, or alley may be paid in part by the city or in part by the owners of property benefited by such improvement and abutting upon the property, street, or alley or portion thereof ordered to be improved, and any resolution or ordinance passed and adopted by the board of commissioners declaring the necessity for such construction shall provide what proportionate part, if any, of the costs of such improvement shall be paid by the city, and the proportion of the costs that shall be borne by the owners

of property abutting on such street or alley or part of street or alley ordered to be made: Provided that, when any person, firm, or corporation owns any railroad or street railroad or railroad switch of any kind on such street or alley or portion thereof ordered to be improved, such person, firm, or corporation shall pay the whole cost of such improvement between the rails and tracks and for 2 feet on each side of the rails of such railroad or street railroad, and the city and abutting property owners shall be relieved of the part of the costs to be paid by such road. The pro rata of the cost of such improvement payable under the terms hereof by any railroad or street railroad or the owners thereof, together with all costs of collecting the same, shall be a special tax against and secured by a lien upon the railroad, ties, rails, fixtures, rights, and franchises of such railroad or street railroad and the owners thereof, and whenever a contract shall be let for any such improvement the board of commissioners shall levy a special tax upon the railroad, ties, rails, fixtures, rights, and franchises of such railroad or street railroad, for the pro rata share due from such road for improvement between their tracks and rails and 2 feet on each side thereof. Said tax shall be levied at or after the time such contract is let or executed, and shall become due and delinquent as the ordinance levying the same may specify, and shall be a lien from the time of levying, and the proceeds thereof shall be used for the payment of the costs of such improvement. If said taxes be not paid as provided for by ordinance, then collection shall be enforced as the collection of other taxes by advertisement and sale of the property, rights, and franchises levied upon: Provided, it shall not be necessary to sell at the same time as for delinquent ad valorem taxes. At any such sale the city tax collector or such other officers as shall be designated by the board shall execute to the purchaser a deed

similar to the one executed when the property is sold for ad valorem taxes. Such assessment and lien may also be enforced by suit brought in any court having jurisdiction thereof. The lien provided for shall be a first and prior lien paramount to all encumbrances except taxes, upon the roadbed, ties, rails, fixtures, rights and franchises of the person, firm, or corporation or company owning the railroad or street railroads aforesaid:

"Provided, further, that when any street, avenue, or alley is ordered graded, paved, curbed, or guttered as herein provided any person, firm, or corporation having right of way or operating a railroad intersecting or crossing such street, avenue, or alley so ordered improved shall bear the entire expense of grading, paving, curbing, and guttering and laying sidewalks over and across their tracks and right of way for the full width of such right of way. . . .

"Sec. 6. After excluding the costs of making any improvements between and 2 feet on each side of the track and rails of railroads or street railroads, and the entire cost of any improvements crossing the right of way of any railroad, which costs are to be assessed against, and wholly paid by, the owners of such railroads as herein provided. . . .

"Sec. 7. The contract or contracts for such improvements and the bond or bonds having been executed and approved by the board, it shall be the duty of the city engineer to at once prepare a written statement which shall contain the names of such persons, firms, or corporations or estate that may own property abutting upon the section or sections of the street, avenue, or alleys paved, to be improved, the number of front feet owned by each, and describing the property owned by each by block and lot, number, or otherwise, so describing such property as to identify the same; and such statement shall also contain an estimate of the total costs of such improvement, the proportion and amount of such costs

to be assessed against abutting property, the amount per front foot to be assessed against abutting property, and the total estimated amount to be assessed against each owner. Such statement shall be submitted to the board, which shall examine the same and correct any errors which may appear therein; but no error, omission, or mistake in such statement shall in any manner invalidate any assessment made, or lien or claim fixed, thereunder. When such statement has been examined and approved by the board, and it shall have determined to assess the costs of such improvements against such property, it shall so declare by resolution, directing notices thereof to be given unto the owners aforesaid by publication for five consecutive days in a daily newspaper of general circulation in the city of Tulsa, and also to mail to such owners a copy of such notice by registered letter deposited in the postoffice in the city of Tulsa, directed to the address of such owner, if known, or if such address be not known then to the agent or attorney of such person, if known, provided that the registered letter aforesaid shall be deposited in such postoffice in the city of Tulsa within ten days prior to the date set for hearing hereinafter provided for, and provided further that the method herein prescribed for service of notice by registered letter shall be merely cumulative of the service of notice by publication above mentioned, and provided that in all cases where personal service by registered letter shall not be obtained said service by publication shall nevertheless be deemed valid and binding. The certificate of the city auditor or such other officer as shall be designated by the board to the effect that the address of such owner or owners or their agent or attorney is unknown to him, and personal service cannot be had upon them, shall be deemed conclusive of such fact. The notice aforesaid shall state the time of the hearing

hereinafter provided for, the general character of the improvements determined upon by the board, the street or part thereof to be improved, and the proportionate part and amount per front foot of the total cost of the proposed improvement which it is contemplated shall be assessed against the property and the owners thereof abutting upon such street or alley to be improved. On the date stated in the notice aforesaid, or any time thereafter, before any special assessment is actually levied, any person, firm, or corporation interested in any property which is claimed to be subject to assessment for the purpose of paying the cost of any improvement, in whole or in part, shall be entitled to a full and fair hearing before said board as to all matters affecting such property, or the benefit thereof of such improvements or any claim of liability or objection to the making of such improvements of any invalidity or irregularity in any of the proceedings in reference to making such improvements or any other objection thereto. Such person, firm, or corporation shall file their objections in writing, and thereafter the board of commissioners shall hear and determine the same, and full opportunity shall be given to the persons, firms, or corporations filing such objections to produce evidence, subpoena witnesses, and to appear in person or by attorney, and a full and fair hearing thereof shall be given by the said board, which hearing may be adjourned from time to time without further notice, and the board of commissioners shall have full power to inquire into and determine the facts necessary to the adjudication of such objects and the ascertainment of special benefits to such owners by means of such improvements, and shall make such order in such case as may be just and proper. Any objections to the regularity of proceedings with reference to the making of such improvements as herein provided or to the validity of any assessment against said prop-

erty or the validity of any assessment against said property or the owners thereof shall be deemed waived, unless presented at the time and in the manner herein specified. The time as set for such hearing shall be not less than ten days from the time of the first publication of such notice. When the hearing above mentioned has been concluded, the board shall by ordinance assess against the several owners of property, and against their property abutting upon the public street or alley or part thereof ordered to be improved, such proportionate part of the costs of said improvements as by such board may have been adjudged against such respective owners and their property. Said ordinance shall fix a lien upon such property for the respective amounts to be assessed, and shall state the time and manner of payment of such assessment, and said board may order that the said assessment shall be payable in instalments, and prescribe the amount, time, and manner of payment of such instalment, which, however, except as hereinafter provided, shall not exceed ten years from the completion of said improvement, and its acceptance by the city. This said ordinance shall also prescribe the rate of interest to be charged upon deferred payments, not exceeding 7 per cent per annum, and may provide for the maturity of all deferred payments, and their collection, upon default in the payment of any instalment of principal or interest. Each property owner, his heirs, assigns, or successors, however, shall have the privilege of discharging the whole amount assessed against him or any instalment thereof, at any time before maturity, upon payment thereof with accrued interest. Upon the payment by any property owner of his assessment in full, the city shall cause to be executed by its mayor and duly acknowledged for record a release of the lien of such assessments. . . .

"Sec. 9. Whenever any error or mistake shall occur in any proceed-

ings provided for in this charter, it shall be the duty of the board to correct the same, and whenever it shall have been finally determined in any suit that any assessment against any property or its owner or lien against such property fixed or attempted to be fixed under the terms hereof is for any reason invalid, unlawful, or not enforceable, then it shall be the duty of the board to at once proceed to reassess against such property such proportion of the costs of making such improvements as shall be proper, lawful, and just, and fix a lien against such property; and such board shall have power, and it shall be its duty, by ordinance or resolution, to adopt such rules and regulations, and to make such orders as shall, in compliance with the law, provide for correcting such mistakes and making a valid reassessment against such property and fix a valid lien thereon. Said board shall have power and it shall be its duty to adopt such rules and regulations for a hearing to the owners of such property before such reassessment which may be necessary or proper, in order to legally bind such owners and their property by such reassessment, and shall have power to adopt all other rules and regulations which may be requisite to a valid reassessment of such property. Subject to the provisions of this charter, the cost of any such improvement or improvements, after deducting the proportion of such costs as may be assessed against any railroad or street railroad, and the proportion of said costs which may have been finally assessed against property abutting upon the street or alley or section or portion thereof ordered to be improved and against the owners of such property shall be borne and paid by the city. . . .

"Sec. 14. At any time within ten days after hearing in § 7 of this article provided for has been concluded, any person or persons, corporation or corporations, having an interest in any real estate which may be subject to assessment under this

charter, or otherwise having any financial interest in such improvement or improvements, or in the manner in which the cost thereof is to be paid, who may desire to contest on any ground the validity of any proceeding that may have been had with reference to the making of such improvements, or the validity in whole or in part, or any assessment lien fixed by said proceedings, may institute suit for that purpose in any court of competent jurisdiction. Any person or persons, corporation or corporations, who shall fail to institute such suit within a period of ten days, or who shall fail to diligently prosecute such suit in good faith to final judgment, shall be forever barred from making any such contest or contests, and this estoppel shall bind their heirs, successors, administrators, and assigns. The city of Tulsa, or the person or persons to whom the contract has been awarded, shall be made defendants in such suit, and any other proper parties may be joined therein. There shall be attached to plaintiff's petition an affidavit of the truth of the matter therein alleged, except such matters as are alleged on information and belief, and that such suit is brought in good faith, and not to injure or delay the city or contractor, or any owner of real estate abutting on the improvement. Unless the provisions of this section are complied with by plaintiff or plaintiffs, such suit shall be dismissed on motion of any defendant, and in that event plaintiff or plaintiffs shall be barred and estopped to the same extent as if suit had not been brought. In any case where a suit is brought as provided for in this section, then the performance of the work may be suspended at the election of either the city or the contractors until such suit shall be finally determined in the court of original jurisdiction or any appellate court to which the same may be taken by appeal or writ of error: Provided, that any appeal or writ of error shall be perfected within thirty days from the adjournment of the term of court of

original jurisdiction at which final judgment was rendered in such suit: And provided, that no appeal or writ of error to review the judgment of such court, may thereafter be taken or sued out by either party."

From a careful review of the evidence we have reached the conclusion that the property of the plaintiff in error was improperly assessed, or, in other words, that the assessment placed by the city authorities upon that part of lot 1 in said block owned by plaintiff in error far exceeds the amount which should properly have been assessed against his property; yet it is admittedly true that his property was within the improvement district and subject to some tax. This is conceded by him. Under the provisions of the charter he was entitled to and did receive due notice of this assessment, and duly appeared before the proper authority and made his protest and had his hearing thereon, but he failed to prosecute an appeal therefrom or to institute a suit within the time provided by the charter, and as a result thereof he is now barred from maintaining this action.

It appears from the record that the plaintiff in error paid the first instalment or assessment against his property, and when the second assessment matured more than two years after the same was made, he instituted this action to enjoin the collection thereof. He cannot recover here unless he shows that the board of commissioners of Tulsa was wholly without jurisdiction to levy this assessment. This he has not done; for, as stated, it is admittedly true that his property was within the improvement district and subject unquestionably to a portion of this assessment. If for any reason this assessment was unfair or improperly apportioned, the city charter gave him the right to redress any grievance he had and to correct the same in a court of competent jurisdiction. This he failed to do.

It appears that the bone of contention here is whether the railway

(— Okla. —, 172 Pac. 945.)

company had a right of way 100 feet right across Archer street; the city contending that the company did not possess such right of way, while the plaintiff in error contends that the company did. The trial court, with the evidence before it, found that the company did possess a right of way across Archer street 100 feet wide; yet this is a question that could have been determined in an action instituted by the plaintiff in error within the time provided by the charter, and if any improper assessment had been made on account of this mistaken view of the situation, the same could have been corrected in due manner and form as provided by the provisions of said charter.

This court in a number of cases has held that, when a city acquires jurisdiction by the proper preliminary proceedings to pave certain of its streets, a property owner who sits by and sees such improvements made with the knowledge that the city authorities intend to levy and collect a special tax against his property, and that those who do such work cannot be compensated in any other way, and there is no objection thereto until complete performance of the work has been made, cannot thereafter maintain an action to enjoin the collection of assessments against his property on the ground of alleged irregularities in the proceedings subsequent to the time the jurisdiction to perform such work had attached.

In Muskogee v. Rambo, 40 Okla. 672, 138 Pac. 567, this court, through Mr. Justice Kane, quoting from

Perry v. Davis, 18 Okla. 427, 90 Pac. 865, said: "It was the plain duty of the defendants in error, upon the publication of the ordinance creating the sewer district, or when they learned that labor and money were being expended in the actual construction of the sewer, to vigorously oppose and protest against it; then was an opportune time to test, by injunction or other proceedings, the legality of the various steps being taken."

See Chickasha v. O'Brien, — Okla. —, 159 Pac. 282; Norman v. Allen, 47 Okla. 74, 147 Pac. 1002; Grier v. Kramer, 62 Okla. 151, 162 Pac. 490; Muskogee v. Rambo, 40 Okla. 672, 138 Pac. 567; Norris v. Lawton, 47 Okla. 213, 148 Pac. 123; Coalgate v. Gentilini, 51 Okla. 552, 152 Pac. 95; Weaver v. Chickasha, 36 Okla. 226, 128 Pac. 305.

The other contentions of the plaintiff in error are untenable, and the decision of the lower court being in accord with the established rule in this jurisdiction as appears from the foregoing cases, the judgment of the lower court is therefore affirmed.

Per Curiam:

Adopted in whole.

NOTE.

The general subject of the loss of right to contest assessment in proceeding for street or sewer improvement, by waiver, estoppel, or the like, is considered in the annotation following BARTLESVILLE v. HOLM, post, 634. Specifically, as to the effect of failure to appeal from an assessment, see subd. V. d, 6.

Public improvement—estoppel to contest assessment.

JOHN J. FRASER, Appt.,
v.
CITY OF PORTLAND, Respt.

Oregon Supreme Court (In Banc) — June 27, 1916.

(81 Or. 92, 158 Pac. 514.)

Public improvement — right of cancellation of assessment.

1. One across whose property a sewer is laid without right, against his protest, is entitled to have the assessment upon his property for the improvement canceled.

[See note on this question beginning on page 634.]

Estoppel — acquiescence.

2. Mere silence or passive acquiescence when a sewer is being laid across one's property does not of itself create an irrevocable license or produce an estoppel.

[See 10 R. C. L. 692; 17 R. C. L. 580.]

License — for construction of sewer — silence.

3. A municipal corporation which, notwithstanding the express refusal of a landowner to permit it to lay a sewer across his property, proceeds to do so, cannot claim an express license by the fact that he failed to take legal steps to protect his rights until after the sewer was laid, if he had no knowledge

that the work was being done until the pipes had been laid.

Equity — compelling removal of sewer — rights of public.

4. Equity will not refuse to compel a city to remove a sewer from property where it had no right to place it, on the theory that the public will be inconvenienced by such removal, if the property owner expressly refused permission to lay the sewer in ample time to have permitted the city to secure the right by legal proceedings.

[See 9 R. C. L. 692 et seq.]

— relief against continuing wrong.

5. Equity may grant relief against a continuing wrong.

[See 14 R. C. L. 455.]

APPEAL by plaintiff from a decree of the Circuit Court for Multnomah County (Coke, J.) dismissing a suit brought to enjoin defendant from collecting a sewer assessment and to require the removal of the sewer from plaintiff's premises. *Reversed with directions.*

Statement by Harris, J.:

John J. Fraser owns a 5-acre tract of land in Portland. East Twenty-ninth street extends north and south and ends in a cul-de-sac at the northeast corner of the Fraser acreage. Siskiyou street extends east and west and terminates at the east line of the 5-acre tract. If East Twenty-ninth street should be extended across the land owned by Fraser, a junction would be formed with Siskiyou street, because what is now the east boundary line of the acreage would by such street extension become the east line of the extended street. The city of Portland constructed a sewer along and to the end of East Twenty-ninth street, and then over the land of plaintiff, on a

line which would be within East Twenty-ninth street if extended, to the end of Siskiyou street, and thence east along that street. While the sewer was in course of construction, but before the work had reached the Fraser land, George A. Ries, a representative of the city, called upon Fraser on September 18, 1912, for the purpose of acquiring a right of way over his premises. The plaintiff was advised of the fact that the city had planned to lay the sewer across his land. During the interview Fraser told Ries that "he would not under any consideration give a right of way, and if the city attempted to put a sewer across there he would fight it." Prior to the interview between Ries and

Fraser a proceeding was commenced for the purpose of extending East Twenty-ninth street across the Fraser land, and according to the testimony of Ries "the city expected the street would be opened in there for a sewer to be constructed across the property." The city engineer explains the delay in seeing Fraser about a right of way by saying that the municipal authorities were "expecting the city would obtain East Twenty-ninth street as a street." The attempt to open the street was defeated while the sewer was under construction, and although the city was without a right of way when the work of construction reached the Fraser land, nevertheless a trench was dug and the sewer laid from the end of East Twenty-ninth street, across the Fraser property, to the end of Siskiyou street. The land was occupied by a tenant, and Fraser says he first knew of the sewer being laid on his property when, about a month after the talk with Ries, he "went there and found the sewer had been dug and the pipe laid across my place." Fraser did nothing, except to consult a lawyer, until March 21, 1913, when he filed a writing with the city council, demanding the removal of the sewer from his land and objecting to an assessment of \$683.80, which the city proposed to levy on his property to pay for construction of the sewer. In the following May the plaintiff commenced this suit to restrain the defendant from collecting the \$683.80 assessment and to require the removal of the sewer from his premises. A trial resulted in a decree dismissing the suit, and the plaintiff appealed.

Messrs. Ralph R. Duniway and J. H. Middleton, for appellant:

Plaintiff's property cannot be taken from him without his consent, except in the mode prescribed by law by means of the power of eminent domain, and just compensation must be made to him.

Salem Flouring Mills Co. v. Lord, 42 Or. 94, 69 Pac. 1033, 70 Pac. 832; Corvalis & E. R. Co. v. Benson, 61 Or. 382, 121 Pac. 418; Clark v. Portland, 62 Or. 124, 123 Pac. 708; United States

v. Lee, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240; Kingsley v. United R. Co. 66 Or. 50, 133 Pac. 785; Davis v. Silverton, 47 Or. 171, 82 Pac. 16; Trotter v. Stayton, 45 Or. 301, 77 Pac. 395; Pacific Mill. & Elevator Co. v. Portland, 65 Or. 349, 46 L.R.A. (N.S.) 363, 133 Pac. 83; Pacific Laundry Co. v. Pacific Bridge Co. 69 Or. 306, 138 Pac. 221.

Defendant proceeded in a lawless manner to intentionally trespass upon the land of plaintiff, which it did at its peril, and did not thereby obtain any license or easement from plaintiff nor raise any equities in its favor.

Lewis, Em. Dom. 3d ed. § 929; Falls City Lumber Co. v. Watkins, 53 Or. 212, 99 Pac. 884; National Automatic Fire Alarm Co. v. Portland, 59 Or. 409, 117 Pac. 285; Bourne v. Wilson-Case Lumber Co. 58 Or. 48, 113 Pac. 52, Ann. Cas. 1913A, 245.

Plaintiff cannot be deprived of his right in his land except by his voluntary act, or by condemnatory proceedings in the mode provided by law.

National Automatic Fire Alarm Co. v. Portland, 59 Or. 409, 117 Pac. 285; Falls City Lumber Co. v. Watkins, 53 Or. 212, 99 Pac. 884; Brown v. Gold Coin Min. Co. 48 Or. 284, 86 Pac. 361; McPhee v. Kelsey, 44 Or. 193, 74 Pac. 401, 75 Pac. 713; Hallock v. Suitor, 37 Or. 9, 60 Pac. 384; Ewing v. Rhea, 37 Or. 583, 52 L.R.A. 140, 82 Am. St. Rep. 783, 62 Pac. 790; Booth-Kelly Lumber Co. v. Eugene, 67 Or. 381, 136 Pac. 29; Bourne v. Wilson-Case Lumber Co. 58 Or. 51, 113 Pac. 52; Ann. Cas. 1913A, 245; Lewis, Em. Dom. 3d ed. § 929.

Courts of equity are as much bound by positive rules of law as are courts of law, and should enforce the law in favor of plaintiff and protect his property.

Allen v. Kitchen, 16 Idaho, 133, L.R.A. 1917A, 563, 100 Pac. 1052, 18 Ann. Cas. 917; Magniac v. Thomson, 15 How. 282, 299, 300, 14 L. ed. 696, 703, 704; Hedges v. Dixon County, 150 U. S. 182, 37 L. ed. 1044, 14 Sup. Ct. Rep. 71; Bourne v. Wilson-Case Lumber Co. 58 Or. 48, 113 Pac. 52, Ann. Cas. 1913A, 245; Sullivan v. Jones & L. Steel Co. 208 Pa. 540, 66 L.R.A. 712, 57 Atl. 1065; American Smelting & Ref. Co. v. Godfrey, 14 Ann. Cas. 8, and note, 89 C. C. A. 139, 158 Fed. 225; 22 Cyc. 782, 783.

An injunction cannot lawfully be refused because more injury will result from awarding than refusing it, if the

one asking for it is entitled to it as a matter of right.

Bourne v. Wilson-Case Lumber Co. 58 Or. 48, 113 Pac. 52, Ann. Cas. 1913A, 245; *Sullivan v. Jones & L. Steel Co.* 208 Pa. 540, 66 L.R.A. 712, 57 Atl. 1065; *American Smelting & Ref. Co. v. Godfrey*, 89 C. C. A. 139, 158 Fed. 225, 14 Ann. Cas. 8; *Hulbert v. California Portland Cement Co.* 161 Cal. 239, 38 L.R.A. (N.S.) 436, 118 Pac. 928; *Arizona Copper Co. v. Gillespie*, 12 Ariz. 203, 100 Pac. 470; *Peterson v. Santa Rosa*, 119 Cal. 387, 51 Pac. 557; *Stock v. Jefferson Twp.* 114 Mich. 357, 38 L.R.A. 355, 72 N. W. 132; 22 Cyc. 782, 783.

Plaintiff did nothing to induce defendant to trespass upon his land and build a sewer across it, nor has he conveyed any license or easement in his land to defendant, nor has plaintiff done anything to estop himself from asserting his title to the land.

Strout v. Portland, 26 Or. 294, 38 Pac. 126; *Applegate v. Portland*, 53 Or. 552, 99 Pac. 890; *Baker City Mut. Irrig. Co. v. Baker City*, 58 Or. 306, 110 Pac. 392, 113 Pac. 9; *Jones v. Salem*, 63 Or. 126, 123 Pac. 1096; *Dyer v. Bandon*, 68 Or. 406, 136 Pac. 652; *National Automatic Fire Alarm Co. v. Portland*, 59 Or. 409, 117 Pac. 285; *Falls City Lumber Co. v. Watkins*, 53 Or. 212, 99 Pac. 884; *Kingsley v. United R. Co.* 66 Or. 50, 133 Pac. 785; *Wayzata v. Great Northern R. Co.* 46 Minn. 505, 49 N. W. 205; *Lewis, Em. Dom.* 3d ed. § 929.

The necessary elements to create an estoppel are neither pleaded nor proved.

Portland v. Inman-Poulsen Lumber Co. 66 Or. 86, 46 L.R.A. (N.S.) 1211, 133 Pac. 829, Ann. Cas. 1915B, 400; *Oliver v. Synhorst*, 58 Or. 582, 109 Pac. 762, 115 Pac. 594, 48 Or. 292, 7 L.R.A. (N.S.) 243, 86 Pac. 376; *Schooling v. Harrisburg*, 42 Or. 494, 71 Pac. 605; *National Automatic Fire Alarm Co. v. Portland*, 59 Or. 409, 117 Pac. 285; *Falls City Lumber Co. v. Watkins*, 53 Or. 212, 99 Pac. 884; *Kingsley v. United R. Co.* 66 Or. 50, 133 Pac. 785; *Wayzata v. Great Northern R. Co.* 46 Minn. 505, 49 N. W. 205; *Lewis, Em. Dom.* 3d ed. § 929.

Plaintiff has a right to resort to a court of equity for a mandatory injunction to remove this continuing trespass as he has no adequate remedy at law, as there is no pecuniary standard by which the damage done by the continuing trespass of the sewer on his land can be measured and compensated.

Bernard v. Willamette Box & Lumber

Co. 64 Or. 223, 129 Pac. 1039; *Bourne v. Wilson-Case Lumber Co.* 58 Or. 48, 113 Pac. 52, Ann. Cas. 1913A, 245; *Willamette Iron Works v. Oregon R. & Nav. Co.* 26 Or. 224, 29 L.R.A. 88, 46 Am. St. Rep. 620, 37 Pac. 1016; *Norton v. Elwert*, 29 Or. 583, 41 Pac. 926; *Salem Flouring Mills Co. v. Lord*, 42 Or. 82, 69 Pac. 1033, 70 Pac. 832; *Curtis Mfg. Co. v. Spencer Wire Co.* 203 Mass. 448, 138 Am. St. Rep. 307, 89 N. E. 534; *Supplee v. Cohen*, 80 N. J. Eq. 83, 83 Atl. 373; *Wayzata v. Great Northern R. Co.* 46 Minn. 505, 49 N. W. 205; 22 Cyc. 782; *High, Inj.* 4th ed. §§ 578, 1272, 1273, 1278; *Lewis, Em. Dom.* 3d ed. §§ 902-904, 929, 931.

The fact that the defendant succeeded in building this sewer across plaintiff's private land without having obtained a license or easement from him or his doing anything to induce defendant to do said acts does not give the latter a license or an easement, nor does it estop plaintiff from resorting to a court of equity to remove the continuing trespass, nor does it authorize a court of equity to refuse relief.

Lewis, Em. Dom. 3d ed. 904, 929; *Holloway v. Louisville, St. L. & T. R. Co.* 92 Ky. 244, 17 S. W. 572; *Louisville, St. L. & T. R. Co. v. Hess*, 92 Ky. 407, 17 S. W. 870; *Crosby v. Dracut*, 109 Mass. 206; *Kingsley v. United R. Co.* 66 Or. 58, 133 Pac. 785; *Bourne v. Wilson-Case Lumber Co.* 58 Or. 48, 113 Pac. 52, Ann. Cas. 1913A, 245; *Falls City Lumber Co. v. Watkins*, 53 Or. 212, 99 Pac. 884; *National Automatic Fire Alarm Co. v. Portland*, 59 Or. 409, 117 Pac. 285.

Defendant cannot lawfully levy or collect an assessment upon the land of plaintiff for the sewer so long as he does not have a right of way for the same through its land.

Clark v. Salem, 61 Or. 120, 121 Pac. 416, Ann. Cas. 1914B, 205; *Elliott, Road & Streets*, 3d ed. § 681; *Page & J. Taxn. by Assessment*, §§ 390-396, 400.

Defendant was a trespasser, and a trespasser cannot recover for a trespass by claiming it is a benefit to the property trespassed upon.

People ex rel. Williams v. Haines, 49 N. Y. 587; *Western Pennsylvania R. Co. v. Allegheny*, 92 Pa. 100; *Re Cheesebrough*, 56 How. Pr. 460, affirmed in 78 N. Y. 232; *Re Rhineland*, 68 N. Y. 105; *Vanderlip v. Grand Rapids*, 73 Mich. 522, 3 L.R.A. 247, 16 Am. St. Rep. 597, 41 N. W. 677; *Hendershott v. Ottumwa*, 46 Iowa, 658, 26 Am. Rep. 182; *Holliday v. Atlanta*, 96 Ga. 377, 23 S.

E. 406; *State ex rel. McKune v. District Ct.* 90 Minn. 540, 97 N. W. 425; *Anderson v. Lower Merion Twp.* 217 Pa. 369, 66 Atl. 1115; *Page & J. Taxn. by Assessment*, §§ 390-396, 400.

Messrs. W. P. LaRoche and Henry A. Davie, for respondent:

An injunction to restrain an alleged trespass will not be granted unless the injury is irreparable and cannot be compensated in an action at law, or unless a multiplicity of suits is threatened, or unless the estate is destroyed.

Smith v. Gardner, 12 Or. 221, 53 Am. Rep. 342, 6 Pac. 771; *Moore v. Halliday*, 43 Or. 243, 72 Pac. 801, 99 Am. St. Rep. 724; *Garrett v. Bishop*, 27 Or. 349, 41 Pac. 10; *Hume v. Burns*, 50 Or. 124, 90 Pac. 1009; *High, Inj.* 4th ed. § 697.

An injunction will be denied where a landowner has failed to assert his claim until the rights of the public and third parties have intervened.

Porter v. Midland R. Co. 125 Ind. 476, 25 N. E. 556; *Page & J. Taxn. by Assessment*, §§ 392, 400; *St. Joseph v. Landis*, 54 Mo. App. 315; *Re McGown*, 18 Hun, 434.

Where the issuance of an injunction might seriously affect the public, the writ is usually denied.

Booth-Kelly Lumber Co. v. Eugene, 67 Or. 381, 136 Pac. 29; *Grey ex rel. Simmons v. Paterson*, 60 N. J. Eq. 385, 48 L.R.A. 717, 83 Am. St. Rep. 642, 45 Atl. 995.

A court of equity will not lend its aid by injunction for a redress of a wrong in the abstract, and unconnected with any injury or damage to the person seeking relief.

Goodrich v. Moore, 2 Minn. 61, Gil. 49, 72 Am. Dec. 74.

One who stands by with knowledge that expensive improvements are being constructed upon his land, and makes no seasonable objection thereto, will be precluded from maintaining a suit for an injunction after the work has been completed.

Roberts v. Northern P. R. Co. 158 U. S. 1, 39 L. ed. 873, 15 Sup. Ct. Rep. 756; *Kingsley v. United R. Co.* 66 Or. 50, 133 Pac. 785.

The assessment levied upon plaintiff's land for benefits derived by it from the proximity of the sewer is valid.

Clark v. Salem, 61 Or. 116, 121 Pac. 416, Ann. Cas. 1914B, 205; *Wilson v. Cincinnati*, 5 Ohio N. P. 68, 7 Ohio S. & C. P. Dec. 242; *Lehigh Valley R. Co. v. Jersey City*, 81 N. J. L. 290, 80 Atl. 228.

Harris, J., delivered the opinion of the court:

1. The city takes the position that the plaintiff is estopped to ask for the removal of the sewer from his land, because he had notice of the intention of the city to construct the conduit across his property, but, notwithstanding such knowledge, he neglected to object until after the completion of the improvement, when the rights of the public had intervened. The city cannot defeat the suit, unless an equitable estoppel can be raised as an insurmountable barrier.

When the city planned the improvement, the municipal authorities assumed that by the time they would be ready to lay the sewer East Twenty-ninth street would be extended so as to connect with Siskiyou street. The attempt to open the street was defeated. The defendant made no move to secure a right of way over the Fraser property until after the work of constructing the sewer had commenced, and when the municipality did move, it was told by Fraser that if it attempted to lay a sewer across his land "he would fight it." The city, however, laid the sewer in spite of the notice not to lay it. The trench was dug, the pipe was laid, and the conduit was completed across his property except filling the trench, when Fraser for the first time knew that the sewer was being constructed across his land. It is true that Fraser said nothing more to the city and made no formal objection until about five months afterward, when he served a written notice to remove the sewer.

2. Nearly every element essential for the creation of an equitable estoppel is wanting. Mere silence, or, in the language of previous judicial opinions, "passive acquiescence," does not, by itself, create an irrevocable license or produce an estoppel. *Lavery v. Arnold*, 36 Or. 84, 86, 57 Pac. 906, 58 Pac. 524; *Hallock v. Suitor*, 37 Or. 9, 12, 50 Pac. 384; *Ewing v. Rhea*,

Estoppel—
acquiescence.

37 Or. 583, 587, 52 L.R.A. 140, 82 Am. St. Rep. 783, 62 Pac. 790; expressly overruling *Curtis v. La Grande Hydraulic Water Co.* 20 Or. 34, 10 L.R.A. 484, 23 Pac. 808, 25 Pac. 378; *Carson v. Hayes*, 39 Or. 97, 65 Pac. 814; *Bolter v. Garrett*, 44 Or. 304, 307, 75 Pac. 142; *Brown v. Gold Coin Min. Co.* 48 Or. 277, 284, 86 Pac. 361; *Shaw v. Proffitt*, 57 Or. 192, 202, 109 Pac. 584, 110 Pac. 1092, Ann. Cas. 1913A, 63; *National Automatic Fire Alarm Co. v. Portland*, 59 Or. 409, 417, 117 Pac. 285; *Booth-Kelly Lumber Co. v. Eugene*, 67 Or. 381, 136 Pac. 29. The defendant, however, cannot even claim that Fraser remained silent. He told the city in plain words that he objected and would fight any attempt to lay the sewer across his property. The defendant was a trespasser when it constructed the sewer across the Fraser land.

The owner did not tell the city that it could lay the sewer across his property, and consequently it is not necessary to determine whether an express oral permission, if acted upon, would alone be sufficient to create an irrevocable license, although the following cases may appear to give support to such conclusion: *Garrett v. Bishop*, 27 Or. 349, 353, 41 Pac. 10; *McBroom v. Thompson*, 25 Or. 559, 42 Am. St. Rep. 806, 37 Pac. 57; *Kelsey v. Bertram*, 63 Or. 563, 565, 127 Pac. 777; *Dwight v. Giebisch*, 77 Or. 254, 150 Pac. 752. Since Fraser did not expressly consent to the improvement, the present controversy does not call for an attempt to distinguish expressions found in the last-mentioned cases from, or to reconcile them with, the following adjudications, holding that an oral permission does not result in an irrevocable license, unless a consideration is paid by the licensee or some benefit accrues to the licensor: *Lavery v. Arnold*, 36 Or. 84, 86, 57 Pac. 906, 58 Pac. 524; *Hallock v. Suitor*, 37 Or. 9, 13, 60 Pac. 384; *Ewing v. Rhea*, 37 Or. 583, 585, 52 L.R.A. 140, 82 Am. St. Rep. 783, 62 Pac. 790; *Miser v. O'Shea*, 37 Or. 231, 237, 82 Am. St. Rep. 751, 62

Pac. 491; *Bolter v. Garrett*, 44 Or. 304, 307, 75 Pac. 142; *McPhee v. Kelsey*, 44 Or. 193, 200, 74 Pac. 401, 75 Pac. 713; *Sumpter R. Co. v. Gardner*, 49 Or. 412, 416, 90 Pac. 499; *Falls City Lumber Co. v. Watkins*, 53 Or. 212, 215, 99 Pac. 884; *Flinn v. Vaughn*, 55 Or. 372, 376, 106 Pac. 642; *Shaw v. Proffitt*, 57 Or. 192, 204, 109 Pac. 584, 110 Pac. 1092, Ann. Cas. 1913A, 63; *National Automatic Fire Alarm Co. v. Portland*, 59 Or. 417, 117 Pac. 285.

Fraser did not in any way aid in the construction of the sewer, and therefore a license cannot be predicated upon his participation in the enterprise. *North Powder Co. v. Coughanour*, 34 Or. 9, 21, 54 Pac. 223; *Bowman v. Bowman*, 35 Or. 279, 281, 57 Pac. 546; *Hallock v. Suitor*, 37 Or. 9, 13, 60 Pac. 384; *Ewing v. Rhea*, 37 Or. 583, 586, 52 L.R.A. 140, 82 Am. St. Rep. 783, 62 Pac. 790. Although the pendency of negotiations for a right of way would not have created a license (*Falls City Lumber Co. v. Watkins*, 53 Or. 212, 99 Pac. 884; *National Automatic Fire Alarm Co. v. Portland*, 59 Or. 409, 413, 117 Pac. 285), still it should be remembered that the defendant was not even negotiating with the owner when the sewer was laid across the Fraser land. Moreover, there is not a word of evidence to indicate that the city relied upon any omission of the owner, or upon any act done or word said by Fraser. *Finn v. Vaughn*, 55 Or. 372, 376, 106 Pac. 642; *Falls City Lumber Co. v. Watkins*, 53 Or. 212, 215, 99 Pac. 884. License—for construction of sewer—silence. The city was a trespasser from the beginning, and it was entirely failed to establish the elements necessary to the creation of an irrevocable license.

3, 4. The defendant argues, however, that another defense is available, if it is compelled to recede from its position that an irrevocable license was created. The remaining defense interposed by the city arises out of the contention that the rights of the public have intervened, and the removal of the sewer would in-

convenience many and convenience only one person, and that therefore a court of equity should refuse to heed the prayer of the complainant and leave him to his remedy at law. It is true that sometimes a court of equity will decline to raise its restraining arm and refuse to issue an injunction, leaving the injured party to his remedy at law, even though an admitted legal right has been violated, when it appears that the intervening rights of the public should be taken into consideration, and the issuance of an injunction would cause serious public inconvenience or loss without a correspondingly great advantage to the complainant. The rule now invoked by the city as its last defense was applied in Booth-Kelly Lumber Co. v. Eugene, 67 Or. 381, 136 Pac. 29; but there the court dealt with a situation quite different from the one here. Fraser warned

Equity—compelling removal of sewer—rights of public.

the city in time for it to make ample provision for its protection. When the defendant entered the premises of Fraser, it knew that the owner had objected, and that he would continue to object. Fraser did not even tacitly acquiesce, as the plaintiff did in Booth-Kelly Lumber Co. v. Eugene, supra. No deception was practised, and nobody was deceived. The city relied on nothing except its expectation that East Twenty-ninth street would be extended. Fraser did all that he could do, and all that could reasonably be asked of him, and he is entitled to

Public improvement—right to cancellation of assessment.

have the assessment canceled, and, unless a right of way is legally acquired within a reasonable time, to have the sewer removed.

5. A court of equity is empowered to grant the relief asked by the plaintiff, because the act complained of produced a continuing wrong. *Equity—relief against continuing wrong.* Bernard v. Willamette Box & Lumber Co. 64 Or. 223, 233, 129 Pac. 1039; Bourne v. Wilson-Case Lumber Co. 58 Or. 48, 52, 113 Pac. 52, Ann. Cas. 1913A, 245; Moore v. Halliday, 43 Or. 243, 247, 99 Am. St. Rep. 724, 72 Pac. 801; 1 High, Inj. 4th ed. p. 663.

Assuming that it is within the power of the city to condemn the land, or to extend East Twenty-ninth street, or in some lawful manner acquire the right to maintain the sewer, a decree should be entered requiring the city to remove the drain, unless within a reasonable time the defendant acquires a right of way for the sewer, but with directions to the circuit court to ascertain what would be a reasonable time, and canceling the assessment attempted to be made against the plaintiff for the improvement, without prejudice, however, to any right that the municipality may have to levy a reassessment. *Willamette Iron Works v. Oregon R. & Nav. Co.* 26 Or. 224, 234, 29 L.R.A. 88, 46 Am. St. Rep. 620, 37 Pac. 1016; 2 Lewis, Em. Dom. 3d ed. p. 1632.

A decree will therefore be entered in conformity with this opinion.

NOTE.

The general subject of the loss of right to contest an assessment for a street or sewer improvement by waiver, estoppel, or the like is considered in the annotation following *BARTLESVILLE v. HOLM*, post, 634.

CITY OF HENDERSON, Appt.,

v.

M. LIEBER, Exr., etc., of Mrs. Babette Lieber, Deceased.

Kentucky Court of Appeals—March 23, 1917.

(175 Ky. 15, 192 S. W. 830.)

Public improvement — unconstitutional statute — estoppel to contest assessment.

1. Failure of a property owner to object to an improvement made under an unconstitutional statute or ordinance does not estop him from contesting an assessment levied upon his property to pay for the improvement.

[See note on this question beginning on page 634.]

Constitutional law — effect of statute contravening Constitution.

2. Any statute or ordinance passed in contravention of the Constitution is without force or effect, and any action had or taken under such ordinance or statute is a nullity.

[See 6 R. C. L. 117.]

Public improvement — void ordinance — refusal to collect assessment.

3. Collection of an assessment for a street improvement made under a void ordinance will be denied.

APPEAL by defendant from a judgment of the Circuit Court for Henderson County sustaining a demurrer to its answer in an action brought for the settlement of the estate of plaintiff's intestate. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. B. S. Morris, for appellant:

Under the ordinance in question, the defendant had authority to provide for the improvement of Ninth street at the exclusive cost of the abutting property owners.

Covington v. Nadaud, 103 Ky. 455, 45 S. W. 498.

When one stands by and allows public improvements to be made on her property, and, without notice or objection, allows the city to expend money in making them upon the faith that the cost is to be a charge upon the abutting property, it is too late to complain, and she as well as her executor is estopped from denying liability for the cost of such improvement.

Barber Asphalt Paving Co. v. Garr, 115 Ky. 334, 73 S. W. 1106; Mudge v. Walker, 122 Ky. 29, 90 S. W. 1046.

Messrs. Vance & Heilbronner and W. S. Heidenberg, for appellee:

A property holder is not estopped to contest a claim and lien for work constructed under an ordinance invalid because based on an unconstitutional statute, although no protest is made before work is constructed.

Covington v. Schlosser, 141 Ky. 838,

133 S. W. 987; Covington v. Brinkman, 25 Ky. L. Rep. 1949, 79 S. W. 234; Thomas v. Woods, 128 Ky. 555, 108 S. W. 880; Richardson v. Mehler, 111 Ky. 408, 63 S. W. 959; Barber Asphalt Paving Co. v. Garr, 115 Ky. 334, 73 S. W. 1106.

Sampson, J., delivered the opinion of the court:

In February, 1914, Mrs. Babette Lieber, of Henderson, Kentucky, died intestate, and M. Lieber, her son, qualified as executor of her estate. In December following the executor instituted this action for the settlement of the estate of Mrs. Babette Lieber, making the city of Henderson, among others, party defendant, and called upon it to make answer. Thereupon, the city of Henderson filed its answer, and, after alleging its right to sue, avers that in 1912 the common council of the said city passed and adopted an ordinance requiring certain street improvements, the cost to be taxed against the abutting property owners, and declared a lien upon the property, and, in case the abutting

property owners failed to pay for the improvements, the city would issue bonds pledging the faith and credit of the city, as well as the lien upon the property acquired by reason of the improvements, and thus fund the debt. This ordinance was passed in conformity to § 3459a, Kentucky Statutes, entitled "Improvements of Public Ways—Ten-Year Plan," and which statute provides ways and means by which the city may improve its thoroughfares and tax the expense thereof against the abutting property. The city in this case claimed \$746.03, with interest, due it from the Lieber estate.

The executor, in reply, admits the improvements made by the city, but denies responsibility of the estate of Mrs. Babette Lieber for the cost thereof, because the statute and ordinance under which the improvements were made, were both unconstitutional and void, and had been so declared by this court prior to commencement of this action, in the case of *Hickman v. Kimbley*, 161 Ky. 652, 171 S. W. 176. The defendant city, responding to this pleading, admitted that the statute had been declared unconstitutional, but alleged that Mrs. Lieber, the owner of the property against which the improvements were made and sought to be charged, was living at the time of the passage of the ordinance and the making of the improvements of the street, and that she stood silently by and allowed the city to make the improvements, with her knowledge, without objection or protest, and that by her conduct her estate is estopped to deny its liability. To this plea a demurrer was interposed and sustained, and of this appellant city complains.

So the question to be determined is, Can a city, under a void statute and ordinance, collect the cost of a street improvement off the property owner, where the property owner stood silently by and, with knowledge of the intended improvements, did not object or protest against the construction, or notify the city

that she would not be liable? An unconstitutional statute is void ab initio. Any statute or ordinance passed in contravention of the Constitution is without force or effect, and any action had or taken under such ordinance or statute is a nullity. In 8 Cyc. 805, it is declared: "As a general rule, all acts done under an unconstitutional law are void and of no effect."

Constitutional law—effect of statute contravening Constitution.

An unconstitutional law has no inherent force, and confers no authority upon those claiming to act under it. *Woolsey v. Dodge*, 6 McLean, 142, Fed. Cas. No. 18,032; *Louisiana State Lottery Co. v. Fitzpatrick*, 3 Woods, 222, Fed. Cas. No. 8,541.

This precise question was determined by this court in the case of *Barber Asphalt Paving Co. v. Garr*, 115 Ky. 353, 73 S. W. 1106, where the court said: "The ordinance requiring the payment of a license fee by contractors was held unconstitutional by this court. Being unconstitutional, it was a nullity. From a nullity no rights can arise, and by it no rights are affected. The ordinance being void, the contractors had a right to ignore it."

Bonds issued under an unconstitutional statute are invalid. *Central Branch Union P. R. Co. v. Smith*, 23 Kan. 745; *Whaley v. Gaillard*, 21 S. C. 560.

And the mere fact that the property owner failed to object to the improvements does

not work an estoppel. The same questions arose in the case of *Covington v. Schlosser*, 141 Ky. 838, 133 S. W. 987, and the court announced the doctrine as follows: "In disposing of this question it does not seem necessary that we should go into a discussion of the acts or conduct of the property owner that would estop him from objecting to an assessment against his property for local improvements. The only question involved in these cases is whether

Public improvement—unconstitutional statute—estoppel to contest assessment.

or not the assessments exceeded the statutory limit. If they did, the city had no right to impose them, and the assessments in excess of the authority conferred were absolutely void. The power to make these assessments is granted alone by the statute, and by its terms alone the validity of the amount that may be charged against the property is to be determined. No question of estoppel can be brought into a case like this. A property owner cannot be estopped by his acts or conduct from objecting to the collection of assessments that are made in excess of the authority to make them. The excess assessment is void from the beginning. Or, to put it in a better way, there could be no assessment for the excess, and so the property owner could not be estopped from contesting the validity of a void act."

See *Thomas v. Woods*, 128 Ky. 555, 108 S. W. 878; *Lexington v. Walby*, 33 Ky. L. Rep. 116, 109 S. W. 299.

The ordinance under which the city of Henderson attempted to proceed in the improvements of the streets mentioned, being void, was no protection whatever to the city, and conferred no authority upon the officers of the municipality to make the improvements, or to enforce the collection of the cost thereof against abutting property. As said in the case of *Lebanon v. Humkey*, 161 Ky. 456, 170 S. W. 1173: "The enactment of the ordinance was wholly within the control and power of the city council, and although it attempted to and

doubtless believed that it had enacted a valid ordinance, it develops that it did nothing of the kind, and, in fact, did not enact any ordinance. This being so, the situation is precisely the same as if the city authorities, without having attempted to enact an ordinance, had demanded and collected from appellees, without any authority, the license tax paid under this void ordinance."

Where a collection is made under a void ordinance it may be recovered back; with greater reason will a collection be denied where it is based upon a void ordinance. This attempted collection is totally without authority under the city ordinance endeavored to be enacted by the city of Henderson.

Entertaining these views, it is unnecessary to discuss the other questions presented in appellant's brief.

Judgment affirmed.

NOTE.

The general subject of the loss of right to contest assessment for a street or sewer improvement by waiver, estoppel, or the like is considered in the annotation following *BARTLESVILLE v. HOLM*, post, 634. Specifically regarding the point considered in *HENDERSON v. LIEBER* (reported herewith) ante, 620, as to the effect of acquiescence where the improvement is made under an unconstitutional statute or ordinance, see subd. VI. a, 2.

—void ordinance
—refusal to
collect assess-
ment.

M. D. DAMRON
v.
CITY OF HUNTINGTON et al.

West Virginia Supreme Court of Appeals — May 7, 1918.

(82 W. Va. 401, 96 S. E. 53.)

Public improvement — estoppel to contest assessment.

1. One owning property abutting upon a street proposed to be improved by municipal authorities, and such improvement paid for by special assessments against the abutting property, knowing of facts which he contends make a contract entered into between the city and a contractor for the improvement voidable, cannot escape payment of the assessment made against his property for the cost of such improvement by protesting to the authorities making the contract at the time it is made. He must, upon his protest being disregarded, test the question by injunction before the work is done, and if he does not do so, he will be held to have waived any right he may have had to question the validity of the contract.

[See note on this question beginning on page 634.]

Municipal corporations — authority to order pavement.

2. Under the provisions of the charter of the city of Huntington, the city commissioners have the authority to determine which of the streets of

said city shall be improved by paving the same, and their determination of this question, in the absence of fraud or corruption, will not be reviewed by the courts.

Headnotes by RITZ, J.

CERTIFICATION by the Circuit Court for Cabell County to the Supreme Court of Appeals, of the question of the sufficiency of a demurrer which was sustained to a bill filed to enjoin the collection of street-paving certificates issued by the defendant city against plaintiff's property. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Vinson & Thomson and Marcum & Shepherd for plaintiff.

Messrs. Livezey & Irons, for defendants:

The paving was of a certain public street in the city of Huntington, and not over any private way or street.

Tonawanda v. Lyon, 181 U. S. 389, 45 L. ed. 908, 21 Sup. Ct. Rep. 609; Cass Farm Co. v. Detroit, 181 U. S. 396, 45 L. ed. 914, 21 Sup. Ct. Rep. 644; Detroit v. Parker, 181 U. S. 399, 45 L. ed. 917, 21 Sup. Ct. Rep. 624; French v. Barber Asphalt Paving Co. 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625; Shumate v. Heman, 181 U. S. 402, 45 L. ed. 922, 21 Sup. Ct. Rep. 645.

Fraud is never presumed, and in order to entitle a party to relief, either at law or in equity, on such ground, it is essential that the fraud be distinctly alleged, so that it may be put in

issue and evidence concerning it received.

1 Hogg, Eq. Proc. 120.

Ritz, J., delivered the opinion of the court:

This is a suit to enjoin the collection of certain paving certificates issued by the defendant city of Huntington against a lot owned by the plaintiff in that city, covering the cost of paving in front of said lot, and to have the lien of said assessment removed and canceled as a cloud upon his title, upon the ground that the paving did not benefit the lot, and that the contract for the paving was let by the city to its codefendant herein, the Stender Construction Company, for a sum largely in excess of the reasonable

cost of the work. The court below sustained a demurrer to the bill, but, without dismissing the same, certifies to this court the question of the sufficiency thereof.

Plaintiff alleges that he is the owner of a lot abutting on what is known as West Sixteenth street, between Virginia and Washington avenues; that on the 28th day of August, 1916, the said city of Huntington entered into a contract with the defendant Stender Construction Company whereby it let to the said company the work of paving said West Sixteenth street, between Virginia and Washington avenues, and providing for the assessment of the cost of said paving against the owners of the real estate abutting on the street so improved, and for the issuance of certificates by the city to the said contractor, evidencing the assessment against each of said properties. The plaintiff says that at the time of the letting of this contract he appeared before the board of commissioners of the city of Huntington, and protested against the paving of this street, and also against the letting of the contract to the particular contractor. His protest against the work being done at all was based upon the declaration that it is not a benefit to the abutting properties, but was made for the convenience of a manufacturing corporation known as the Glass Brick Company. His objection to the making of the contract was and is based upon the allegation contained in his bill, and which he says he made known to the board of commissioners at the time, that the bid of the contractor, which he says was the lowest bid offered, was excessively high; that the contractor, in making up his bid, included therein an estimate of what it would actually cost him to do the work, then added a profit thereto, and to this again added some 15 to 25 per cent as the amount which the contractor conceived it would be necessary to discount the certificates in order to obtain the money thereon. His objections were

disregarded by the commissioners and the contract was let, the work done thereunder, and the certificates issued against his real estate, and he brings this suit for the purpose of having a cancelation of the certificates, and the lien thereof removed as a cloud upon the title to his property.

Can the action of the commissioners in determining to improve this street by paving the same be reviewed by the court? It is not alleged that the commissioners were actuated by any fraudulent or corrupt motives in determining that this pavement should be laid, but it is simply alleged that it does not benefit the abutting property owners, but does benefit and was for the convenience of the Glass Brick Company, whose plant is at one end of the street. The authority of the commissioners of the city of Huntington, under its charter, to improve streets by paving the same, is not questioned, and it seems that it is ample for the purpose. It is uniformly held, so far as we have been able to ascertain, that where the charter of a municipal corporation devolves upon its council or board of commissioners, as in this case, the authority to pave streets, this is a delegation of legislative power, and such authorities have the right to determine what streets shall be improved, and in what manner such improvement shall be made.

The exercise of this power is not reviewable by the courts. The right to make the assessment against the adjoining property owners upon the basis that it was made in this case is likewise one conferred by the legislature, and while the plaintiff may be of the opinion that it does not improve his property, the determination of this question involves the exercise of legislative power which is not subject to judicial review, unless it be upon a showing that it was fraudulently or corruptly exercised. In *Hamilton on Special Assessments*, at § 440, this doctrine is

**Municipal corporations—
authority to
order pavement.**

announced: "The necessity for making local improvements is a matter for the exclusive determination of the council, when the statute so directs; and when they act within the limits of the power conferred, their determination, fairly made, without fraud or oppression, cannot be interfered with by the courts."

See also 28 Cyc. 955; Wight v. Davidson, 181 U. S. 371, 45 L. ed. 900, 21 Sup. Ct. Rep. 616; Peoria v. Kidder, 26 Ill. 351; Jackson v. Smith, 120 Ind. 520, 22 N. E. 431.

We conclude, therefore, that the determination of the city commissioners to improve this street by paving the same is not subject to review by this court upon the allegations made in the bill.

Do the allegations of the bill that the city commissioners accepted a bid in excess of what was a fair compensation for the work under the circumstances here entitle the plaintiff to relief? He alleges that he protested to the city commissioners that the bid was grossly excessive; that it was made up of an estimate of the cost of the work and reasonable profit to the contractor, and a discount which the contractor added as being necessary in order to obtain money upon the certificates. This protest of his, made before the city commissioners, was disregarded, and he says he declared at that time that he would contest the assessment. He says that he immediately brought suit, but, disregarding that suit, the city went on and did the work. What became of that suit does not appear. It could not have been this suit, for the reason that his bill in this case avers that the work has been done and the certificates issued. Such a suit was the proper method for him to employ in order to obtain relief, and if that suit was decided against him, of course the judgment or decree would be *res judicata*, and would settle the question. However that may be, we are not concerned with that case, but only with this suit, brought after the work was done, and after the assessment was made.

9 A.L.R.—40.

The plaintiff shows by his bill that he was fully cognizant of all the facts upon which he now relies to defeat this assessment at the time the contract was entered into between the city and the contractor, and that he urged them before the commissioners. If there was merit in his contention that the awarding of this contract, at the price at which it was awarded, was a violation of the authority conferred upon the commissioners, should he have contented himself with making the protest before the commissioners, and, after this protest was overruled, do nothing to prevent the work from being done, or to have the merits of his contention determined by some other authority having jurisdiction to settle the question? We think not. Why did he not, upon the overruling of his protest, apply to the courts for injunctive relief against the execution of the contract? In such a suit the validity of the contract could have been, and would have been, fully determined before any of the work had been done, or any money expended. He chose, however, to take no action with a view to stopping the work, but allowed it to be proceeded with, and then, after the money had been spent, and the improvement made, he brings a suit to cancel the assessments. It seems to us that, inasmuch as he was in possession of all the facts which he now claims made this contract invalid, it was his duty, if he desired to escape the burden which the same would impose upon him, to pursue all of the remedies at hand for the abrogation of it before the same had been fully performed. In *Hamilton on Special Assessments*, at § 732, the author says: "As a necessary corollary to what has preceded, action on the part of the property owner must be reasonably prompt, so that no false conclusions may be drawn from his inaction. If he object to the power of the council to order the work done, or denies the validity of a provision in the ordinance under which the work is done,

requiring the contractor to employ only bona fide residents of the city, as being prejudicial to his property rights, as increasing the cost of the work, he must act in time to stay the work in limine."

And this doctrine is announced upon the authority of the decision of the Supreme Court of the United States in *Chadwick v. Kelley*, 187 U. S. 540, 47 L. ed. 293, 23 Sup. Ct. Rep. 175, wherein that court held that the party must not only object to the improvement being made under the contract, but he must take such steps as will raise the question in time to stay the work and prevent the expenditure of the money. So, *McQuillin*, in his work on *Municipal Corporations*, vol. 5, § 2120, says: "It is the duty of the parties assessed for an improvement to act promptly if they wish to avail themselves of irregularities in the improvement proceedings, and not wait until after the contracts are made and expense incurred in the doing of the work."

And in *Palmer v. Stumph*, 29 Ind. 329, it is held that where the owner of property fronting on a city street, for the improvement of which the common council has made a contract, denies the power of the council to order the improvement, he must test the question before the work is done. If he allows it to proceed and acquiesces in the action of the council in making the contract, he cannot thereafter raise the question of its invalidity. Again, in *Lafayette v. Fowler*, 34 Ind. 140, it was held that where the owner of real estate abutting on a street ordered to be improved by the city, knowing of the matters which he claims make the assessment for such improvements invalid, does not by injunction seek to prevent such improvement, he cannot, after the work is completed, or nearly completed, refuse to pay for it. See also *Alley v. Lebanon*, 146 Ind. 125, 44 N. E. 1003. In the case of *Brewer v. Elizabeth*, 66 N. J. L. 547, 49 Atl. 480, it was held that where a party owning property

abutting on a city street protested from time to time to the city authorities against the improvement of the street, and against the validity of the contract under which the improvement was made, but did not take any proceeding to enjoin or prevent the doing of the work, he could not, after the work was done, and the assessment levied against him, avoid the collection of it. See also *Corry v. Corry Chair Co.* 18 Pa. Super. Ct. 271, *Peoria v. Kidder*, 26 Ill. 351, and *Werninger v. Stephenson*, 82 W. Va. 367, 95 S. E. 1035, decided at this term of this court, and authorities there cited. We know there are a great many authorities which hold that if the property owner makes protest before the governing body he will not be estopped to claim the assessment invalid after it is made, but we do not think they are sound. The courts are just as open to parties before the contract is executed and the expense incurred, to enjoin the execution of it, and to prevent the outlay of the money, as they are afterward to cancel the assessment for the alleged invalidity; and we conclude that where one owning property, abutting on a street proposed to be improved, has full knowledge of the matters which he claims render the contract for the same invalid, and he does no more than protest to such body, he cannot, after the work is done, escape paying the assessment therefor. He must avail himself of the remedies provided for preventing the alleged injury to him; and where, as in this case, the courts are just as open to him before the contract is performed, to test its validity, as they are afterward, he cannot be said to be acting in entire good faith to permit the money to be expended, knowing that it is the intention of the city authorities to levy it against his property as an assessment, and then appeal to the courts to cancel such assessment.

Whether the matter set up by the

Public improvement—estoppel to contest assessment.

plaintiff in his bill would be cause for vacating the contract and holding it invalid, had he taken advantage of it at the proper time, we need not and do not say in this suit. It may be said, however, that if it is true that the bids were computed as alleged in this case, and an allowance added to them by the contractor for the discount of the paving certificates, and the city commissioners knew this fact, it would, to say the least, be a very good reason for rejecting all of the bids. It should convince them that the bids were excessive; and where, as in the case of the city of Huntington, it can do the work itself without letting it to contract, it might proceed to do it on its own account, and levy the assessments against the property, or determine not to do the

work at all if bidders refuse to do it without making such excessive charges therefor.

Finding no error in the decree of the Circuit Court sustaining the demurrer to the bill, we affirm the same, and remand the cause.

NOTE.

The general subject of the loss of the right to contest an assessment for a street or sewer improvement by waiver, estoppel, or the like, is considered in the annotation following *BARTLESVILLE v. HOLM*, post, 634. More particularly as to the point considered in *DAMRON v. HUNTINGTON* (reported herewith) ante, 623, as to objections relating to the contract under which the improvement is made, see subds. V. a, 4 (e) and VI. a, 3 (e).

CITY OF BARTLESVILLE et al., Plffs. in Err.,

v.

H. J. HOLM et al.

Oklahoma Supreme Court — January 13, 1914.

(40 Okla. 467, 139 Pac. 273.)

Public improvement — assessment — estoppel.

Where jurisdiction is conferred upon a municipal body to provide for paving its streets and charge the cost thereof against the property benefited, according to the method provided by law, a property owner who stands by while such work is being prosecuted, with full knowledge that large expenditures are being made for such improvement, which will benefit his property, or, upon due notice, fails to appear at the proper time and before the tribunal prescribed by law, and present his objections, if he have any, will not, after the work is completed, be afforded relief by injunction against assessments levied against the property benefited, to pay for such work.

[See note on this question beginning on page 634.]

Headnote by KANE, J.

ERROR to the District Court for Washington County (Hudson, J.) to review a judgment in plaintiffs' favor in a suit to enjoin the collection of a certain special assessment for street paving purposes. *Reversed.*

The facts are stated in the opinion of the court.

Mr. M. D. Libby for plaintiffs in error.

Messrs. Leahy & Macdonald, for defendants in error:

The mayor and council could only proceed in accordance with the statutes in making assessments to pay for the paving of streets; and it was necessary for them to comply with the statutory requirements before they had jurisdiction to make the assessment.

28 Cyc. 971; Chicago Union Traction Co. v. Chicago, 209 Ill. 444, 70 N. E. 659; Case v. Johnson, 91 Ind. 477; State, Vreeland, Prosecutor, v. Jersey City, 54 N. J. L. 49, 22 Atl. 1052; Hawthorne v. East Portland, 13 Or. 271, 10 Pac. 342; Barber Asphalt Paving Co. v. Edgerton, 125 Ind. 455, 25 N. E. 436; Kiphart v. Pittsburgh, C. C. & St. L. R. Co. 7 Ind. App. 122, 34 N. E. 375; Gray v. Burr, 138 Cal. 109, 70 Pac. 1068; Girvin v. Simon, 127 Cal. 491, 59 Pac. 945; State, Durant, Prosecutor, v. Jersey City, 25 N. J. L. 309; Burns v. Casey, 13 Cal. App. 154, 109 Pac. 94; Morrow v. Barber Asphalt Paving Co. 27 Okla. 247, 111 Pac. 198.

The assessment was void.

Morrow v. Barber Asphalt Paving Co. supra; Stoner v. Los Angeles, 8 Cal. App. 607, 97 Pac. 693; McGarvey v. Swan, 17 Wyo. 120, 96 Pac. 697; Union P. R. Co. v. Abilene, 78 Kan. 820, 98 Pac. 224; Brown v. Central Bermudez Co. 162 Ind. 452, 69 N. E. 150; Derby v. West Chicago Park, 154 Ill. 213, 40 N. E. 438; Jones v. Salem, 63 Or. 126, 123 Pac. 1096.

Plaintiffs are not estopped from contesting the validity of the assessment.

Morrow v. Barber Asphalt Paving Co. supra; Steinmuller v. Kansas City, 3 Kan. App. 45, 44 Pac. 600; McCoy v. Anderson, 47 Mich. 505, 11 N. W. 290; Marshall v. Leavenworth, 44 Kan. 459, 24 Pac. 975; Derby v. West Chicago Park, 154 Ill. 213, 40 N. E. 438; Barker v. Wyandotte County, 45 Kan. 681, 26 Pac. 585; Jones v. Salem, 63 Or. 126, 123 Pac. 1096; Mt. Vernon v. State, 71 Ohio St. 428, 104 Am. St. Rep. 783, 73 N. E. 518, 2 Ann. Cas. 399.

Kane, J., delivered the opinion of the court:

This was a suit in equity, commenced by the defendants in error, plaintiffs below, against the plaintiffs in error, defendants below, to enjoin the collection of a certain special assessment for street paving purposes, levied against the proper-

ty of the plaintiffs in the city of Bartlesville. Upon trial to the court, the relief prayed for was granted, to reverse which action this proceeding in error was commenced.

The specific ground of complaint on the part of the property owners is that the mayor and council of the city did not take the necessary steps, or do the things necessary, to confer jurisdiction upon the municipal authorities to make the assessment herein complained of, in that, after a time was appointed for holding a session of the city council, and a day and hour fixed to hear any complaints or objections that the property owners may have had concerning the appraisal and apportionment of the lots or tracts of lands involved in the improvement, and the publishing of notice of such session as required by § 726, Okla. Comp. Laws 1909 (Rev. Laws 1910, §§ 626-639), said mayor and city council proceeded with said public improvement without giving said property owners an opportunity to present their objections on the day fixed by them to hear such complaints or objections. The records of the city in that regard show: That the time fixed in the resolution providing for a hearing was Monday, the 18th day of January, 1909, at 8 o'clock P. M., at the city hall. That on the said 18th day of January, 1909, the following entry was made: "This being the date for the regular meeting of the council of the city of Bartlesville, and there being no quorum, it was moved and seconded that the council adjourn to Monday, January 25th. Carried." That on said 25th day of January, 1909, the following entry was made: "Adjourned meeting of the council of the city of Bartlesville met at the city hall. . . . Moved and seconded that the council adjourn to January 26th. Carried." That on said 26th day of January, 1909, the following entry was made: "This being the date for an adjourned meeting of the council of the city of Bartlesville, and there being no quorum, it was moved and seconded

that the council adjourn to January 28, 1909. Carried." That on said January 28, 1909, a resolution was passed by said council, wherein, after detailing the proceedings of the council in relation to said improvement, the following appears: "And whereas, at the time mentioned in said notice by the city clerk, to wit, January 18, 1909, quorum of the council failed to appear, and said meeting was then and there adjourned to this date; and whereas, the council has reviewed, revised, and corrected the said appraisalment and apportionment, and the same as it now stands is correct, equitable, and just, and is in accordance with the laws governing such appraisalment and apportionment: Now, therefore, be it resolved by the mayor and councilmen that the said report of the said board of appraisers, as corrected and revised by the council, and said appraisalment and apportionment of the cost of said improvements, be and the same hereby is adopted, ratified, and confirmed."

Counsel for the defendants states his contentions as follows: "There are two principal questions arising upon this record, one of which is: Were the proceedings of the mayor and council touching the hearing as to complaints and objections which might be made concerning the appraisalment and apportionment such as that the mayor and council proceeded without jurisdiction to pass the assessing ordinance? and the other of which is: Are not the plaintiffs below estopped and precluded by their acts from now contesting the validity of the assessment, even though the ordinance levying the assessment be absolutely void for want of jurisdiction, and have they not waived their right so to do by their acts?"

Counsel for the property owners insist that the questions which naturally arise out of the first principal proposition stated by counsel for the defendants have been settled by this court in the case of *Morrow v. Barber Asphalt Paving Co.* 27 Okla. 247, 111 Pac. 198, wherein it was held:

"Where the mayor and city council fail to meet 'to hear and adjust any complaint and review such assessment' at the meeting called pursuant to the notice required by Wilson's Rev. & Anno. Stat. (Okla.) § 449, such assessment is void. The period of limitation by statute (Wilson's Rev. & Anno. Stat. (Okla.) § 450), within which an action may be brought to set aside a special assessment made against the lots abutting upon a street to pay the cost of grading the same, does not apply to bar a lot owner of an action to enjoin collection of such assessment, when the proceedings upon which it is based are void."

The two cases are not exactly analogous. In the *Morrow Case* the city authorities, after giving the preliminary notice, proceeded without taking any action upon the property owners' protest, which was on file; whilst in the case at bar the property owners filed no complaints or objections, nor did they in any way indicate that they were in any way dissatisfied with the proceedings until they filed this suit in equity, long after the work had been completed. Moreover, the doctrine of laches was not discussed in the *Morrow Case*, and probably would not apply to it on account of the protest of the property owners, which was filed in due time and disregarded. There is authority to the effect that, where the property owner has given due notice of his intention to resist the assessment, he will be entitled to equitable relief, although he does not institute a suit to enjoin until after the completion of the work. *Keys v. Neodesha*, 64 Kan. 681, 68 Pac. 625; *Edwards v. Cooper*, 168 Ind. 54, 79 N. E. 1047. In the case at bar the court below, after reciting the facts in relation to the proceedings of the city council, as hereinbefore set out, further found in effect: That thereafter such other and further proceedings were had by said mayor and city council relating to the making of said improvement, and in conformity with the statutes in such cases

made and provided, as that a contract was let by the mayor and council for the making of said improvement, and the costs thereof ascertained, and which resulted in the issuance by said city of a series of street improvement bonds in the aggregate amount of \$29,556 in payment of such improvements. That the defendant Foster purchased said bonds, and paid therefor, without notice, knowledge, or information that the plaintiffs had any complaint or objection concerning the said appraisal and apportionment of benefits of the said improvements to said property, or to said assessment, until after the property owners had paid one or more of the instalments of such assessment. That at the session of the council so appointed for the said 18th day of January, 1909, the said plaintiffs, nor any of them, nor any other persons, appeared for the purpose of making any complaints or objections concerning the said appraisal and apportionment, or did at any time or place make any complaints or objections concerning said appraisal and apportionment, prior to the commencement of this action. That said plaintiffs did not, nor did either of them, within sixty days after the passage and publication of the ordinance levying such final assessment, bring suit to set aside such assessment, or to enjoin the levying or collecting of such assessment, or to contest the validity thereof, upon any ground, or for any reason, or at all. That this action was commenced on the 28th day of September, 1912. That the plaintiffs, and each of them, had knowledge and notice of the said resolution passed by the mayor and council of said city on the 28th day of September, 1908, declaring such work of improvement necessary to be done, and had knowledge and notice of the passage of said resolution of October 23, 1908, expressing the determination of the mayor and council of said city to proceed with the said improvement, and had full knowledge and notice of the making

of the said contract by and between the said city of Bartlesville and the contractors for constructing said improvement, and did know and understand from the time of the passage of the said resolution on the 28th day of September, 1908, that the cost of the improvement in said resolution and contract mentioned would be paid for by special assessments levied upon the lots and tracts of land fronting and abutting upon said improvement, and that such assessment would thereby become a lien upon plaintiff's said property and other property in said paving district, and had information and notice of the commencement of said work, of improvement by the said contractors, and of the progress and completion and acceptance thereof, and of the intended issuance of bonds by said city in the amount of \$29,566 in payment of said work of improvement, and did permit said work to be done, and large sums of money, to wit, the amount of \$29,566, to be expended in excavating, grading, curbing, guttering, draining, and paving said portion of said Johnstone avenue under said contract, and issuance of said bonds, without making objection to the said council concerning said appraisal and apportionment, and without seeking to prevent the issuance of said bonds, though none of them were issued until the latter part of the month of July, 1909, when some of them were issued, and the residue on the completion and acceptance of said work of improvement in the month of November, 1909. There is a growing tendency on the part of the courts to require prompt action on the part of the property owner in interposing objections, so that they may be made in time to enable the municipality to correct any defects in the proceedings under which public improvements are being made. Failure in this regard is sometimes referred to as estoppel, sometimes as waiver, and sometimes as laches; but by whatever name it is known, or on whatever theory it is ex-

plained, it is generally held that if the delay is unreasonable, and during such delay the other party has in good faith changed his position so that he would be injured by such delay if the relief which is sought were to be given, such delay amounts to laches, and precludes relief, even if the circumstances were such that relief should have been given, had application been made promptly. This court on several occasions has applied the doctrine of laches to cases involving assessments for public improvements. *Perry v. Davis*, 18 Okla. 458, 90 Pac. 865; *Kerker v. Bocher*, 20 Okla. 729, 95 Pac. 981; *Paulsen v. El Reno*, 22 Okla. 734, 98 Pac. 958; *Jenkins v. Oklahoma City*, 27 Okla. 230, 111 Pac. 941; *Lonsinger v. Ponca City*, 27 Okla. 397, 112 Pac. 1006; *Weaver v. Chickasha*, 36 Okla. 226, 128 Pac. 305; *Shultz v. Ritterbusch*, 38 Okla. 478, 134 Pac. 961; and *Muskogee v. Rambo*, 40 Okla. 672, 138 Pac. 567.

In the former case, Mr. Justice Garber, in delivering the opinion of the court, says: "The evidence discloses that the defendants in error stood by without objection or protest when the construction of the sewer adjacent to their property was in progress. Equity does not look with favor upon their silent and approving acquiescence of the performance of labor and expenditure of money enhancing the value of their properties, when contrasted with their belligerent and warlike attitude exhibited for the first time after the full completion of the work. It was the plain duty of the defendants in error, upon the publication of the ordinance creating the sewer district, or when they discovered that labor and money were being expended in the actual construction of the sewer, to vigorously object and protest against it; then was an opportune time to test by injunction or other proceedings the legality of the various steps being taken, but no objection was made, no protest was filed, and not a single murmur was heard in the sewer district from that November morning

when contractor Plummer and his workmen, with their picks and shovels and spades, went out to improve the sanitary conditions of the district in which all the defendants in error were resident property holders, to the evening when the entire work was completed according to contract, approved by the city engineer, and accepted by the city. It was not until after the completion of the work, and when these defendants were called upon to pay their respective assessments for benefits received, that it occurred to them that an injunction proceeding was a necessary and proper remedy to invoke. Under such circumstances both the law and equity look with approval upon the payment of such assessments, especially when made for a public work of this character."

In the case of *Kerker v. Bocher*, 20 Okla. 729, 95 Pac. 981, on the same subject, Mr. Chief Justice Williams says: "Every person as a member of a municipal community, thereby enjoying the incident benefits, takes notice of the accompanying obligations. Streets are to be laid out, graded, paved, and lighted. The constabulary must be maintained to enforce peace and preserve order. Sewerage systems and water supplies must be provided. No one is entitled to enjoy these advantages, and to be permitted to successfully contend that the laws, ordinances, and resolutions under which such benefits and advantages are created, regulated, and controlled are invalid, and thereby escape the resultant burdens. The citizen of the modern municipality and property owner thereof take notice of such necessities. He owes his personal service to maintain order and promote the public good in his municipality, just as he owes to the nation his service to protect against hostile encroachments and invasion. No man can expect to have property in cities, abutting on public thoroughfares and streets, without bearing the burdens of special taxation to maintain grades, build sidewalks, and macadamize and pave the

streets; and he acquires his property with the full knowledge of the fact that the legislative power of the state can be exercised to levy and provide for an assessment or special tax for such improvements." The law of the case is stated in the syllabus as follows: "Abutting property owners, with knowledge that such paving is being done with the intention of levying a special tax upon them for payment of the same, and permitting such improvement to be done without objection to the council, and knowingly receiving the benefits, when afterwards they seek relief in equity to escape payment therefor, will be deemed to have ratified the same, and estopped from setting up any irregularity, except when it goes to the extent of jurisdiction."

The great weight of authority leans toward a rather strict and technical application of the doctrine of estoppel, and is to the effect that, where there is jurisdiction, one who stands idly by while a public work is being prosecuted, with full knowledge, by himself or agent, that large expenditures are being made for such public improvement, which will benefit his property, or fails to appear at the proper time and present his objections, will not, after the work is completed, be afforded relief against assessments levied against the property benefited to pay for such work, either in courts of law or equity. *O'Dea v. Mitchell*, 144 Cal. 374, 77 Pac. 1020; *Fair Haven & W. R. Co. v. New Haven*, 77 Conn. 667, 60 Atl. 651; *Taylor v. Patton*, 160 Ind. 4, 66 N. E. 91; *Arnold v. Ft. Dodge*, 111 Iowa, 152, 82 N. W. 495; *Ritchie v. South Topeka*, 38 Kan. 368, 16 Pac. 332; *Atkinson v. Newton*, 169 Mass. 240, 47 N. E. 1029; *Nowlen v. Benton Harbor*, 134 Mich. 401, 96 N. W. 450; *State, Hildreth, Prosecutor, v. Rutherford*, 52 N. J. L. 501, 20 Atl. 60; *Corry v. Gaynor*, 22 Ohio St. 584; *Clinton v. Portland*, 26 Or. 410, 38 Pac. 407; *Ferry v. Tacoma*, 34 Wash. 652, 76 Pac. 277; *State ex rel. Schintgen v. La Crosse*, 101 Wis. 208, 77 N. W.

167; *Treat v. Chicago*, 64 C. C. A. 645, 130 Fed. 443; *Shepard v. Barron*, 194 U. S. 553, 48 L. ed. 1115, 24 Sup. Ct. Rep. 737.

There seems to be considerable confusion in the authorities on the question of what constitutes jurisdictional facts. This question is discussed in 1 Elliott, *Roads & Streets*, 3d ed. § 329, as follows: "There is a material difference between proceedings void for want of jurisdiction and proceedings erroneous because of a departure from the provisions of the statute or the general rules of law. Much confusion has been produced by employing the word 'void' in a loose sense, and incorrectly assigning it a meaning equivalent to voidable. The truth is, sound principle requires that it should be held that no judicial proceeding shall be deemed void where there is jurisdiction of the subject-matter and the person. Such proceedings may be erroneous, and may be avoided by an appeal or some other direct attack; but, in a just sense, they are not void. Where there is jurisdiction the judgment of the tribunal is not void, unless it is one which it was clearly beyond the power of the tribunal to render. Jurisdiction does not, however, authorize a judgment clearly and wholly beyond the power of the tribunal, even in courts of superior jurisdiction."

The same author (§ 607), further discussing the same question, says: "We venture to suggest that in some of the cases the courts have erred in pronouncing the proceedings absolutely void, and that in others, where the attack was direct, they erred in doing more than declaring the proceedings to be erroneous. If proceedings are entirely without or beyond the authority of the tribunal, then they are, of course, absolutely void; but, where they are not beyond the scope of the jurisdiction of the court, they are simply voidable."

It is true that whether delay in resisting or enforcing assessment proceedings amounts to laches which will prevent the relief sought de-

pends largely upon the circumstances of each case. 2 Page & J. Taxn. by Assessment, § 1016. The instant case, however, seems to contain all the elements essential for the application of that principle. Indeed, we have found no case—and none has been called to our attention—where the application of the rule has been denied, where the statute under consideration was similar to ours, and the facts substantially the same. The preliminary notice fixing the time for hearing complaints and objections was regular in every respect. This gave the property owners notice of the contemplated action of the mayor and city council, and an opportunity to present in due time any complaints or objections they may have had to the validity of the proceedings to the city authorities, or the courts of general jurisdiction. *Perry v. Davis*, 18 Okla. 458, 90 Pac. 865; *Kerker v. Bocher*, supra; *Muskogee v. Rambo*, 40 Okla. 672, 138 Pac. 567. The record shows, however, and the court below found, that none of the property owners attempted to file any complaint or objection, or otherwise indicated that they were not entirely satisfied with the action of the city authorities. If they had done so, the members of the city council present at the meeting of the council called for the 18th day of January, 1909, could have secured a quorum for the purpose of hearing such objections and complaints as the parties might present, and probably would have done so. It has been held that, where the statutes contemplate the formal presentation of objections, remonstrances, protests, and the like, at a certain stage of the assessment proceedings, and the property owner fails to make such formal objection at the stage required by statute, he is precluded from making such formal objection at a later stage, when the improvements have been completed, the benefits secured to his property, and the assessment levied. *Field v. Barber Asphalt Paving Co.* (C. C.) 117 Fed. 925; *Haughawout v. Raymond*,

148 Cal. 311, 83 Pac. 53; *Duncan v. Ramish*, 142 Cal. 686, 76 Pac. 661; *Wabash Eastern R. Co. v. East Lake Fork Special Drainage Dist.* 134 Ill. 384, 10 L.R.A. 285, 25 N. E. 781. Other cases to the same effect are collected in a note to § 1016 of vol. 2, Page & J. Taxn. by Assessment.

Whilst a great many of the foregoing cases are analogous to the case at bar, the following will probably be found to be more directly in point: *Dakota County v. Cheney*, 22 Neb. 437, 35 N. W. 211; *Kellogg v. Ely*, 15 Ohio St. 64; *Prezinger v. Harness*, 114 Ind. 491, 16 N. E. 495; *McCoy v. Able*, 131 Ind. 417, 30 N. E. 528, 31 N. E. 453; *Cass County v. Plotner*, 149 Ind. 116, 48 N. E. 635; *Atwell v. Barnes*, 109 Mich. 10, 66 N. W. 583; *Moore v. McIntyre*, 110 Mich. 237, 68 N. W. 130.

Certain reflections by Brinkerhoff, Ch. J., who delivered the opinion in *Kellogg v. Ely*, 15 Ohio St. 64, in relation to the duty of property owners in special improvement proceedings, may very well be applied to the property owners in the case at bar: "We do not find it necessary to determine any one of the many questions made and argued by counsel in the case as to the legality or illegality of the proceedings by which this ditch was established, because, if we take for granted all that the plaintiff below claims in this respect, we are of opinion that he does not make such a case as to entitle him to a remedy by injunction at the hands of a court of equity. It is not for every threatened violation of the legal rights of a party that a court of equity will intervene with its preventive remedy by injunction, even in cases where that remedy would be efficient. A party appealing to a court of equity must make a case which can commend itself to the conscience of the court. How is it with the case before us made by the plaintiff below? It is evident enough that, when the proceedings in the probate court, on inquiry of damages claimed by him, were ended, the plaintiff below might have proceeded on error to test their le-

gality, and, if erroneous, to reverse them. And when the final order establishing the ditch was made by the county commissioners, he might then have proceeded, on error or by appeal, to question their power and jurisdiction, and to undo what may have been erroneously done. And these remedies, if they had been resorted to, would have had these important recommendations: That whatever had been done erroneously or without authority of law would have been set aside; officers would have been instructed as to their duties, and parties as to their rights; and proceedings, recommencing from the erroneous point of departure, would have been carried on in strict conformity to law, with all just interests respected, and all rights conserved. But it does not appear that any resort was had to these remedies. Again: When the different sections of this ditch were let to the lowest bidder, and when the first spade had been thrust into the earth in the execution of

the contracts then made, before the contractors had expended any money, or the laborers any sweat, then, if ever, the remedy by injunction was open to the plaintiff below. But then he did not invoke it. It does not appear from the record that he ever warned the contractors or laborers that he intended, for himself, to resist the collection of the assessment which must follow to raise the money to pay them; but, remaining inactive and silent until his swamp lands were drained by a ditch of nearly a mile in length, he then, for the first time, asks the interposition of a court of equity. We think he comes too late."

Public improvement—assessment—estoppel.

For the reasons stated, the judgment of the court below is reversed, and the cause remanded, with directions to proceed in conformity with this opinion.

All the Justices concur.

Petition for rehearing denied, March 10, 1914.

ANNOTATION.

Loss of right to contest assessment in proceeding for street or sewer improvement by waiver, estoppel, or the like.

- I. Introductory, 635.
- II. Waiver by express contract, 636.
- III. Estoppel by deed, 646.
- IV. Estoppel by petitioning for improvement:
 - a. Generally, 649.
 - b. Sufficiency of petition, 649.
 - c. Validity of statute or ordinance, 651.
 - d. Conformity of proceedings to statute or ordinance, 654.
 - e. Performance of work, 658.
 - f. Assessment, 658.
- V. Estoppel by failure to resort to legal remedy:
 - a. Failure to object:
 1. Generally, 662.
 2. Sufficiency of petition, 667.
 3. Validity of statute or ordinance:
 - (a) Generally, 669.
 - (b) Irregularities in enactment or contents of ordinance, 671.

V. a—continued.

4. Conformity of proceedings to statute or ordinance:
 - (a) Resolution of intention, 674.
 - (b) Estimate of cost, 676.
 - (c) Qualification of official, 679.
 - (d) Notice, 681.
 - (e) Contract for improvement, 686.
5. Performance of work, 692.
6. Assessment:
 - (a) Generally, 698.
 - (b) Assessment in excess of benefit, 704.
 - (c) Assessment in excess of statutory provision, 705.
 - (d) Disproportionate assessment, 706.
 - (e) Improvement of no benefit, 708.

V. a, 6—continued.

- (f) Improvement injurious to property, 710.
- (g) Assessment in excess of cost of improvement, 712.
- (h) Assessment without regard to benefit, 714.
- (i) Extra charges included in assessment, 718.
- (j) Entire cost of improvement on abutting property, 720.
- (k) Exclusion of property benefited, 721.
- (l) Improvement as general, 724.
- (m) Property condemned or dedicated for improvement, 724.
- (n) Boundaries of district, 726.
- (o) Description of property assessed, 728.
- (p) Assessment by instalments, 729.

b. Appearing and filing other objections:

- 1. Generally, 729.
- 2. Sufficiency of petition, 730.
- 3. Validity of statute or ordinance, 730.
- 4. Conformity of proceedings to statute or ordinance, 730.
- 5. Performance of work, 735.
- 6. Assessment, 735.

c. Failure to pursue remedy within time prescribed by statute:

- 1. Generally, 737.
- 2. Sufficiency of petition, 738.
- 3. Validity of statute or ordinance, 740.
- 4. Conformity of proceedings to statute or ordinance, 741.
- 5. Performance of work, 743.
- 6. Assessment, 744.

d. Failure to appeal:

- 1. Generally, 746.
- 2. Sufficiency of petition, 747.
- 3. Validity of statute or ordinance, 748.

1. *Introductory.*

The purpose of the present annotation is to discuss the means by which an owner whose property is specially assessed to pay the cost of a street or sewer improvement may lose his right

V. d—continued.

- 4. Conformity of proceedings to statute or ordinance, 748.

- 5. Performance of work, 751.

- 6. Assessment, 753.

VI. Estoppel by acquiescence or acceptance of benefits:

a. Generally:

- 1. Sufficiency of petition, 757.
- 2. Validity of statute or ordinance:

- (a) Generally, 763.

- (b) Lack of power in municipality, 766.

- (c) Irregularity in enactment or contents of ordinance, 772.

- 3. Conformity of proceedings to statute or ordinance:

- (a) Declaration of necessity or intention, 778.

- (b) Estimate of cost, 779.

- (c) Qualification of official, 782.

- (d) Notice, 783.

- (e) Contract for improvement, 786.

4. Performance of work:

- (a) Owner estopped, 797.

- (b) Owner not estopped, 803.

5. Assessment:

- (a) Owner estopped, 808.

- (b) Owner not estopped, 814.

- b. Dedicating land for improvement, 821.

- c. Consenting to or suggesting change in work, 822.

- d. Assigning contract for improvement, 825.

- e. Acting in official capacity, 825.

- f. Accepting damages in condemnation proceedings, 825.

VII. Estoppel by payment of assessment:

- a. Generally, 827.

- b. Validity of statute or ordinance, 828.

- c. Conformity of proceedings to statute or ordinance, 829.

- d. Performance of work, 832.

- e. Assessment, 832.

to object to the assessment for defects and irregularities in the proceedings. Every form of street improvement, and ordinary sewer improvements within municipalities, are included in the discussion, but the loss of the

right to object to an assessment in drainage or reclamation proceedings is excluded, that subject being considered in the note to *Geib v. Morrison County*, post, 839. Cases involving the liability of a street railway company for a special assessment are also excluded, where such liability seems to pertain distinctively to street railways.

If any underlying principle can be said to govern the waiver, or the loss by estoppel, of the right to object to an assessment for a street or sewer improvement, it is that a property owner cannot ordinarily waive or become estopped to urge the invalidity of an assessment which is void by reason of an inherent defect, either of jurisdiction or of procedure. This principle, however, is not universally recognized by the courts, the decisions in many cases being made to depend on entirely different principles or considerations. Nor is the principle similarly applied when recognized, the courts being apparently not altogether agreed as to when an assessment may be said to be absolutely void rather than merely voidable. On account of this lack of harmony in the views of the courts, it has been deemed inadvisable to discuss the subject of this note primarily from the standpoint of fundamental rule or principle, or to attempt primarily to classify the discussion as between void and voidable assessments. Of greater benefit and aid to the reader has it seemed to be, to classify the treatment according to the various kinds of waiver or estoppel, and under each such kind to classify again according to the particular kind of alleged defect in the proceeding, with respect to which the doctrine of waiver or estoppel has been invoked. The treatment of the subject in this manner has permitted the statement, in the various divisions and subdivisions, of such governing rules as have emerged or have been deduced from the decisions pertinent to the precise point under discussion.

II. Waiver by express contract.

A property owner may by express stipulation, or agreement made to fur-

ther the proposed scheme, or in consideration of delayed payments of the tax, waive his right to object to an assessment for a street or sewer improvement. Thus, where a property owner signs a waiver of irregularities in order to secure the advantage of paying an assessment in instalments, he will not be heard to complain that the assessment is excessive (*Evans v. Des Moines* (1918) — Iowa, —, 169 N. W. 336; *North View Land Co. v. Cedar Rapids* (1918) — Iowa, —, 169 N. W. 644; *Wagoner v. La Grande* (1918) 89 Or. 192, 173 Pac. 305), or that the work has been done in an improper manner and that inferior materials have been used (*Plagmann v. Davenport* (1917) 181 Iowa, 1212, 165 N. W. 393), or that the assessment is indefinite and uncertain (*Richcreek v. Moorman* (1895) 14 Ind. App. 370, 42 N. E. 943), or that the city had no jurisdiction over the street (*Patterson v. Ashland* (1920) — Or. —, 187 Pac. 593). So, in *Dunkirk Land Co. v. Zehner* (1905) 35 Ind. App. 694, 74 N. E. 1099, it was held that an objection to an assessment for a street improvement on the ground of insufficiency in the description of the property could not be set up as a defense in an action to enforce collection, where it appeared that the objector, in consideration of the privilege of payment by instalments, had agreed to make no objection "to any illegality or irregularity." The court said: "Two courses of action were open to it [the objector]; one to refuse to pay and take advantage of 'any illegality or irregularity' in the progression leading up to the assessment of its property; and the other to waive the benefit of any objection it might have on account of 'any illegality or irregularity' in the proceedings of council, by which its property was so assessed. It chose the latter, and by this waiver and promise to pay thereby invited the city to issue bonds for the purpose of raising money with which to pay for such improvement, and to act further upon the identical proceeding which it now claims to be irregular and illegal. The objections now urged against the enforcement of the liens and claims of

appellees ought not to prevail. . . . When the work is completed the property owner has his election to refuse to sign the agreement provided for, and stand upon his common-law rights in respect to contesting the validity of the assessments made against him, in which case the assessment becomes due when made, or he may waive any irregularities, and secure the benefit of ten years' time by signing an agreement to that effect.'

. . . In *Edward C. Jones Co. v. Perry* (1900) 26 Ind. App. 554, 57 N. E. 583, this court reaffirmed the case of *Richcreek v. Moorman* (Ind.) supra, when it said: 'The assessed property owner could not, after signing the agreement contemplated by § 4294, Burns's Anno. Stat. 1894 [Acts 1891, p. 323], be heard to question the irregularity or illegality of his assessment,' and held that a promise to pay, incorporated in a waiver such as here filed, amounts to an express contract, founded upon a valid consideration, unconditionally to pay the sum of money fixed by the assessment, without regard to any future contingency, and 'creates a personal liability upon the part of the property owner whose property may be assessed under' the provisions of the statute here invoked. In the course of the opinion it was further said: 'It is the history of the growth of cities and towns that the real estate therein at times rapidly increases in value, and at other times as rapidly decreases in value. The lots and parcels of land abutting upon a street may be worth many times the amount of the assessments levied upon them at the time the improvement is made and the assessment falls due, and in a short time thereafter may be worth less than the assessment; but the cost of the improvement is fixed; the contractor has already expended his money. If permitted to foreclose his statutory lien at the time the assessment falls due, he would obtain his money; but the owner of the property, by an agreement which the statute simply permits, defers the time of payment for ten years. In order to do this' he agrees to pay the debt. We cannot

hold that, after so contracting, he can, if his property decreases in value to a point where it is not worth as much as the debt, throw the assessed real estate with the resulting loss upon the holder of the debt, and thus escape the consequences of his own act.' The reasoning of the court just quoted is applicable here. The purpose of the waiver is to give the property owner additional time to pay his apportioned part of the cost of the improvement. The filing of the waiver has that effect, and the city or contractor is powerless to prevent it. On neglect or failure to file such waiver within twenty days after date of the estimate, the contractor could have enforced payment of his debt under the provisions of § 4298, Burns's Anno. Stat. 1894, Acts 1891, p. 323, and in attempting to compel payment, had it appeared that his lien was ineffectual because of an error in the final estimate, called an 'assessment,' the assessment could have been immediately amended or corrected, and the lien perfected and enforced without delay, and the attending risk of a loss from a decrease in the value of the property avoided. . . . One of the very objects of the statute authorizing the property owner to file a waiver is to cut off his right to make objections, such as are here claimed, years after the work is done and the improvement completed. To hold that such waiver and agreement amount only to a promise to pay the assessment in case it is valid would be contrary to the wording of the statute, contrary to every principle of equity and fair dealing, and would permit the property owner to take advantage of his own act and promise, which might result in great damage and loss to the party doing the work and investing his money in the improvement."

One who signed an application for an extension of time of payment and to pay in instalments as provided by statute, the application containing an express waiver of "all irregularities or defects, jurisdictional or otherwise, in the proceedings to construct" the pavement for which the assessment was levied, is estopped to raise any

objections to the assessment, either in the matter of authority on the part of the city to levy the same, or otherwise. *Patterson v. Ashland* (1920) — Or. —, 187 Pac. 593. The particular objection involved in this case was that the street improved was a county road, not subject to the jurisdiction of the city.

Where a property owner, after protesting against a paving improvement, pays an instalment of the assessment therefor and voluntarily executes a written contract to pay the balance, he thereby waives the right thereafter to plead in defense to his contract that the assessment has been declared invalid by the courts. *Floyd v. Atlanta Bkg. Co.* (1899) 109 Ga. 778, 35 S. E. 172, wherein the court said: "As a matter of law he was not liable to pay the assessment; but although he protested against the paving of the street and the same was done over his protest, yet when a demand was made upon him to pay his proportion of the assessment for the paving, he at once complied with the demand, and elected to exercise the privilege given him by the act of the legislature, and paid one fourth of the amount assessed against him in cash and gave his written obligations to pay the remainder within the three following years. It is true that these agreements were made before it had been determined that such assessments were illegal, but nevertheless, in consideration of the increased value of his property caused by the paving, for which the assessments were made, he could make a valid and binding contract to pay his proportion of the cost of the same. . . . It was perfectly competent for him to waive the illegality in the proceedings taken to have the work done, and if, with a knowledge of the irregularity of such proceedings, he nevertheless, in consideration of the benefit to his property, undertook and agreed to pay his proportionate part of the expense of the same, such agreement will be held to be a valid and binding contract."

It seems that a written waiver of objections to irregularities in a street improvement, in consideration of the

privilege of paying the assessment in instalments, is binding on the heirs and grantees of the property owner. *Close v. Twibell* (1910) 47 Ind. App. 290, 92 N. E. 377.

Where property owners, in a signed agreement, declare that they waive any illegality or irregularity in the proceedings in consideration of a reduction in the amount of an assessment provided it is paid within a certain time, the fact that payment is not so made does not establish a mutual abandonment of the waiver, when the contractor has gone on and completed the work; and the waiver applies to the objection that several streets of different widths are included in a single proceeding. *Remillard v. Blake & B. Co.* (1915) 169 Cal. 277, 146 Pac. 634, Ann. Cas. 1916D, 451, wherein the court said: "If the various streets, or, rather, the portions thereof to be improved, are so related that the improvement of them as a whole may fairly be deemed to be a benefit to all the property fronting upon such parts, the council does not exceed its jurisdiction by treating the work on the several streets as an entirety, and including it in a single proceeding. Whether one or more streets should form a unit for improvements is a question committed primarily to the direction of the council. No abuse of discretion appears here."

Where certain of the petitioners for the paving of a street sign an agreement waiving any objection to the assessment therefor on the ground of a previous mistake in grading, they are unquestionably estopped to contest the assessment on the ground stated. *Montgomery's Estate v. Pittsburg* (1905) 29 Pa. Super. Ct. 312. In that case it also appeared that one of the abutting owners, who did not sign the paving petition or the waiver agreement, nevertheless, at about the same time, withdrew pursuant to leave of court exceptions previously filed by her to the assessment for grading, based on the mistake made in the grading proceedings. The court said that it might well be doubted whether she could consistently raise the same

objection in defense of the paving assessment.

Landowners who petition for a street improvement to be made under an existing statute, and who, after the completion of the work, sign an agreement stipulating that the improvement has been "legally made and constructed," such agreement being made in order to facilitate the sale of bonds issued by the municipality to cover the cost of the improvement, are estopped to plead the invalidity of the statute as a defense to the collection of the assessments against their property. *Shepard v. Barron* (1903) 194 U. S. 553, 48 L. ed. 1115, 24 Sup. Ct. Rep. 737.

A property owner, who, after the adoption by the common council of a resolution authorizing a grading improvement, executes a "release of damages," is estopped to object to the assessment on the ground of the illegality of the resolution. *Tacoma Land Co. v. Tacoma* (1896) 15 Wash. 133, 45 Pac. 733. But the fact that a petition for a street improvement contains a "waiver of damages" for injury to the abutting property does not estop a petitioner to object to the assessment on the ground that it is in excess of the value of the property. *Louisville v. Benedict* (1912) 147 Ky. 391, 144 S. W. 43. So, an abutting owner on a street in a town through which a sewer is constructed, who enters the sewer with his private drain by license from the municipal authorities, by which he agrees to make no claim for damages on account of the work, is not estopped to contest the validity of the order laying out the sewer under which an assessment is levied on him, where the resolution of the council is so loosely worded as to render the location of the sewer uncertain. *Sheehan v. Fitchburg* (1881) 131 Mass. 523, wherein the court said: "No existing object was to be described or identified, and the inquiry was whether the vote had expressed with sufficient clearness what was thereafter to be done. As it appeared that it had not in any way described the length of the proposed sewer, or the points from and to which it was to extend, it might

properly be ruled, as matter of law, to be insufficient. It was not such a case as would have been presented if one of the points from or to which the sewer was to run had been imperfectly described, and had required identification. We are, therefore, of opinion that the order of September 9, 1871, relied on by the defendant as a legal establishment of the first three sewers, was insufficient. . . . The plaintiff Harrigan entered with his private drain the drain on Water street constructed in 1871 and 1872, by license from the town clerk, by which he agreed to make no claim for damages on account of the work. It was equally competent for the city to have made it a condition that he should, before doing so, consent to submit to the assessment which might be laid upon him. . . . Not having made this one of the terms of the license, his acceptance of it cannot estop him from contending that it has never been so laid out as to entitle the city to levy an assessment therefor. The use of a structure made for the public benefit does not bind the party so using it to pay an assessment therefor, unless it is legally laid, or unless he has waived his right to object to its legality. When the license prescribed one claim,—that for damages,—that he should not make, it is fairly to be inferred that he was left free to make any other proper claim in relation thereto."

It has been held that an objection to assessment for opening a street, that the condemnation proceedings prior thereto were void because the question of damages was determined by a jury of eleven men, was waived where counsel representing the property owners and the city agreed to proceed with eleven jurors. *Borgman v. Detroit* (1894) 102 Mich. 261, 60 N. W. 696, wherein the court said: "The city authorities stood, in a sense, as representatives of the taxpayer, and the taxpayer was in court by these representatives. There is no more reason to question the good faith of the authorities in waiving a juror than there would be to charge collusion in refusing to call all the witnesses accessible. The two parties who con-

trolled the proceedings doubtless acted in perfect good faith; the city authorities in behalf of all the public interested, and the property owners in their behalf. It was competent for the owners of the land to waive their constitutional right to a trial by jury."

Similarly, it has been held that a property owner waives all irregularities in proceedings for a reassessment, where by a stipulation of counsel it is agreed that such reassessment shall be made because of a misdescription of the property and name of the owner, and no other reason is assigned. *Texas Bitulithic Co. v. Henry* (1917) — *Tex. Civ. App.* —, 197 S. W. 221.

In *Metropolitan Bldg. Co. v. Seattle* (1916) 92 Wash. 660, 159 Pac. 793, it appeared that a stipulation was entered into between a property owner and a city in condemnation proceedings, which was later, by the act of the parties in applying for and granting a reduction in a street assessment, construed as imposing on the property owner the obligation to pay the assessment in question. It was held that the property owner was estopped thereafter to question the validity of the assessment as reduced.

Where property owners petition for an improvement, binding themselves to pay the assessment therefor, "irrespective of the number of owners of property signing this petition," they are estopped from raising the objection that the statutory requirement as to the number of petitioners has not been complied with. *Thornton v. Cincinnati* (1904) 26 Ohio C. C. 33, wherein the court said: "It is said that three fourths of the abutting front feet have not joined, and hence this improvement and assessment cannot have been under § 2272, Rev. Stat. But the signers of the above petition have expressly estopped themselves from making this objection, having agreed with the city and each other 'to pay such assessment, irrespective of the number of owners of property signing the petition.' Whether this improvement was made under § 2272, Rev. Stat., or the city's general pow-

ers, is all the same, because the objection here is that assessment beyond the special benefits is unconstitutional. There is no doubt of this constitutional limitation, but this may be waived by contract, or parties by conduct in pais may estop themselves from setting it up. . . . The petition in the case at bar was not needed to confer jurisdiction or power; its sole office was to avoid and surrender the constitutional limitation." See to the same effect, *Sexsmith v. Smith* (1873) 32 Wis. 299.

A property owner who petitions for an improvement and, as inducement to favorable action thereon, offers to waive the benefit of the statute limiting a special assessment against his property to 25 per cent of its value, cannot be heard to repudiate his undertaking after his petition has been granted, and the improvement for which he has asked has been made; but where the council does not accept the offer of the petitioner, and thereafter proceeds professedly and expressly on its own motion to exercise its statutory power to make an improvement of that nature without reference to the request or consent of the persons interested, there is no principle of law or equity which will entitle the city to set up the offer or waiver contained in the rejected petition as an estoppel against the property owner's assertion of his statutory rights. *Bailey v. Des Moines* (1912) 158 Iowa, 747, 138 N. W. 853, wherein the court said: "It is true that persons who have petitioned for street improvements have quite frequently been held estopped to contest the assessments thus resulting because of irregularity in the preliminary proceedings, and it is not unreasonable to suppose that the existence of this rule was one reason for the enactment requiring the city to make of record the fact whether the work had been ordered upon petition therefor, or upon the council's own motion. A petition granted is one thing; a petition rejected or not acted upon is quite another." Somewhat similarly, in *Lewis v. Cook* (1910) 57 Wash. 1, 106 Pac. 198, it was held that a property owner

was not estopped to deny the validity of an assessment on his property up to the amount of \$6 per front foot, because his predecessor in interest had petitioned the city to make the street improvement, agreeing to permit an assessment on the property at the rate of \$6 per front foot on certain conditions being performed, where the city ordered and carried out the improvement without regard to the conditions imposed. The court said: "It is manifest, from a comparison of the petition asking for the improvement and the ordinances of the city passed authorizing the same, that the city, when it ordered the improvement, paid but little heed to any of the limitations contained in the petition, and especially none to those which were intended for the actual benefit of the petitioners. The conditions that would benefit the petitioners, it will be observed, not only limited the amount of the assessment on lots damaged in excess of benefit to \$6 per front foot, but provided, in effect, that such lots should not be assessed any sum unless the amounts that could be assessed on lots for actual benefits should not equal the cost of the improvement. This stipulation was entirely disregarded. The property in the assessment district was all assessed alike, without distinction between that which could be lawfully assessed for actual benefits and that which could only be assessed under the stipulation. Whether the property actually benefited was assessed for the full amount of the benefits it received does not appear, and hence it does not appear whether the respondents' property is liable to assessment in any sum, much less does it appear that it is liable to an assessment of \$6 per front foot. The respondents, therefore, are not estopped from questioning the validity of the assessment on their property by any act of their own or their predecessor in interest."

But the signer of a petition which in effect waives the 25 per cent statutory limit of assessment is estopped thereafter to object to an assessment which exceeds the limit; and the same is true as to a grantee of the petition-

9 A.L.R.—41.

er. *Squier v. Cincinnati* (1891) 3 Ohio C. D. 196.

While it is well settled that property owners who sign a petition for a local improvement, wherein they stipulate to waive exemption from assessment, are estopped from contesting the validity of the assessment made on their property, it is also the rule that such an agreement, like any other agreement, may be abrogated by the parties thereto by a subsequent agreement. Thus, in the case of *Re Patterson* (1917) 98 Wash. 334, 167 Pac. 924, wherein it appeared that, after signing such a petition, the owners agreed with the city to accept nominal damages in condemnation proceedings in consideration of exemption from assessment, it was held that they were not estopped by the original petition from objecting to the levy of an assessment on their property. See to the same effect, *James v. Seattle* (1910) 57 Wash. 318, 106 Pac. 1114; *Michaelson v. Seattle* (1911) 63 Wash. 230, 115 Pac. 167; *Seattle School Dist. v. Seattle* (1911) 63 Wash. 245, 115 Pac. 173; *Hapgood v. Seattle* (1912) 69 Wash. 497, 125 Pac. 965; *Richardson v. Seattle* (1917) 97 Wash. 371, 166 Pac. 639, 168 Pac. 513.

So in *Dempster v. Chicago* (1898). 175 Ill. 278, 51 N. E. 710, it was held that a landowner was not estopped from enjoining the collection of a special assessment for the construction of a sewer on a street which did not exist, where he was induced to withdraw valid objections to its confirmation by an agreement entered into by the municipal corporation constructing such sewer, to condemn the right of way over his land for the street, which it did, but, after the confirmation of the special assessment, vacated the condemnation judgment and dismissed the proceedings. The court said: "While the ordinance purported to give the location of the improvement, it was an impossible one, because there was nothing which answered the description of the ordinance. . . . This assessment could not be enforced, and by withdrawing their objections complainants, through the agreement and

representations of defendant or its officials, lost a substantial right. The law secures to them as property owners this important and substantial right of objection to the proposed assessment, and to a hearing of the objection. This understanding was entered into by complainants, so far as appears, in good faith on their part, and after the defendant had obtained all the benefits of the agreement, and had laid the sewer across their property, the ordinance for laying out a street was repealed. This conduct, in violation of the agreement, warrants the inference that, having acquired possession, there is no intention of laying out a street, but a fraudulent design to disregard the agreement and enforce the assessment. The assessment is not a tax in the ordinary sense, but if it were, the rule is that a tax in which the party is deprived, by fraudulent practices of the officers, of important rights which the law intends to secure to him, may be enjoined. *Cooley*, Taxn. 547. The complainants have no legal remedy to recover compensation for the land included in the street, which was abandoned and the ordinance repealed. The locality which is described in the ordinance as a street is not a street. The assessment could not be enforced against complainants under the ordinance, and the proceeding is shown by the bill to be vitiated by fraud, against which a court of equity should give relief. The bill showed good ground for setting aside the judgment of confirmation and restoring the parties to their original rights unless the agreement should be carried out by the defendant."

A landowner, who, being desirous of having a street improvement completed without unnecessary delay, entered into a written agreement with the contractor, in which he waived any right of protest against the performance of the work by the contractor or against the assessment district, cannot object to a claimed invalidity in the resolution of intention or alleged defects in the postings and in the contract. *Cutting v. Vaughn* (1920) — Cal. —, 187 Pac. 19.

However, the rule has been laid down in several cases that though a property owner signs an express waiver of all defects and irregularities in the proceedings and the levying of an assessment, he is not thereby estopped from objecting to a jurisdictional defect. *Harnwell v. White* (1914) 115 Ark. 88, 171 S. W. 108; *Heft v. Payne* (1892) 97 Cal. 108, 81 Pac. 844; *Cushing v. Bullock* (1910) 151 Mo. App. 281, 181 S. W. 713; *Cushing v. Branson* (1910) — Mo. App. —, 181 S. W. 946; *Cushing v. Allen* (1911) — Mo. App. —, 183 S. W. 1197; *Cushing v. Phillip* (1911) — Mo. App. —, 183 S. W. 1197. But see *Patterson v. Ashland* (1920) — Or. —, 187 Pac. 593, *supra*.

Thus, in *Heft v. Payne* (1892) 97 Cal. 108, 81 Pac. 844, *supra*, an action to foreclose a lien for a street assessment, it was held that a property owner was not estopped from defending on the ground that the improvement was not completed within the time specified in the contract, because on a previous assessment it appeared that "the defendant and other lot owners appealed to the city council and filed objections; that the latter appeared and took part in the hearing of the objections, and expressly waived all objections which they might have by reason of the failure of the contractors to complete the work within the time fixed, or any extension thereof, and stated that all they wanted was a completion of the improvement to the satisfaction of the council, and when that was accomplished no further objections would be made and the assessment for the work would be paid; that the council, relying on the good faith of said representations, set aside the assessment and warrant, and ordered further work to be done; that plaintiff, relying on the good faith of said promises, went on and completed the work to the satisfaction of the proper officers, and of said council, and the work was by resolution accepted, a new assessment made, and a warrant issued and recorded, demand for payment made, etc." The court said: "It is contended that the defendant is estopped by his representations and

promise from claiming that the work was not done within the time required. But this is an action purely to foreclose a lien on the land for the cost of a public improvement. There is no personal liability, and to such proceedings the doctrine of estoppel in pais has no application. . . . If there is no lien, there can be no recovery. The lot alone is liable, and if there was no lien at the time it is claimed a waiver was made, we do not see how any could have been created by the oral statements of the defendant."

Similarly, in *Cushing v. Bullock* (1910) 151 Mo. App. 281, 131 S. W. 713, wherein it appeared that the ordinance authorizing a street improvement had been declared void, it was held that a property owner who signed a waiver, providing that if the work was completed in accordance with the terms and provisions of the ordinance and contract, and to the satisfaction of the city engineer, she would not contest the validity of any tax bills issued in payment for the work against her property, but would waive any and all defenses which might be made against said tax bills, was not thereby estopped when the work was not completed within the time specified, although the city council granted an extension of time. The court said: "The request relied upon as a waiver was conditioned that the contractor should not only go ahead and 'do the work,' but he was to 'complete the same in accordance with the terms and provisions' of the contract, among which was the imperative one that the work should be finished in ninety days. This was made of the essence of the contract. It must be assumed that Mrs. Hutton [the owner] wanted the work done and out of the way so as not to inconvenience her or embarrass the use of the property, and so she agreed that if it was completed in the time agreed upon, she would waive the illegality which had appeared in the proceedings. Plaintiff insists that the contract of waiver, properly interpreted, meant only that the work should be done 'to the satisfaction of the city engineer.' That

idea is not borne out by either the words or evident meaning of the writing. The work was to be done as specified in the original contract between the contractor and the city. The waiver contract had specified that the work should be done and completed as required by the contract with the city, and the reference to the engineer was not to annul the terms of the contract with the city, but merely that he should see to it that those terms were performed." See to the same effect, *Cushing v. Branson* (1910) — Mo. App. —, 131 S. W. 946; *Cushing v. Allen* (1911) — Mo. App. —, 133 S. W. 1197; *Cushing v. Phillip* (1911) — Mo. App. —, 133 S. W. 1197.

In *Harnwell v. White* (1914) 115 Ark. 88, 171 S. W. 108, an action to recover the amount of a special assessment for grading and paving a street, it appeared that the commissioner's report disclosed that the improvements could not be made within the limit of 20 per centum of the value of the real property in the district, whereupon the character of the improvement was changed, and four districts were organized, three of them for the purpose of making each a portion of the improvement petitioned for, and the fourth for making sidewalks, all on the original petition asking for the single improvement and specifying it. The property owners then signed an agreement to pay the assessments, and waived all irregularities. It was held, however, that the defendant, one of the signing owners, was not estopped from denying the validity of the assessment on the ground that the proceedings were in violation of the statute. The court said: "It is contended, however, that appellant is estopped to dispute the validity of the different improvement districts and escape the payment of the assessment levied therein, on account of having received the benefit of the different improvements already constructed, and because of the instrument executed by her after the legality of the districts was questioned, waiving all irregularities in their formation and guaranteeing the payment of all of the assessments levied for the con-

struction of the different improvements. We do not agree with this contention. Improvement districts are creatures of the law, and cannot be created by consent, waiver, estoppel, or agreement of the property owners. They are governmental agencies, deriving their powers directly from the legislature, and can exercise no powers, perform no duties, nor incur any liabilities except by authority conferred upon them expressly by statute. . . . The property owner has the right to rely upon the protection afforded him by the statute, and to expect the organization of improvement districts in cities and towns and the levy and collection of assessments against his property in accordance with and as provided by law, and he is not estopped to deny the validity of any assessment against his property where the improvement district has failed to secure the power to make the levy by not complying with the terms of the statute authorizing its creation as in this case. Here the defects complained of are not mere irregularities in the exercise of powers conferred upon the district, but consist of failure on the part of the board of improvement to secure the power to make the improvement through the necessary prerequisite,—the petition of the majority in value of the property owners of the district,—and the appellant is not estopped to challenge the power of the district and the validity of the assessment because she has stood passively by and seen the improvement go on, and paid all prior assessments levied against her property. *Watkins v. Griffith* (1894) 59 Ark. 344, 27 S. W. 234. Those interested in the collection of the assessment as compensation for the work done in making the improvements cannot be said to have relied upon her acquiescence in the creation of the district, since they knew in making the contracts with the board of improvement that they were dealing with a governmental agency without powers, except as expressly conferred by statute, and whose authority they were bound to know. Neither was she estopped to deny the author-

ity of the district, nor the validity of the assessments by reason of the execution of the said waiver and guaranty, since improvement districts are not created nor liabilities for assessments fixed, by estoppel, as already said."

An executor who appears before the board of public works in his individual capacity, and states that he has no objection to certain assessments of benefits against his lands, is not estopped from denying the validity of an assessment against the lands of his decedent. *Pomainville v. Grand Rapids* (1914) 157 Wis. 384, 147 N. W. 377.

A stipulation in a contract for grading a street, that "all loss or damage arising from the nature of the work to be done under this agreement . . . shall be sustained by the contractor," is not void as against public policy, and an objection to an assessment thereunder may be waived by express consent. *Allen v. Hance* (1911) 161 Cal. 189, 118 Pac. 527. In that case it was also held that where a property owner signed an express waiver of her right to object to an assessment, "if an independent survey shall demonstrate that the work . . . is constructed upon the grade established by the ordinance fixing the grade of the street," since the waiver did not in terms declare that a joint independent survey should be made at the instance of both parties, whatever may have been her original right to participate in the making of such a survey, she waived it by her acquiescence in the issuance of and the payment of instalments on, the bond on her property.

Where a street improvement is petitioned for, and it is such an improvement as the city council may legislate for and have made, the only question of legality being that touching the right to assess the cost back on the property, and the parties expressly agree that it shall be so assessed, they are estopped to question the validity of the assessment. *Hendrickson v. Toledo* (1901) 23 Ohio C. C. 256. See to the same effect, *Loomis v. Little Falls* (1901) 66 App. Div. 299, 72 N. Y.

Supp. 774, affirmed in (1903) 176 N. Y. 31, 68 N. E. 105, wherein a property owner was held to be estopped to object to an assessment against him in view of the fact that he had petitioned to have the improvement made, and had stated in the petition that the costs would be a tax on the adjoining property, and not on the public. So, in *Harrisburg v. Baptist* (1893) 156 Pa. 526, 27 Atl. 8, it was held that a property holder, who petitioned the council of a city to pave a street and to assess the cost against abutting owners, was estopped to question the validity of the assessment on the ground that the paving was not an original paving, and therefore that the abutting owners were not liable to assessment therefor. In like manner, it was held in *Straub v. Allegheny* (1881) 1 Pennyp. (Pa.) 424, that one who remonstrated against a proposed change of grade of a street, admitting that the improvement would be of some local benefit to him by making the "market easy of access and convenient" to him, and that he expected to pay his quota of the cost, was estopped to assert that his property was used for farming purposes, and, being rural, was not the subject of local assessment. In *Winnebago Furniture Mfg. Co. v. Fond du Lac County* (1902) 113 Wis. 72, 88 N. W. 1018, however, it was held that an objection to an assessment for the paving of a street on the ground that the property owners had already made such an improvement, and under the statute could not be assessed for another, was not waived by one who signed a petition for a particular kind of pavement, agreeing to pay his proportionate share of the expense, where a different kind of pavement was laid under another petition which he had not signed. The court said: "This petition, until acted on, of course, was no more than an offer, and plaintiff's liability thereon is to be controlled by the familiar rules of law governing the question of acceptance and consequent fastening of liability upon one making an offer or a proposition. That petition requested the paving of the street with cedar blocks, and that re-

quest unquestionably entered into and became one of the conditions upon which was based the offer to pay for the curbing. The city substantially repudiated this petition, after taking some steps toward compliance therewith, and decided not to put in block pavement, but to put in macadam. The council fully understood that its proceeding was not in compliance with the petition, for it postponed final action until a new petition could be circulated, calling for macadam pavement in substitution for cedar block, which latter petition was not signed by the plaintiff. Whether, in the opinion of a court, the macadam pavement may have been as useful or beneficial to the plaintiff, is not a controlling consideration. The plaintiff might, of course, impose such conditions upon its offer as it saw fit. One of those conditions was the laying of a cedar block pavement which, for certain reasons, it seemed to think would be preferable for the convenience of its premises, used as a manufacturing plant. Even if whimsical, this condition it had a right to impose, and, having done so, cannot be bound to its offer save by compliance therewith. There was no such compliance. We cannot, therefore, concur in the conclusion of the circuit court that by its petition the plaintiff is either bound, on the theory of contract to pay for the curbing, or estopped to deny liability therefor." So, in *Pottsville v. Jones* (1916) 63 Pa. Super. Ct. 180, it was held that a mere request by a property owner to the city council, when they were about to make a new pavement for a street, that wood block instead of vitrified brick should be used, did not estop him from resisting an assessment therefor, on the ground that a first pavement already existed, which, under the statute, exempted abutting property owners from liability for any subsequent improvement.

Where one has consented to the construction of a sewer over a lot owned by him, and has stood by in silence, he is estopped from objecting to the assessment on the ground that it is

across private property. *St. Joseph v. Landis* (1898) 54 Mo. App. 315, where the court said: "The undisputed evidence showed that one of the sewers was built across the private lot of Dr. Schwab with his previous approval and consent. He would now be estopped to question the plaintiff's right to occupy his lot with its sewer under the facts and circumstances detailed in the evidence. As owner of the property he not only consented to the use of it by the city, but stood by and acquiescingly saw an expensive sewer constructed through his lot, which became a part of the public sewer system of the city. He testified at the trial that he consented to the location of the sewer, and that he had not and would not object to the use of his lot for that purpose. Under the well-settled law of this state, he would be estopped, after this, from treating his consent as a nullity or maintaining ejectment against the city for the recovery of the property."

But a landowner who has consented to the construction of a sewer across his land, waiving any claim for damages, is not thereby estopped from questioning the amount of his assessment. *McLain's Appeal* (1920) — Iowa, —, 176 N. W. 817.

A distinction is to be observed between an express waiver of the right to object to an assessment for a street or sewer improvement found in some clause or stipulation in the petition for the improvement, which goes to the very ground of the objection, and an ordinary estoppel in pais arising from the mere fact of joining in the petition to have the work done. A discussion of the latter question will be found *infra*, IV.

III. Estoppel by deed.

It has generally been held that a purchaser of real estate, who assumes in his deed of purchase the payment of an assessment for a street improvement as part of the consideration or purchase money, will be estopped thereafter to object to the assessment. This rule has been applied to an objection that the purchaser had received no special benefit (*Waldschmidt v. Bowland* (1905) 27 Ohio C.

C. 782); to an objection based on the defective construction of a street (*Gault v. Columbus* (1904) 30 Ohio C. C. 335); to an objection that notice of the meeting of the board of equalization was insufficient (*Eddy v. Omaha* (1904) 72 Neb. 550, 101 N. W. 25, 102 N. W. 70, 103 N. W. 692); to an objection based on want of the statutory notice to owners to select the materials to be used in a repaving improvement (*ibid.*); and to an objection that a petition for repaving was not signed by a majority of the owners of the foot frontage (*ibid.*). In the case last cited, the court said: "The purchaser obtained the benefit of the deduction from the consideration money of the amount of the eight instalments of special assessments, by reason of his agreement to pay the same. He deprived his vendor of this money upon the promise that he would pay it to the city of Omaha upon this specific special assessment. It would be manifestly inequitable to allow him to retain the money which he promised his grantors that he would pay, and at the same time allow him to come into a court of equity and ask it to relieve him from his agreement. As is said in *Equitable Trust Co. v. Omaha* (1908) 69 Neb. 342, 95 N. W. 650: 'If appellant does not promise to pay the taxes in question, what does he propose to do with the money he has withheld from the owner of the land?' The taxes were presumptively valid, and the owner of the property was at least under moral obligations to pay them. The facts in the cases cited by the appellants in their brief are clearly distinguishable from those in which the principle herein stated is laid down. By the agreement to pay the specific assessments, and by obtaining the benefit of the deduction of the amount of the same as a part of the consideration for the property, the appellees are estopped to maintain an action to set aside the apparent lien of these special assessments."

Similarly, in *Farwell v. Des Moines Brick Mfg. Co.* (1896) 97 Iowa, 286, 35 L.R.A. 63, 66 N. W. 176, it appeared that the plaintiff had purchased certain property, taking a deed which ex-

cepted from the covenants of warranty and against encumbrances, taxes, or claims for curbing and paving. The work of curbing and paving had been completed at the time of purchase, and the assessments were levied subsequently. It was held that the plaintiff was in no situation to complain that the imposition of these assessments on him and his land would work a great injustice, since he had taken the land charged with actual knowledge of the assessments by the very terms of his deed.

Compare, however, *State, Evans, Prosecutor, v. Jersey City* (1872) 35 N. J. L. 381, wherein it appeared that the petition for the improvement was not made by the persons who were to be assessed, and who owned the lands in front of which the work was done, as provided by statute. Holding that the validity of the assessments might be attacked by a purchaser whose deed recited the encumbrance, the court said: "His knowledge of these claims against the property, and his assumption of the payment in his deed as part of the purchase money, are not a waiver, nor will he be estopped thereby to deny their validity in an action between him and the city and the purchaser under the city. They are not parties to the deeds, nor to the consideration of the deeds, and can claim no advantage of the recitals and covenants as a waiver of, or an estoppel to deny the legality of, these assessments and the sales under them. . . . The principle is the same in case of similar encumbrance or charge upon the land claimed by third parties. By the purchase of these lots and his covenants, the prosecutor assumed the place of his vendor, and is certainly in no worse position than he would be as to third parties who claimed to have liens on the land prior to his title. He may, therefore, avail himself of the defense which Gardner could use to defeat the assessment, and the sale under it."

The rule seems to be otherwise, however, with respect to a purchaser whose deed merely recites that the land is conveyed subject to encumbrances, or that the purchaser agrees

to pay special assessments against the property. Thus, it has been held that a purchaser who takes land "subject to encumbrances" generally is not thereby estopped from asserting the invalidity of a paving assessment, where the proceedings are void, and an action to remove the cloud on the title is not barred by the Statute of Limitation. *Batty v. Hastings* (1901) 63 Neb. 26, 88 N. W. 139, wherein the court said: "Had they taken subject to this particular lien, there would be ground for asserting an estoppel. But 'encumbrances' meant valid encumbrances, and the covenants and recitals in their deeds did not preclude them from insisting that the assessment in question had no legal standing as a charge upon the property."

So, in *Carter v. Cemansky* (1905) 126 Iowa, 506, 102 N. W. 438, it was held that a grantee was not estopped by the failure of his grantor to appear before a city council and object to an assessment on the ground that the grading done on a street improvement was unauthorized, notwithstanding his conveyance was made subject to special assessments and encumbrances. The court said: "The recital, 'subject to all encumbrances,' without more, does not estop a grantee from pleading the invalidity of any such encumbrances. It means no more than 'subject to all valid encumbrances,' and was introduced, no doubt, to avoid action for breach of covenant, express or implied. As the assessment was wholly invalid, neither plaintiff nor any of his grantors was required to bring action to set it aside, nor was he bound to give notice of the invalidity thereof to anyone."

Likewise, in *Walsh v. Sims* (1901) 65 Ohio St. 211, 62 N. E. 120, it appeared that property was purchased at an administrator's sale while a street improvement was in progress, but before its completion, the deed being delivered prior to the completion of the work and some three or four months prior to the passage of the assessing ordinance. It was held that the purchaser was not estopped from contesting the assessment on the ground that it was in excess of special benefits, be-

cause of a recital in the deed that "all street assessments and sewer assessments are to be paid by the said purchaser and grantee." The court said: "It is not reasonable to assume that the parties intended that any assessment should be paid beyond that which the city had a lawful right to make, and the vendee is not here insisting upon any defense which the vendor might not himself have made. The case is different from one where a debt of the vendor had existed. None did exist against the vendor. A charge was to be made upon his property, but he had, as yet, received no benefit, and no personal obligation had been incurred, nor could such debt be imposed prior to the taking effect of the assessing ordinance, and at that time the vendor was not the owner of the property. That the statute provides that the lien of the assessment shall attach from the date of the contract is not of importance; it in no way justifies an illegal assessment, or estops the owner to make the question after the assessment ordinance is passed."

Similarly, in the case of *Re Pennie* (1887) 19 Abb. N. C. (N. Y.) 117, 45 Hun, 391, affirmed in (1888) 108 N. Y. 364, 15 N. E. 611, it was held that where due notice of the meeting of the board of contract and apportionment, as required by law, was not given, a property owner who took subject to the assessment, as stated in his deed of conveyance, was not estopped thereby from objecting to the validity of the assessment. The court said: "The petitioner purchased while the work was in progress, before the assessment was made or the amount which it would be was ascertainable. If he had taken his title subsequent to the confirmation of the assessment, and it had been made to appear that he had in fact been indemnified, or had assumed the assessment and agreed to pay it, or had deducted the amount of the assessment from the purchase price, he might not, perhaps, be 'aggrieved,' and might be precluded from setting up the invalidity of the assessment. But I think the true construction of the clause quoted from the petitioner's deed is that he took the property sub-

ject to such legal assessments as might be imposed upon it. Of these he took the risk. In other words he assumed the place of his vendor, and was to pay such assessments as might thereafter be made, and which, but for the transfer, the grantor might be legally compelled to pay, or for which the lot in his hands would be liable."

In *Waldschmidt v. Bowland* (1905) 27 Ohio C. C. 782, it was said that where the recital in a deed does not specify any particular assessment for the improvement of any particular street, it cannot be said that the assumption expressed in the deed relates to and covers an assessment for a street improvement, ordered but not assessed at the time of the deed, and the purchaser is not estopped from contesting the assessment on the ground of lack of special benefit.

Evidently, the doctrine of estoppel by deed to object to a street improvement may apply as well to a grantor as to a grantee. Thus, it has been held that where the grading and improvement of a street did not conform to the lines of the old street, as prayed for in the petition, a property owner who made a conveyance of part of her land after the confirmation of the assessment, and subject thereto, was estopped from objecting to the variance in line by her implied recognition and acquiescence in the mistake. *Gillman v. Bloomfield* (1901) 78 N. J. L. 67, 73 Atl. 604.

So, the lessor of property, assessed for an improvement, without regard to value or benefits, under a statute which has been declared unconstitutional, is not estopped from objecting to an assessment on this ground because, under the lease, the lessee agrees to pay all taxes and assessments. *Lewis v. Symms*, decided with *Lewis v. Taylor* (1899) 10 Ohio C. D. 205, 18 Ohio C. C. 448. See also *Bader v. Cincinnati, P. & V. R. Co.* decided with *Lewis v. Taylor* (Ohio) supra, wherein the same rule was applied to the grantor in a deed.

An objection to an assessment for paving a street on the ground that it has not been dedicated cannot be made by a property owner, where the

street has been opened and used for more than twenty-one years, and his deed calls for it as a boundary. *Pepper v. Philadelphia* (1886) 114 Pa. 96, 6 Atl. 899. See to the same effect, *Brown v. Philadelphia* (1886) 3 Sadler (Pa.) 45, 18 W. N. C. 256, 6 Atl. 904.

It has been held that a property owner was estopped from contesting the validity of a sewer assessment on the ground of inaccuracy of description in the assessment roll, where it appeared that for a number of years he had paid taxes on the property according to such description, and had made conveyances of his land by a reference thereto. *Harts v. People* (1898) 171 Ill. 373, 49 N. E. 539. See to the same effect, *Harts v. People* (1898) 171 Ill. 458, 49 N. E. 538.

IV. Estoppel by petitioning for improvement.

a. Generally.

As the cases cited in this subdivision will show, a petitioner for a street or sewer improvement may, in accordance with the general principle of estoppel in pais, become estopped by his very act of joining in the petition, to object to the validity or regularity of the proceedings. A distinction is to be observed between an estoppel thus arising, and an express waiver of the right to object to the assessment found in some clause or stipulation in the petition, which goes to the very ground of the objection. A discussion of this latter question will be found *supra*, II.

b. Sufficiency of petition.

On general principles, it would seem that where the petition of property holders forms the basis on which rest the entire proceedings for a local improvement, such petition must be free from jurisdictional defects, and the petitioners should not be estopped from objecting to the resultant assessment if the petition does not comply with the statutory requirements. According to the weight of authority, therefore, a property owner who has joined in a petition for a

street or sewer improvement is not thereby estopped from objecting to the assessment on the ground that the petition was not signed by the requisite number of property owners. *Ketchikan v. Zimmerman* (1911) 4 Alaska, 336; *Batty v. Hastings* (1901) 63 Neb. 26, 88 N. W. 139; *Re Sharp* (1874) 56 N. Y. 257, 15 Am. Rep. 415; *Tone v. Columbus* (1883) 39 Ohio St. 281, 48 Am. Rep. 438; *Andrew v. Auditor* (1897) 5 Ohio S. & C. P. Dec. 242; *Strout v. Portland* (1894) 26 Or. 294, 38 Pac. 126. See also *Columbus v. Sohl* (1886) 44 Ohio St. 479, 8 N. E. 299. So, a property owner whose grantor signed a petition for an improvement is not thereby estopped from contesting the assessment on the ground that the common council never acquired jurisdiction, because the petition was not signed by a majority of the owners of the frontage, as required by law. *Auditor General v. Woodward* (1916) 191 Mich. 496, 158 N. W. 179.

In the case of *Re Sharp* (1874) 56 N. Y. 257, 15 Am. Rep. 415, the court said: "It is insisted by the counsel for the appellant that the petitioner is estopped from denying the power of the board to do the work, by having signed the petition asking to have it done. Upon principle, there is no basis for such an estoppel. All that the petitioner did was, as a property owner, to petition the board to proceed and repave the street in the mode desired by him, as he lawfully might. He made no representation to the board that the signers constituted a majority of the owners of property fronting on the street, or anything to that effect; he had a right to rely upon the performance of its duty by the board, which was, upon the presentation of the petition and before basing any action thereon, to ascertain whether the numbers who had signed were sufficient to confer jurisdiction to act. Signing or presenting it was no assertion of its sufficiency in this respect. It contained a representation that the petitioner owned property fronting upon the street, and that he desired, in case a sufficient number of like owners united

therein to constitute a majority, that the street should be paved with Nicholson pavement. A party is estopped only when, by his declarations or conduct, he has induced another to act upon the supposed existence of a fact, and would be, in consequence, injured by showing its nonexistence. There is no such element in this case. The consequence of the doctrine contended for would be to make the assessment valid upon such owners as had signed the petition, while invalid as to all others; leaving the former not only to pay their just portion of the expense, but to contribute as taxpayers to the payment of the portions which should have been imposed upon those who had not signed. The principle contended for, if generally applied, would involve most mischievous consequences. One signing a petition to the commissioners of highways, to lay out a road, would be estopped from showing that the proceedings based thereon were not legal, and hence the road might be adjudged a legal highway as to him, while it was not as to the public generally. The cases calling for its application, it is readily seen, would be quite numerous, and the consequences would create much confusion and hardship."

So, in *Ketchikan v. Zimmerman* (1911) 4 Alaska, 386, it was said: "The position of the plaintiff in respect to estoppel would be tenable, providing the defendant were complaining of some irregularities on the part of the common council; but the defendant goes farther. He attacks the jurisdiction of the common council, and contends that a sufficiently signed petition is a condition precedent to the power of the council to levy any portion of the expense against the abutting owners. The position taken by the defendant in that respect is sound, for, while one signing such a petition is estopped from questioning any irregularities in the acts of the common council in carrying out the purpose of such petition, yet he is not estopped from questioning the jurisdiction of the common council, for all his name to the petition indicates is that he is willing to be bound, providing the law is fol-

lowed and a majority of the owners in value sign the same petition. . . . The jurisdiction of the common council to exercise the power of laying out and constructing streets and taxing any portion of the expense thereof to the abutting owners is dependent upon the council's being petitioned to exercise such authority by the abutting owners of two thirds in value; and, unless the petition in this instance was signed by the owners of two thirds in value of the property abutting on Water street, the common council was without authority to construct such street and tax any portion of the expense thereof to the abutting owners. It therefore follows, since the existence of such a petition is a condition precedent to the power of the common council to exercise such authority, that the defendant is not estopped from questioning the sufficiency of the petition and denying that it contained a sufficient number of signers of the abutting owners, for, in the absence of such petition sufficiently signed, the common council was without jurisdiction to proceed to carry out the desires of any of the abutting owners, as expressed in the petition."

Likewise, in *Strout v. Portland* (1894) 26 Or. 294, 38 Pac. 126, the court said: "The plaintiff who petitioned the common council to improve the street did not thereby waive his right to have the proceedings conform to the mode prescribed in the charter, . . . and therefore he is not estopped to question them. His petition, fairly construed, meant that the common council should proceed to the improvement of said street in the manner authorized by law, and he never consented to the improvement being made in any other mode. The common council not having acquired jurisdiction to make said improvement, the plaintiffs have a right to challenge the validity of its proceedings."

In *Batty v. Hastings* (1901) 63 Neb. 26, 88 N. W. 139, it appeared that a petition for the establishment of a paving district contained signatures which did not fully and legally bind the owners of the property purported to be affected thereby, and which

could not be counted in determining the validity of the petition. Holding that other petitioners were not estopped to urge the invalidity of the assessment because of the insufficient petition, the court said: "Those who signed the petition had a right to presume that the city would act legally. It cannot say that it relied on the signatures of plaintiffs to an invalid petition, when plaintiffs intended to sign, and had every reason to suppose they were signing, a valid petition, which would not be acted upon unless it received the requisite number of signatures; and had no intention of binding themselves in any other event. They asked the city to proceed lawfully. Such request does not estop them from objecting when the city has proceeded without warrant of law."

On the other hand, in *Burlington v. Gilbert* (1871) 31 Iowa, 356, 7 Am. Rep. 143, it was held that where property owners signed and presented a petition to the city council asking for the improvement of certain streets, and the council granted their prayer, the petitioners, after their request had been complied with, could not resist payment of the tax on the ground that two thirds of the property owners had not signed, as required by law. The court said: "Had the petition not been signed by the requisite number of property owners, the action of the city upon the petition might not bind those who had not signed the petition. As to them, the action of the city in assessing the cost of improvement to their property might be without authority and invalid. Whether it would be so or not, we do not decide. But in this case the defendant Gilbert, with forty-eight others, signed and presented the petition to the city council, asking the improvement to be made that was made, and when the city solicitor reported that the petition was not signed by a sufficient number of property owners, it was taken by the petitioners and additional signatures obtained, and again presented to the city council for action thereon. There is no claim that the defendant signed the petition with the understanding that it was to be presented, and he bound thereby, only

after a sufficient number of property owners had signed it. On the other hand, the record shows that the petition, when signed by defendant and forty-eight others, was by them presented to the city council, and that if the petition was not sufficiently signed he knew the fact. And we are of opinion that, after having thus signed and presented the petition to the city council, thereby inducing the city to enter upon the improvement requested in the petition, the defendant is estopped from objecting that his petition was not sufficiently signed. The defendant, by his acts, consented and agreed in writing that the city should make the improvement designated in the petition, and assess his property with its due proportion of the cost thereof, and he cannot be allowed to repudiate that agreement on the ground that other parties should have entered into the same agreement. While they may not be bound, he is."

Similarly, in *Doran v. Barnes* (1894) 54 Kan. 238, 38 Pac. 300, it was held that a petitioner for the paving of a street was estopped to allege that the petition was not signed by the owners of a majority of the front feet abutting on the street, where he had ample opportunity to discover and call to the attention of the authorities the alleged insufficiency of signatures.

In *Doppes v. Cincinnati* (1898) 16 Ohio C. C. 188, 8 Ohio C. D. 786, it was held that the signers of a petition for a street improvement were estopped to deny that they had the number of assessable feet stated in their petition.

c. Validity of statute or ordinance.

According to the weight of authority, a property owner who petitions for a street improvement cannot be heard to complain that the statute authorizing the improvement is unconstitutional. *Shepard v. Barron* (1903) 194 U. S. 553, 48 L. ed. 1115, 24 Sup. Ct. Rep. 737; *Conde v. Schenectady* (1900) 164 N. Y. 258, 58 N. E. 130; *State ex rel. Columbus v. Mitchell* (1877) 31 Ohio St. 592; *Columbus v. Sohl* (1886) 44 Ohio St. 479, 8 N. E. 299; *Bidwell v. Pittsburgh* (1887) 85 Pa. 412, 27 Am. Rep. 662; *Ferson's*

Appeal (1880) 96 Pa. 140; *Ebensburg v. Little* (1905) 28 Pa. Super. Ct. 469. See also *Crowley v. Acadia Parish* (1915) 138 La. 488, 70 So. 487; *Murphy v. Sims* (1905) 27 Ohio C. C. 825.

In *Bidwell v. Pittsburgh* (1887) 85 Pa. 412, 27 Am. Rep. 662, *supra*, the court said: "Prior to the presentation of the petition of the plaintiff in error, the city authorities had taken no steps toward the improvement of Ellsworth avenue. In fact, under the act they had no power so to do. The power was called into action by the petitioners. They asked to have the avenue brought under the operation of the act. They voluntarily asked for the privilege of becoming subject to all its provisions. They asked for the passage of the ordinance directing the work—for the assessment of their lands according to the frontage rule, in order to pay the bonds to be given to raise money to make the improvement. The authorities acceded to the request. They altered their previous position. They assumed the large additional indebtedness, relying upon the words and conduct of the petitioners. The latter declared they would submit themselves to all the charges and responsibilities imposed by that act. They wilfully caused the authorities to believe this as a matter of fact. So believing, the authorities acted upon it. They accepted the offer in the terms in which it was made. The petitioners directed the work. They received and enjoy the benefits. To now permit them to deny the truth or the efficacy of the assurance given, and continued during the progress of the work, would work a fraud on the city which cannot be sanctioned. It is true everyone is presumed to know the law, and knowledge thereof is said to be equally open to all. Conceding that the city had knowledge of the law, or ought to have had it, the like legal presumption applies to the plaintiff in error, and his equities derive no strength from that presumption. The city had no reason to believe that he would allege any invalidity in the law which he was praying to have extended over him. The city was misled not by expressive silence merely of the plaintiff in error,

but by his decided and persistent action. . . . The valid waiver of constitutional rights, both of person and of property, is of frequent occurrence. The Constitution guarantees the right of trial by jury to one charged with a crime, yet he may waive that right and plead guilty in a case where his life will pay the penalty. So, his private property may not be taken for a public highway without compensation paid or secured, yet he may just as effectively divest his right by a voluntary dedication to the public, followed by acceptance and expenditure. It is objected that inasmuch as some lands abutting on this avenue may not be held liable to the specific tax for grading and paving the same, in consequence of the owners thereof not having subjected themselves to the application of an estoppel, and in that case a portion of the cost of the improvement will fall on the taxpayers generally, of which the plaintiff in error is one, it would be unjust to impose on him this special tax in addition thereto. We are unable to see any force in this objection. His own direct action has charged his land with this special tax. If one of the consequences of that action has been to throw a portion of the cost of the improvement on the taxpayers generally, on what principle ought he to claim exemption therefrom? He has not derived less benefit than they from this improvement. No voluntary act of theirs caused the expenditure. Why, then, shall he not bear his share of the obligation which his voluntary action has created, and not cast it wholly on others? As, then, a portion of any general tax levied for this purpose would justly fall on him, it cannot furnish any ground for relieving his property from the payment of the special tax. If so relieved, his conduct would have the effect of imposing larger taxation on others, and thus work still greater injustice."

In *State ex rel. Columbus v. Mitchell* (1877) 31 Ohio St. 592, it was said: "We deem it unnecessary to undertake to recite all the steps that have been taken in making the improvement. It is sufficient to say that the defendants, and the other abutting lot owners who

have co-operated with them, have caused the improvement to be completed. In doing the work a large indebtedness has been incurred, for which the bonds of the city have been issued and negotiated in accordance with the provisions of the act. All this has been done with full knowledge that the only provision made for paying such indebtedness was by assessment on the abutting property. Under these circumstances, we are of opinion that the defendants, and those who have participated with them in causing the improvement to be made, are estopped from denying the validity of the assessment. Having voluntarily availed themselves of the provisions of the act to create an indebtedness for the benefit of their property, good faith requires that they should be thus estopped. The principles of estoppel apply where the proceedings are questioned on the ground of the unconstitutionality of the statute under which they are had, as well as where they are sought to be impeached on other grounds. . . . Hence, notwithstanding the unconstitutionality of the act, the rights of third parties have so intervened that it is the duty of the commissioner to complete the apportionment of the assessment in accordance with the terms of the act."

In *Ebensburg v. Little* (1905) 28 Pa. Super. Ct. 469, the court said: "If the petitioners had desired to have the improvement made upon the basis of liability according to benefits, they might have proceeded under the Act of May 16, 1891, P. L. 75, under which, if property was to be assessed for benefits, every element arising out of the character and peculiarities of the street and the nature and situation of the property could properly be considered, and every person assessed could have had the privilege of a jury trial. The petitioners saw fit to invoke the provisions of the Act of April 23, 1889, P. L. 44, under which they were certain to escape liability for one third of the cost of the improvement, which must be paid by the borough, and which specifically provides for the manner in which the other two thirds shall be collected, 'by an equal assessment on the feet front bounding or

abutting' on the part of the street proposed to be paved. This was an election by the petitioners to proceed under the Act of 1889, and that the assessment upon the properties, when made, should be in accordance with the terms of that statute, and vested the borough authorities with jurisdiction to order the improvement to be made, and assess two thirds of the cost thereof upon the abutting property, according to the foot-front rule.

. . . The defendant, having signed the petition which clearly meant that one third of the cost of the improvement should be paid by the borough and the other two thirds by assessments upon abutting property, according to frontage upon the improvement, as authorized by the Act of April 23, 1889, and said petition having induced the municipal action and the expenditure of the money of the borough, is estopped to assert either that the act is unconstitutional, or that the mode of assessment thus adopted is invalid."

On the other hand, it has been held that in an action for the sale of lands assessed for taxes, the owners of the lands who had joined in the petition for the improvement were not thereby estopped to deny their liability, on the ground that the statute governing the proceedings had been declared unconstitutional. *Auditor General v. Johns* (1916) 190 Mich. 601, 157 N. W. 76. So, in *Perkinson v. Hoolan* (1904) 182 Mo. 189, 81 S. W. 408, it was held that a petitioner for a paving improvement was not estopped to deny the validity of the improvement ordinance which was adopted in accordance with the provisions of an unconstitutional statute. The court said: "It seems to us that it would be carrying the doctrine of estoppel to an unwarranted extent, to hold that because a property owner petitions the proper authorities of a municipality to pass some ordinance of a public character which it has no authority to pass, but which it does pass, and which is beneficial to him, he would be estopped to deny the validity of such an ordinance. Most certainly this could not be so under any

circumstances, unless the party doing the work acted upon the faith of the petition, and in the case at bar the plaintiff had never seen the petition until he had entered into the contract with the city for the work, and could not, therefore, have relied upon the petition in contracting for the work." Likewise, in *Lyon v. Tonawanda* (1889) 98 Fed. 361, it was held that an owner of property acquired by the foreclosure of a mortgage was not estopped, in a suit to restrain the collection of an assessment for a street improvement, from denying the validity of a statute providing for the front-foot rule method of assessment, because a prior owner had joined in a petition for the improvement. That case was reversed in (1901) 181 U. S. 389, 45 L. ed. 908, 21 Sup. Ct. Rep. 609, on the ground that the statute in question was not unconstitutional.

In *State, Wakeman, Prosecutor, v. Jersey City* (1872) 35 N. J. L. 455, wherein it appeared that a property owner was one of the petitioners for the grading of a street, and the ordinance exceeded the petition by including paving, it was held that the entire proceeding would not be declared void, but apparently because of the estoppel of the property owner by signing the petition, and especially because of his laches, the assessment against him would merely be reduced by so much as would equal the cost of the paving.

A property owner who signs a petition for a grading improvement, after the adoption by the common council of a resolution authorizing the same, is estopped to object to the assessment because of the illegality of the resolution. *Tacoma Land Co. v. Tacoma* (1896) 15 Wash. 133, 45 Pac. 733.

A property owner's complaint to a constable of the bad condition of a street is not "equivalent to petitioning the corporate officers to grade it and pave it with brick," and he is not estopped, on the theory that he has induced the public authorities to make the improvement, to assert the invalidity of the ordinance providing for the improvement. *Re Queen Street* (1901) 18 Pa. Super. Ct. 241.

d. Conformity of proceedings to statute or ordinance.

According to the view taken in most cases, a property owner who has petitioned for a street improvement is not thereby estopped to deny the validity of the assessment on the ground that the requirements of the governing statute or ordinance have not been complied with. Thus, where a statute relating to a street improvement requires, as a preliminary to any proceeding thereunder, that the city authorities "shall determine the proposed work to be consistent with the public good," and no such preliminary determination is made, a property owner is not estopped to assert the invalidity of the proceedings, because he signed a petition asking for the improvement. *Baltimore v. Porter* (1862) 18 Md. 284, 79 Am. Dec. 686, wherein the court said: "The principle of estoppel has no application to the case. The law requires the application of the owners of a majority of the feet of property fronting on the avenue, before any steps can be taken by the corporation to have it graded; but, because the appellee has signed such an application, it surely cannot be successfully maintained that he assented that the work should be done in any other way than the law requires, or, if he had so assented, that such assent could confer any power upon the city commissioner not possessed by him under the laws and ordinances of the city."

Similarly, where a city charter provides that when the mayor and city council shall deem it necessary to grade any street, alley, etc., within the limits of a city, for which a special tax shall be levied, they shall, by resolution, declare the work and improvement to be necessary and publish such resolution for a certain number of days, giving property owners opportunity to protest against the improvement, an assessment made for an improvement without these formalities is void and an owner is not estopped from asserting its invalidity because of his joining in a petition for the improvement. *McLauren v. Grand Forks* (1889) 6 Dak. 397, 43 N. W. 710.

wherein the court said: "The law-making body evidently intended that before the mayor and council entered upon making improvements on behalf of the city, for the expense of which private property was to be burdened, the necessity therefor should be considered and determined by them in their official capacity, and the evidence preserved by proper records. This is an important provision, prescribing the preliminary steps necessary when it proposed to make public improvements, and, if disregarded or omitted, all subsequent proceedings are invalid, and of no effect. . . . Nor are the plaintiffs estopped from taking advantage of the invalidity of the tax certificates, or the illegality of the proceedings. They did not, by merely petitioning the council to grade the street, waive the rights which they had under the statute; they did not assume to do so in their petition; they asked simply that the street be graded. It is not to be presumed that by such request they intended that such improvement should be made without reference to the provision of the law under which it could only be made legally. On the contrary, the presumption, if any could be indulged in or was necessary, would be that the defendants should take such proceedings as were necessary under the law to be done for the grading of the street, not that the law be disregarded."

Likewise, in *Joyce v. Barron* (1902) 67 Ohio St. 264, 65 N. E. 1001, a suit to enjoin the collection of an assessment, the fact that the plaintiff's predecessor in title signed a petition for the improvement was held not to estop the plaintiff to object to the assessment on the ground that she had not received notice of the proposed improvement. The court said: "This is not tenable, for the reason that the signing of a petition does not waive either notice or the right to damages, unless expressly so stated, and no such waiver is found in the petition in this case. The owner may sign a petition, and the resolution may never be passed by council, or may be passed many months after the petition is presented. There is, therefore, no cer-

tainty when the resolution will be passed, and when the time for making a claim for damages will expire. The statute makes no exception as to notice by reason of the owner having signed the petition, and the courts should not ingraft upon it such exception."

So, where a city charter provides that, when the council shall have determined to make a street improvement, "the engineer shall make an immediate report of the probable cost of such work, and at the same time give the names of those owning property on either side of the street, and the number of front feet of each party," the engineer's report is a condition precedent to jurisdiction, and property owners who have petitioned for the improvement are not estopped thereby to deny the validity of an assessment because of the failure of the engineer to make a report. *Dallas v. Ellison* (1895) 10 Tex. Civ. App. 28, 30 S. W. 1128, wherein the court said: "It is claimed by appellant's counsel in his able and exhaustive presentation of the case that appellees, having petitioned the city to have the work done, and having stood by and seen it done, are estopped from denying the validity of the assessment or to pay for it. If appellees petitioned for the improvement to be made and knew that it was being done, they are not thereby estopped. It is not claimed that they petitioned to have it done otherwise than in a legal manner, or expected to be assessed otherwise than as the law then provided.

. . . We do not find, therefore, that any principle of estoppel will preclude the complainants from the relief prayed." See to the same effect, *Dallas v. Atkins* (1895) — Tex. Civ. App. —, 32 S. W. 780; *Ardrey v. Dallas* (1896) 13 Tex. Civ. App. 442, 35 S. W. 726; *Alford v. Dallas* (1896) — Tex. Civ. App. —, 35 S. W. 816.

A petitioner for a paving improvement is not estopped by his signature from attacking the contract entered into between the city and the contractor, on the ground that it does not comply with the statutory requirements. *Harrisburg v. Shepler* (1898) 7 Pa. Super. Ct. 491, affirmed in (1899)

190 Pa. 374, 42 Atl. 893, wherein the court said: "It was argued for the plaintiff, although not with much urgency, that the defendant is estopped from contesting the assessment because he petitioned councils to do the work. It is true that he signed such a petition, and no doubt his signature would estop him from denying that the work ought to have been done, or from making certain other defenses; but it seems to us equally incontestable that his signature does not estop him from insisting that the work must be done in the manner provided by law. He had no power over the process of passing the ordinance or of executing the contract. This was entirely within the hands of councils. The statute describes the prerequisites of an instrument that shall take effect as a binding obligation, and he had a legal right to suppose that these would be observed."

A property owner who has signed a petition for an improvement is not estopped to contest the validity of the assessment on the ground that the selection of a patented pavement excluded competition in the bidding. *Temple v. Portland* (1915) 77 Or. 559, 151 Pac. 724.

And where no notice of the sitting of a board of equalization is published as required by law, a property owner who has signed the petition for the improvement is not thereby estopped from objecting to the assessment. *Wakeley v. Omaha* (1899) 58 Neb. 245, 78 N. W. 511. See to the same effect, *Grant v. Bartholomew* (1899) 58 Neb. 839, 80 N. W. 45.

On the other hand, it has been held that, after one has signed a petition for an improvement which can be paid for only by means of an assessment on contiguous property, he and his grantees are estopped from contesting the validity of the assessment on the ground that the provisions of the charter and of the ordinances relating to street improvements were not pursued with sufficient strictness, especially after the work has been completed and accepted by the proper authorities. *Seattle v. Hill* (1900) 23 Wash. 92, 62 Pac. 446. See to the same effect, *Aberdeen v. Lucas* (1905)

37 Wash. 190, 79 Pac. 632, wherein the court said: "The appellants, having petitioned for the improvement, are estopped from now questioning the validity of the proceedings or the assessment, unless it be that the city council never had any jurisdiction of the proceedings, or so far departed from established methods as to oust it of jurisdiction."

It has also been held that a defect in the publication of the notice of hearing on the resolution of necessity for a public improvement would not defeat the assessment against the abutting property of those who signed the petition for the improvement, or filed objections thereto prior to the date set for the hearing. *Gilchrest & Co. v. Des Moines* (1911) — Iowa, —, 131 N. W. 776, wherein the court said: "The notice, as it included the contents of the resolution, was sufficient in form, but as it was published in but three issues of the newspaper, when four publications were exacted, the statute was not complied with, and but for the plea of waiver and estoppel, the order directing the improvement must have been declared unauthorized. The sole object of this notice is to apprise the owners of property abutting on the improvement, in order to afford them an opportunity to present their objections to making the improvement, previous to definite action by the council. If abutting owners have petitioned for such improvement, and it is ordered in pursuance of such petition, or if, notwithstanding defect in the giving of notice, they have filed objections thereto and been heard, it would seem that they ought not to be heard to complain that notice was not given as prescribed by this statute. . . .

To hold that one who has petitioned for a particular improvement must be notified in order that he may object to its being made as petitioned for, at a designated time, would be equivalent to declaring and protecting the right to assume contradictory petitions. In directing such an improvement the city but complies with the petitioner's request, and he is estopped, in resisting the assessment, from urging that he was not afforded an opportunity to object thereto."

See to the same effect, *Gilchrest & Co. v. Des Moines* (1912) 157 Iowa, 525, 137 N. W. 1072.

So, in *Hendrickson v. Toledo* (1901) 23 Ohio C. C. 256, it was held that property owners who petitioned for an improvement were estopped from denying the validity of proceedings whereby land was acquired for the opening of a street by agreement with the owners, and without a jury to award damages. The court said: "It seems to me that the statute (see Rev. Stat. §§ 1692 and 2232 et seq.) authorizes the city to acquire property for such purposes by purchase or agreement as well as by condemnation proceedings, and that, if they can obtain it at a fair price by an agreement or compromise, they may do so; and when the petitioners ask that the council shall proceed to pass the necessary legislation to cause proper appropriation proceedings to be had to acquire the property, the fair construction of that is, if the city is not able to obtain it at a fair and reasonable price without condemnation, then the city is authorized to proceed by appropriation proceedings to acquire the property. At all events, we agree that there was no irregularity in this that would invalidate the award. The city was contented with it, the owner of the property was contented; the city is not questioning it, the owner of the property raises no question about it. The city paid the award, the owner of the property accepted the award, and the city took possession of the premises and has since held them. And we do not think, even if this were an irregularity, that it now lies in the mouths of the plaintiffs to complain, unless their complaint is based upon an averment or charge of fraud or prejudice of some sort."

Likewise, in *People ex rel. Bonnett v. Clarke* (1906) 110 App. Div. 28, 96 N. Y. Supp. 1051, it appeared that under its charter the common council of a city could make certain street improvements only after notice to, and the refusal or neglect of, the abutting property owners to do the work. It was held that an owner who, after receipt of such a notice, united in a peti-

9 A.L.R.—42.

tion to the common council, asking that the contract for the work should be awarded to a named contractor, thereby waived the right to object to the assessment on the ground that it was based on a contract ordered by the city at a time when the city could not make the contract, because it had not afforded the petitioner a practical opportunity to do the work.

In *Shoenberg v. Field* (1902) 95 Mo. App. 241, 68 S. W. 945, it appeared that a petition by property owners, selecting a vitrified brick for a pavement, was not presented until after the ten-day limit prescribed by the statute. It was held that a property owner who signed the petition was not estopped from objecting to the assessment on the ground that the board of public works, in letting the contract, limited it to vitrified brick manufactured by one concern. The court said: "What possible opportunity can there be for competition, when there can be but one bidder? What possible benefit can result to the property holder for a public letting of the contract, when the contractor has already been selected? The board of public works had the right to designate and select vitrified brick as the paving material, but it had no right to stifle competition, and thereby violate the provisions of the city charter, by cutting out, in advance, all competitors. . . . Estoppel was pleaded in that the defendants (there were two sued as owners of the real estate, but only the present defendant appealed) signed the petition aforesaid, making the same selection of the material which the board of public works thereafter itself selected. We do not gather from the record that this appealing defendant signed the petition, though his codefendant did. But however that may be, there can be no estoppel in the case, and it was so declared by the trial court. The petition, by being presented out of time, was an unauthorized paper and could bind no one. It could not be the basis of an estoppel. In order to work an estoppel it must have caused the board to make the selection it asked. But plaintiff

cannot take that position without destroying his case, since, if the petition was the cause of the board's order, the order would be void, as the petition was a mere nullity, not being presented within the time prescribed by law."

e. Performance of work.

Property owners who have petitioned for a street improvement to be made in a certain manner, and agree to pay for the cost of the improvement, are estopped from objecting to the assessment on the ground that the work was improperly and negligently done, if the improvement was made in the manner asked for. *Breuer v. Gibson* (1906) 29 Ohio C. C. 266, 32 Ohio C. C. 492, affirmed in (1907) 77 Ohio St. 602, 84 N. E. 1125.

So, where parties petition for a change of grade of a street they are estopped from resisting payment of the assessment on the ground that the grade established is not a true one, where it is in exact accordance with their petition. *Burlington v. Gilbert* (1870) 31 Iowa, 356, 7 Am. Rep. 143. To the same effect, see *Curtis v. Tillamook City* (1918) 88 Or. 443, 171 Pac. 574, 172 Pac. 122, wherein it appeared that property owners abutting on a street had at their own expense improved the street by graveling the same at a grade then in force by order of the council. Afterwards the city changed the grade, and still later the abutting owners petitioned to have a sidewalk laid on the established grade. It was held that the petition must be held to refer to the new grade, and that the petitioners were estopped to complain that the sidewalk, as laid, was below the level of the street and in rainy weather was unfit for use.

Similarly, the right to object to an assessment on the ground that the street improved was widened to an unusual and unnecessary width is lost by estoppel, where those seeking to protest were petitioners for a street of that width. *Re Jackson Street* (1911) 62 Wash. 432, 113 Pac. 1112.

f. Assessment.

A property owner who is one of the petitioners for a street improvement,

knowing that his lands will be assessed for a part of the costs and expenses thereof, is estopped from contesting the assessment as in excess of special benefit. *Murphy v. Sims* (1905) 27 Ohio C. C. 825. So, in *Borger v. Columbus* (1905) 27 Ohio C. C. 812, wherein it appeared that property owners by petition asked that a street improvement should be made with certain material, and the contract awarded to a named company, it was held that while the petition did not estop the property owners from challenging an illegal assessment, yet it might well be treated as an acquiescence on their part with respect to the cost of the improvement, and estop them to object to the assessment as in excess of special benefits. Likewise, in *Cincinnati Bldg. & Deposit Co. v. Cincinnati* (1907) 30 Ohio C. C. 501, it was held that a purchaser of property at mortgage foreclosure was estopped, by the fact that the mortgagor signed the petition for a street improvement, to claim lack of benefits or lack of value of the property to stand the assessment.

A lot owner who petitions for a pavement is estopped to deny that the cost of the improvement exceeds the benefits. *Gamma Alpha Bldg. Asso. v. Eugene* (1919) 94 Or. 80, 184 Pac. 973.

An objection that an assessment is void because there is no apportionment of the burden throughout a taxing district, each lot owner being arbitrarily charged with the whole expense of the grading and paving in front of his premises, irrespective of the burden on his neighbors and without regard to valuation, is waived by those owners who petitioned for the improvement. *Motz v. Detroit* (1869) 18 Mich. 495, wherein the court said: "It was in compliance with that petition that the improvement was ordered; the contractors knew of it, and may be supposed to have placed some reliance upon it while the work was progressing, and inasmuch as no objection appears to have been made by any of the petitioners to the contract made, or to any of the action of the contractors or of the common council, until the work was completed, the contractors had reason to believe they

were engaged in the fulfilment of the wishes of the petitioners, and might rely upon their making payment without question when the contract was performed. Both the contractors and petitioners,—all of whom are residents of the city,—knew that, by the city charter, the city was not and could not be made liable for the cost of the work, but that the contractors must rely upon the special assessment exclusively. There is no claim now on the part of these petitioners that the assessment of the expense of the improvement is made on any different basis from that contemplated by them when the petition was signed. Under these circumstances they must be taken to have been willing and actively consenting parties to all the proceedings which led to the assessment, and to have impliedly, at least, consented that such an assessment should be made."

In *Wingate v. Tacoma* (1896) 13 Wash. 603, 43 Pac. 847, it was held that a property owner who petitioned for an improvement, personally inspected the work as it progressed, and made no objection at any time to the levying of the assessment was estopped from raising an objection to the authority of the city to prosecute the work and to make an assessment to pay for it. The court said: "If the remonstrance and a subsequent withdrawal of that remonstrance will work an estoppel, it seems to us that a petition would equally work an estoppel. It is true that in the case of *Howell v. Tacoma* (1892) 3 Wash. 711, 28 Am. St. Rep. 83, 29 Pac. 447, it was held that a petition could not be extended so as to estop one from asserting rights as against such assessment when the common council had never had any jurisdiction of the proceeding, or had so far departed from proper methods as to oust it of jurisdiction; but the testimony in this case, it seems to us, carries the case beyond the facts proven in the case of *Howell v. Tacoma* (Wash.) *supra*, for Mr. Drum testified that at the time this improvement was made he was the owner of the property described in the complaint, and that he signed the petition for the improvement of said

street, that he saw the work being done and thought it was a benefit to the property, and that he made no objections to the work as it was being done, or to the manner in which it was being done, and that he was aware of the improvement. So that it seems to us that, if a person ever could waive a jurisdictional question, it was waived in this case, and that it does not fall within the reason of the case of *Buckley v. Tacoma* (1894) 9 Wash. 253, 37 Pac. 441, where it was announced that 'the people who pay for streets made the charter, and while they granted to the public authorities most liberal powers, by permitting the arbitrary improvement of streets, at local expense, they emphatically reserved to themselves the right to have three things distinctly brought to their knowledge, viz.: (1) What improvement it is proposed to make; (2) what the cost is to be; (3) what property is to be charged with the expense. This knowledge, they declared, must be afforded in a certain way, and after that they reserved the right to remonstrate, and to have a two-thirds vote of the council to overcome their objections.' These rights, according to the testimony of Mr. Drum, were all accorded to him, and these three things were brought to his knowledge, and he testifies he made no objection to them because he thought that it was a benefit to the property taxed. We think the appellant is estopped from raising an objection to the authority of the city to prosecute this work and to make an assessment to pay for it."

In *Brick & Terra Cotta Co. v. Hull* (1892) 49 Mo. App. 433, it was held that a property owner who petitioned for the repaving of a street was estopped from asserting that his assessment was excessive because the city included the cost of repaving that portion of the street formerly occupied by the tracks of a railway company, which were removed prior to the improvement, the court saying: "The whole theory of street improvement provided by the statute is that the property benefited thereby must be charged with the cost thereof. It may be and doubtless is true that if the

street railway company had continued to occupy a part of the street with its track that it would have been liable for such improvement to the extent of the cost of paving the space between its rails and for 18 inches outside thereof. As to who liable, or how such liability should be enforced in such case, we need express no opinion, as the question does not arise in the case. It nowhere appears that the street railway company was bound to perpetually maintain its track on said street. Its duty to pave was co-extensive with the existence of its street franchise. If its license to occupy the street with its railway track was revoked by the city, the corresponding duty to pave the space required by the ordinance necessarily terminated. How could the railway company or the contractor pave the space between the rails and for 18 inches on the outside thereof, if there was no such railway track in the street? How could it be benefited in such case by the street improvement? What principle can be invoked to make it liable for any part of that improvement under such circumstances? It must be presumed that the defendant had notice of the provisions of the ordinance granting the street railway company the right to use the street. He must be held to have known, when he petitioned the common council to order the improvement of the street, that the duty of the railway company to pave did not extend beyond the time when it should cease to maintain its track on the street under the license granted it by the city. The defendant petitioned the city to improve the street when he knew that the duty of the street railway company to pave the space required by the ordinance granting it the right to occupy the street with its track was contingent in its nature, and not a continuing one."

But while a petition of property owners requesting an improvement will go to establish an estoppel to deny some benefit, it will not operate as an estoppel to assert that assessments are arbitrary in amount. *Spokane v. Fonnell* (1913) 75 Wash. 417, 135 Pac. 211. So, a petitioner for the

repaving of a street is not estopped from objecting to an assessment which includes damages paid for a change of grade, when such damages are not permitted by the decisions of the courts. *McGlynn v. Toledo* (1901) 12 Ohio C. D. 15, 22 Ohio C. C. 34.

The owner of property whose predecessor in title petitioned for an improvement is not estopped from objecting to an assessment for the reason that it is laid under a statute by which the amount is materially greater than it would have been under the statute in force at the time the petition was presented. *Squier v. Cincinnati* (1891) 3 Ohio C. D. 196, 5 Ohio C. C. 400, wherein the court said: "The owners of property, knowing that under existing laws their property will be assessed in a particular manner, petition for the improvement of a street, and a resolution is passed by the board and council declaring it is necessary to do so, and this initiates the proceeding. It would be manifestly inequitable that a law passed thereafter, providing for a wholly different mode of assessment, and greatly increasing the burdens on the part of the property, should apply to such a pending proceeding."

It has been held that where a property owner joins in a petition for the creation of a special improvement district, to include all the property mentioned in the petition, she is not thereby estopped from objecting to an assessment, if the city, in creating the district, excludes a very considerable portion of the property. *Lewistown v. Warren* (1916) 52 Mont. 954, 157 Pac. 954, wherein the court said: "She may have been desirous that a district be created with a large area and a correspondingly low tax, and justly opposed to the creation of a district with a less area and a higher tax."

The fact that one is a petitioner for an improvement will not estop him from objecting to an assessment on the ground that it is unjust and inequitable in that it is laid on the lots or parcels supposedly benefited, according to the value thereof regardless of the depth of the lots or parcels, and of the frontage thereof. *Howell v. Tacoma* (1892) 3 Wash. 711, 28 Am. St.

Rep. 83, 29 Pac. 447. See to the same effect, *Griggs v. Tacoma* (1892) 3 Wash. 785, 29 Pac. 449, and *Pierce v. Tacoma* (1892) 3 Wash. 785, 29 Pac. 449.

A property owner is not estopped from objecting to a street assessment on the ground that it is in excess of the value of the property because of the fact that she signed a petition for the improvement. *Louisville v. Benedict* (1912) 147 Ky. 391, 144 S. W. 43, wherein the court said: "The plea of estoppel contained in appellant's amended answer and cross petition was unavailing. The fact that appellee, in common with other property owners, . . . signed the petition for the improvement of the street, . . . does not bar the defense interposed by her. It is not alleged or shown that when she signed the petition she was informed of the cost that would be apportioned to her property by the improvement of the street, or that she knew the construction of the street would require it to be so elevated above her lots as to make them practically worthless."

Where property owners petitioned for a sewer, and stood by and saw it built and made no objection or protest, though they must have known they would be called on to help defray the expenses of its construction, it was held that they were nevertheless not estopped from resisting the payment of any part of the cost on the ground that they were not at all specially benefited, because their property was at such a level as to make discharge into the sewer impossible. *Hildebrand v. Toledo* (1905) 27 Ohio C. C. 427, wherein the court said: "They may well ask the city to make an improvement in their part of the city that may operate as a general improvement to that quarter of the city, without waiving their right to be exempt from any special assessment unless they receive a special benefit."

In Ohio, a property owner who signs a petition for an improvement is not thereby estopped from objecting that the assessment levied is in excess of the statutory limit of 25 per cent of the value of his property. *Birdseye v. Clyde* (1899) 61 Ohio St. 27, 55 N. E.

169; *Storer v. Cincinnati* (1899) 2 Ohio C. D. 546, 4 Ohio C. C. 279. See to the same effect, *Hammond v. Pelton* (1878) 4 Ohio Dec. Reprint, 132.

In *Birdseye v. Clyde* (Ohio) supra, the court said: "It can hardly be supposed that the plaintiffs who signed the petition for the improvement intended thereby to donate their entire property to the public, or, what is practically the same thing, consent to an assessment that would amount to its confiscation. They evidently contemplated that some special benefit would accrue to them from the construction of the improvement, which could not possibly be the case if the substantial value of their property were taken to pay the assessment laid upon it. The petition must be construed in the light of this situation, and so as to effectuate the manifest intention of the parties."

Where a property owner joins in a petition for an improvement, setting out the number of feet on the longer side of a corner lot owned by him as abutting on the street, he is thereby estopped from objecting to the assessment on the ground that he should be assessed for a less number of feet, the shorter frontage being the one which actually abuts on the improvement. *Cincinnati v. Manss* (1896) 54 Ohio St. 257, 43 N. E. 687, wherein the court said: "If the number of feet a petitioner represents himself as having on the improvement is not the number on which he is to be assessed, in case the improvement is ordered, then there is no mode by which it can be determined from the petition whether the requisite number have asked for the improvement. It is certainly not the business of the council or of the board of improvements to ascertain for themselves, aliunde the petition, whether a petitioner has the number of feet, subject to assessment, represented by him in the petition. What he represents in the petition must, as against him, be taken as true. He is estopped to say otherwise. For it must be remembered that the very purpose of stating in a petition the number of feet each petitioner has, is to enable the council to determine whether the petitioners, in the aggre-

gate, represent three fourths in interest of the property owners to be assessed for the improvement. And everyone who signs a petition of this kind must be held to know the purpose and effect of it." See to the same effect, *Andrew v. Auditor* (1897) 5 Ohio S. & C. P. Dec. 242.

However, where the owner of a corner property signs a petition for an improvement, but without representation as to the frontage on the longer side, he is not estopped to claim the benefit of an assessment on the shorter side, actually abutting the improvement. *Gibson v. Cincinnati* (1894) 6 Ohio C. D. 422, 9 Ohio C. C. 243, 3 Ohio Dec. 90. See to the same effect, *Baker v. Schott* (1894) 6 Ohio C. D. 738, 10 Ohio C. C. 81.

Where a church corporation joined in a petition for a street improvement, and it appeared that its consent was necessary to meet the statutory requirement of two thirds of the frontage of property owners, it was held that, after the completion of the work and the acceptance of benefits, the church was estopped from claiming exemption from the assessment on the ground that it was a religious corporation. *Sewickley M. E. Church's Appeal* (1895) 165 Pa. 475, 30 Atl. 1067, wherein the court said: "Having thus united with other property owners in procuring the improvement to be made, and having enjoyed the benefits resulting therefrom, it comes with bad grace for appellant to object to paying its proper share of the cost. In equity and good conscience it should pay it. If not liable on broader grounds, we think the facts and circumstances of the case justify application of the principle of estoppel enforced in *Bidwell v. Pittsburgh* (1877) 85 Pa. 412, 27 Am. Rep. 662; *Dewhurst v. Allegheny* (1880) 95 Pa. 487, and kindred cases."

In *Carlisle v. Cincinnati* (1906) 29 Ohio C. C. 81, it was held that where the abutting lot owners petitioned for the improvement of a street at an established grade, and the petition was, by the municipal authorities, referred back to the property owners, with directions to file a new petition, which was accordingly done, asking for

the improvement at a different grade, a lot owner who signed the original petition, but did not sign the second petition according to the terms of which the improvement was made, was not estopped to contest the validity of the assessment because of the inclusion therein of an award of damages for injuries to abutting property caused by the improvement and the cost of excavation to the new grade.

A property owner who has petitioned for an improvement is not thereby estopped from objecting to an assessment on the ground that all local and special benefits arising from the proposed improvement have been offset against damages recovered by him in condemnation proceedings, where it appears that the city, regardless of the petition and the limitations contained therein, elected to order the improvement by unanimous vote of the council. *Schuchard v. Seattle* (1908) 51 Wash. 41, 97 Pac. 1106. See to the same effect, *Barrett v. Seattle* (1908) 51 Wash. 47, 97 Pac. 1109; *Seattle & P. S. Packing Co. v. Seattle* (1908) 51 Wash. 49, 97 Pac. 1093; *Emerson v. Seattle* (1909) 51 Wash. 689, 99 Pac. 1135.

V. Estoppel by failure to resort to legal remedy.

a. Failure to object.

1. Generally.

In the ordinary course of procedure for the making of a street or sewer improvement and the laying of the assessment therefor, provision is made for the hearing of the objections of property owners. It seems to be the general rule that the failure to urge an objection at such a hearing estops a property owner from raising it subsequently.

United States.—*Minnesota & M. Land & Improv. Co. v. Billings* (1901) 50 C. C. A. 70, 111 Fed. 972; *Hibben v. Smith* (1903) 191 U. S. 310, 48 L. ed. 195, 24 Sup. Ct. Rep. 88; *English v. Arizona* (1909) 214 U. S. 359, 53 L. ed. 1030, 29 Sup. Ct. Rep. 658; *MOORE v. YONKERS* (reported herewith) ante, 590; *Brown v. Drain* (1901) 112 Fed. 582, affirmed without opinion in (1902)

187 U. S. 635, 47 L. ed. 343, 23 Sup. Ct. Rep. 842.

Alabama.—Woodlawn v. Durham (1909) 162 Ala. 565, 50 So. 356; Birmingham v. Wills (1912) 178 Ala. 198, 59 So. 173, Ann. Cas. 1915B, 746; Birmingham v. Abernathy (1912) 178 Ala. 221, 59 So. 180.

Arkansas.—Ahern v. Board of Improv. Dist. (1901) 69 Ark. 68, 61 S. W. 575.

California.—Emery v. Bradford (1865) 29 Cal. 75; Cochran v. Collins (1865) 29 Cal. 129; Taylor v. Palmer (1866) 31 Cal. 240; Nolan v. Reese (1867) 32 Cal. 484; Shepard v. McNeil (1869) 38 Cal. 72; Himmelmann v. Hoadley (1872) 44 Cal. 213; Oakland Paving Co. v. Rier (1877) 52 Cal. 270; Dyer v. Parrott (1882) 60 Cal. 551; Boyle v. Hitchcock (1884) 66 Cal. 129, 4 Pac. 1143; Jennings v. Le Breton (1889) 80 Cal. 8, 21 Pac. 1127; McVer-ry v. Boyd (1891) 89 Cal. 304, 26 Pac. 885; Fanning v. Leviston (1892) 93 Cal. 186, 28 Pac. 943; Perine v. Forbush (1893) 97 Cal. 305, 32 Pac. 226; Meitzsch v. Berkhout (1893) 4 Cal. Unrep. 419, 35 Pac. 321; McSherry v. Wood (1894) 102 Cal. 647, 36 Pac. 1010; Warren v. Riddell (1895) 106 Cal. 352, 39 Pac. 781; Smith v. Hazard (1895) 110 Cal. 145, 42 Pac. 465; Harney v. Benson (1896) 113 Cal. 314, 45 Pac. 687; Wells v. Wood (1896) 114 Cal. 255, 46 Pac. 96; Girvin v. Simon (1897) 116 Cal. 604, 48 Pac. 720; Blanchard v. Ladd (1901) 135 Cal. 214, 67 Pac. 131; Petaluma Paving Co. v. Singley (1902) 136 Cal. 616, 69 Pac. 426; Lambert v. Bates (1902) 137 Cal. 676, 70 Pac. 777; Duncan v. Ramish (1904) 142 Cal. 686, 76 Pac. 661; O'Dea v. Mitchell (1904) 144 Cal. 374, 77 Pac. 1020; Bates v. Hadamson (1906) 2 Cal. App. 574, 84 Pac. 51; Beckett v. Morse (1906) 4 Cal. App. 228, 87 Pac. 408; Oak Hill Water Co. v. Gillette (1910) 13 Cal. App. 605, 110 Pac. 316; United Real Estate & T. Co. v. Barnes (1911) 159 Cal. 242, 113 Pac. 167; Pierce v. Los Angeles (1911) 15 Cal. App. 702, 115 Pac. 746; Hayne v. San Francisco (1917) 174 Cal. 185, 162 Pac. 625; Telegraph Hill Neighborhood Asso. v. San Francisco (1917) 174 Cal. 814, 162 Pac. 630; Cooper v. San Francisco (1917) 174 Cal. 813,

162 Pac 631; Simpson v. San Francisco (1917) 174 Cal. 815, 162 Pac. 631; Empire Securities Co. v. Matthews (1918) — Cal. —, 176 Pac. 160; Ahlman v. Barber Asphalt Paving Co. (1919) — Cal. App. —, 181 Pac. 238; Watkinson v. Vaughn (1920) — Cal. —, 186 Pac. 753; Smith v. Lighttson (1920) — Cal. —, 186 Pac. 769.

Colorado.—Denver v. Dumars (1905) 33 Colo. 94, 80 Pac. 114; Spalding v. Denver (1905) 33 Colo. 172, 80 Pac. 126; Hallett v. United States Security & Bond Co. (1907) 40 Colo. 281, 90 Pac. 683; Hildreth v. Longmont (1909) 47 Colo. 79, 105 Pac. 107.

Georgia.—Regenstein v. Atlanta (1896) 98 Ga. 167, 25 S. E. 428; Lanham & Sons Co. v. Rome (1911) 136 Ga. 398, 71 S. E. 770.

Idaho.—Caldwell v. Mountain Home (1916) 29 Idaho, 13, 156 Pac. 909.

Illinois.—McBride v. Chicago (1859) 22 Ill. 574; Jenks v. Chicago (1868) 48 Ill. 296; Gage v. Parker (1882) 103 Ill. 528; Schertz v. People (1882) 105 Ill. 27; LeMoyne v. West Chicago Park (1886) 116 Ill. 41, 4 N. E. 498, 6 N. E. 48; Brown v. Chicago (1886) 117 Ill. 21, 7 N. E. 108; Bloomington v. Blodgett (1887) 24 Ill. App. 650; Walters v. Lake (1889) 129 Ill. 23, 21 N. E. 556; Goodwillie v. Lake View (1889) — Ill. —, 21 N. E. 817; Kelly v. Chicago (1893) 148 Ill. 90, 35 N. E. 752; Thomas v. Chicago (1894) 152 Ill. 292, 38 N. E. 923; Hewes v. Winnetka (1895) 60 Ill. App. 654; Hertig v. People (1896) 159 Ill. 237, 50 Am. St. Rep. 162, 42 N. E. 879; Kirchman v. People (1896) 159 Ill. 265, 42 N. E. 884; Doremus v. People (1896) 161 Ill. 26, 43 N. E. 701; Gage v. People (1896) 163 Ill. 39, 44 N. E. 819; Steenberg v. People (1897) 164 Ill. 478, 45 N. E. 970; People ex rel. Kochersperger v. Colvin (1897) 165 Ill. 67, 46 N. E. 14; People ex rel. Kochersperger v. Markley (1897) 166 Ill. 48, 46 N. E. 742; O'Neil v. People (1897) 166 Ill. 561, 46 N. E. 1096; Larson v. People (1897) 170 Ill. 93, 48 N. E. 443; Illinois C. R. Co. v. People (1897) 170 Ill. 224, 48 N. E. 215; Hull v. People (1897) 170 Ill. 246, 48 N. E. 984; Pfeiffer v. People (1897) 170 Ill. 347, 48 N. E. 979; Walker v. People (1897) 170 Ill. 410, 48 N. E. 1010;

Nicholls v. People (1898) 171 Ill. 376, 49 N. E. 574; Harts v. People (1898) 171 Ill. 458, 49 N. E. 538; Gross v. People (1898) 172 Ill. 571, 50 N. E. 334; Craft v. Kochersperger (1898) 173 Ill. 617, 50 N. E. 1061; Gross v. Grossdale (1898) 176 Ill. 572, 52 N. E. 370; Johnson v. People (1898) 177 Ill. 64, 52 N. E. 308; Chicago Terminal Transfer Co. v. Chicago (1899) 178 Ill. 429, 53 N. E. 861; Smith v. Kochersperger (1899) 180 Ill. 527, 54 N. E. 614; McManus v. People (1899) 183 Ill. 391, 55 N. E. 886; Pipher v. People (1899) 183 Ill. 436, 56 N. E. 84; Leitch v. People (1900) 183 Ill. 569, 56 N. E. 127; Thomson v. People (1900) 184 Ill. 17, 56 N. E. 383; Fiske v. People (1900) 188 Ill. 206, 52 L.R.A. 291, 58 N. E. 985; Lawrence v. People (1900) 188 Ill. 407, 58 N. E. 991; Fischback v. People (1901) 191 Ill. 171, 60 N. E. 887; People ex rel. Raymond v. Whidden (1901) 191 Ill. 374, 56 L.R.A. 905, 61 N. E. 133; People ex rel. Raymond v. Talmadge (1901) 194 Ill. 67, 61 N. E. 1049; Vandersyde v. People (1901) 195 Ill. 200, 61 N. E. 1050, 62 N. E. 806; Shepard v. People (1902) 200 Ill. 508, 65 N. E. 1068; Walker v. People (1903) 202 Ill. 34, 66 N. E. 827; Chew v. People (1903) 202 Ill. 380, 66 N. E. 1069; Bass v. People (1903) 203 Ill. 206, 67 N. E. 806; People ex rel. Raymond v. Fuller (1903) 204 Ill. 290, 68 N. E. 371; Gage v. People (1903) 207 Ill. 63, 69 N. E. 635; Ryan v. People (1903) 207 Ill. 74, 69 N. E. 638; Thompson v. People (1904) 207 Ill. 334, 69 N. E. 842; Gage v. People (1904) 207 Ill. 377, 69 N. E. 840; Lyman v. Chicago (1904) 211 Ill. 209, 71 N. E. 832; Fisher v. Chicago (1904) 213 Ill. 268, 72 N. E. 680; Gage v. People (1904) 213 Ill. 410, 72 N. E. 1084; Harman v. People (1905) 214 Ill. 454, 73 N. E. 760; Phillips v. People (1905) 218 Ill. 450, 75 N. E. 1016; Noonan v. People (1906) 221 Ill. 567, 77 N. E. 930; People v. Wiemers (1907) 225 Ill. 71, 80 N. E. 45; People ex rel. Price v. Cole (1907) 227 Ill. 59, 81 N. E. 7; People ex rel. Thompson v. Judson (1908) 233 Ill. 280, 84 N. E. 233; Casgrove v. Chicago (1908) 235 Ill. 358, 85 N. E. 599; People ex rel. Thompson v. Harper (1910) 244

Ill. 121, 91 N. E. 90; People ex rel. Gifford v. Belz (1911) 252 Ill. 296, 96 N. E. 910; Mushbough v. East Peoria (1913) 260 Ill. 27, 102 N. E. 1027; Chicago v. Wells (1916) 274 Ill. 360, 118 N. E. 695; People ex rel. Schultz v. George Moench Estate (1917) 277 Ill. 121, 115 N. E. 187; People ex rel. Stuckart v. Culver (1917) 281 Ill. 401, 117 N. E. 1044.

Indiana.—Reeves v. Grottendick (1892) 131 Ind. 107, 30 N. E. 889; DePuy v. Wabash (1893) 133 Ind. 336, 32 N. E. 1016; Byram v. Foley (1897) 17 Ind. App. 629, 47 N. E. 351; Valparaiso v. Parker (1897) 148 Ind. 379, 47 N. E. 430; Holloran v. Morman (1901) 27 Ind. App. 309, 59 N. E. 869; Greensburg v. Zoller (1901) 28 Ind. App. 126, 60 N. E. 1007; Gorman v. State (1901) 157 Ind. 205, 60 N. E. 1083; Leeds v. Defrees (1901) 157 Ind. 392, 61 N. E. 930; Shank v. Smith (1901) 157 Ind. 401, 55 L.R.A. 564, 61 N. E. 932; Wray v. Fry (1902) 158 Ind. 92, 62 N. E. 1004; Hibben v. Smith (1902) 158 Ind. 206, 62 N. E. 447, affirmed in (1903) 191 U. S. 310, 48 L. ed. 195, 24 Sup. Ct. Rep. 88; Milliken v. Crail (1912) 177 Ind. 426, 98 N. E. 291.

Iowa.—Tuttle v. Polk (1894) 92 Iowa, 433, 60 N. W. 733; Minneapolis & St. L. R. Co. v. Lindquist (1903) 119 Iowa, 144, 93 N. W. 103; Owens v. Marion (1905) 127 Iowa, 469, 103 N. W. 381; Higman v. Sioux City (1906) 129 Iowa, 291, 105 N. W. 524; Durst v. Des Moines (1911) 150 Iowa, 370, 130 N. W. 168; Gilcrest v. Des Moines (1911) — Iowa, —, 131 N. W. 776; Shaver v. J. W. Turner Improv. Co. (1911) — Iowa, —, 133 N. W. 770; Gilcrest v. Des Moines (1912) 157 Iowa, 525, 137 N. W. 1072; Durst v. Des Moines (1914) 164 Iowa, 82, 145 N. W. 528; F. M. Hubbell, Son & Co. v. Des Moines (1915) 168 Iowa, 418, 150 N. W. 701; Hansen v. Missouri Valley (1916) 178 Iowa, 859, 160 N. W. 340.

Kansas.—Wahlgren v. Kansas City (1889) 42 Kan. 243, 21 Pac. 1068.

Maine.—Auburn v. Paul (1892) 84 Me. 212, 24 Atl. 817.

Massachusetts.—Stark v. Boston (1902) 180 Mass. 293, 62 N. E. 375.

Michigan.—Brown v. Grand Rapids

(1890) 83 Mich. 101, 47 N. W. 117; *Duffy v. Saginaw* (1895) 106 Mich. 335, 64 N. W. 581.

Minnesota.—*McKusick v. Stillwater* (1890) 44 Minn. 372, 46 N. W. 769; *State ex rel. Duluth v. District Ct.* (1895) 61 Minn. 542, 64 N. W. 190; *State v. Norton* (1896) 63 Minn. 497, 65 N. W. 935.

Missouri.—*Michael v. St. Louis* (1891) — Mo. —, 18 S. W. 967; *Vrana v. St. Louis* (1901) 164 Mo. 146, 64 S. W. 180; *McGhee v. Walsh* (1913) 249 Mo. 266, 155 S. W. 445.

Montana.—*Powers v. Helena* (1911) 43 Mont. 336, 36 L.R.A.(N.S.) 39, 116 Pac. 415.

New Jersey.—*State, Townsend, Prosecutor, v. Jersey City* (1857) 26 N. J. L. 444; *Hayday v. Ocean City* (1901) 67 N. J. L. 155, 50 Atl. 584.

New York.—*Laimbeer v. New York* (1850) 4 Sandf. 109; *Re Miller* (1861) 12 Abb. Pr. 121; *Re Horn* (1861) 12 Abb. Pr. 124; *Webber v. Lockport* (1872) 43 How. Pr. 368; *Re Cruger* (1881) 84 N. Y. 619; *Genet v. Brooklyn* (1886) 1 N. Y. S. R. 581; *Lyth v. Buffalo* (1888) 48 Hun. 175; *Chilcott v. Buffalo* (1889) 27 N. Y. S. R. 222, 7 N. Y. Supp. 638; *Hoffeld v. Buffalo* (1892) 130 N. Y. 387, 29 N. E. 747.

North Carolina.—*Felmet v. Canton* (1919) 177 N. C. 52, 97 S. E. 728.

Ohio.—*Cincinnati Use of Nolte v. McDermott* (1877) 5 Ohio Dec. Reprint, 494.

Oklahoma.—*Kerker v. Bocher* (1908) 20 Okla. 729, 95 Pac. 981; *Rawlins v. Warner-Quinlan Asphalt Co.* (1918) — Okla. —, 174 Pac. 526; and see *BARTLESVILLE v. HOLM* (reported herewith) ante, 627.

Oregon.—*Rogers v. Salem* (1912) 61 Or. 321, 122 Pac. 308.

Pennsylvania.—*Re Aiken Ave.* (1892) 11 Pa. Co. Ct. 228; *Traver's Appeal* (1893) 152 Pa. 129, 25 Atl. 528; *Child's Appeal* (1893) 152 Pa. 134, 25 Atl. 529; *Shanley's Appeal* (1893) 152 Pa. 135, 25 Atl. 529; *Wilson's Appeal* (1893) 152 Pa. 136, 25 Atl. 530; *Rich's Appeal* (1893) 152 Pa. 138, 25 Atl. 530; *Re Twenty-eighth Street* (1893) 158 Pa. 464, 27 Atl. 1109; *Scranton v. Davidson* (1894) 3 Lack. Jur. 141; *Chester v. Bullock* (1898) 187 Pa. 544, 41 Atl. 452.

Washington.—*Barlow v. Tacoma* (1895) 12 Wash. 32, 40 Pac. 382; *Tumwater v. Pix* (1897) 18 Wash. 153, 51 Pac. 353; *Northwestern & P. Hypotheek Bank v. Spokane* (1898) 18 Wash. 456, 51 Pac. 1070; *Heath v. Mc-Crea* (1898) 20 Wash. 342, 55 Pac. 432; *Annie Wright Seminary v. Tacoma* (1900) 23 Wash. 109, 62 Pac. 444; *New Whatcom v. Bellingham Bay Improv. Co.* (1899) 16 Wash. 131, 47 Pac. 236, affirmed in (1898) 172 U. S. 314, 43 L. ed. 460, 19 Sup. Ct. Rep. 205; *McNamee v. Tacoma* (1901) 24 Wash. 591, 64 Pac. 791; *Young v. Tacoma* (1903) 31 Wash. 153, 71 Pac. 742; *Ferry v. Tacoma* (1904) 34 Wash. 652, 76 Pac. 277; *Alexander v. Tacoma* (1904) 35 Wash. 366, 77 Pac. 686; *Aberdeen v. Lucas* (1905) 37 Wash. 790, 79 Pac. 632; *Spokane v. Preston* (1907) 46 Wash. 98, 89 Pac. 406; *Renard v. Spokane* (1908) 48 Wash. 345, 93 Pac. 517; *Rucker Bros v. Everett* (1911) 66 Wash. 366, 38 L.R.A.(N.S.) 582, 119 Pac. 807; *Collins v. Ellensburg* (1912) 68 Wash. 212, 122 Pac. 1010; *Martin v. Olympia* (1912) 69 Wash. 28, 124 Pac. 214; *Great Northern R. Co. v. Leavenworth* (1914) 81 Wash. 511, 142 Pac. 1155, Ann. Cas. 1916D, 239; *Sampson v. Leavenworth* (1914) 81 Wash. 700, 142 Pac. 1160; *Kuehl v. Edmonds* (1915) 85 Wash. 307, 148 Pac. 19; *Grandin v. Tacoma* (1915) 87 Wash. 98, 151 Pac. 254; *Shaser v. Olympia* (1916) 92 Wash. 466, 159 Pac. 756; *Seattle v. Jones* (1917) 95 Wash. 5, 163 Pac. 12; *Sanderson v. Seattle* (1917) 95 Wash. 582, 164 Pac. 217.

Wisconsin.—*Wright v. Forrestal* (1886) 65 Wis. 341, 27 N. W. 52.

That misleading statements were made by the board of local improvements affords no excuse for not filing objections in the county court at the confirmation of a paving assessment, and equity will not relieve an owner by setting aside a special tax on this ground. *Mushbaugh v. East Peoria* (1913) 260 Ill. 27, 102 N. E. 1027.

However, in some instances where it appeared that the body levying an assessment for a street or sewer improvement had never acquired jurisdiction to act in the premises, and therefore the assessment was absolutely void, it has been held that a

failure to object to an assessment in the manner prescribed does not operate as a waiver, and a property owner is not estopped from later denying his liability for the amount of his assessment.

Alabama.—*Woodlawn v. Durham* (1909) 162 Ala. 565, 50 So. 356.

California.—*Brady v. Bartlett* (1880) 56 Cal. 350; *Brock v. Luning* (1891) 89 Cal. 316, 26 Pac. 972; *Manning v. Den* (1891) 90 Cal. 610, 27 Pac. 435; *McBean v. Redick* (1892) 96 Cal. 191, 31 Pac. 7; *Perine v. Forbush* (1893) 97 Cal. 305, 32 Pac. 226; *Capron v. Hitchcock* (1893) 98 Cal. 427, 33 Pac. 431; *Partridge v. Lucas* (1893) 99 Cal. 519, 33 Pac. 1082; *San Jose Improv. Co. v. Auzeais* (1895) 106 Cal. 498, 39 Pac. 859; *Kenny v. Kelly* (1896) 113 Cal. 364, 45 Pac. 699; *Warren v. Chandos* (1896) 115 Cal. 382, 47 Pac. 132; *Chase v. Los Angeles* (1898) 122 Cal. 540, 55 Pac. 414; *Perine v. Lewis* (1900) 128 Cal. 236, 60 Pac. 422, 772; *Pacific Paving Co. v. Verso* (1900) 12 Cal. App. 362, 107 Pac. 590; *De Haven v. Berendes* (1901) 135 Cal. 178, 67 Pac. 786; *Blanchard v. Ladd* (1901) 135 Cal. 214, 67 Pac. 131; *BARBER ASPHALT PAVING CO. v. JURGENS* (reported herewith) ante, 597; *City Securities Co. v. Harvey* (1917) 176 Cal. 682, 169 Pac. 380; *Schmidt v. Santa Monica Commercial Co.* (1919) — Cal. App. —, 178 Pac. 315.

Colorado.—*Keese v. Denver* (1887) 10 Colo. 112, 15 Pac. 825; *Denver v. State Invest. Co.* (1911) 49 Colo. 244, 33 L.R.A. (N.S.) 395, 112 Pac. 789.

Illinois.—*LeMoyne v. West Chicago Park* (1886) 116 Ill. 41, 4 N. E. 498, 6 N. E. 48; *People ex rel. McCormack v. McWethy* (1896) 165 Ill. 222, 46 N. E. 187; *People ex rel. Kochersperger v. Eggers* (1897) 164 Ill. 515, 45 N. E. 1074; *Cass v. People* (1897) 166 Ill. 126, 46 N. E. 729; *Walker v. People* (1903) 202 Ill. 34, 66 N. E. 827; *Glos v. Cannata* (1905) 121 Ill. App. 215; *Phillips v. People* (1905) 218 Ill. 450, 75 N. E. 1016; *People ex rel. Price v. Lyon* (1905) 218 Ill. 577, 75 N. E. 1017; *People ex rel. George v. Phinney* (1907) 231 Ill. 180, 83 N. E. 143; *Casey v. Cincinnati, H. & D. R. Co.* (1914)

263 Ill. 352, 105 N. E. 130; *Melrose Park v. Indiana Harbor Belt R. Co.* (1916) 275 Ill. 74, 113 N. E. 880.

Iowa.—*Coggeshall v. Des Moines* (1889) 78 Iowa, 235, 41 N. W. 617, 42 N. W. 650; *Gallaher v. Garland* (1904) 126 Iowa, 206, 101 N. W. 867; *Comstock v. Eagle Grove* (1907) 133 Iowa, 589, 111 N. W. 51; *Bennett v. Emmetsburg* (1908) 138 Iowa, 67, 115 N. W. 582; *Andre v. Burlington* (1908) 141 Iowa, 65, 117 N. W. 1082; *Shaver v. J. W. Turner Improv. Co.* (1911) — Iowa, —, 133 N. W. 770.

Michigan.—*Brush v. Detroit* (1875) 32 Mich. 43; *Mills v. Detroit* (1893) 95 Mich. 422, 54 N. W. 897.

Minnesota.—*Sewall v. St. Paul* (1874) 20 Minn. 511, Gil. 459.

Montana.—*Shapard v. Missoula* (1914) 49 Mont. 269, 141 Pac. 544.

New Jersey.—*State, Evans, Prosecutor, v. Jersey City* (1872) 35 N. J. L. 381.

New York.—*Re New York* (1823) 1 Cow. 74.

North Dakota.—*McKenzie v. Mandan* (1914) 27 N. D. 546, 147 N. W. 808; *Robertson Lumber Co. v. Grand Forks* (1914) 27 N. D. 556, 147 N. W. 249.

Oregon.—*Jones v. Salem* (1912) 63 Or. 126, 123 Pac. 1096; *Randall v. Salem* (1912) 62 Or. 509, 123 Pac. 1099.

Pennsylvania.—*Swissvale v. Dickson* (1917) 68 Pa. Super. Ct. 160; *Swissvale v. Collingwood* (1917) 68 Pa. Super. Ct. 170.

Texas.—*Hutcheson v. Storrie* (1899) 92 Tex. 685, 45 L.R.A. 289, 71 Am. St. Rep. 884, 51 S. W. 848; *San Antonio v. Spears* (1918) — Tex. Civ. App. —, 206 S. W. 703.

Utah.—*Gwilliam v. Ogden City* (1917) 49 Utah, 555, 164 Pac. 1022.

Washington.—*Howell v. Tacoma* (1892) 3 Wash. 711, 28 Am. St. Rep. 83, 29 Pac. 447; *Pierce v. Tacoma* (1892) 3 Wash. 785, 29 Pac. 449; *Briggs v. Tacoma* (1892) 3 Wash. 785, 29 Pac. 449; *Monk v. Ballard* (1906) 42 Wash. 35, 84 Pac. 397; *Sanderson v. Ballard* (1906) 42 Wash. 697, 84 Pac. 399; *McCurdy v. Ballard* (1906) 42 Wash. 697, 84 Pac. 399; *Kuehl v. Edmonds* (1915) 85 Wash. 307, 148 Pac. 19.

West Virginia.—*Moundsville v. Yost* (1914) 75 W. Va. 224, 83 S. E. 910.

An objection that the street had been accepted by the city and therefore, under the provisions of the statute then in force, could not be improved at the expense of the abutting owners, was held in *BARBER ASPHALT PAVING CO. v. JURGENS* (reported herewith) ante, 597, not to be waived by the failure of the property owner to present the objection to the common council which ordered the improvement.

"Jurisdictional defects are not waived by a failure to appear and object to an assessment, or a failure to appeal from the order of the council adopting an assessment resolution. . . . And it is equally well settled that, as against an assessment void for want of jurisdiction, equity will grant relief by injunction. . . . Errors nonjurisdictional in character, and being such as that it is possible to the council to make corrections, may be waived by a failure to appear and object, or, having objected, by failure to appeal. But it is only errors in an assessment that the council has authority to make which are thus waived. A failure to object cannot be given effect to relate back and infuse validity into a contract the council had no power to make." *Bennett v. Emmetsburg* (1908) 138 Iowa, 67, 115 N. W. 582.

"As such proceedings are in invitum the statutes must be strictly followed, or the acts done will be invalid. But it is within the power of the legislature to establish tribunals for the settlement of all issues arising during the progress of the proceedings, and to these tribunals the aggrieved party must resort. Of course, if the council, by reason of some act or omission, is without jurisdiction,—that is to say, has no power to act at all in the premises,—the question may be raised at any time and in any kind of proceedings." *Andre v. Burlington* (1908) 141 Iowa, 66, 117 N. W. 1082.

So, it has been held that city authorities have no right to open and widen a turnpike road as one of the

streets of the city, and an objection to an assessment for such improvement may be made, though no objection was made on the application for the confirmation of the report of the viewers. *Breed v. Allegheny* (1877) 85 Pa. 214, wherein the court said: "No attempt appears to have been made by the city to condemn said road; on the contrary, it is still a turnpike road on which toll is charged. It is clear the city authorities had no right to open and widen this turnpike road as one of the streets of the city.

. . . It was alleged, however, that this defense should have been taken before the confirmation of the report of the viewers, and that it cannot be made upon the scire facias. This is not so, for the reason that the city had no power to assess the property of the plaintiff in error with any portion of the expense of opening the alleged street. The confirmation of the report of the viewers amounts to nothing as respects him." See to the same effect, *Wilson v. Allegheny City* (1875) 79 Pa. 272.

The failure of a landowner to appeal to the city council because of irregularity of an assessment, due to the failure of the contractor to make affidavit that he had not contracted to pay a rebate to anyone liable for the assessment, amounts to a waiver of this defect. *Smith v. Lighttson* (1920) — Cal. —, 186 Pac. 769.

2. Sufficiency of petition.

An objection that the ordinance under which a paving assessment was levied is void, because it was adopted without a petition of the owners of one half of the property abutting on the line of the proposed improvement, cannot be raised in a collateral proceeding for judgment of sale of the property for delinquent tax. If not made at the confirmation of the assessment, it is considered waived. *Phillips v. People* (1905) 218 Ill. 450, 75 N. E. 1016, wherein the court said: "The jurisdiction of the county court to confirm the assessment did not depend upon the existence of such petition, and as the judgment could not be collaterally attacked except for want of jurisdiction, the objection

could not be interposed in the proceeding to collect the assessment."

So, an objection that a petition for an improvement had been refiled with the board of local improvements after it had served its purpose and ceased to be effective as a petition should be made in opposition to the application to confirm the assessment, and, failing to do this, a landowner is estopped from raising the question on an application for judgment of sale. *Harman v. People* (1905) 214 Ill. 454, 73 N. E. 760. The court said: "Waiving the fact that some of these objections do not appear upon the face of the record of the proceeding to confirm the special tax, and therefore are not available for a collateral attack thereon, it is apparent that everyone of these objections might have been made in that proceeding. The facts on which they are alleged to be founded were in existence at that time and could have been presented to the court. . . . The property owner is entitled to a hearing before his property is finally charged with a special tax or assessment, and the law has provided such a hearing; but when the property owner has had his day in court the judgment is binding and conclusive as to every defense which was or might have been made by him. That is the rule, regardless of the statute, and we have always held that objections such as these cannot be raised by way of collateral attack, in the proceeding to collect the assessment by judgment and sale. It was the right and duty of appellants, when notified as provided by the statute, if they desired to contest the tax for any of the reasons now alleged, to appear in the county court and make their objections. The judgment of confirmation is in full force, not vacated, reversed, or set aside as to appellant's property, and it cannot be collaterally attacked in the way here attempted."

See also *Leitch v. People* (1900) 183 Ill. 569, 56 N. E. 127, wherein the court said: "It is provided in § 66 of the Act of 1897 that, upon the application for judgment against property for delinquent special assessments, no defense or objection shall be made or heard which might have been

interposed in the proceeding to confirm such assessment, and no errors in the proceeding to confirm, not affecting the power of the court to entertain and consider the petition therefor, shall be deemed a defense to the application therein provided for. Upon the application to confirm the assessment, appellant had the undoubted right to appear in the county court and call in question the validity of the petition presented to the board of local improvements, and, as he was notified as required by law, it was his duty to appear and make objection if he desired to contest the validity of the proceedings, but as he failed to appear on application to confirm, under the plain language of the statute he is concluded from calling in question any of the proceedings anterior to the judgment of confirmation, except the jurisdiction of the court rendering the judgment."

Where the county court, on the application for confirmation of an assessment for a street improvement, is empowered by law to hear and determine whether the owners of a majority of the property abutting on a street petitioned for the improvement, the objection that a majority did not sign is waived by a failure to adopt the remedy provided. *Pipher v. People* (1899) 183 Ill. 436, 56 N. E. 84.

Where it is alleged that the petition for the change of grade of a street was not signed by the necessary two thirds of the property owners interested, as required by statute, but no objection was made to the city council, the right to urge the objection later is lost, since it will be presumed that the council decided jurisdictional questions correctly, and nonjurisdictional questions cannot be raised in a suit to enjoin the collection of the assessment. *De Puy v. Wabash* (1893) 133 Ind. 336, 32 N. E. 1016.

In *Collins v. Ellensburg* (1912) 68 Wash. 212, 122 Pac. 1010, it was said: "The petition is not a jurisdictional prerequisite. To proceed without petition was not to proceed without power. It was, at most, the exercise in an irregular manner of power amply conferred. The legislature might have conferred the power without re-

quiring any petition. There is no constitutional inhibition against such a course. The lack of a petition was, therefore, a mere irregularity; and the right to object on that account was waived by the failure of the property owners to protest against the improvement on that ground, in response to the notice given by the declaratory ordinance as published, and within the time fixed in that notice."

However, authority is not wanting that a proper petition is jurisdictional and a special assessment without it is void. Thus, where a statute provided that "the city councils shall cause sewers to be constructed in any district, whenever a majority of the property holders resident therein shall petition therefor," and it appeared from the evidence that a majority did not join in the petition, it was held that an ordinance passed for the improvement was void, and that a property holder might restrain the sale of real estate for the purpose of collecting an assessment, though a meeting was held to hear objections to the proposed improvement, and he, though having notice, did not attend. *Keese v. Denver* (1887) 10 Colo. 112, 15 Pac. 825. The court said: "The general rule is laid down by Judge Dillon in his work on Municipal Corporations (§ 800), and is as follows: 'Where the power to pave depends upon the assent or petition of a given number or proportion of the proprietors to be affected, this fact is jurisdictional, and the finding of the city authorities or council that the requisite number had assented or petitioned is not, in the absence of legislative provision to that effect, conclusive; and the want of such assent makes the whole proceeding void, and the non-assent may be shown as a defense to an action to collect the assessment, or may, it has been held, be made the basis for a bill in equity to restrain a sale of the owner's property to pay for it.' The ordinance . . . cannot be sustained upon the petition therefor."

So, an objection to a petition for a street improvement that it was not signed by the persons who owned the

lands in front of which the work was to be done is jurisdictional, where the statute makes such signature mandatory, and may be raised by a purchaser of land subject to the assessment, even though his grantor failed to avail himself of the opportunity offered to present objections. *State, Evans, Prosecutor, v. Jersey City* (1872) 35 N. J. L. 381.

3. *Validity of statute or ordinance.*

(a) *Generally.*

Where an ordinance for a street improvement shows on its face that it is unauthorized, and that the council was without power to enact it, or shows a failure to comply with some positive requirement, and is, therefore, absolutely void, it is generally held that advantage may be taken of such defect on an application for judgment of sale to meet the assessment, although the property owner has failed to make objection at the time and place provided by law.

Thus, an ordinance providing for the laying of a water service pipe, which left it discretionary with the department of public works to determine the nature and character of the improvement, has been held to be void, as exceeding the power of the council, and therefore a property owner was not estopped to object to its validity because of his failure to raise the objection at the hearing for confirmation of the assessment. *Cass v. People* (1897) 166 Ill. 126, 46 N. E. 729, wherein it was said: "It not only does not specify with sufficient definiteness the nature and character and description of the improvement, but it leaves the nature, character, and description of the improvement largely to be determined by the department of public works. The department of public works is thereby invested with a discretion in regard to how the improvement should be made. We have held that an ordinance thus clothing the department of public works with discretionary power is void. The responsibility of directing the mode and manner and extent of such public improvements is with the common council. An attempt to vest the board

with discretionary powers in such cases may afford a cover for unfair estimates, and 'open the door to fraud and favoritism in letting contracts for the work.'"

Where, under a statute providing for the construction of sidewalks, an ordinance can legally provide for the laying of a sidewalk on one street only, and not on a number of streets, an ordinance providing for the construction of a sidewalk on forty-two different streets and parts of streets is void, and a property owner does not waive his right to object to an assessment thereunder because of his failure to raise the question at the confirmation of the assessment. *Glos v. Cannata* (1905) 121 Ill. App. 215.

Where a statute provides that, before any sewer is constructed, a proposed resolution of necessity shall be brought forward, setting forth the necessity of the improvement, a statement of the material to be used, method of construction, etc., this provision is mandatory, and an ordinance ordering a sewer without such notice is void; hence, a property owner is not estopped from enjoining the collection of the assessment on such grounds by failing to appear and object at the hearing before the council. *Bennett v. Emmetsburg* (1908) 138 Iowa, 67, 115 N. W. 582.

But an objection to an assessment on the ground that the city charter authorizing improvements is defective, in that it does not require the commissioners to give notice, is waived where notice and full opportunity to be heard are given, and the property owner acquiesces in the improvement without objecting. *Marion v. Pilot Mountain* (1915) 170 N. C. 118, 87 S. E. 53, wherein the court said: "The plaintiff has had every opportunity to be heard both before the work was begun and during its progress. He stood by and saw his property benefited at the expense of the town, and he cannot now be heard to contest repayment to the town treasurer of the sum which has been paid by the other taxpayers for the benefit of the property and in discharge of the civic duty which was imposed on

his property to furnish proper sidewalks. . . . When served with notice of the order to lay the sidewalk he did not appear before the commissioners nor make any objections. When served on January 7, 1914, with notice that unless he laid the sidewalks in front of his property the city would do so and charge him with the costs, again he did not appear before commissioners or take any other steps to object. After three months' delay, the city ordered the work to be done. He stood by complacently and saw the sidewalks laid in front of his hotel and warehouse, as they were in front of the property of his neighbors, and made no objection. He was notified of the amount of such assessments, and has not objected that the cost was excessive or shown that such action was arbitrary. His property was in the center of the town, and the pavement was laid down in front of his hotel, which was the only one in town, and in front of his adjacent warehouse. His sidewalks must be paid for, either at his expense or at the expense of the other taxpayers in the town. It is only after the lapse of eighteen months, after he was served with legal notice, and also had actual notice of the work going on, that he now objects for the first time and seeks to prevent repayment to the town treasurer of the sums spent on his sidewalks. . . . The plaintiff is estopped to object now, having had notice to put down the sidewalk, and notice later that if he did not do so the town would lay the sidewalk and charge the cost to him (to neither of which notices he responded), and, further, by his acquiescence in standing by while the work was being done and making no objection, either before the town authorities or otherwise, taking part in laying out the work, and even promising to pay."

Likewise, where, on due notice to him, a property owner on grievance day finds no fault with an assessment for the construction of a sewer, acquiescing in the assessments for benefits upon his premises, and does not in any manner attempt to appeal or to review them through the proper

channels, he is estopped to attack the validity of the legislation under which the improvement was made. *Ithaca v. Babcock* (1901) 36 Misc. 49, 72 N. Y. Supp. 519, affirmed on other grounds in (1902) 72 App. Div. 260, 76 N. Y. Supp. 49.

(b) *Irregularities in enactment or contents of ordinance.*

Where authority is given to enact an ordinance originating proceedings for street improvements, it is generally held that a failure to object to mere irregularities in the adoption of the ordinance, as to defects in the contents thereof, at the time of confirmation of the assessment, estops a property owner from later objecting in proceedings to enforce the lien of the assessment.

Thus, a property owner is estopped from asserting the invalidity of a paving assessment on the grounds that the ordinance was not referred to a committee of the council, and that unanimous consent was not obtained for its passage without such reference, when no objection was made at the confirmation of the assessment. *Doremus v. People* (1896) 161 Ill. 26, 43 N. E. 701, wherein the court said: "It is not permissible for appellant to attack the judgment in the assessment proceedings upon such grounds. The petition was sufficient to give the court jurisdiction to enter the judgment of confirmation, and that judgment is not open to collateral attack on grounds not affecting the jurisdiction, and for matters that might have been urged at the time judgment was entered."

So, where a statute provides that an ordinance for an improvement shall be read at two consecutive meetings of the city council, an objection to a paving assessment because of non-compliance therewith is jurisdictional, and a property owner is not estopped by the failure of his grantor to appear and object, in response to notice. *Moundsville v. Yost* (1914) 75 W. Va. 224, 83 S. E. 910, wherein the court said: "It may be that, if the objection related only to a mere irregularity in the proceeding, the present owner would be estopped by

the failure of his predecessor in title to make objection before the assessment was made. But the objection relates to more than a mere irregularity. It strikes at the jurisdiction of the council to proceed in violation of the mandate of its charter, and involves the very right and power of the city to make a binding special assessment in a manner different from the only method provided by the statute. The right to make local assessments depends upon legislative grant of power, which in this case is given. But the power must be exercised in the particular mode prescribed by the statute. The void resolution is the only basis for the alleged special assessment, and the invalidity of the resolution renders void all subsequent proceedings, so far as they relate to the rights of property owners. Hence the defendant E. H. Yost is not estopped to deny the validity of the lien. No one is estopped to assail collaterally proceedings which are wholly void."

Likewise, inconsistency between the title and body of an ordinance for a street improvement must be made at confirmation proceedings, and if the question is not raised there it will be considered waived. *Fiske v. People* (1900) 188 Ill. 206, 52 L.R.A. 292, 58 N. E. 985. See to the same effect, *Chicago Terminal Transfer Co. v. Chicago* (1899) 178 Ill. 429, 53 N. E. 361.

An objection to an assessment that the original ordinance failed to describe the general character of the material to be used in making a pavement cannot be raised in a bill to enjoin collection, where the property owner has failed to take advantage of a statute providing that "the council will meet to hear and determine any objections or defense that may be filed," and that "persons who do not file objections in writing or protests against such assessments shall be held to have consented to the same." *Birmingham v. Wills* (1912) 178 Ala. 198, 59 So. 173, Ann. Cas. 1915B, 746.

Failure to object, as permitted by that act, has also been held to estop a property owner to enjoin the collec-

tion of a paving assessment, on the ground that the ordinance does not sufficiently describe the nature and extent of the work proposed. *Ibid.*

And under the same statute the omission of the name of the street to be improved in the body of an ordinance providing for paving, and which recites the facts in the title, is an objection which cannot be raised in a suit to enjoin the collection of an assessment, where the property owner has failed to appear and file his protest before the city council. *Birmingham v. Abernathy* (1912) 178 Ala. 221, 59 So. 180.

In *People ex rel. Price v. Wiemers* (1907) 225 Ill. 17, 80 N. E. 45, an application for judgment of sale it was contended that an ordinance for grading and paving was illegal and void because of the uncertainty as to the kind of sod-edge curb and the filling forming a portion of the improvement, in that it called for good, fresh-cut, and live sod, without specifying its thickness or the character of the grass, etc. It was held that the right to raise the objection had been waived, the court saying: "Without attempting to set out in detail the objections on this point, it is plain that these questions could have been raised at the hearing on the confirmation of the assessment. Numerous decisions of this court, as well as the statute, hold that if they could have been then raised they cannot be raised later on application for judgment, unless they go to the jurisdiction of the court. . . . Unless there is a total failure to include in an ordinance the necessary elements of a specification of the nature, character, locality, and description of the improvement required by statute, the mere fact that the specification is defective in some respect is not a defense to an application for judgment of sale." See to the same effect, *People ex rel. Price v. Cole* (1907) 227 Ill. 59, 81 N. E. 7.

So, in *Steenberg v. People* (1897) 164 Ill. 478, 45 N. E. 970, it was held that where a grading and paving ordinance was fair and legal on its face, giving a full and sufficient descrip-

tion of the locality of an improvement, although it could be shown that the description was a false one, the objection must be made on the application for confirmation, and could not be made on application for judgment of sale, the court saying: "The ordinance, affidavit of posting notices, certificate of publication, assessment roll, and all proceedings were on their face proper and sufficient, and fulfilled every condition requisite in the law to confer jurisdiction on the county court. In such a case we cannot assent to the claim that the ordinance was a nullity, and the assessment and judgment of the county court void, because there was a misdescription of the improvement. Where an ordinance exceeds the power of the city council, or the necessary conditions for its enactment have not been observed, the ordinance will be void and no rights can grow up under it. But this ordinance is not of that character. The enactment of such an ordinance was within the corporate power, and there is no question of its lawful passage. The description of the locality where the improvement was to be made was defective, as appears by extraneous evidence, and for that reason an objection might have been sustained to the confirmation. The parties assessed were notified of the assessment against their property for the improvement specified in the ordinance, and if they wanted to object that the ordinance was insufficient because the northern terminus was wrong, or was uncertain, they should have made their objection on the application for judgment of confirmation. They would then have had an opportunity to prove the fact."

In *Nicholes v. People* (1898) 171 Ill. 376, 49 N. E. 574, the court said: "At most, there was but an irregularity or lack of perfect accuracy in the ordinance, in stating one of the termini of the sidewalk, which cannot be availed of in this collateral proceeding. It did not render the ordinance void. . . . If appellant desired to raise questions of this character she would have raised them

at the hearing for confirmation of the special assessment." In *Gage v. Parker* (1882) 103 Ill. 528, the court said: "If the assessment was illegal from the fact that it was based upon an insufficient ordinance, it was the duty of the complainant in the bill to appear before the county court when the application was made to confirm the assessment, and there make the objection; but as he failed to do so, this judgment of the county court, when called in question collaterally, must be regarded as conclusive." See to the same effect, *Kelly v. Chicago* (1893) 148 Ill. 90, 85 N. E. 752; *Thomas v. Chicago* (1894) 152 Ill. 292, 38 N. E. 923.

An objection that the grade of a street was never legally established by ordinance cannot be litigated in a suit to enjoin the collection of a paving assessment, where a property owner has not complied with the provisions of a statute that objection shall be made to the city authorities, and that an owner failing to do this shall be deemed to have consented to the assessment. *Birmingham v. Wills* (1912) 178 Ala. 198, 59 So. 173, Ann. Cas. 1915B, 746.

So, an objection to an assessment for paving a street because of a failure to state in the ordinance the grade at which the pavement was to be laid cannot be raised on the application for judgment of sale against the delinquent property, the owner being estopped by his failure to present the objection at the confirmation of the assessment. *Shepard v. People* (1902) 200 Ill. 508, 65 N. E. 1068, wherein the court said: "The ordinance required the grade of the pavement, when completed, to be at 'the established grade' of said street, and it was not defective in that respect. If there had been in existence an ordinance establishing a grade, the objection would have been of no avail, even upon application for the judgment of confirmation; but appellant offered evidence tending to prove that at the date of the ordinance there existed no ordinance fixing the grade of said street at the place of the improvement. The fact that no grade had

9 A.L.R.—43.

been established having been proved, the objection would have been a good one, if it had been made to the application for confirmation of the assessment. . . . The ordinance was not void, and the judgment of confirmation cannot now be attacked on the ground that a grade had not been established when the ordinance was passed." See also *Walker v. People* (1908) 202 Ill. 34, 66 N. E. 827, wherein it was said: "The first objection would undoubtedly have been good, under the proofs in this case as to the nonexistence of a grade ordinance, had it been urged on the application for a confirmation of the assessment.

. . . The question here is whether or not the objection is available in this collateral proceeding, and upon the authority of our repeated decisions that question must be answered in the negative. No objection to an assessment, which does not go to the jurisdiction of the court and which could have been made on the application for confirmation of the assessment, can be urged against the county collector's application for judgment of sale."

"Unless there is a total failure to include in an ordinance the necessary element of a specification of the nature, character, locality, and description of the improvement, required by statute, the mere fact that the specification is defective in some respect will not be a defense on the application for judgment on a delinquent list." An objection of this character, unless made at the confirmation of the assessment, is waived. *Gross v. People* (1898) 172 Ill. 571, 50 N. E. 334, holding that an objection to an ordinance in that it did not specify the grade of a street, but provided that a "uniform grade" should be established, cannot be raised in a proceeding for judgment of sale against delinquent property.

Where an ordinance unwarrantably imposes a discretion on the board of local improvements in directing the work of constructing a sidewalk, in case an adjoining landowner determines to do the work in front of his property himself, to be done under

the superintendence of said board, a property owner is estopped from raising the question in later proceedings, when he has failed to bring the matter to the attention of the court in an action for confirmation of the assessment. *Chew v. People* (1908) 202 Ill. 380, 66 N. E. 1069.

In *Shepard v. People* (Ill.) *supra*, the court said with respect to an ordinance for curbing, grading, and paving: "If the ordinance was lacking in any of the particulars now pointed out, affecting the ability of the commissioners or bidders to make an intelligent estimate of the cost of the improvement, the objection should have been made upon the application for judgment of confirmation. The ordinance was not a nullity, but constituted an existing law of the municipality, under which the county court had jurisdiction to entertain the application of the city and to enter judgment confirming the assessment."

In *Chew v. People* (Ill.) *supra*, an appeal from a judgment of sale for certain lots in satisfaction of a special assessment levied for the construction of a plank sidewalk, it was contended: (1) That a variance between the estimate of the engineer and the ordinance rendered it uncertain on what street the sidewalk was to be constructed; (2) that it was not clear from the ordinance whether the sidewalk was to adjoin the curb line or be laid midway between the curb line and lot line; (3) that the ordinance did not specify the number of stringers to be used. In holding that the objections were not timely, the court said: "These objections are all extremely technical, and none of them challenge the jurisdiction of the court to render the judgment confirming the assessment. While they might have been raised on the application for confirmation, they do not show the ordinance to be void and cannot be raised in this proceeding."

In an appeal from an assessment, the court will strike out those grounds of objection interposed by the plaintiff in his petition, which were not made before the city council, as

required by statute. *Higman v. Sioux City* (1906) 129 Iowa, 291, 105 N. W. 524, wherein the rule was applied to an objection to an assessment for curbing, under a proceeding entirely independent from one making an assessment for paving, the plaintiff claiming that the curbing and paving were one improvement.

Where a property holder fails to avail himself of his remedies at law under the statute, he is estopped from raising objections to an assessment in a suit to enjoin the collection of the tax. This rule applies to an objection that there existed no council which could legally pass an ordinance for an improvement, and that therefore the proceedings under such ordinance were void. *Hewes v. Winnetka* (1895) 60 Ill. App. 654.

Even the failure to pass an ordinance may be waived by the failure to make objection at the proper time and place. Thus, an objection that the city council passed no ordinance for an improvement cannot be raised in a suit for judgment and sale of property for nonpayment of an assessment. Such a question must be presented when application for confirmation is made, and an owner failing to do so is estopped in later proceedings. *Schertz v. People* (1882) 105 Ill. 27.

4. Conformity of proceedings to statute or ordinance.

(a) Resolution of intention.

In certain jurisdictions the resolution of intention is the primary step to be taken in every instance of a street improvement, and cannot be waived. If such resolution is omitted entirely, or is irregular, a property owner may resist payment of the assessment, notwithstanding his failure to object before the tribunal whose province it is to hear and pass on such objections.

Thus, it has been said: "The passage and publication of the resolution of intention are acts by which the board acquires jurisdiction; and by those acts they acquire jurisdiction to make only such improvements as they described in the resolution, and they cannot, therefore, lawfully cause

work other than that which is described to be performed." *Partridge v. Lucas* (1893) 99 Cal. 519, 33 Pac. 1082, holding that where a resolution declaring it to be the intention of the board to macadamize a street did not include the construction of rock gutter ways, the board did not, under the rule just stated, acquire jurisdiction, and an owner, by failing to appeal to the board for the correction of a contract so made, did not waive his right to object to the assessment in an action to recover.

In *Shapard v. Missoula* (1914) 49 Mont. 269, 141 Pac. 544, it was said with respect to the resolution of intention: "It is the basis of the whole proceeding. It, with a notice of its adoption, is a condition precedent; nothing may be substituted in its place, and, though the proceedings may in all other respects conform to the requirements of the statute, the omission of it is fatal and renders all the subsequent proceedings nugatory. The proceeding is not aided in any way by the failure of any property owner to file with the city clerk his written objection to the regularity of the proceedings within sixty days after the letting of the contract. The conclusive presumption of waiver of the statute is predicated upon the passage of the resolution of intention, and the publication of the required notice as a condition precedent; and, though the section may be regarded as having a curative purpose, and may accomplish this purpose so far as regards other irregularities in the proceedings, it cannot supply jurisdiction when it has not been acquired by observance of the antecedent steps necessary to acquire it."

So, in a resolution of intention, the limits of the district to be improved must be defined, at least to a common certainty, so that a person of ordinary understanding may know what it is proposed to do, and where a resolution for paving and curbing contained a description of the district as the intersection of three streets, which was only a small section of the entire work, it was held that it was insufficient, and that the assessment was void on its face, and the owners of

the assessed lots need not appeal to the city council for the correction of the assessment, but might raise the question for the first time as a defense to the enforcement of the assessment. *Pacific Paving Co v. Verso* (1910) 12 Cal. App. 362, 107 Pac. 590.

A resolution of intention to improve a street with "granite or artificial stone curbing on both sides" is void for insufficient description, and a property owner may object to his assessment on this ground in an action to enforce collection, without having appealed to the city council. *San Jose Improv. Co. v. Auzerais* (1895) 106 Cal. 498, 39 Pac. 859, wherein it was said: "As the city council never acquired any jurisdiction to order the work, the subsequent acts in its performance were not within the authority conferred by the statute, and none of the provisions of the statute can be invoked in support of the acts of the municipality, or of its officers, or to impair any defense that the defendant may have."

Similarly, where a statute requires the city council to designate a newspaper for the publication of a resolution of intention, this provision is mandatory, and a publication in some paper not designated is not a compliance with the statute, and is in effect no publication; hence, an objection to an assessment on this ground is not waived by a failure to appeal to the board of supervisors. *Chase v. Los Angeles* (1898) 122 Cal. 540, 55 Pac. 414.

But, in Alabama, the fact that a resolution is illegal, because it was not published in a newspaper as required by law, is an objection which cannot be made in a suit to enjoin the collection of an assessment, where a property owner has not followed the provision of a statute in failing to file a protest at the confirmation of the assessment, such failure being deemed by the statute a consent to the assessment. *Birmingham v. Wills* (1912) 178 Ala. 198, 59 So. 173, Ann. Cas. 1915B, 746.

It has been held that the fact that an assessment resolution included an item for the construction of a disposal system as part of a sewer contract,

which did not appear in the ordinance authorizing the work, might be objected to, notwithstanding a failure to appear before the city council or to appeal from its decision. *Bennett v. Emmetsburg* (1908) 138 Iowa, 67, 115 N. W. 582.

Likewise, an objection to an assessment on the ground that, at the time of the passage of a resolution of intention to pave, there were no plans and specifications on file, is waived by a failure to raise it before the confirmation. *Chilcott v. Buffalo* (1889) 27 N. Y. S. R. 222, 7 N. Y. Supp. 638.

And it has been held that, where the city charter constitutes the common council a board of review to review the assessments made by the board of public works, a property owner having notice of the hearing of appeals, who failed to attend or to file objections, waived his right to question an assessment for the construction of a sewer on the ground that the improvement was not embraced in the report of the board as necessary for the current year, following the requirements of the statute. *Nelson v. Saginaw* (1895) 106 Mich. 659, 64 N. W. 499.

A landowner who failed to object to the absence of a required declaration in the resolution of intention that the district assessed was the district to be benefited cannot, after the proceedings are completed, the work done, and bonds issued in payment thereof, contest the proceeding for this defect, where the statute expressly declares that a failure to object at suitable time and place shall cure the defect. *Watkinson v. Vaughn* (1920) — Cal. —, 186 Pac. 753.

(b) *Estimate of cost.*

In general it may be said that a party who fails to appear before the viewers and state his objections as to the estimate of the cost of a street improvement is estopped by the order of confirmation of their report. *Re Twenty-eighth Street* (1893) 158 Pa. 464, 27 Atl. 1109, wherein the court said: "The proper practice under the Act of 1891 is for the lot owner to appear before the viewers and aid them, if he can, in determining what the

materials and labor employed in the improvement are really worth. If they refuse to hear him or disregard his proofs, he should except to the report when filed. If the court does not correct the errors of the viewers, he can readily put himself in position to be heard in this court. If, instead of appearing before the viewers and the court below, he waits until after final confirmation, and then brings up the record on certiorari, he cannot be heard on any question of fact."

And see *Travers's Appeal* (1893) 152 Pa. 129, 25 Atl. 528, wherein the court said with reference to an estimate of cost: "The questions which a lot owner desires to raise should be raised before the viewers in the first instance, or at least upon the hearing before them when their report is made up. All exceptions and requests in writing for rulings placed before them should be returned with their report to the court. If one does not appear before the viewers to raise the questions of fact on which he wishes to be heard, he may properly be held to have waived them, unless he accounts satisfactorily for his failure to appear before the viewers. Questions of form or of law arising upon the face of the report may, however, be brought to the attention of the court by exceptions by anyone interested, and without regard to his appearance or nonappearance before the viewers." See to the same effect, *Childs's Appeal* (1892) 152 Pa. 134, 25 Atl. 529; *Shanley's Appeal* (1893) 152 Pa. 135, 25 Atl. 529; *Wilson's Appeal* (1893) 152 Pa. 136, 25 Atl. 530; *Rich's Appeal* (1893) 152 Pa. 138, 25 Atl. 530.

In *Gage v. People* (1903) 207 Ill. 61, 69 N. E. 635, it was held that a failure to object to a paving assessment, on the ground that no itemized estimate of the cost of an improvement was made part of the record of the resolution before the court in confirmation proceedings, estopped the property owner from raising the question in later proceedings. The court said: "This objection would have been a good objection, had it been made to the confirmation of the assessment. Not being made, however, until the time

of the application for judgment for delinquent instalments of that assessment, it is in the nature of a collateral attack upon the judgment of the county court confirming the assessment. We have frequently held that no defense which existed at the time the judgment of confirmation was entered, and which might have been interposed in that proceeding, can be made upon an application for judgment for the sale of real estate to satisfy the special assessment, unless it be shown that the county court did not have jurisdiction of the proceeding to confirm the assessment." See to same effect, *Ryan v. People* (1903) 207 Ill. 74, 69 N. E. 638; *Thompson v. People* (1904) 207 Ill. 334, 69 N. E. 842; *Gage v. People* (1904) 207 Ill. 377, 69 N. E. 840; *Lyman v. Chicago* (1904) 211 Ill. 209, 71 N. E. 832.

So, property owners who, in response to notice duly given, fail to appear before the city council at confirmation of a paving assessment, are thereby estopped from objecting to the sufficiency of the engineer's report in that it does not contain the estimated amount of cost to be borne by each lot in an assessment district. *Great Northern R. Co. v. Leavenworth* (1914) 81 Wash. 511, 142 Pac. 1155, Ann. Cas. 1916D, 239. The court said: "Had the property owners appeared and urged their objections in the initial state of the proceedings, the council would have been in a position to correct the defects. Having failed to appear, and having permitted the improvement to proceed, and not having urged the objections until they were urged to the confirmation of the assessment roll, it would seem only reasonable to hold that the objections as to the defective report of the engineer had been waived. Our attention has been called to, and reliance is placed upon, the case of *Buckley v. Tacoma* (1894) 9 Wash. 253, 37 Pac. 441, as sustaining the contention that the failure of the city engineer to report all the data required by the resolution and statute was a jurisdictional defect and rendered the assessment void. In that case the court was construing a charter provision of the city of Tacoma, which differs somewhat from the

present statute. This charter required that, after a resolution had been passed by the city council ordering the improvement, a diagram and estimate should be filed in the office of the board of public works for the instruction of all persons interested therein. If persons owning a certain amount of the property to be affected did not object within a time specified, the board of public works should proceed with the improvement. In that case, as shown by the opinion, no resolution was passed ordering the improvement. No attempt was made to file a diagram or estimate, and the notice given was defective. Under § 10 of the statute . . . the report is required to be submitted to the council, and the improvement, if ordered, must be ordered thereafter by ordinance. In that case, there was not only no resolution or notice, as required by the charter, but there was no attempt to file a diagram or estimate. In this case there is no question raised relative to the sufficiency of the resolution and ordinance, and there was an attempt on the part of the city engineer to report the data required. To hold that this case is ruled by the *Buckley Case* would be to extend the doctrine of that case." See to the same effect, *Sampson v. Leavenworth* (1914) 81 Wash. 700, 142 Pac. 1160.

An objection that sidewalk proceedings are illegal because the estimate of the engineer, which was the basis of the ordinance for an improvement, was not itemized as required by statute, cannot be raised in an application for judgment of sale. *Noonan v. People* (1906) 221 Ill. 567, 77 N. E. 930. The court said: "We call attention once more to § 66 of chapter 24 (*Hurd's Stat.* 1903, p. 406), which provides that upon the application for judgment and order of sale upon any assessment, or the interest thereon, or the interest accrued on instalments not yet matured, no defense or objection shall be made or heard which might have been interposed in the proceedings for the making of such assessment, or the application for the confirmation thereof, and no error in the proceeding to confirm, not affect-

ing the power of the court to entertain and consider the petition therefor, shall be deemed a defense to the application for judgment. The construction of this section has been before this court on many occasions, and we have uniformly held that an attempt to question the sufficiency of the estimate of the engineer is in the nature of a collateral attack upon the assessment, and not available upon the application for judgment and order of sale."

And where a property owner does not avail himself of the opportunity to appear before the city council and be heard on his objections, he waives the right to raise afterwards the question that a paving assessment is invalid because the certificate of costs made by the board of public works was not signed by the members. *Duffy v. Saginaw* (1895) 106 Mich. 335, 64 N. W. 581.

So, an objection that the estimate of the cost of a street improvement was made prior to the passage of the ordinance is one which should be made at the application for confirmation, and it cannot be raised for the first time upon application for judgment of sale for the delinquent assessment. *People ex rel. Kochersperger v. Colvin* (1897) 165 Ill. 67, 46 N. E. 14. The statute involved in that case provided that, "upon the application for judgment upon such assessment, no defense or objection shall be made or heard which might have been interposed in the proceeding for the making of such assessment or the application for the confirmation thereof." The court said: "It is not claimed that the court did not have jurisdiction of the cause and of the parties when the judgment of confirmation was entered, and we have frequently held that where such jurisdiction appears, no objection which could have been urged against the confirmation can be made against the petition of the collector for judgment of sale, which decisions simply give effect to the foregoing statute."

Likewise, an objection that the description in the estimate of the cost of an improvement does not correspond with the description of the im-

provement contained in the ordinance, in that the curbing work to be done in the one is described in the other as plastering and resetting, is waived if not raised as provided by statute. *Chicago Terminal Transfer Co. v. Chicago* (1899) 178 Ill. 429, 53 N. E. 361, wherein the court said: "This is not the improvement estimated by the engineer. But if the appellant desired to take advantage of the discrepancy between the estimate and the ordinance, an objection pointing out the variance should have been made, so that the city could have had an opportunity to explain or supply the alleged defect. But no objection of that character was interposed in the county court. The only objection which had any reference to the estimate filed by the appellant was No. 20, as follows: 'The estimate of the cost of said improvement is void.' This objection did not raise the question now presented. The estimate was in proper form. It properly estimated the cost of paving the street with asphalt, adjustment of sewers, catch basins, and manholes, and estimated the amount required for making and collecting the assessment. Indeed, no objection is perceived to the estimate except in regard to the curb walls and curbstones. We cannot, therefore, regard the estimate as void, and, as the objection now made to the estimate was not made in the county court, it must be regarded as waived." See to the same effect, *Fiske v. People* (1900) 188 Ill. 206, 52 L.R.A. 291, 58 N. E. 985.

And it has been held in a suit to enjoin the collection of an assessment that a property owner was estopped from alleging that no estimates of the cost of the improvement were made prior to the adoption of the resolution ordering the work to be done, where it is provided by statute that a failure to file objections to an assessment with the city authorities, sitting for the purpose of hearing and determining such objections, shall be considered as a consent to the proceedings, and he failed so to object. *Birmingham v. Wills* (1912) 178 Ala. 198, 59 So. 173, Ann. Cas. 1915B, 746.

But where a failure to observe a

charter provision requiring a detailed estimate of the cost of a sewer to be obtained before proceeding with the work renders the proceedings void, a property owner, without previous objection, may sue to enjoin the collection of the assessment, on the ground that the original ordering of the work, as well as the subsequent laying and levying of the assessment to pay for it, was illegal. *Mills v. Detroit* (1898) 95 Mich. 422, 54 N. W. 897.

(c) *Qualification of official.*

The final judgment of a court or of the common council, confirming an assessment, is conclusive as to irregularities not affecting the jurisdiction, and an objection not raised in that proceeding is waived. Thus, an objection to the qualification of assessors comes too late, when made for the first time after the confirmation of the assessments. *Re Miller* (1861) 12 Abb. Pr. (N. Y.) 121.

Where the commissioners appointed to make an assessment did not take the oath in the exact form as prescribed by statute, the objection should be made on the confirmation of the assessment, and if not then made it is considered as waived. *Walker v. People* (1897) 170 Ill. 410, 48 N. E. 1010, wherein the court said: "If the objection interposed had been made on the application to confirm the assessment, it might have been sustained; but on an application to confirm a special assessment, where the court has jurisdiction to render the judgment of confirmation, such judgment will conclude the landowner from questioning any of the proceedings had prior thereto, in a subsequent application for judgment and order of sale of the premises. . . . Here the affidavit was defective, but the defect was not of such a character as to deprive the court of jurisdiction." See to same effect, *Gross v. Grossdale* (1898) 176 Ill. 572, 52 N. E. 870.

So, an objection that only two of the three commissioners appointed to estimate the cost of an improvement acted in making the estimate, and but two signed the report, does not go to

the jurisdiction, and cannot be raised in an action for judgment and sale of delinquent property, where the property owner did not appear to object at the confirmation proceedings. *People ex rel. Kochersperger v. Markley* (1897) 166 Ill. 48, 46 N. E. 742. The court said: "The first question to be considered is whether the court had jurisdiction to render the judgment of confirmation. Where, upon an application for the confirmation of a special assessment, the court has jurisdiction to render the judgment of confirmation, such judgment will conclude the landowner from questioning any of the proceedings had prior thereto, on a subsequent application for a judgment and order for sale of the premises; but if the proceedings anterior to the judgment confirming the assessment were so defective as not to authorize the court to act at all upon the question of confirmation, then the objections to these proceedings may be made upon an application for judgment and order of sale.

. . . The same rule has been declared in *Clark v. People* (1893) 146 Ill. 348, 35 N. E. 60; *Culver v. People* (1896) 161 Ill. 89, 43 N. E. 812, and other cases. In regard to the first point relied upon to defeat the judgment of confirmation: Section 135, chapter 24, of the Revised Statutes, requires the city council to appoint three competent persons, who shall make an estimate of the cost of the improvement and report the same in writing to the city council. Section 136 provides that, upon such report being made and approved by the city council, it may order a petition to be filed in the county court for proceedings to assess the cost of the improvement. Section 137 provides that the petition shall recite the ordinance for the improvement and the report of the commissioners appointed to estimate the cost of the improvement. . . . As appears by the allegations of the petition filed, but two of the commissioners appointed to estimate the cost of the improvement acted. The petition was defective, and had appellee appeared and interposed an objection, no judgment of confirmation would have been entered unless

the defect in the petition had been cured by amendment. But the defect was not one which affected the jurisdiction of the court, and while the court may have erred in rendering a judgment of confirmation on the petition without amending it, the action of the court was a mere error, which cannot be availed of on application for judgment against delinquent lands." See to the same effect, *Larson v. People* (1897) 170 Ill. 93, 48 N. E. 443.

But where a committee of two is appointed to make and certify a bill of the cost of a sidewalk, and but one acts, it has been held that the question may be raised on application for judgment of sale. *Vennum v. People* (1900) 188 Ill. 153, 53 N. E. 979, wherein the court said: "In this proceeding for the levy of a tax for the construction of a sidewalk, the property owner has no opportunity to question the act of the sidewalk committee, until the application for judgment against his delinquent land is made. He has no opportunity, as is the case in special assessment proceedings, to make objections upon an original application for the confirmation of the assessment."

And where it appeared that two of the commissioners appointed to assess the benefits of the opening of a street were interested as owners of property within the district to be assessed, it was held that the decision of the city council on the hearing expressly provided by statute, after notice to the property holder giving him an opportunity to make an objection, was conclusive, and a failure so to appear was a waiver of the right. *United Real Estate & T. Co. v. Barnes* (1911) 159 Cal. 242, 113 Pac. 167. The court said: "As the defect is not jurisdictional, because the statute does not expressly forbid such action, the objection constitutes a mere irregularity, which must be urged at the hearing provided for that purpose the same as any other objection to the regularity of fairness of the assessment. In the case at bar, the commissioners fixed the damages and apportioned the same to the several tracts of land within the district as an as-

essment. Under the statute, this must be reported to the city council for confirmation before it is of any effect whatever. When it comes before the council that body again takes up the matter, and if the assessment is confirmed it becomes a lien upon the property. But it has no force or effect whatever until it is promulgated by the council. It is, in effect, an assessment made by the council itself. Under such circumstances the fact that one or more of the commissioners who made the preliminary report on which the assessment is based is interested is not sufficient to invalidate the assessment unless the objection is made at the hearing before the council."

Likewise, an objection that the court did not appoint commissioners to assess the cost of a street improvement should be made on the application for confirmation, and, failing to do this, a property owner is estopped from raising the question in a proceeding for judgment and sale of the property. *Schertz v. People* (1882) 105 Ill. 27. The court said: "If the proceedings anterior to the judgment confirming the assessment were so defective as not to authorize the court to act at all upon the question of confirmation, then it is equally clear the objections in question might properly be made upon an application for judgment and order of sale of the lots, as well as at any other time, and if such was the case, the court erred in ordering them stricken from the files. The doctrine that the judgments and orders of a court acting without jurisdiction are absolutely void, and may be successfully resisted wherever and whenever sought to be enforced, even in a collateral proceeding, is so well understood and elementary in its character as to require no discussion at our hands."

However, where it appears that the persons appointed to make an assessment had no exceptional knowledge of values in the locality of the improvement, a property owner may object to an assessment on this account, notwithstanding he signed a remonstrance in which two thirds of the property owners joined, but later

withdrew his name. *State, Roebling, Prosecutor, v. Trenton* (1895) 58 N. J. L. 40, 32 Atl. 685, wherein the court said: "By the filing of the remonstrance or refusal within the statutory limit, signed by the requisite number, the city was deprived of the power to proceed, and that power could not be restored to the city by the attempted withdrawal of any number of the persons assessed."

(d) *Notice.*

Where a notice of intention to make a street improvement is defective in not correctly "naming the purposes for which the taxes are to be levied," and in not describing the proposed improvement, the case stands as if no notice was given, and a landowner may enjoin the collection of the assessment as in excess of the improvement contemplated by the notice, notwithstanding no objection was previously made by him. *Gwilliam v. Ogden City* (1917) 49 Utah, 555, 164 Pac. 1022.

In *Mills v. Detroit* (1893) 95 Mich. 422, 54 N. W. 897, it appeared that the complainant never received notice of the intended improvement, and the first he ever heard of it or of the assessment was when called on to pay the tax, though he lived in the city and had for many years. It was held that he was not estopped from maintaining a suit to enjoin the collection of the assessment on the ground of the invalidity of the ordinance.

However, although a city may fail to obtain jurisdiction because of a defective notice of an improvement, yet if property owners appear and file a remonstrance, which they afterwards withdraw, they are estopped to object. *Barlow v. Tacoma* (1895) 12 Wash. 32, 40 Pac. 382, wherein the court said: They "saw fit to appear in said proceeding and remonstrate against the prosecution of the work, on the sole ground that the same would involve the expenditure of a large amount of money, and that it would considerably inconvenience said parties remonstrating to pay their proportion thereof. Subsequently, in consequence of an extension by the council of the time of payment for

two and a half years, these parties withdrew their remonstrance. This action supplied the defect aforesaid in the proceedings and conferred jurisdiction upon the city to proceed as against said parties, and they are estopped from raising the questions presented."

So, an objection that it was not made to appear in the confirmation proceedings that an affidavit of service of notice of the passage of a sidewalk ordinance, within ten days after its passage, was filed with the official report of the assessment, as required by law, cannot be raised for the first time on application for judgment and sale. *People ex rel. Gifford v. Belz* (1911) 252 Ill. 296, 96 N. E. 910. In that case the court said: "The law is well settled that no objection to an assessment can be made on application for judgment and order of sale, which could have been raised on the application for confirmation, unless it goes to the jurisdiction of the court to enter the judgment of confirmation (*Phillips v. People* (1905) 218 Ill. 450, 75 N. E. 1016), and which lack of jurisdiction must appear upon the face of the record. . . . While it may be true that proper proof of notice of the passage of the ordinance was not filed, and the appellants were not given the statutory period in which to construct the sidewalk, these questions did not go to the jurisdiction of the court to hear and determine the question whether the assessment should be confirmed. Had the appellants raised the questions now sought to be raised, and they had been decided adversely to their contention upon the application for confirmation, they could have had those questions reviewed in a direct proceeding. They cannot, however, have them reviewed on an application for judgment and order of sale for the nonpayment of the assessment, as that would be to review them in a collateral proceeding. The fact that the judgment of confirmation was rendered by default can make no difference. The appellants had notice of the application for confirmation, and they were then required to appear and raise all questions which they de-

sired to raise, which showed the assessment ought not to be confirmed and which did not go to the jurisdiction of the court, and if they failed to appear, and a judgment of confirmation was entered against their lands, they and their property are bound by that judgment. Clearly, if the appellants had appeared and objected to confirmation on the grounds now urged against the judgment and order of sale, and their contentions had been overruled and the assessment confirmed, they would have been barred. In that event it must be conceded the county court would have had jurisdiction to pass upon the questions now raised, and the jurisdiction of a court cannot rest, so far as the questions decided are concerned, upon which way those questions are decided."

That proof was not made that a property owner was given forty days' notice, as provided by statute, in which to construct a sidewalk in front of his property before proceedings for confirmation were commenced, is an objection not going to the jurisdiction, and, if not raised in the confirmation proceeding, is waived. *People ex rel. Gifford v. Belz* (Ill.) supra, wherein the court said: "The statute conferred upon the county court jurisdiction of the confirmation of special assessments, and the application for confirmation of this particular assessment conferred jurisdiction upon the county court of this assessment, and the giving of the statutory notice authorized the county court to proceed to confirm the assessment. The questions, therefore, as to whether proper proof was made of the service of notice of the passage of the ordinance, or whether the appellants were given the statutory period allowed to construct the sidewalk in front of their property before the confirmation proceedings were commenced, were questions which could have been properly raised in the county court upon the application for confirmation."

In a proceeding for judgment and sale of property, for nonpayment of a street assessment, the court will, on the application to the circuit court for

the confirmation of an assessment, hear an objection that due notice was not given of the application for the appointment of commissioners, notwithstanding the question was not raised at the confirmation. The objection goes to the jurisdiction, and the statutory requirements as to publication must be followed. *Le Moyne v. West Chicago Park* (1886) 116 Ill. 41, 4 N. E. 498, 6 N. E. 48.

A property owner will not be permitted to attack the validity of a direct assessment on the ground that the requirements as to notice of the hearing of objections were not strictly complied with, where it appears that a full opportunity to be heard was given, and the owner failed to object. *Millikan v. Crail* (1912) 177 Ind. 426, 98 N. E. 291, wherein the court said: "While the property owner must have notice at some time before the final assessment is made, in order to give the tribunal vested with jurisdiction of the subject-matter, jurisdiction over his person and property, and so meet the constitutional requirements of due process of law, it is not required that he shall be notified of the intention to make the improvement, nor of the preliminary resolution. Neither is he entitled to notice of every intermediate step in the proceeding leading to an assessment against his property. It is sufficient if notice is given him before the assessment becomes final and conclusive."

So, an objection that the notice given of the time and place of hearing objections to a proposed street improvement required such objections to be presented in writing is waived, where a property owner did not appear at the hearing. *State, Townsend. Prosecutor, v. Jersey City* (1857) 26 N. J. L. 444, wherein the court said: "In the case of *State, Durant, Prosecutor, v. Jersey City* (1855) 25 N. J. L. 311, a similar notice was considered as invalidating the ordinance. It is to be remarked, however, that in that case the council never, in fact, appointed a time for hearing persons interested, as the charter requires, and the ordinance passed was not introduced at a previous stated meet-

ing; so that it may be doubted whether the mere insertion of the words in the notice that objections should be made in writing, in a case where no objections of any kind were offered, would have been held to render the ordinance absolutely void. Be that as it may, it appears in this case that after the assessment was made the prosecutors presented several written remonstrances against confirming it, in none of which is the ordinance itself objected to. Notice of a proposed ordinance authorizing improvements is required, to give the parties interested, upon whom the expense must fall, an opportunity of being heard, and stating their objections, if they have any. If any such party had appeared, and desired to be heard verbally, or had made written objections, and therein expressly reserved all legal objections, as was done in the case referred to, he might with propriety afterwards insist that, so far from consenting to the improvement, he had formally dissented. But here the prosecutor offered no objections to the contemplated improvement in any way, but subsequently made objection to the amount assessed against him, for reasons which implied his assent to the ordinance itself. Under these circumstances, I think he must be held to have waived any objection he might have taken to the form of the notice, and to have consented to the passing of the ordinance, so far as his interests were concerned."

So, where the supervisors, after due notice as required by statute, met at the time and place fixed for a hearing of protests to an assessment, and, after deciding thereon, adjourned for four weeks, property owners who did not attend the hearing cannot object to the adjournment. They "were bound by the notice of the hearing previously given, and were required to take notice that a continuance might be ordered. They had the privilege of attending at the hearing, and of contesting any claim made for increase of damages. By failing to appear they waived the right and are concluded by the result." *Hayne v. San Francisco* (1917) 174 Cal. 185, 162

Pac. 625. See to the same effect, *Telegraph Hill Neighborhood Asso. v. San Francisco* (1917) 174 Cal. 814, 162 Pac. 630; *Cooper v. San Francisco* (1917) 174 Cal. 813, 162 Pac. 631; *Simpson v. San Francisco* (1917) 174 Cal. 815, 162 Pac. 631.

The fact that the notice by assessors that they had completed the assessment roll was published before the approval by the mayor of the resolutions ordering the work is an irregularity which cannot be objected to after the confirmation of the assessment. *Lyth v. Buffalo* (1888) 48 Hun (N. Y.) 175, wherein the court said: "It was the duty of the plaintiff to have appeared before the clerk and filed his objection to the confirmation of the roll, as required by the notice published by the clerk in accordance with the charter, and . . . by neglecting to do so he has waived the irregularity."

In *Brown v. Chicago* (1886) 117 Ill. 21, 7 N. E. 108, it appeared that, after petition by property owners, an order was made by council deferring action on an improvement for two years, but before the time had elapsed the assessment roll was filed in the county court for confirmation, and notices published as required by law. It was held that an objection to the validity of the proceedings after the order of discontinuance was one properly to be raised at the confirmation of the assessment, and a bill would not lie to enjoin the collection, at the suit of a property holder who failed so to object.

Similarly, in *Hertig v. People* (1896) 159 Ill. 237, 50 Am. St. Rep. 162, 42 N. E. 879, an action for judgment and sale of property for failure to pay a street assessment, the defendant offered testimony to prove that the notice of confirmation was insufficiently set out in its publication. The court excluded the testimony, saying: "The proper time to have tendered such testimony was at the hearing of the confirmation proceeding. As it was, the offer came too late, for this is a collateral proceeding, in which it is sought to attack the jurisdiction of the court to render the

judgment. In the record of the confirmation proceeding there appeared a certificate which was sufficient, if true, and the judgment recited that the facts alleged in such certificate were true, consequently it will be assumed that the court had sufficient evidence before it to warrant the rendering of judgment. Even were the certificate in fact insufficient, appellant could take no advantage of it in this, a collateral proceeding, for in such a case the presumption would be that the court heard and acted upon other and sufficient evidence to sustain the finding."

See to the same effect, *Kirchman v. People* (1896) 159 Ill. 265, 42 N. E. 384.

And where a property owner does not file objections with the city council as provided by statute, she is estopped thereafter from contesting a street assessment on the ground of irregularity; thus, where a notice of the date of hearing of objections is two days short of the required time, it is defective only, and not void, and an owner cannot by injunction set aside the assessment, and thus collaterally attack the finding of the city council. *Owens v. Marion* (1905) 127 Iowa, 469, 103 N. W. 381, wherein the court said: "Plaintiff in the instant case gave no attention to the notice, and she neither filed nor offered to file any objections to the assessment as shown on the plat and schedule. The assessment was confirmed on the 8th day of September, 1902, after the giving of the notice referred to, and as plaintiff made no objection thereto, she waived all errors, irregularities, and inequalities in the making of the assessment, and in the prior proceedings and notices."

A landowner who fails to object to the city council that the notices of improvement were not posted "immediately," as required by statute, has waived such defect where it is not claimed that the notices did not stay up the required length of time after they were posted. *Watkinson v. Vaughn* (1920) — Cal. —, 186 Pac. 753.

An objection that an assessment is invalid, because the city charter does not specify the tribunal or the time or place for hearing objections before assessments for sidewalks constructed by the city shall become final, is waived, where power is given the city authorities to provide for such notice and such tribunal, and the property owner fails to present his objections when notified to do so. *Hallett v. United States Security & Bond Co.* (1907) 40 Colo. 281, 90 Pac. 683, wherein the court said: "Perhaps owners filing objections to assessments in response to the notice by the clerk, which the ordinance says shall be given to them, should have notice of the time and place when they would be considered and determined, but that right has not been denied in the case at bar, because no objections were filed, and the ordinance cannot be construed to inhibit or not to require such a notice to those who have filed objections. The charter and ordinance are not invalid because neither specifies the character of objections which will be considered in fixing the amount of the sidewalk assessments. Having provided for a hearing with respect to such assessments, it logically follows that the tribunal designated shall hear and determine all questions which would be competent to present to that tribunal, attacking the validity or amount of such assessments. . . . Whether or not the charter of 1889 failed to provide a specific method for determining how the assessment against a lot to defray the expense of constructing a sidewalk in front thereof should be made, or left it with the city authorities to make such assessment according to benefits, is not presented by the record. It was the province of the city authorities to determine the rule to be followed in making, and the amount of, the assessment in the first instance. Neither appellant nor his predecessor raised any question before the special forum provided by law to determine these questions. The owner must avail himself of the opportunity afforded to appear and make objections to special assessments in

the special forum which the law has designated for that purpose. Otherwise, he will not be heard to object in any other forum."

Where a property owner fails to avail himself of the remedy provided by law, a court of equity will not set aside a judgment and restrain the collection of a street assessment on the ground of want of notice, where such defect does not appear on the face of the record. *Craft v. Kochersperger* (1898) 173 Ill. 617, 50 N. E. 1061.

But where a statute provides that a notice of assessment shall be served on the owners of property, so that they may make objection at the confirmation of the assessment, the requirements are to be strictly followed, and, on failure to prove the proper service, the owner may contest the assessment on the application for a judgment of confirmation. *Murphy v. Peoria* (1887) 119 Ill. 509, 9 N. E. 895.

So, the objection that no notice was given to property owners, and that, therefore, there was no opportunity to be heard on the assessment roll, is not waived by failure to appear at the confirmation proceedings, and may be heard in an application for judgment of sale. "The failure to give notice to the property owners, and to afford them an opportunity to be heard before the confirmation of the assessment, was fatal to the jurisdiction of the county court, and the court did not err in sustaining the objection." *People ex rel. George v. Phinney* (1907) 231 Ill. 180, 83 N. E. 143.

Nor does the confirmation of the report of viewers preclude a property owner who has had no notice of the filing of the report nor opportunity to be heard as to his objections; hence he may be heard in defense on a scire facias lien. *Hershberger v. Pittsburgh* (1886) 115 Pa. 78, 8 Atl. 381, wherein the court said: "If the defendant had no notice, he had no opportunity to make defense before the viewers or in court; in such case the confirmation of the report of the viewers amounts to nothing as respects the defendant; he may make his defense on the scire facias."

Where notice of the report of viewers and hearing thereon was served on the husband of the owner of property, she is not estopped by the confirmation of the report from objecting to the assessment. *Watson v. Sewickley* (1879) 91 Pa. 330, wherein the court said: "It is the intent of the statutes relating to boroughs that notice shall be given to every person of a proceeding to fix him for a debt. Not only is it directed of the incipient action to ordain or change streets or alleys, but it is implied in the provision for assessment of damages and benefits. How can parties choose to contest, and have a hearing in court, unless they have been notified? And how can a decree be final upon a stranger to the record? What matters it that the assessment is on property, when the owner is entitled to a hearing before it can be made? His right to contest is the same, whether the assessment be a personal debt or charge on land."

"If the property owner has notice, his only method of questioning any error or irregularity in the proceeding is by objection before the city council and appeal to the district court. It is well settled that when a special tribunal is provided for determining such questions, the property owner, with notice of the proceeding, must avail himself of the special remedy by objection and appeal, and cannot maintain an equitable action to enjoin the enforcement of the assessment. . . . It is quite evident that if the property owner has no notice whatever he is not bound to make objections before the city council; for the want of notice deprives him of legal opportunity or duty to make such objections. . . . If, however, as in this case, the property owner has received notice, and has had opportunity to make his objections, we think it is in accordance with the theory of the statute, and also in accordance with general equitable principles, that he should make such objections and prosecute his appeal if he is dissatisfied with the action of the council." *Shaver v. J. W. Turner Improv. Co.* (1911) — Iowa, —, 133 N. W. 770.

Failure to file objection at a confirmation of a paving assessment, because no notice of the application for the judgment of confirmation had been received, will not estop a property owner from having the question litigated in an action for judgment of sale. *Phillips v. People* (1905) 218 Ill. 450, 75 N. E. 1016, wherein the court said: "The statute requires that a notice shall be sent by mail, postpaid, to each of the persons paying the taxes on the respective parcels of property on the assessment roll for the last preceding year during which taxes were paid, and if such notices were not mailed the county court did not acquire jurisdiction to enter the judgment of confirmation. If the fact was as alleged, and the want of jurisdiction appeared upon the face of the record of the proceeding to confirm the assessment, appellants had a right to make proof of the fact. The answer of counsel, to the assignment of error that the court struck the objection from the files, is that the record of the proceeding for confirmation is not contained in the record in this case, and that therefore it will be presumed that the court, in confirming the assessment, proceeded regularly and had jurisdiction, and that all notices required by law were given. What would have been proved by the record of the proceeding for confirmation, if the objectors had been permitted to make the proof, of course, does not appear, but the complaint is that the court refused to allow them to show the fact. The collector's report, with proof of publication thereof and notice of application for judgment, made a prima facie case for the collector. . . . The objectors had a right to meet the prima facie case by showing a want of jurisdiction upon the face of the record of the former proceeding, and when they filed their objection it was their right to have it heard. The court erred in striking the objection from the files."

So, where a property owner fails to appear on the hearing for judgment, and interpose an objection of want of notice of the application to the common council for confirmation of an

assessment for grading, he is not estopped from questioning the assessment in later proceedings, since the notice is essential to the validity of the action of the city council in confirming the assessment. *Sewall v. St. Paul* (1874) 20 Minn. 511, Gil. 459.

On the contrary, a notice of a sidewalk assessment which is technically defective, but which did not mislead property owners, since it contained all the essentials required by law, cannot be objected to in a later proceeding, where the owner did not appear and raise the objection at the hearing for such purpose. *State v. Norton* (1896) 63 Minn. 497, 65 N. W. 935.

(e) *Contract for improvement.*

An objection that the notice to bidders was insufficient in that it failed to state when the work was to be done, kind of material to be used, etc., does not go to the jurisdiction, and is waived by a failure to appear before the tribunal named by statute to hear such protests. *Owens v. Marion* (1905) 127 Iowa, 469, 103 N. W. 381.

So, an objection that a contract for a street improvement was not let within the time limit prescribed by statute is one which should be made at the confirmation of the assessment, and is waived if not made at that time. *Gage v. People* (1904) 213 Ill. 410, 72 N. E. 1084, wherein the court said: "There is nothing in the record to show that appellant was in any way injured by the contract, and if he had been, he had adequate remedy under the statute, and it was his duty to act promptly. Section 80 of chapter 24 (Hurd's Stat. 1903, p. 409) provides that the owners of a majority of the frontage may take the contract from the successful bidder if they think they can profit by so doing. The appellant could have availed himself of this provision, or he could have objected to the board of local improvements on the ground that the contract was not let within the time authorized by law, or he could have made the objection in the county court at the time the board of local improvements filed their petition for a hearing, after the completion of the work.

Having failed to take advantage of any of these opportunities, and having received the benefit of the work, and in the absence of any proof of injury, the county court committed no error in overruling the objection."

Similarly, a property owner is not estopped to deny the validity of an assessment for paying by the failure of his predecessor in title to appear and present his objections, where it appears that the proceedings are wholly void because the mandatory provisions of the city charter in letting the contract were not complied with. *Moundsville v. Yost* (1914) 75 W. Va. 224, 83 S. E. 910, wherein the court said: "The charter requires notice to be published for four weeks in one or more newspapers of the city for bids and proposals for the work. This provision is intended to protect the property owners liable to special assessment, as well as the general taxpayer, by ample notice to prospective bidders, and is also mandatory. The bill shows that it was not complied with. The advertising, by the express terms of the resolution, was to be for only fifteen days. The allegation that the work was not let to contract until four weeks after the first publication of the notice does not show a substantial compliance with the statute. It should have been published for four weeks as the statute requires."

Where it is evident that defects in the proceedings could not have been remedied or avoided by a city council on an objection to an assessment, a property owner is not estopped by reason of his failure to file such objection. *Manning v. Den* (1891) 90 Cal. 610, 27 Pac. 485. In that case it appeared that the city council awarded to the assignors of the plaintiff a contract for doing the work upon which the assessment in question was afterwards issued; that the clerk posted a notice of said award "on the 17th day of October, 1883, and for five days thereafter;" that afterwards, on the 22d day of October, 1883, the street superintendent entered into a contract with the plaintiff's assignors to do said work, and thereafter made the assessment upon which the action was

brought. Section 5 of the Act of March 18, 1885, authorizing street improvements, provided as follows: After the contract has been awarded, "notice of such awards of contracts shall be posted for five days, in the same manner as hereinbefore provided for the publication of proposals for said work. The owners of the major part of the frontage of lots and lands upon the street whereon said work is to be done . . . may, within ten days after the first posting of notice of said award, elect to take said work, and enter into a written contract to do the whole work at the price at which the same has been awarded. Should the said owners fail to elect to take said work, and to enter into a written contract therefor within said ten days, . . . it shall be the duty of the superintendent of streets to enter into a contract with the original bidder, to whom the contract was awarded at the prices specified in his bid." The court said: "The provisions of this section make it clear that the superintendent is not authorized to enter into a contract with the person to whom it has been awarded, until after the expiration of ten days from the first posting of the notice of award. During that period the owners of the land to be assessed are allowed the privilege of electing to take the work, and enter into a written contract to do the same at the price at which it was awarded. The power of the superintendent to enter into a contract with the 'original bidder' does not arise or come into existence except upon a failure of the owners to make their election within the statutory period; and any contract entered into by him with the bidder before the time when, by the statute, he has the power to enter into such contract, is without authority and void, and consequently cannot be the basis of a valid assessment. . . . The provision in the latter part of § 11 that 'no assessment shall be held invalid except upon appeal to the city council,' etc., has no application to a case in which an appeal is not authorized, or in which, even if taken, the city council could not have remedied the defect. The

legislature did not intend to declare that the owner should be deprived of his defense to any claim upon an assessment, where the assessment was void by reason of incurable defects, because he had failed to invoke the aid of a tribunal which was powerless to grant him any relief. Nor would the owner be estopped from presenting any such defects because he had appealed to the city council, and that body had denied him relief. Their denial of relief may have been based upon the express ground that the matter appealed from was not such as they could remedy, and therefore they would decline to take any action. If, however, they had expressly determined that the assessment was valid and the previous steps regular, their decision would not have any binding force. Being a tribunal of limited jurisdiction, unless the facts conferring such jurisdiction existed, their action would be void, and it would be competent at any time to show that they had no jurisdiction to determine the question."

And it has also been held that an objection that the notice to contractors, inviting them to bid, did not specifically state the extent of the work and the kind of materials to be furnished as required by statute, was not waived by a failure to appear and object to the city council and take an appeal from the decision thereof. *Bennett v. Emmetsburg* (1908) 138 Iowa, 67, 115 N. W. 582.

In *Comstock v. Eagle Grove* (1907) 133 Iowa, 589, 111 N. W. 51, a sewer assessment was attacked on the ground that there was no proper and legal published notice inviting proposals to do the work of construction, the statute requiring ten days to elapse after the last day of publication before bids were opened not having been complied with. It was held that the objection was jurisdictional, and, as the contract was void, the owner had not waived his right by his failure to object to the city council. The court said: "If the council did not have the power to proceed to an assessment, an abutting owner could not be bound against his will,

—expressed with reasonable promptness,—by any action it might see fit to take. It is fundamental that a want of jurisdiction, whatever the tribunal, is fatal to its acts, and no one can be held to have waived such want by failing to appear and object. It may be taken advantage of at any time or place. And, conceding the existence of power, no one will suppose that the legislature intended to create a tribunal whose acts, done without jurisdiction, should be deemed legal if no one appeared in response to a subsequent notice given by it, to make objection. On no principle, therefore, can a grant of right to a city council to proceed to the correction of errors, to reduce irregularities, or to adjust inequalities, be considered as having operation to cure jurisdictional defects occurring in its prior proceedings, simply on condition that a time shall be fixed for the making of objections and none shall be made."

An objection to an assessment, on the ground that the contract was invalid in that the specifications prepared by the city engineer called for work and materials not within the contemplation of the original resolution, is one which cannot be raised for the first time in a suit to enjoin the collection of an assessment, where the statute provides that "the council will meet to hear and determine any objections or defense," and that "persons who do not file objections in writing, or protests against such assessments, shall be held to have consented to the same." *Birmingham v. Wills* (1912) 178 Ala. 198, 59 So. 173, Ann. Cas. 1915B, 746.

And where it appeared that before a contract for an improvement was let, the contractor made a private arrangement with a part of the owners to do their work at a price less than that allowed by the contract, it was held that an owner was estopped from alleging the fraud was vitiating the assessment in an action for its enforcement, where he had failed to appeal to the board of supervisors within the time prescribed by statute. *Nolan v. Reese* (1867) 32 Cal. 484, wherein the court said: "Though the street com-

tract in question was free from illegality, in itself considered, still, assuming the facts which the defendant offered to prove, the side arrangements made by the contractor with a portion of the lot owners were in fraud of the method devised by the legislature for the opening and repairing of streets, and the contract itself would, therefore, on the principle of the common law, be illegal and void from the beginning. But under the provisions of the Act of 1862, we are cut off from subjecting the rights of the plaintiff to the test of those principles. Should the fraud with which the contractor was charged be considered as affecting the 'award of the work' to him by the board of supervisors (§ 6), then under the 4th section of the act it should have been brought to the notice of the board of supervisors by a remonstrance coming from one or more of the lot owners. If on the other hand the fraud is considered as affecting the 'legality of the assessment,' then any person having objections to make should have appealed to the board of supervisors within thirty-five days subsequent to the date of the assessment. § 12. Such are the methods pointed out by the act for reviewing the decisions of the board and the acts of the superintendent, and they exclude all others by positive provision."

"If a property owner fails to appeal upon the application to confirm an assessment, then, under the plain language of the statute, he is precluded from calling in question any of the proceedings anterior to the judgment of confirmation, except where the court rendering the judgment of confirmation is shown to have been wanting in jurisdiction to do so." *Fiske v. People* (1900) 188 Ill. 206, 52 L.R.A. 291, 58 N. E. 985, wherein it appeared that the specifications provided that eight hours should constitute a day's work, and that only members of labor unions should be employed. Although these provisions were declared unconstitutional, it was held that the objection was waived by failure to urge it at the confirmation proceedings. The court said: "We, however, have 9 A.L.R.—44.

searched in vain among the numerous objections made by the appellant in the county court to the entry of judgment of sale against his lots, for any objection which has reference to this provision of the specifications attached to the contract. None of the objections make any reference whatever to the contract or to any of its provisions, either to the specification requiring that eight hours shall constitute a day's labor, or to the specification that the contractor shall not employ, or permit to be employed, any person or persons other than native-born or naturalized citizens of the United States. As no objection of this kind was interposed in the county court, it must be regarded as waived in this court, and cannot be made here."

See also *Re Horn* (1861) 12 Abb. Pr. (N. Y.) 124, wherein the court said: "Had the petitioner brought this objection before the common council before the assessment was confirmed, it is reasonable to assume that the confirmation would never have been made, and that the defense of the city against the payment of the contractor for the work done under an illegal contract would have been resisted. The petitioner has slept upon his rights for four years, allowed the city government to pay for work done under a contract now alleged to be illegal and void, without any objection or notice on his part; and his claim now is that his land, although enjoying the benefit of the improvement, shall be relieved from bearing any share of the expense. It is not alleged or proven that the common council had not jurisdiction to confirm this assessment. The ordinance for the work was adopted, and the subsequent proceedings requisite to give jurisdiction must, in the absence of proof or allegation to the contrary, be assumed to have been complied with."

So, in *Himmelmann v. Hoadley* (1872) 44 Cal. 213, it was held that a fraudulent side agreement entered into between the contractor and a part of the lot owners, as rendering the contract between the contractor and the city, for sidewalks, illegal and

void, could not be litigated in an action to collect an assessment. It was said: "If the fact that the defendants had no knowledge of the fraudulent agreement until the time for an appeal to the board had elapsed entitles them to any relief, as the statute now stands, they could avail themselves of it only in a direct attack on the contract. It is apparent that the statute might readily be framed so as to afford adequate remedies which would reach both parties to those fraudulent contracts, and thus secure a greater degree of fairness and honesty in the administration of the street laws."

But in *Brady v. Bartlett* (1880) 56 Cal. 350, under the provisions of a later statute, a contrary rule was laid down, and it was held that an agreement between a contractor and certain owners, by which the latter were charged less than the amount assessed, rendered the whole proceeding void, and the question could be raised when the assessment was attempted to be enforced. It was said by the court: "The contractor and owners were willing that the work should be done, provided that the profit to the contractor should be made, not out of his friends who colluded with him, but out of those who did not sign the side agreement. It is too plain to elaborate it further that the defendants, and each of them, were deprived of the right secured to them by the act, of having the work done by the lowest responsible bidder, and that the devices of the contractor and those who colluded with him were a fraud on defendants, which vitiated the whole proceeding. The assessment has no foundation to it. It is vitiated with fraud from the beginning, and must be held to be a nullity. Whether the defendants knew of the fraud, or not, in its inception and progress, whether they failed to protest or not, or to take any other step to put a stop to the proceeding, the result is the same. The fraud, under any circumstances, is fatal to the claims of the contractor, or his assignee, unless in some way condoned by the defendants. There is no condonation pretended in this case. The

defense can be made under the 13th section of the Act of 1872. . . . This conclusion is in harmony with what was said by Shafter, J., who drew up the opinion of the court in *Nolan v. Reese* (1867) 32 Cal. 436. In that case, an offer was made to prove what was pleaded and found here. The learned judge said, in substance, to this offer: 'Though the street contract in question was free from illegality, in itself considered, still, assuming the facts which the defendant offered to prove, the side arrangements made by the contractor with a portion of the lot owners were in fraud of the method devised by the legislature for the opening and repairing of streets, and the contract itself would, therefore, on the principles of the common law, be illegal and void from the beginning.' The opinion then proceeds to state the reason why the ruling rejecting the offer should be upheld, viz., that the act on the subject then in existence did not admit such a defense. The remedies were narrowed to those adverted to in the opinion (see 32 Cal. p. 437), and this meagerness of remedy was attributed to the necessities of the power given by the act. The decision was made under an act passed in 1862 (Stat. 1862, §§ 6, 12, p. 391), which allowed no such defense as that permitted by the Act of 1872."

Where it appeared, in an action to foreclose a street assessment, that the contract for the improvement was void because the time within which it specified the work was to be done was a different time than that authorized in the notice inviting sealed proposals, and that the assessment based on the void contract was also void, it was held that a property owner might raise the question, and was not estopped by his failure to appeal to the board of supervisors. The court said: "As the action of the superintendent of streets was void, it could not become valid by the failure of the property owner to appeal, under § 12 of the Law of 1872, to the board of supervisors. He could not appeal unless 'aggrieved.' Such owner was not aggrieved; for the contract made was

void, and affected his rights no more than would a void judgment." *Brock v. Luning* (1891) 89 Cal. 316, 26 Pac. 972.

And where a resolution provided for a certain length of sewer which was duly published according to law, but later a contract was let for the improvement of considerably less distance, it was held that the contract was invalid, and a property owner did not waive his right to raise the objection by failing to appeal to the city council. *McBean v. Redick* (1892) 96 Cal. 191, 31 Pac. 7.

Likewise, where a statute provides that the contract for a street improvement shall be entered into within fifteen days after the first posting of the notice of its award to the contractor, a failure to follow this provision renders the contract void, and it is not incumbent on a property owner to appeal to the city council, but he may raise the question in defense to an action of enforcement. *Perine v. Forbush* (1893) 97 Cal. 305, 32 Pac. 226.

So, where a contract for a street improvement is void because given to a city official in violation of a statute, property owners are not estopped from objecting to the assessment on this ground in a suit to enforce a lien, by reason of the fact that the defendant did not raise the point by appeal to the city council. *Capron v. Hitchcock* (1893) 98 Cal. 427, 33 Pac. 431. The court said: "It would seem that neither a void award of a street contract, nor a void contract upon such award, would become valid by failure to file a petition of remonstrance; . . . and if not, that all subsequent proceedings dependent upon a[n in]-valid contract must also be invalid. Besides, the construction of the provision for petition of remonstrance, contended for by counsel for respondent, would necessarily result in nullifying all limitations of the power of the council in regard to contracts for street work. If, in cases of this kind, the lot owners have no other remedy than by petition of remonstrance, and the decision of the council upon such petition is final and conclusive, it surely follows that the council have power to award all street contracts to

its own members, and then, upon this *coram nobis* process, to conclusively affirm its own award. The possibility of such a result could not have been contemplated or intended by the legislature; nor would it follow from a proper application of the provision of the Code. The provision authorizing a petition of remonstrance against the acts and proceedings of the city council was intended to be applicable only to acts and proceedings within the power of the council. Thus limited in its application, the provision has ample scope for operation and effect, without the possibility of any absurd consequence."

In *Warren v. Chandos* (1896) 115 Cal. 382, 47 Pac. 132, it appeared that after work was commenced under a contract for grading streets, an order was passed by the board of supervisors changing the grade of a street embraced in the contract, so that the cost of doing the work was lessened. In allowing this objection as a defense to the assessment, the court said: "It was not necessary for the defendants to appeal to the board of supervisors for a correction of the assessment. The board of supervisors had no authority, in the first instance, to order the street graded to any other line than the official line, and, after that line had been changed, had no authority to require the contractor to grade the street to any other line than to the line of the official grade, as thus changed, and there was no 'error' which could have been corrected on appeal."

Where specifications of a street improvement contract contained certain provisions which delegated duties which the city council alone could perform, an objection to an assessment on this ground is not waived by failure to appeal to the board of supervisors, as provided by statute, but may be raised in a suit to restrain the sale of property to pay the assessment. *Chase v. Los Angeles* (1898) 122 Cal. 540, 55 Pac. 414.

Where a property owner contended, in an action to foreclose a lien for a street assessment, that the contract was not signed by the contractor until after the assessment was made, it

was held that he was not estopped from objecting to the validity of the proceedings by his failure to appeal to the proper board. *Schmidt v. Santa Monica Commercial Co.* (1919) — Cal. App. —, 178 Pac. 315.

5. Performance of work.

The general rule is that where a statute provides that a contractor for any street work shall fulfil his contract to the satisfaction of the street superintendent or of the board of supervisors, on appeal, a property owner will not be permitted in defense of an action for an assessment, to introduce evidence that the work was not completed in accordance with the specification of the contract. Having failed to avail himself of the hearing before the board, he is estopped from raising the question in other proceedings. *Emery v. Bradford* (1865) 29 Cal. 75; *Cochran v. Collins* (1865) 29 Cal. 129; *Shepard v. McNeil* (1869) 38 Cal. 72; *Petaluma Paving Co. v. Singley* (1902) 136 Cal. 616, 69 Pac. 426.

The failure of a property owner to file objections to an assessment because of defects in the execution of the work, within the time named in the published notice of a hearing, will estop him from raising the question thereafter. *New Whatcom v. Bellingham Bay Improv. Co.* (1899) 16 Wash. 131, 47 Pac. 236, affirmed in (1898) 172 U. S. 314, 43 L. ed. 460, 19 Sup. Ct. Rep. 205.

So, it has been held that an objection that the improvements made in a street were materially different from the improvement petitioned for is an irregularity which, according to the recognized rule, is waived, if not raised at the hearing on the confirmation of the assessment roll. *Renard v. Spokane* (1908) 48 Wash. 345, 93 Pac. 517.

In reiterating the rule that an owner who has neglected the remedies afforded in the proceeding has no standing in equity to enjoin the enforcement of the assessment, the court, in *Robinson v. Valparaiso* (1894) 136 Ind. 616, 36 N. E. 644, traced the steps of a proceeding for an improvement, showing the successive remedies of

which an aggrieved owner may avail himself. In that case, wherein it was contended that the construction of a sewer was not according to contract, and so imperfect as to be practically worthless, it was said: "By the provisions of the statute (Acts 1891, p. 328), nothing in the statute 'shall be so construed as to prevent any person from obtaining an injunction upon the proceedings prior to the making of any such improvements.' By this provision the rights of the property owners are fully protected not only up to the time when the council acquires jurisdiction, but even to the beginning of the work under the contract. Whatever ought not to begin can, therefore, be stopped by the strong arm of the law. But from the time that work begins under a lawful contract, vested rights attach; and the faithful completion of the work is placed by the law in custody of the city authorities, chosen by the people, and clothed with power to care for the common welfare. It is made their duty to see that the work is done according to contract. Yet, to guard against possible hardship to any property owner, the law adds yet another shield for his protection. When the work is done, and the final estimate of assessments on the property is reported to the council, it is provided (Acts 1891, p. 324) that two weeks' notice shall be given of the time and place when and where objections may be made to the confirmation of such estimate. And, finally, if the property owner is still dissatisfied, and refuses to pay his assessment, and a precept is issued for its collection, he is given the right of appeal to the courts. On this appeal all questions, from the making of the contract to the report of the engineer on the final estimate, are brought in review. Acts 1891, p. 327. Not until the court shall find that the proceedings subsequent to the order directing the work to be done are regular, that a contract has been made, that the work has been done according to the contract, and that the estimate has been properly made thereon, will the property owner be finally compelled to pay his assessment. Thus, the law affords the prop-

erty owner a full and complete remedy, and injunction will not lie."

And an objection to an assessment on the ground that the city departed from the petition of property owners in providing for lateral branches to a sewer, and thereby included within the district property of the objector, is waived if not raised at the confirmation proceedings. *Spokane v. Preston* (1907) 46 Wash. 98, 89 Pac. 406, wherein the court reiterated the rule as follows: "Any objections to mere irregularities should have been made before the city council, and the errors corrected through the regular channels of appeal provided by law."

And where the provisions of a statute declaring that a city council, in accepting a street improvement, "shall not accept any portion of a street less than the full width thereof, and one block in length, or one entire crossing," were not followed, a property owner cannot raise this objection in an action to collect an assessment, if he has failed to follow the statutory requirements as to making complaint. "Were the proceedings irregular in that respect, the remedy of the defendant was by appeal to the council, as prescribed by the 11th section of the act as amended." *Oakland Paving Co. v. Rier* (1877) 52 Cal. 270.

An objection that a change was made in the construction of a boulevard from the original plan attached to the petition, in that certain lawns on each side were made wider, should be made at the confirmation of the assessment, and a property owner who has not done so, but has permitted the work to go to completion, is estopped from questioning the validity of the assessment on this ground in a later proceeding. *McManus v. People* (1899) 183 Ill. 391, 55 N. E. 886.

And an objection that the work was not done in strict compliance with the contract, in that, by authority of the common council, a small strip was left unpaved, will be deemed to have been waived, where notice was given of the time and place of a hearing to receive objections and the owner did not avail himself of the opportunity. *Holloran v. Morman* (1901) 27 Ind. App. 309, 59 N. E. 869, wherein the court said:

"It is found that the contractor completed the improvement; that it was so reported to the city council; that the council accepted the work as completed; that a final estimate was ordered, made, and approved; and that notice of the time and place was given when and where property owners affected could appear and make objections. In such case, the property owner is bound by the assessments, even though the work was not done in substantial compliance with the ordinance and contract, except where fraud is shown."

So, in *Woodlawn v. Durham* (1909) 162 Ala. 565, 50 So. 356, it was held, in an action in equity to enforce the lien of an assessment, that the property owner, after failing to appear, on due notice, before the council sitting for the confirmation of assessments, cannot, in defense of the action, litigate the question whether the work was well done, or of any benefit to the property or done in accordance with charter and ordinance provisions or with the specifications or contract between the city and the contractors. The court said: "He should have made this defense at the confirmation of the assessments by the municipal board, and if not satisfied with the assessment and levy made by the municipality he should have appealed from that assessment. Then he could have litigated these questions. Notice and publication of the hearings for the assessments and confirmation having been given as provided by law, and he not having appeared and contested as provided by law, the decree, orders, or judgments of confirmation were binding upon the property owners."

In *Gilchrest v. Des Moines* (1911)—Iowa, —, 131 N. W. 776, it appeared that the plans and specifications required the contract to be performed to the satisfaction of the board of public works and city engineer. It was contended that though the city engineer approved of the pavement as constructed, the members of the board of public works were not agreed. The court said: "No objection of this kind was interposed before the city council, and in so far as it related to the work being of a character to satisfy

the above officers, it must be regarded as waived." See also *Gilchrest v. Des Moines* (1912) 157 Iowa, 525, 137 N. W. 1072.

In *Smith v. Hazard* (1895) 110 Cal. 145, 42 Pac. 465, which was an action to foreclose a lien for assessments for a street improvement, it was contended that the superintendent accepted the work before it was completed according to contract, in that there was a narrow strip of an average width of 6 inches, on which a fence stood in front of one of the lots, ungraded at the time the work was accepted, though it was afterward graded by the owner of the lot. It was held that the owner, having failed to appeal to the board of supervisors as provided by statute, could not raise the question of this deficiency in an action to enforce the lien of the assessment.

An objection to a paving assessment that, during the progress of the work, the materials to be used were changed, cannot be raised in a suit to enjoin collection, where the provisions of a statute make a failure to present objections to the city council a consent by the owner to the validity of the assessment. *Birmingham v. Wills* (1912) 178 Ala. 198, 59 So. 173, Ann. Cas. 1915B, 746.

And the facts that an ordinance stipulated a particular kind of asphaltum for paving a street, and that an inferior grade was used, are not grounds for setting aside a judgment and vacating an assessment, where the parties had full opportunity to present such objection at the proper time and place, and failed to do so. *Craft v. Kochersperger* (1898) 173 Ill. 617, 50 N. E. 1061.

In *People ex rel. Raymond v. Whidden* (1901) 191 Ill. 374, 56 L.R.A. 905, 61 N. E. 133, it appeared that the improvement, as completed, was not of the quality provided for in the ordinance, because of the use of inferior materials, want of thickness of the pavement, and the failure to plaster the curb walls, as required. In holding that a property owner, not having raised these objections at the confirmation of the assessment, was estopped on the application of the county treasurer for judgment, the court

said: "If the objections are of a nature to annul the judgment of confirmation and defeat the assessment they may be properly made on the application, for the reason that the facts upon which they are based have arisen since the judgment of confirmation. That judgment cannot be collaterally attacked except for matters going to the jurisdiction of the court rendering it, but the landowner is only concluded by it as to proceedings up to the time it is entered. All proper objections and defenses arising subsequently can be interposed to the application for judgment for sale.

. . . In this case, the property owners whose lands were specially assessed upon an estimate for a certain improvement did not receive as good an improvement as was provided for and estimated. It need not be said that they were entitled to have the improvement of equal quality and in substantial conformity with the provisions of the ordinance, and that the city of Chicago had no power to change it in any material respect. Neither are the laws so deficient that the property owners had no remedy for any departure from the provisions of the ordinance which would make the improvements less durable and beneficial to them. The law has charged the city authorities with the duty of seeing that a contract is let and performed in compliance with the terms of the ordinance. While the work is in progress, and a court of equity can control the manner of its performance, the court will interfere at the application of the property owner who has been assessed to pay for the improvement, to prevent any substantial departure from the terms of the ordinance, and to enforce the duty of the city towards him. . . . In this case no steps were taken to compel a compliance with the terms of the ordinance or to prevent a deviation from them. While the work was in progress, an alderman, in the interest of the property owners, employed a civil engineer to inspect the work and to make report to him. The engineer reported, from time to time, the failure of the contractor to perform the work accord-

ing to the specifications, and such failure was presented to the city authorities, but without any substantial result. The question now is whether the objection, which could have been made by a bill for injunction before the work was completed, is admissible on the application of the county treasurer for judgment for sale. The rule seems to be that, while the honest fulfillment of a contract for public work may be enforced by those who are assessed to pay for it, it must be by a proceeding to enforce the performance of the duty. If the improvement is the one provided for in the ordinance, and it has been completed and accepted by the city authorities invested with power to determine whether the contract has been complied with, the objection that it was not completed in compliance with the terms of the ordinance is not available. . . . The rule that objections to the manner in which an improvement is completed are not available on the application for judgment for sale does not extend to cases where the improvement authorized is changed for another, nor where the city authorities accept a different improvement from the one for which the assessment was levied. . . . In this case the improvement was the identical one provided for in the ordinance, but the contractor failed to perform the work as well or with as good materials as the ordinance called for. The improvement, as completed, was the same vitrified brick pavement provided for by the ordinance, but it was not as good or beneficial to the property owners as they were entitled to. The evidence did not show that the improvement was a different improvement from that authorized by the ordinance, and the objections sustained could not be made on application for judgment, after the work was completed and accepted."

Likewise, a property owner, in an action to collect an assessment for the construction of a sewer, will not be permitted to defend on the ground that the assessment is void because the supervisors did not provide an outlet, making it useless as a drain, when he failed to protest before the

board in the manner provided by law, since the work was within the general power of the board, though to construct the sewer may have been an improvident use of the power. *Harney v. Benson* (1896) 113 Cal. 314, 45 Pac. 687, wherein the court said: "Possibly, if, as matter of law, we could see that the structure could not be useful, the conclusion of the board would not prevent the courts from giving relief. But the aggrieved owner should exhaust the special remedies provided before he applies to the court. The board could have afforded him all the relief he required. If he had protested in time, the contractor might not have expended his money and labor in the improvement of the property. Since the law provided that he should object, and he did not, he should not now be heard, unless there was a total absence of power in the board to do the work, or the procedure has been materially departed from. A property owner should not thus sit by and see his property improved, and expect to escape the expense."

So, an objection that, after a grade was established for a proposed improvement to a street, a different grade was fixed and the contractor cut down the natural grade of the street to an unnecessary depth, rendering access to the property difficult, killing shade trees along the sidewalk, and impeding the drainage of surface water from the street in front of the lots, should be made before the city council, and property owners who fail to do this are estopped from enjoining the collection of assessments after the work is completed. *De Puy v. Wabash* (1893) 133 Ind. 336, 32 N. E. 1016.

And where it appeared that the grade of a street, as improved, differed from the established grade by from 2 to 18 inches only, it was held that this was a substantial compliance with the statute, providing that permanent street improvements shall not be made until after the street has been graded so that the improvement, when completed, will bring the surface to the established grade, and constituted only an error or irregularity, of which

complaint should be made to the city council, and that failure to do so was a waiver of the objection. *Shaver v. J. W. Turner Improv. Co.* (1911) — Iowa, —, 133 N. W. 770.

A change in the grade of a street, between the time of entering into a contract to make the improvement and the performance thereof, is not a matter which will invalidate the contract, and an owner failing to pursue his statutory remedy by objecting at the proper time waives the right. *F. M. Hubbell, Son & Co. v. Des Moines* (1915) 168 Iowa, 418, 150 N. W. 701, wherein the court said: "The entire matter relates not to the power of the city council in making the improvement, but to the exercise of that power, —the manner of accomplishing that which the legislature had authorized that body to do,—and therefore was not jurisdictional. This was pointed out in *Shaver v. J. W. Turner Improv. Co.* (1912) 155 Iowa, 492, 136 N. W. 711, and plainly is one of those matters to which objection must be interposed, if at all, before the city council, and if not there made is to be deemed waived. As observed in *Cheney v. Ft. Dodge* (1912) 157 Iowa, 250, 138 N. W. 549, the purpose of the statutory provisions is 'to relegate the property owner to his remedy by objection and appeal, in all cases where the city council has not exceeded its jurisdiction; and the holding of the *Shaver Case*, just cited, is, in effect, that, in the case of a mere departure from the plans and specifications not substantially changing the nature of the improvement, the council does not lose jurisdiction to make assessment for the improvement as constructed, but may, on objections, grant the property owner such relief as he should have; and that on appeal the district court may review the action of the council, and grant the relief which should have been granted by it.' Such remedy is exclusive, and the objection was not available to plaintiffs in this suit."

Where the contract for a street improvement is departed from in that the grading is not done to the official line and grade, an owner who does not follow the statutory requirement by an appeal to the board of supervisors

is estopped from raising the objection in an action to foreclose the lien. *Warren v. Riddell* (1895) 106 Cal. 352, 39 Pac. 781, wherein the court said: "The objection to the work which is here presented is one which is eminently within the functions of the board of supervisors to remedy under the provisions of this section, and unless such appeal is first taken the owner is precluded from raising the objection in an action to enforce the assessment. Whether, if an appeal had been taken, and the board of supervisors had refused to direct the plaintiffs to complete the work according to the terms of their contract, the owner would be precluded from making this defense to an action upon the assessment, does not arise in the present case. The statute requires that he shall first seek relief from that body, and we cannot assume that if such appeal had been taken the board of supervisors would have disregarded the appeal, or that the plaintiffs would not have performed their contract according to its terms." See to the same effect, *Fanning v. Leviston* (1892) 93 Cal. 186, 28 Pac. 943.

In *Jennings v. Le Breton* (1889) 80 Cal. 8, 21 Pac. 1127, it appeared that the contractor never completed the work of grading a street, but left it in an unfinished condition. It was, however, approved by the street superintendent. In an action to recover the assessment the court held that, as the property owner had not followed the statutory remedy by appealing to the board of supervisors, he was estopped from introducing evidence as to the incompleteness of the work.

However, "the rule that objections to the manner in which an improvement is completed are not available on the application for judgment for sale does not extend to cases where the improvement authorized is changed for another, or where the city authorities accept a different improvement from the one for which the assessment was levied." *People ex rel. Raymond v. Whidden* (1901) 191 Ill. 374, 56 L.R.A. 905, 61 N. E. 133.

So, where the improvement described in an ordinance under which a paving assessment was levied was

not constructed, but a wholly different improvement was made and at a different grade, it was held that a property owner could object to an assessment on these grounds, in an action for judgment of sale, and was not estopped from so doing by his failure to present the objection to the court in confirmation proceedings. *Phillips v. People* (1905) 218 Ill. 450, 75 N. E. 1016, wherein the court said: "The objectors were entitled to show in defense of the application for judgment that the improvement provided for, and for which the assessment was levied, was a different one from the one actually constructed, which they were asked to pay for. . . . It is argued that the order of the court was correct because the Local Improvement Act provides that the board of local improvements shall make a final report to the county court after the improvement is completed; that notice shall be given to the parties in interest, and a hearing can be had on the question whether or not the improvement has been made in substantial compliance with the ordinance, and therefore the objection that the improvement is a different one from the one provided for by the ordinance comes too late. The existence of such a statute does not establish the fact that there was such a report in this case, with an opportunity to the objectors to be heard upon the question raised by the objection. The objection was stricken from the files without a hearing, and whether the identity of the improvement with the one provided for had become *res judicata* does not appear. The court erred in striking that objection from the files." See also *People ex rel. Price v. Lyon* (1905) 218 Ill. 577, 75 N. E. 1017, wherein the court said: "Under the repeated decisions of this court, . . . on application for judgment and order of sale it may be shown the improvement provided for in the ordinance and for which the assessment was levied was a different improvement from the one actually constructed. The basis of these decisions is that a valid ordinance must lie at the foundation of every assessment, and if the

improvement constructed is not the improvement provided for in the ordinance, then there is no ordinance in existence providing for the construction of the improvement made; and at the time of confirmation it cannot be ascertained that the improvement which will be constructed will not be the improvement provided for in the ordinance."

In *Young v. People* (1902) 196 Ill. 603, 63 N. E. 1075, it was said: "The improvement as constructed under the contract being essentially different and another improvement than that called for in the ordinance, the appellants cannot be compelled to pay for the same by special assessment. This defense, arising subsequently to the confirmation of the assessment, may be set up when the collector seeks judgment." To same effect, see *Marshall v. People* (1905) 219 Ill. 99, 76 N. E. 70; *People ex rel. Price v. Wiers* (1907) 225 Ill. 17, 80 N. E. 45.

Where one of several property owners has filed an objection to an assessment on the ground that the work under a contract for paving has not been done according to specifications, which objection goes to the entire work and is not limited to the owner objecting, other property owners who have failed to object are not estopped afterwards to contest the validity because of such failure to object, as in such a case they are entitled to the benefit accruing because of the objection actually made by another. *Girvin v. Simon* (1900) 127 Cal. 491, 59 Pac. 945.

So, where a resolution of a board of trustees authorizing the contractors to construct a sewer at another place than that fixed by the ordinance, and the construction of the sewer on the new line in accordance with the resolution, are subsequent to the judgment of confirmation, so that the objection could not have been urged on the hearing of the application for confirmation of the assessment, the property owner will not be estopped from asserting the invalidity of the ordinance on application for judgment of sale. *Church v. People* (1898) 174 Ill. 366, 51 N. E. 747.

And where work included within a contract had been previously done by the owner himself, and it appeared that the contractor had made no change, it was held that an assessment against such lot was void, and that a failure to appeal to the city council as provided by statute would not act as an estoppel in a suit to enforce payment. *De Haven v. Berendes* (1901) 135 Cal. 178, 67 Pac. 786.

6. Assessment.

(a) Generally.

Where a property owner has an opportunity given him, under the prescribed proceedings, to appear and contest the question before the local authorities whose duty it is to pass on objections, their determination on the subject of benefits is final, and if he fails to avail himself of the opportunity provided he thereby admits the finality of the determination, and is estopped to raise the question in subsequent proceedings.

Thus, in *Duncan v. Ramish* (1904) 142 Cal. 686, 76 Pac. 661, it was held that the failure of a property owner to avail himself of an opportunity to contest the question of benefits from a street improvement before the city council, by a proper remonstrance against the proceedings, is an admission of the finality of the determination of that body on the subject of benefits, and the question cannot be raised in an action to enjoin the city treasurer from executing a deed to the purchasers for certain lots sold for the nonpayment of bonds, issued under proceedings for a street improvement.

And in *Aberdeen v. Lucas* (1905) 37 Wash. 190, 79 Pac. 632, the court said: "The appellants raised numerous objections to the assessment proceedings, but as these . . . go rather to the regularity of the proceedings than to the jurisdiction of the city council to make the assessment, it is sufficient to say that they are not matters that can be urged as a defense to the foreclosure action, but, to have availed the appellant, they must have been taken before that body, and an appeal taken therefrom."

Where there is no authority for the levy of any special assessment to pay for a sewer, failure to appeal from the order of the council adopting an assessment resolution does not estop a property owner to enjoin enforcement of the assessment. *Bennett v. Emmetsburg* (1908) 138 Iowa, 67, 115 N. W. 582.

In *Brown v. Grand Rapids* (1890) 83 Mich. 101, 47 N. W. 117, a bill was filed to remove a cloud on complainant's title by reason of an assessment levied for the opening and widening of a street, and the sale of the property to the city for such assessment, the allegation being that the assessors had acted illegally and arbitrarily in fixing the assessment. In dismissing the bill, the court said: "He did not appear, and does not pretend that he made any effort to have the assessment corrected before the council. The determination of these two bodies, the commissioners who made the assessment roll, and the common council of the city of Grand Rapids, cannot now be inquired into, unless it appears that they acted in bad faith. It is not for this court to set its judgment up in opposition to that of the board of commissioners and the council, and to say that this parcel of land or that is assessed too much or too little. The assessments were to be made according to benefits to each parcel of property, and there is nothing in the record showing that the commissioners did not assess the complainant's lands in accordance with their best judgments. Where provision is made by law for a review of assessment proceedings, and a body appointed with the power to set aside or correct the error complained of, and the party wholly fails to appear before such body, or to take any steps to have such correction made, he is not in a position to appeal to the courts for redress, in the absence of fraud or bad faith."

In *People ex rel. Raymond v. Fuller* (1903) 204 Ill. 290, 68 N. E. 371, the court said: "We think it the settled practice in this state, in this class of proceedings, that the defense here urged must be made at the time of the

application for confirmation of the assessment, and that at any other stage in the proceedings such defense comes too late. It is important to all concerned that the validity of special assessments should be settled in this preliminary hearing, and the case at bar may well be considered as illustrating the necessity and wisdom of the application of such a rule. On the faith of such judgment of confirmation, contracts were let and the work and improvement made pursuant to the ordinance, and to leave the questions open that might and should have been settled on the application for confirmation, and allow them to be urged against the judgment for sale, is to make that uncertain which the legislature evidently intended should be certain, and a protection to all persons acting on the faith thereof."

The confirmation of an assessment, in the absence of an objection, is binding, and a property owner who has failed to object at the confirmation is estopped thereby from objecting thereafter to the collection of an assessment, on the ground that a single piece of land, separated by the opening of a street, was assessed separately for the benefits, but awarded damages as a whole. *Genet v. Brooklyn* (1886) 1 N. Y. S. R. 581.

So, an objection to the form of an assessment which is purely technical is waived, when the property owner has failed to avail himself of the opportunity offered for the correction of errors. *Tuttle v. Polk* (1894) 92 Iowa, 483, 60 N. W. 738.

It has likewise been held that an assessment for a street improvement is valid, notwithstanding errors and irregularities in the method adopted for apportioning it, or even an unauthorized method, if the owners of the property charged, having full and fair opportunity to do so, do not object to the assessments. *State ex rel. Duluth v. District Ct.* (1895) 61 Minn. 542, 64 N. W. 190.

In *Norman v. Allen* (1915) 47 Okla. 74, 147 Pac. 1002, in the official syllabus, the court said: "Where a city of the first class, in the manner provided by law, lets a contract for street

paving and other improvements, and, after ascertaining the cost thereof, appoints a board of appraisers to appraise and apportion such cost to the lots and lands in such improvement district, and the city council causes notice to be published of the holding of a session to consider the appraisers' report, and to hear objections thereto on the part of the property owners, who file no objections to the appraisers' report, they will, after the work has been completed and accepted by the city, be precluded from interposing objections that the appraisers' report and apportionment is excessive, where such property owners knew, or were in position to have known, of such alleged defective work or apportionment before the confirmation of the appraisers' report."

It has also been held that a suit in equity to annul the assessment for the construction of a sewer, on the ground that the slope of the land within the district was sufficient to drain it and no benefit was derived from the improvement, will not be entertained, where the property owner failed to take advantage of an opportunity to object in the proceeding. *Spalding v. Denver* (1905) 33 Colo. 172, 80 Pac. 126, wherein it was said: "Before parties aggrieved by an assessment, levied under a fixed rule which appears to be reasonable and likely to proximate an equality of assessments, can appeal to a court of equity to relieve them from an alleged excess, or because their property was not, in fact, benefited, they must at least first apply for such relief to the special tribunal which the law has provided to settle these questions. The plaintiffs never attempted to raise any of these questions before the city authorities, and are, therefore, not in a position to litigate them in a court of equity."

And an objection to the report of a tax collector, showing a delinquent list of property for a special assessment, that it was not in proper form, must be made in the trial court at the confirmation, when it could be obviated by amendment, and, if not so raised, will be deemed to have been

waived. *People ex rel. Schultz v. George Moench Estate* (1917) 277 Ill. 121, 115 N. E. 187.

Where the property owners are informed of the fact that the action of the adjustment commissioners will be submitted to the court for its approval, and they have an opportunity then to object to the confirmation of the report for the reason that several lots, originally assessed separately, are collectively assessed, and they neglect to avail themselves of that opportunity, they are estopped by the confirmation. *Hayday v. Ocean City* (1901) 67 N. J. L. 155, 50 Atl. 584, wherein the court said: "The . . . act makes the report of commissioners final and conclusive upon the rights of parties affected thereby, when confirmed by the circuit court. The object of this legislation was to produce a result that would be a finality and end litigation, so far as it might justly do so. For this reason, as is said by Mr. Justice Van Syckel, in *State ex rel. Benedictine Sisters of Elizabeth v. Elizabeth* (1888) 50 N. J. L. 347, 13 Atl. 5: 'It is obvious that the cases in which an application for review by certiorari can be favorably entertained must be very few in number. No relief can be had in this way against alleged irregularities in the proceedings of the commissioners, or against undue or excessive assessments, or against alleged mistakes in the manner of making the assessments.' The error in the action of the commissioners, being a mere mistake in the manner of making the assessment, affords no ground for review by this proceeding."

Also, where a lot is owned in severalty, but an assessment is levied on the whole, the assessment is irregular, but the right to object on this ground is waived if the question is not raised in the manner prescribed by statute. *Thomson v. People* (1900) 184 Ill. 17, 56 N. E. 383, wherein the court said: "In making the assessment it was the duty of the commissioners, where a tract of land was owned in severalty, as it was here, to assess each tract separately, so that each owner may pay the assessment on the land which

he owns without being encumbered with an assessment which should be paid by another. But while the commissioners committed an error, the appellant cannot take advantage of that error on application for judgment by the county collector. It is not disputed that appellant was duly notified of the assessment, and that his agent examined the assessment roll before the assessment was confirmed. It was, therefore, his duty to appear in the county court on the application to confirm the assessment, and call the attention of the court to the error, so that it could be corrected. This he failed to do, and the judgment of confirmation is conclusive upon him. Where the court had jurisdiction, as it had here, its judgment will be conclusive, although errors not affecting the jurisdiction may have occurred."

In an action brought against several persons to enforce collection of an assessment, it appeared that all were owners of the lot in question, but that the assessment was against one alone. It was contended that the assessment was void as not being against all as joint owners, or that if not joint owners, they should have been separately assessed, each for his portion. It was held that "if, for the reasons suggested, the assessment was not properly made, the appellant's remedy was by appeal to the board of supervisors, as provided in the 12th section of the statute. He is named in the assessment, and was therefore put upon his appeal, if he had any fault to find. If he owned in common with others, or if he owned only a part of the premises, he could have appealed to the board of supervisors and had the assessment corrected to suit the facts. Not having done so, he cannot now question the validity of the assessment upon the ground suggested." *Taylor v. Palmer* (1866) 31 Cal. 240.

An objection that there is a variance as to curbing between the ordinance and the publication notice and assessment delinquent list does not raise a jurisdictional question, where it appears that there is no statutory

requirement as to the delinquent list, but one as to the description in the notice, which has been substantially complied with. Such an objection, therefore, must be made at the confirmation of the assessment, or it will be deemed waived. *People ex rel. Thompson v. Harper* (1910) 244 Ill. 121, 91 N. E. 90, wherein it was said: "The alleged error did not in any way affect the substantial justice of the tax, nor was it calculated to mislead. While the notice and delinquent list were not formally and technically correct, the object and intent of the law were substantially attained thereby, and no advantage, therefore, can be taken of the inaccuracies complained of. . . . Of course, had the improvement provided for in the ordinance been a different one from that advertised, the objection could properly be raised on application for judgment of sale. . . . It is not claimed that the special assessment advertised is not actually the same improvement provided for in the ordinance."

An objection that an assessment is excessive, in that there are not the number of square yards or lineal feet of pavement which are alleged to have been laid, is waived by a failure of the property owner to raise it on confirmation. *Phillips v. People* (1905) 218 Ill. 450, 75 N. E. 1016.

In *Kerker v. Bocher* (1908) 20 Okla. 729, 95 Pac. 981, in the official syllabus, the court said: "When the estimate of benefits is referred to a board of appraisers and afterward approved by the council, the remedy of one who considers himself unfairly assessed is to apply for redress to such tribunal, and, failing so to do, he will not be permitted in an action in equity to overcome such finding, especially on review in the supreme court, when the referee found that there was no proof to show that appraisement or assessment in any way inequitable or unjust." And the court further said: "Every person, as a member of a municipal community, thereby enjoying the incident benefits, takes notice of the accompanying obligations. Streets are to be laid out, graded, paved, and lighted. The constabulary must be

maintained to enforce peace and preserve order. Sewerage systems and water supplies must be provided. No one is entitled to enjoy these advantages, and to be permitted to successfully contend that the laws, ordinances, and resolutions under which such benefits and advantages are created, regulated, and controlled, are invalid, and thereby escape the resultant burdens. The citizen of the modern municipality and property owner thereof takes notice of such necessities. He owes his personal service to maintain order and promote the public good in his municipality, just as he owes to the nation his service to protect against hostile encroachments and invasion. No man can expect to have property in cities, abutting on public thoroughfares and streets, without bearing the burdens of special taxation to maintain grades, build sidewalks, and macadamize and pave the streets; and he acquires his property with the full knowledge of the fact that the legislative power of the state can be exercised to levy and provide for an assessment or special tax for such improvements. The legislative authority of the state, or, when properly authorized to be exercised, the municipality, may determine over what territory to apportion the burdens, and the whole subject of taxing districts belongs to the legislature, and the authority may be left to local boards or bodies. . . . Also it is within the power of the legislature to conclusively determine in advance what improvements shall be taxed against certain districts, and it is presumed that the legislature has determined in advance what property shall be benefited to the extent of the cost of such improvement."

So, an objection that the viewers' report of assessments is based on the contract price of the work done, and does not properly estimate either the damages or the benefits, is waived, where the property owners fail to appear and present their objection, and take no appeal. *Re Aiken Ave.* (1892) 11 Pa. Co. Ct. 228, wherein the court said: "They practically maintain that the property owners can

ignore the board of viewers, and by merely filing exceptions throw upon the court the burden of making the assessments *de novo*. We cannot for a moment accede to this. It is true the act requires the court to carefully and strictly supervise the work of the viewers, and this we will not hesitate to do. If it is made to appear that they have neglected their duties, acted arbitrarily, failed to hear the complaints and evidence of those interested, or made material mistakes, or shown incapacity or unfairness in the performance of their duties, we will not hesitate to correct the report, or refer it back to the board, or appoint another board. But we cannot do this upon a mere allegation or suggestion; much less can we adopt a practice which would practically, or might, require the court to make the assessment. Parties interested must look after the matter before the report leaves the hands of the viewers. They must, if dissatisfied with the assessments, object then, and give or offer the viewers such evidence as will enable them to correct error, if it exists. If the viewers decide against them, they come into court with the burden upon them of showing error. They must, in such case, present evidence sufficient to cause the court to act, sufficient to overcome the presumption of fairness and justice to which the court will certainly hold the reports of viewers entitled. The evidence should be of the existence of specific facts. It must certainly be something more than a mere allegation that the party has been assessed too much or allowed too little damages."

Where the superintendent of streets makes an assessment for grading, which by a mistake of calculation is more than the amount should have been, it is an error which should be corrected by the city council on appeal, and, having failed to take such appeal, a property owner is estopped from raising the question in an action to enforce the assessment. *Bates v. Hadamson* (1905) 2 Cal. App. 574, 84 Pac. 51, wherein it was said: "The above section gave defendants a tribunal to

which they had the right to apply for relief. They had only to briefly state their objections in writing to the assessment and file it with the clerk of the city council. They had thirty days in which to do this, but do not appear to have made any objections in any manner to the assessment. The city council could have instructed the superintendent of streets to correct the assessment, or to make a new one. The object of the section is to treat all owners fairly; to give them a tribunal where, without technical formalities, they may have their rights adjusted, and all questions in regard to the assessment and proceedings leading up to it passed upon and corrected by the local authorities. This meaning is clearly expressed in the section, because it states that no assessment shall be held invalid, except upon appeal to the city council, for any error or defect in the assessment itself. It would have been fair to the contractor and to the other owners of lots on the street if defendants had made their objections to the assessment in the manner provided in the statute, and at the time when it could have been corrected. As they did not do so, they will not now be heard to complain as to any matter which the city council might have corrected upon such appeal."

An objection that, in the adjustment of benefits, certain property within an assessment district was appraised at a price greatly in excess of its market value, is not available in an action to restrain a sale for nonpayment of an assessment, where the owners did not appeal to the city council as provided by law. *Pierce v. Los Angeles* (1911) 15 Cal. App. 702, 115 Pac. 746, wherein the court said: "The matters embraced within that cause of complaint were all matters which should have been urged during the course of the proceedings, and the failure of plaintiffs to seasonably make complaint thereof estopped them from objecting thereafter."

However, equity will relieve a property owner from the burden of an assessment not made according to the requirements of the statute, and without

regard to the special benefits conferred, notwithstanding the failure to raise the objection before the commissioners or before the council. It is not an objection which involves an error in judgment, but one which is directed to the method by which the assessment was levied. It does not raise the objection that a mistake was made as to the real amount the property was benefited, or that there was a mistake in the computation of the assessment, but it raises the point that the commission had no jurisdiction whatever to levy the assessment, because it had failed to comply with the terms of the statute upon which its jurisdiction was based. Such being the case, it was not necessary that the point should have been raised prior to the proceedings in equity. *McKenzie v. Mandan* (1914) 27 N. D. 546, 147 N. W. 808. See also *Robertson Lumber Co. v. Grand Forks* (1914) 27 N. D. 556, 147 N. W. 249, where, in disposing of an objection of this class, the court said: "It [the statute] in fact required that the assessment should not be arbitrarily made, but that the actual benefits, as well as the apportionment of the assessment or cost, should be found and given, to the end that the assessment might not only be in proportion to the benefits, but that the owners of the property and the public might know the basis on which the assessments were levied, and the commission itself, and later the city council sitting as a board of review on appeal from the commission (see Rev. Codes 1905, § 2803), might have something definite before them. The finding of these facts and the doing of these things, we believe, are, under the North Dakota statutes referred to, fundamental to the levying, the confirmation, and the validity of any assessment. There is, in fact, no authority to levy an assessment until the benefits have been first ascertained. Such being the case, the objection is not waived, nor is a subsequent collateral attack, by means of a suit in equity to restrain the collection of the assessment, precluded by the conclusions of the commissioners, or of the city council acting as a board of re-

view on appeal, or by the fact that the specific point was not raised before such commission, or such council. Without such prior finding and ascertainment of benefits, indeed, the commission and the city council had no jurisdiction to proceed to a determination of the assessment as to each specific lot or tract to be assessed. . . . It is sufficient for us to say that the plaintiff and appellant was not precluded from raising the question in the equitable proceedings before us, by reason of the fact that the point was not urged before the commissioners sitting as a board of review, or the city council on appeal. It might have been estopped by such failure if these bodies had any power to consider the question. . . . As we have before stated, however, no legal assessment roll was made, and the commissioners acting as a board of review, and the city council, had nothing before them to review, or any jurisdiction over the immediate subject-matter."

In *Boals v. Bachmann* (1903) 201 Ill. 340, 66 N. E. 336, it appeared that a city had passed an ordinance providing for the construction of a sidewalk and a stone curbing, to be paid for by special taxation of the abutting property. In front of appellant's property there was a stone sidewalk, and no work was done in the construction of a new one except as to a driveway across the pavement. The owner nevertheless was assessed for the curbing and a sidewalk. It was held that he was not estopped by his failure to take proceedings earlier, from contesting the validity of the assessment, seeking to restrain the city from giving a deed for his property, sold to pay the special tax.

In *Harrisburg v. Hoak* (1892) 9 Pa. Dist. R. 51, a rule to show cause why judgment should not be opened and the lien for a sewer assessment stricken off, it was conceded that the lien was invalid for the reason that it was based on an assessment for the construction of a sewer in a street other than that upon which the property attempted to be subjected to the lien abutted. It was contended that the

ruie should be discharged, because the defendant was in default in not interposing his defense to the original scire facias. The court said: "While this objection might perhaps be fatal if the action were between private parties, we do not think it ought to prevail here. Assessments of this nature are a species of taxation, and in laying and collecting them the city exercises the delegated power of the state. But it is manifestly unjust for the state to take advantage of the oversight or omission of a citizen, and to exact from him a tax that cannot constitutionally be imposed."

In *San Antonio v. Spears* (1918) — Tex. Civ. App. —, 206 S. W. 703, it was held that property holders were not estopped from interposing a plea of homestead, in an action to collect a special assessment, by failure to appear and contest the assessment. The court said: "The defendants were not estopped from interposing a plea of homestead. The act confers no power to fix a lien on a homestead, whether by estoppel or in any other way, and, even if it had not stated that no power existed to levy an assessment against a homestead, the homestead would have been protected under the Constitution, and such protection could not be affected by any failure of the owners to appear and contest the proceedings."

(b) Assessment in excess of benefit.

A property owner who deems himself injured by an assessment, in that it is in excess of the benefits conferred on his premises, is estopped from asserting the invalidity of the assessment, if he fails to appear and object at the time and place prescribed by law. *MOORE v. YONKERS* (reported herewith) ante, 590, wherein the court said: "In our opinion, a property owner who deems himself injured by an assessment, and who has an opportunity of seeking correction before the tribunal pointed out in the assessment law, is under an obligation to appear there and urge his objections, in order that the municipality may correct its proposed error. That waiver of the most lawful objections to a proposed assess-

ment is possible has been pointed out in *Wight v. Davidson* (1901) 181 U. S. 371, 45 L. ed. 900, 21 Sup. Ct. Rep. 616; *Chadwick v. Kelley* (1903) 187 U. S. 540, 47 L. ed. 293, 23 Sup. Ct. Rep. 175.

And where a statute provides that, after a resolution for the improvement of streets, the property owners shall have the right to file objections, which shall be considered by the city council, and the further right to file objections before or after the issuance of the assessment roll, this remedy is exclusive, and one who fails to take advantage of it is estopped from obtaining a decree in equity to restrain the collection of an erroneous assessment, on the ground that the assessment is in excess of the benefits received. *Brown v. Drain* (1901) 112 Fed. 582, affirmed in (1902) 187 U. S. 635, 47 L. ed. 343, 23 Sup. Ct. Rep. 842.

In *Walker v. People* (1897) 170 Ill. 410, 48 N. E. 1010, it was held that if the complainant's property was assessed more than it was benefited, or more or less than its proportionate share of the cost of the improvement, the proper place to raise that question and obtain the proper relief was in the county court, on the application to confirm the assessment, and that the objection would not be heard as a defense to an application for judgment against the delinquent lands for the special assessment. See to the same effect, *Pfeiffer v. People* (1897) 170 Ill. 347, 48 N. E. 979; *Gross v. Grossdale* (1898) 176 Ill. 572, 52 N. E. 370; *Gage v. People* (1904) 207 Ill. 377, 69 N. E. 840.

"If it be true that the assessment exceeded the benefits conferred on the appellant's property by the improvement, the objection should have been urged before the city council. It is not a matter for a collateral attack on the assessment proceedings." *Alexander v. Tacoma* (1904) 35 Wash. 366, 77 Pac. 686.

Confirmation of an assessment will estop a property owner from complaining that it is greatly in excess of benefits. *Hoffeld v. Buffalo* (1892) 130 N. Y. 387, 29 N. E. 747, wherein the court said: "It is not claimed that any land outside the district up-

on which the assessment was made should have been included in it as benefited by the work. Nor is any fraud on their part in making it alleged. The plaintiff's case rests mainly upon the alleged fact that the assessment on his land was largely in excess of its proportionate benefit derived from the improvement. . . . While the excess may be so greatly out of proportion as to permit the inference of corrupt purpose, or of adoption of an erroneous rule of estimate, the matter of excess is one of degree only; and if in one case an assessment, having the support of jurisdiction of the assessors and of presumption of regularity, may, upon the evidence of witnesses to the effect that it was disproportionately made upon the lands, be vacated in a collateral action, the question would be an open one in every case where some one or more of the persons whose lands are subjected to assessment deem themselves aggrieved for such cause."

In *Shank v. Smith* (1901) 157 Ind. 401, 55 L.R.A. 564, 61 N. E. 932, it appeared that property owners who objected to an assessment because, as they claimed, it was in excess of the benefits conferred, were denied a hearing before the committee having the engineer's report under consideration, at the time and place specified in the notice. It was held that this would not avail them as a defense in an action to collect the assessment. The court said: "Assuming that both the committee and board of trustees refused to grant appellants a hearing, they could not be permitted to waive their right to bring mandamus to compel a hearing, or injunction against the approval of the engineer's report until it had been accorded, and make the denial of a hearing available as a defense in an action to collect the assessment. The right of the board in such cases to consider the engineer's report, and adjust the assessments to benefits received, is a quasi judicial power. Here the proper notice was given, the board had jurisdiction of the person and subject-matter, the power to decide; and their judgment, thus far upon its face, cannot be col-

9 A.L.R.—45.

laterally attacked." See to the same effect, *Hibben v. Smith* (1902) 158 Ind. 206, 62 N. E. 447, affirmed in (1903) 191 U. S. 310, 48 L. ed. 195, 24 Sup. Ct. Rep. 88.

Where a property owner fails to avail herself of any of the methods of making objection as provided by statute, she will be deemed to have waived her right unless the objection is jurisdictional. Under this rule an injunction will not lie to restrain the collection of an assessment, on the ground that it is excessive and greater than the benefits conferred. *Owens v. Marion* (1905) 127 Iowa, 469, 103 N. W. 381, wherein the court said: "Plaintiff did not file any objections to the assessment, did not appear before the city council at any time, and, of course, did not appeal to the district court, as she might have done. She offers no excuse whatever for not having done so. She is proceeding on the theory that the proceedings were wholly void, and that she was not required to do any of these things. It goes without saying that, if the assessment was without any authority, plaintiff was not bound to file objections with the council, or to appeal from its action in the premises. . . . But if irregular, unequal, or erroneous simply, then, as a tribunal is provided for the correction thereof, plaintiff must resort to this tribunal. . . . There being no sufficient evidence of fraud, and no proof of want of authority in the city council to make it, the assessment must be sustained. The remedy was by appeal to the district court, and not by injunction."

(c) *Assessment in excess of statutory provision.*

Where the legislature has established a tribunal for the correction of errors in an assessment for a street improvement, and has declared that failure to submit objections to an assessment to such tribunal, save in case of fraud, shall be a waiver thereof, and objection that an assessment is excessive in that it exceeds the percentage of the value of the property, fixed by statute as a limit to street assessments, is waived by a failure to make objection before the prescribed tribu-

nal. *F. M. Hubbell, Son & Co. v. Des Moines* (1915) 168 Iowa, 418, 150 N. W. 701.

In *Durst v. Des Moines* (1911) 150 Iowa, 370, 130 N. W. 168, the court said: "The city council had authority to determine the amount of the assessment. It may have erred in fixing the amount by not treating the assessable value in the circumstances disclosed as the actual value, but this was in the exercise of the power it had, and not an act without authority." See to the same effect, *Durst v. Des Moines* (1914) 164 Iowa, 82, 145 N. W. 528, wherein the court said: "An error in estimating the value of the property, or in the extent of the special benefits accruing to the land, or in the amount properly chargeable to any abutting property, does not go to the jurisdiction of the council, but to an incident or detail of the proceedings, and the property owner complaining thereof should lay his objection before the council, and, upon an adverse ruling there, may appeal to the district court. In no other way can the statute be given practical effect, or the decisions above cited be sustained."

And in *Methodist Episcopal Church v. New York* (1877) 55 How. Pr. (N. Y.) 57, disposing of an objection that an assessment for opening a street was in excess of one half of the value of the property benefited, the court said: "If there was any error or mistake made by the commissioners with respect to the amounts imposed upon the plaintiff's lots, or if for any special cause they were not liable to be assessed, it was their duty to appear in the proceeding and interpose the objections, so that the error might be corrected in season and the rights of all protected. I do not think that a person owning land within the limits liable to be assessed, who has allowed the confirmation of the report to be made without objection, should, after the lapse of years and when it is too late to make any readjustment of the expense, be allowed by action to question it. There was a fitting time for his intervention, before the judgment of the court rendered the pro-

ceedings of the commissioners final and conclusive. To give favor to such action would in effect nullify the provisions of the Act of 1813, by virtue of which the judgment is conclusive as to all questions litigated, or which might have been litigated, in the proceedings."

And where notice is given to property owners, as required by law, and they do not appear in the tribunal provided for that purpose, they are estopped to question the regularity of the assessment in that it exceeded 50 per cent of the valuation of the property. *Perry v. Tacoma* (1904) 34 Wash. 652, 76 Pac. 277. See to the same effect, *Rucker Bros. v. Everett* (1911) 66 Wash. 366, 38 L.R.A. (N.S.) 582, 119 Pac. 807.

But it has been held, on the other hand, that a property holder is not precluded by the confirmation of an assessment from asserting that the special tax laid on his property exceeded over one half of its valuation, as prohibited by law, and, further, that his land, being under water, was not benefited by the construction of a sewer. *Re Palmer* (1865) 1 Abb. Pr. N. S. (N. Y.) 30.

(d) *Disproportionate assessment.*

If a property is assessed for more than its lawful proportion of the cost of an improvement, whether by reason of an erroneous computation, or an improper distribution of the cost upon the lands assessable therefor, the error is waived by the failure to appeal to the city council; and in the absence of such appeal the objection cannot be made for the first time in an action to enforce the assessment. *Beckett v. Morse* (1906) 4 Cal. App. 228, 87 Pac. 408.

An alleged discrimination in favor of one property owner at the expense of another in the assessment of benefits is an objection which cannot be raised in an action for judgment and sale of property, where the owner has failed to present such objection at the confirmation of the assessment. *Schertz v. People* (1882) 105 Ill. 27.

So, an objection to a street assessment that it does not charge other property benefited by an improvement

with its just proportion of the cost is no ground for an injunction to restrain the collection of a tax, since it should have been raised on the application for confirmation of the assessment roll, and the owner, by his failure, has waived his right to object. *Cosgrove v. Chicago* (1908) 235 Ill. 358, 85 N. E. 599.

Likewise, an objection that marginal property is assessed too low, thus raising the assessment on more remote property in the district, is waived, where property owners fail to raise the question either at the hearing on the initiatory resolution or at the hearing on the assessment roll. *Seattle v. Jones* (1917) 95 Wash. 5, 163 Pac. 12, wherein the court said: "The city council are, as we have shown, specially empowered by the statute to determine the amount that shall be assessed to the marginal property, and any objection to the sufficiency of the amount fixed as a proper charge should be made to that body at the hearing had on the initiatory resolution. This is the purpose of the hearing, and failure to make the objection at that time is a waiver of the objection."

In *Wells v. Wood* (1896) 114 Cal. 255, 46 Pac. 96, it was contended that the amount of the whole assessment was not equally distributed to the lots fronting on the improvement, and that defendant's lot was assessed for more than its proper proportion. It was held that this objection was waived by failure to appeal to the board of supervisors, and that the error could not be corrected in an action to enforce payment of the assessment.

Where a property owner fails to appear and file objections to an assessment, in answer to a notice pursuant to the statute, he cannot be heard in an action, to declare the assessment void on the ground that one of his lots is assessed for a larger portion of the costs resulting from the proceedings to effect the widening of a street than it should have been. *Mietzsch v. Berkhout* (1893) 4 Cal. Unrep. 419, 35 Pac. 321, wherein the court said: "He apparently thought he could safely rest upon his oars till

after the sale, and then invoke the power of the court of equity to declare the sale null and void. But we do not think he was at liberty to do that. If the objection now urged had any merit, it should have been presented to and acted upon by the board; and it cannot, in our opinion, be raised for the first time in the courts."

Similarly, where a property owner has an opportunity to present objections before the confirmation, and before the judgment of sale, he cannot, having failed to avail himself of these remedies, be permitted to enjoin the sale of lands for the payment of a delinquent tax. The rule was applied in *Smith v. Kochersperger* (1899) 180 Ill. 527, 54 N. E. 614, wherein the objection to the assessment was that a certain land association entered into an agreement with the city authorities, whereby its assessment was greatly reduced and was less than its proportionate share. The court said: "All of the alleged illegal acts occurred before the judgment of sale, and many of them before the judgment of confirmation, and were matters of public record in a cause affecting the complainant's property, and in which, and of the proceedings therein, they had due notice. It would be manifestly inequitable to allow them to stand by until the improvements have been completed and their property benefited thereby, and the judgments at law rendered, and then, in a court of equity, sustain the objections to their assessment which they could have raised in the proceedings at law."

But it has been held that, where there was a gross inequality in assessments for a street improvement, a property owner was not estopped from objecting thereto, under the provisions of a city charter declaring that owners of property who fail to appear and make objection are bound by the confirmation of the assessment by the city council. *Howell v. Tacoma* (1892) 3 Wash. 711, 28 Am. St. Rep. 83, 29 Pac. 447, wherein the court said: "The provisions of the charter in that regard are broad enough to warrant this contention on the part of the appellants, but such construction would, as

in the other case cited, destroy the constitutionality of such provision. If it is to be held constitutional, the conclusiveness of the proceedings had before said city council must be held to apply only to the question of procedure and valuation, under a method which, if properly applied, would work substantial justice. It could not be extended so as to estop one from asserting rights as against such assessment, when the common council had never had any jurisdiction of the proceeding, or had so far departed from proper methods as to oust it of jurisdiction. In the case at bar we think that the proceedings clearly show such a departure from constitutional methods as to render them void, and for that reason respondent, as a petitioner for the work, is not responsible therefor or bound thereby; and that, for a like reason, the proceedings before the common council in equalizing and approving the assessment are binding upon no one." This decision is followed without discussion in *Griggs v. Tacoma* (1892) 3 Wash. 785, 29 Pac. 449.

Where an objection to a street improvement assessment does not require extrinsic evidence for the purpose of establishing the fact, but the assessment appears on its face to have been made in violation of the statute, a property owner is not precluded from making the objection in an action to enforce payment, by his previous failure to appeal to the board of supervisors. Hence, where a statute provides that, when one street terminates in another street, the expense of the work done on one half of the width of the street, opposite the termination, shall be assessed upon the lots in each of the two quarter blocks adjoining and cornering on the same, and the expense of the other half upon the lots fronting on the street opposite such termination, an objection that the whole of the expense of the work done at this intersection was assessed exclusively on the lots in the two quarter blocks adjoining and cornering upon the intersecting streets, and that, therefore, the charge against the lot of the objectors is double what

it should have been, comes within the meaning of the rule. *Perine v. Lewis* (1900) 128 Cal. 236, 60 Pac. 422, 772.

(e) *Improvement of no benefit.*

In an action to enforce the collection of an assessment, a property holder is estopped from denying that the improvement was of benefit to his property, when he did not avail himself of the opportunity of presenting his objections to the council at the confirmation of the assessment. *Woodlawn v. Durham* (1909) 162 Ala. 565, 50 So. 356.

So, an objection that a property assessed is not benefited by an improvement is waived by a failure to urge it at the confirmation of an assessment, and it cannot be raised in a proceeding for judgment and sale of the property. *Le Moyne v. West Chicago Park* (1886) 116 Ill. 41, 4 N. E. 498, 6 N. E. 48. See to the same effect, *Illinois C. R. Co. v. People* (1897) 170 Ill. 224, 48 N. E. 215, wherein the court said: "This was not a valid objection, because the question of benefits was settled by the determination of the common council when it passed the ordinance providing for the improvement, and was not open for determination upon the application for judgment and sale of the property."

In *Power v. Helena* (1911) 43 Mont. 336, 36 L.R.A.(N.S.) 39, 116 Pac. 415, the rule is laid down that the failure of a property owner, notified of proposed improvement proceedings, to avail himself of the opportunity to remonstrate to the local authorities whose duty it is to pass on the same, will preclude him in a subsequent proceeding from insisting that his property was wrongfully assessed for a portion of the cost, in that it received no benefits from the improvement. The court said: "May a property holder invoke the aid of a court of equity, in the first instance, to relieve him from an assessment for special improvements, upon the ground that his property is so situated that it is impossible for it to obtain any benefit? The respondent city contends that, since the legislature has designated the city council as a special tribunal before which objections to the

creation of the proposed improvement district and to the proposed tax may be made and heard, the presentation of objections to that tribunal is a condition precedent to the right of the property holder to go into a court of equity for relief, in the absence of fraud or lack of jurisdiction appearing upon the face of the council's proceedings. The purpose of requiring notice to be given and a hearing had by the council upon any objections to the creation of a special improvement district, or assessment made therefor, is to give an opportunity to any interested property holder to be heard, and to show, if he can, that his property will not derive any special benefit from the improvement, or that his property is made to bear an unjust proportion of the burden of taxation; but equally, also, is it to enable the city to correct any errors or mistakes, and, if any appear, to readjust itself before expense has been incurred or warrants have been issued. In the present instance, if the property of plaintiff, and others similarly situated, can be relieved from the tax, innocent third persons who have done the work and received the warrants must suffer, or the owners of the remaining property within the district must bear the burden of the entire assessment. It may be that a particular property holder whose property will be benefited was willing to have the improvement made, provided all the property within the proposed boundaries of the district shared in the expense, but would not have been willing if one half of the property was excluded, and the remaining portion left to bear the entire burden. While we have not been able to find any case directly in point, and the decision of the question presented is not without difficulty, it seems to us that, upon principle, the doctrine of estoppel in pais is applicable here; that the failure of the plaintiff to appear before the council and object not only deceived the city, but other property holders as well, and led the city to incur expense which cannot otherwise be met; that now, after the expense has been incurred, the improvement made, and warrants issued,

it would be altogether inequitable to permit the plaintiff to escape his proportion of the tax. He is estopped at this late day to say that his property will not be benefited."

An objection to an assessment for a sewer because the property owner has no access to it, a strip of land belonging to another intervening, comes too late when raised for the first time in an action for judgment of sale. The objection is one which should be made at the confirmation of the assessment, and an owner who fails to do this waives his right. *Vandersyde v. People* (1901) 195 Ill. 200, 61 N. E. 1050, 62 N. E. 806.

And in *Grandin v. Tacoma* (1915) 87 Wash. 98, 151 Pac. 254, it was held that a property owner was estopped to object to an assessment for a street system of storm drainage, on the ground that his property was not benefited thereby, where he had failed to make objection at the proceedings for confirmation.

In *Rogers v. Salem* (1912) 61 Or. 321, 122 Pac. 308, in disposing of an objection that property would not be benefited by the construction of a sewer, the court said: "It was incumbent upon the parties interested to have acted promptly, making their objections to the council and specifying the reason why their property would not be benefited by the sewer, or wherein the assessment would be unjust and oppressive, and then, if the council had failed to give a proper hearing, their action could have been reviewed. This remedy was adequate.

. . . No objections having been made to the improvement in question until after the ordinance providing for the construction of the sewer and the apportionment of the expense was passed, and the contract for the construction let, and the work partially performed, any irregularities occurring in the proceedings for such an improvement, after the common council had acquired jurisdiction, should not be considered in a suit to avoid the entire assessment. . . . In such a case, where the property owners have had notice and an opportunity to be heard in regard to an assessment for

a public improvement, a court of equity will not grant relief against such assessment as unequal, where they failed to appear and make their objection at the proper time."

So, an objection to an assessment for a sewer on the ground that an owner has access from his land to sewers on other streets, for which he has already been assessed, should be made at the hearing for confirmation, and, having failed to avail himself of this statutory remedy, an owner is estopped from raising the question in an action for judgment of sale. *Vandersyde v. People* (Ill.) *supra*.

Likewise, an objection to an assessment that the property has not increased in value because of an improvement, as shown by the rents, must be raised before the city council, as provided by statute, or it will be considered waived. *Hansen v. Missouri Valley* (1916) 178 Iowa, 859, 160 N. W. 340.

So, in *Minneapolis & St. L. R. Co. v. Lindquist* (1903) 119 Iowa, 144, 93 N. W. 103, it was held that an injunction would not lie to restrain the collection of an assessment for the construction of a sewer, on the ground that the land was so situated as to derive no benefit, where the statute gave the right to make objection to the city council and appeal to the district court, and the plaintiff failed to avail himself of either remedy. See to the same effect, *Cincinnati use of Nolte v. McDermott* (1877) 5 Ohio Dec. Reprint, 494, wherein the court said: "The power of assessing for a sewer improvement is conferred by the legislature, and proceeds upon the theory that special benefits result to the property assessed. But the exercise of the power presupposes that question to have been determined by the city council, in whose discretion it is left, and further inquiry is precluded."

However, where the statute does not require nor provide for the giving of a notice of the hearing of objections to the proposed assessment roll, such a notice is a voluntary proceeding on the part of the city, and the neglect or refusal of a property owner to appear at the time indicated in no man-

ner affects his rights, or estops him from objecting to an assessment for the construction of a sewer on the ground that the latter is so far distant from his property as to afford him no benefit, because he cannot connect with it. *Monk v. Ballard* (1906) 42 Wash. 35, 84 Pac. 397. See to the same effect, *McCurdy v. Ballard* (1906) 42 Wash. 697, 84 Pac. 399, and *Sanderson v. Ballard* (1906) 42 Wash. 697, 84 Pac. 399.

In *Jones v. Salem* (1912) 63 Or. 126, 123 Pac. 1096, it was contended that a portion of the property assessed was situated in thickly populated parts of the city, and of great value; that other portions were located in rural sections, were of small value, and comprised tracts of land which, by reason of the topography, were unsuitable for building purposes, and could never be benefited by the proposed improvements; that other parts lay below the grade of the proposed sewer, and could not be benefited thereby; and, further, that the assessment was made without regard to the direct benefits which would result from the improvement. It was held that, the council being without jurisdiction because of the insufficiency of the notice of the proposed improvement, property holders were not estopped from enjoining the collection of the assessment because they made no objection before the work was partially performed. The court said: "In proceedings for levying an assessment, if the common council is without jurisdiction from the beginning, a person whose property is affected by such assessment is not estopped to deny the validity of the proceedings on the ground that he made no objection thereto while the improvement was under progress."

(f) Improvement injurious to property.

Where notice of the filing of the assessment roll was duly given as required by statute, and the property owner made no objection to the confirmation, in any form, before the city council, it has been held that the objection that the property is injured more than it is benefited cannot be made for the first time, in a suit in

equity to set aside the assessment. *Annie Wright Seminary v. Tacoma* (1900) 23 Wash. 109, 62 Pac. 444.

In an action to invalidate an assessment for a storm sewer it appeared that the plaintiffs had never filed any protest or objection with the city council, as provided by statute; hence, that body was never given an opportunity to pass upon the question of benefits inuring to the property of the plaintiffs by reason of the construction of the sewer. It was held that it was error to admit evidence tending to establish the claim that the property was not in fact benefited, but rather injured, the court saying: "The law afforded the plaintiffs an opportunity to be heard before the city council touching the question of benefits inuring to their property, before the assessment was made. They have failed to take advantage of this opportunity, or call to the attention of the city authorities in apt time the claim that their property was not benefited. For this reason they will not be permitted to litigate in a court the question of benefits. The owner must avail himself of the opportunity afforded to appear and make his objections to special assessments in the special form which the law provides for that purpose; otherwise, he will not be heard to object in any other forum." *Denver v. Dumars* (1905) 33 Colo. 94, 80 Pac. 114.

Where a property owner undertook to contest the validity of a sale to enforce an assessment, on the ground that the property, after the improvement had been made, was not worth as much as the amount assessed against it, and that the assessment, therefore, necessarily exceeded the benefits resulting from the improvement, it was held that, having failed to appeal to the city council as provided by statute, he was estopped from raising the question. *Empire Securities Co. v. Matthews* (1918) 179 Cal. 239, 176 Pac. 160, wherein it was said: "The sole remedy for an excessive assessment is by appeal to the city council, . . . and . . . in the absence of such appeal the amount of the assessment is

not open to question in a subsequent or collateral proceeding."

In *Fischback v. People* (1901) 191 Ill. 171, 60 N. E. 887, it appeared that a property owner, in an action for judgment of sale for a delinquent tax, objected to an improvement in a pavement, because it deprived him of a sidewalk in front of his property. It did not appear that the defendant had filed any objection to the confirmation, but afterwards, while the work was in progress, he objected, because, as he claimed, there would be no room left for a sidewalk in front of his lot. It further appeared that afterward the city council passed an ordinance which defined the lines and width of the space for a sidewalk on that side of the street, and which reduced the width of such space from the uniform width of 12 feet, as theretofore by ordinance provided, to a width from the curb line of the street, as paved and improved, which varied from 12 feet to 4 ft, according to the lot lines fronting on said street. There was some evidence that the city had theretofore constructed the sidewalk and placed it over the line on defendant's lot, instead of in front of it, and that appellant had recovered damages for the trespass, and he testified that the curb of the improved street touched at some points on his property, but there was no evidence adduced showing there the true line was. It appeared, however, from the evidence, that the improvement was made in strict conformity with the ordinance authorizing it, and the maps, plans, and detail drawings prepared by the city engineer, referred to in the ordinance, and which were on file in his office, and no sufficient reason appears why defendant could not have made and filed his objections in the county court on the application for confirmation. In holding him estopped from raising the objection, the court said: "It may be that the actual construction of the improvement brought more directly and forcibly to his attention the fact, if it be a fact, that his property would not be benefited, or benefited to the extent it was assessed, by the improvement, than was done by the ordinance

and its accompanying maps and plans. Still, that would not give him the right to appear and make the same objections on the application for sale that he would have made on the application for confirmation."

An injunction to restrain the collection of an assessment, on the ground that the lowering of the grade of a street was an unreasonable act of oppression, and injurious to property owners, will not be granted where no objection was made at the confirmation of the assessment. *Cosgrove v. Chicago* (1908) 235 Ill. 358, 85 N. E. 599, wherein the court said: "The bill sets up no claim of which the plaintiffs in error might not have availed themselves at some stage of the assessment proceedings. This suit is substantially a collateral attack upon such proceedings. The aid of a court of equity can only be invoked in the absence of an adequate legal remedy. The collection of a special assessment cannot be enjoined in favor of one who has had an opportunity to make his defense in the court in which the assessment proceedings were had. His failure to make his defense there affords no ground for an application to a court of equity to relieve him from the consequences of his neglect."

In *De Puy v. Wabash* (1893) 133 Ind. 336, 32 N. E. 1016, it was held that the right to object to the assessment for a street improvement on the ground that the property was not benefited, but in reality injured, by the grading of a street, was waived by a failure to present the objections at the proper time and place, the court saying: "The appellants could have contested before the city council many of the questions raised in this proceeding, including benefits and damages to their property, but they could not stand by while the contract was being executed and the improvement was being made, and, after taking the chances of the benefits of their property, embarrass the city or the contractor by denying the propriety of the work, and by objecting to the manner of its execution."

But a property owner, having filed with the city a claim for damages

which was disallowed, and then having brought suit for such claim before an assessment was made, is not estopped in an action to enforce payment, from setting up her claim, by reason of the fact that she did not appear before the mayor and aldermen to protest, when notified in accordance with the charter and ordinances of the city. *Birmingham v. Wagenseler* (1910) 168 Ala. 344, 53 So. 289. The court said: "Her claim for damages and suit for same were not only a claim for damages for injury done by the said city to her said property, but was a most emphatic protest against the right of the city to assess any amount against her said property to help pay for such grading and fixing of said avenue and sidewalk. In other words, if said lots were damaged by said work, the city was not entitled to assess any amount against her property; for, under the rules of law governing such matters, the same work could not be both a benefit and a detriment to the property. To determine whether there was a benefit or a detriment to the property, the test is whether the work done increased or diminished the value of the property. If it increased the value of the property, then an assessment not exceeding the benefit on the one hand, or its proportionate share of the expense on the other, would be proper and legal. On the other hand, if said work diminished the value of said property by making it more inaccessible, then the owner thereof would be entitled to damages."

(g) Assessment in excess of cost of improvement.

In *Tumwater v. Pix* (1897) 18 Wash. 153, 51 Pac. 353, it was held that, where an assessment for the improvement of a street was double the actual cost, the defect was not jurisdictional, and a property owner who had notice of the assessment, and failed to appear and object at the time appointed, was estopped from raising the question in defense of an action to enforce collection of the assessment. In this case the court said: "This does not go to the jurisdiction to make a reassessment, but is a matter which the town

council could have, and it must be presumed would have, corrected, had application been made for that purpose in accordance with the notice contained in the ordinance for reassessment above set out. It is a mere mistake, or irregularity at most, not affecting the jurisdiction. No reason is suggested why respondent did not appear and make his objection before the town council. That body had jurisdiction of the subject-matter, and was clothed with power to arrive at a correct determination. It was the tribunal appointed by the law for the correction of any mistakes or irregularities. Parties interested cannot be permitted to disregard the opportunities so afforded for a hearing, and to select a forum of their own choosing. They must make their objections seasonably, before the tribunal which the law appoints for that purpose, and, failing to do so, cannot thereafter be heard to complain."

And in *Alexander v. Tacoma* (1904) 35 Wash. 366, 77 Pac. 686, it was said: "It appears by the terms of the contract that the actual cost of the improvement was \$5,795, while the reassessment was for \$5,800, or \$5 more than the original cost. On this discrepancy the second objection is founded. In tax sales, where the proceedings were wholly ex parte, courts have set aside titles acquired thereunder apparently for some not very substantial reasons, and cases can be found where differences even less than are shown here have been held to avoid the proceedings. The reasoning on which such judgments are justified, however, has no application to proceedings such as our statutes prescribe. They were rendered in cases where the proceedings were such that no opportunity was given to make the objection until after the sale. Such is not the fact here. The appellant had the right to appear before the city council and make this objection. Had he done so, doubtless it would have been corrected. But, having failed to appear and make the objection, he must be deemed to have waived it."

But where, by statute, a city of the third class is prohibited from making

an assessment for more than the amount of the estimated cost of a street improvement, an assessment for more than the estimated cost exceeds the power of the city council, and in such a case a property owner is not estopped to object to the assessment on that ground, by his failure to object at the confirmation. *Kuehl v. Edmonds* (1915) 85 Wash. 307, 148 Pac. 19.

It has been held that an objection to a special assessment for paving, that sufficient money has already been collected to pay for an improvement, should be made at the confirmation, and comes too late when raised for the first time in an application for judgment of sale. *People ex rel. Thompson v. Judson* (1908) 233 Ill. 280, 84 N. E. 233, wherein the court said: "We are of opinion that the question now under consideration in so far as it sought to show that prior to the confirmation of the new assessment there was no unpaid balance, is conclusively settled by the judgment of confirmation. Of course, appellants might show, on application for judgment and sale, that the assessment had been paid, in whole or in part, subsequent to the confirmation; but where, as in the case at bar, it is contended that there is nothing due for which a second or new assessment can legally be levied, there is no reason why this matter should not be brought forward at the confirmation. Under the statute, a failure to raise this question at the time of confirmation precludes appellants from now contending that there was no balance for which the new assessment could properly be levied."

And in *Goodwillie v. Lake View* (1889) — Ill. —, 21 N. E. 817, it was held that, if property owners desired to question the finding as to the amount necessary to defray the cost of an improvement, they should have done so at the time the order for confirmation was applied for and entered, and were estopped by their failure to do so, from raising the objection in later proceedings.

Where a contract for the construction of a sewer was let for a considerably less sum than that on which an

assessment was based, the objection that the latter is excessive is a proper one, but it must be raised on the confirmation of the assessment, if known at that time; and a court of equity will not relieve a property owner from payment when he has neglected to follow the method provided by law. *Bloomington v. Blodgett* (1887) 24 Ill. App. 650, wherein the court said: "If the excessive and unnecessary levy was known to appellee at the time, or before the judgment of the county court confirming the assessment of the commissioners, as provided in §§ 30 and 31 of art. 9, chap. 24, Rev. Stat., he should then and there have made his defense. If not known at that time, but the error is discovered at or before the time when the county collector applies to the county court for judgment against the lots, at the time of applying for judgment against lands for taxes due the state and county, appellee may, at that time, make his defense under the provisions of § 39, art. 9, chap. 24, Rev. Stat., for the reason that the objection would be based upon facts discovered after the original judgment confirming the assessment, and hence could not have been interposed as a defense at the time the assessment was confirmed. The last clause of § 39 is: 'And, upon application for judgment upon such assessment, no defense or objection shall be made or heard which might have been interposed in the proceeding for the making of such assessment, or the application for the confirmation thereof.' The meaning of this clause is that all proper objections and defenses arising subsequently to the confirmation of the assessment, and which could not, therefore, have been interposed in that proceeding, may be set up when the collector seeks a judgment; that the confirmation of the assessment by the county court is final and conclusive only as to all defenses and objections existing at that time."

(h) *Assessment without regard to benefit.*

A failure to object to an assessment for a street improvement on the ground that the "front-foot" rule has

been used in apportioning it, without regard to the benefits, will estop a property owner from later raising the objection. Thus, it has been held that, when an owner has not followed the remedy given him by statute for revision of assessments, he is precluded from objecting that an assessment was made according to the "arbitrary front-foot" rule, and not on the basis of benefits derived from the improvement. *English v. Arizona* (1909) 214 U. S. 359, 53 L. ed. 1030, 29 Sup. Ct. Rep. 658.

Similarly, a property owner who fails to object before the tribunal provided by law to try such objections, in the course of the proceeding, is estopped from alleging the invalidity of a sidewalk assessment on the ground that he is charged for the frontage on both streets, of a corner lot. *Hallett v. United States Security & Bond Co.* (1907) 40 Colo. 281, 90 Pac. 683.

And where the acts of the legislature, under which proceedings for paving were taken, are not void, and the city charter furnishes an ample remedy to the owner of an abutting lot to contest the amount of an assessment, or the legality of the proceedings to levy and collect it, an owner will not be permitted to enjoin collection. *Lanham & Sons Co. v. Rome* (1911) 136 Ga. 398, 71 S. E. 770. In that case objection was made for the first time, in such an action, that the front-foot-rule adopted resulted in an excessive assessment. The court said: "Counsel for plaintiff in error cited, in regard to what is known as the front-foot rule of assessment, the case of *Norwood v. Baker* (1898) 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187. That decision has been discussed by the Supreme Court of the United States in several other later cases.

. . . It would not be profitable to enter into a discussion of the views entertained by the majority and minority of the court in those cases. It might not be amiss, however, to suggest that if the general rule is to allow assessment by the front foot, and the exception is only where such an assessment becomes confiscatory in character, whether wholly or partial-

ly so, it would seem that the person who seeks to bring himself within the exceptional status ought to allege facts sufficient for that purpose. In the case at bar, as we have stated, the plaintiffs in error were afforded ample opportunity to contest the assessments, either as to their amount or legality; and neither on the face of the statute, nor in the pleadings or evidence, was there anything to show that the assessment was confiscatory in character, either wholly or partially."

So, an objection to the mode of assessment for the construction of a sewer, unless it appears that the board is wholly without jurisdiction, or that the procedure has been departed from in some vital manner, must be made before the board, as provided by statute, and one who fails to do this waives his right to raise the question in an action to enforce the assessment; hence an objection that an assessment made according to the frontage of the property was not a correct estimate of benefits cannot be heard in such an action. *Harney v. Benson* (1896) 113 Cal. 314, 45 Pac. 687.

Similarly, an objection that an assessment was levied by the front foot, and not according to the special benefits to each lot, cannot be raised in defense of an action to enforce payment. *Jenks v. Chicago* (1868) 48 Ill. 296, wherein the court said: "The record shows that the assessment was upon property specially benefited, in the judgment of the commissioners, and their judgment could not be impeached, except for fraud. . . . Objections of the character here presented should be made at the proper time, before the common council. If they disallow them, he might enjoin the proceedings, if there had been fraud in the assessment, or made on a wrong basis. It is not fair or just that a party should lie by until the improvement is made, and then, by his objections, impose the whole burden of the improvement upon the city, or upon other property holders, the full benefit of which he enjoys."

In *Wray v. Fry* (1902) 158 Ind. 92, 62 N. E. 1004, which was an action to

enforce the lien of an assessment for the construction of a sewer, it was alleged "that, at the time and place appointed to hear objections to said assessment, appellant appeared before the committee of the common council, and presented his objections to the assessment against his said lot, and said committee, after hearing his objections, informed him that his said lot was not benefited by the construction of said sewer, and that they would so report to the council; that said committee failed to make such report, but, on the contrary, reported the approval of the assessment by the front-foot rule, as made by the engineer; that, by the failure of said committee to report as aforesaid, this defendant was deceived and misled, and prevented from enforcing his legal rights." The court said: "How he was prevented by said action of the committee 'from enforcing his legal rights' is not shown. Said committee was not authorized to assess benefits; it could only make recommendations to the common council. Burns's Stat. 1901, § 4294. The power to make assessments in such cases was vested in the common council. This appellant was bound to know. If the committee had reported to the council that appellant's lot was not benefited, that body had the power, notwithstanding such report, to assess benefits against said lot. Under said § 4294 . . . appellant was entitled to a hearing on his objections, not only before the said committee, but before the common council. In the exercise of diligence, he should have presented his objections to that body, and obtained the hearing accorded by the statute. His failure to do this gives him no right to be heard in this action on such questions."

An objection that an assessment is made according to the front-foot rule, without regard to actual benefits, must be made at the proper time before the city council, and if not then raised, the right to object is waived. *Leeds v. Defrees* (1901) 157 Ind. 392, 61 N. E. 930, wherein the court said: "If appellant was not satisfied with the part of the costs apportioned to her property, she, as was her right under

Burns's Stat. 1901, § 4294, ought to have appeared before the common council at the time fixed for the hearing of the engineer's report, and presented her objections thereto, and sought a hearing thereon. Such a hearing, we must presume, the common council would have accorded to her. That body, under § 4294, *supra*, being § 7 of the Barrett Law as originally enacted, was the proper tribunal before which appellant might have appeared and contested the question as to whether or not the amount of the cost of the street assessment sought to be apportioned to her abutting property exceeded, under all the circumstances in the case, the amount of benefits received by such property on account of the improvement. In the event it was shown or established to the satisfaction of the common council that such sum exceeded the amount of the special benefits resulting to such property, the common council, under the provisions of the above section, was invested with plenary powers so to change or modify the proposed assessment as to make it conform, under all the circumstances, as near as possible to such resulting benefits. . . . The statute in question as shown, provides a tribunal for that purpose, and further provides that an aggrieved person shall have the right to appear before it, and be accorded a hearing on his objections to the proposed assessment. The power to hear the complaint of the aggrieved owner carries with it such implied power as will make the hearing effectual; for the rule is well settled that when a general power is granted by a statute, every necessary power for the effectual exercise thereof is given by implication. . . . Possessing such general power under the statute, the council certainly had the right, upon a hearing, to award adequate and effectual relief by ultimately apportioning the cost of the improvement to the several pieces of property, according to the benefits resulting to each on account of the improvement."

Where the notice required by statute has been duly given, affording op-

portunity to appear and be heard on the question, an owner who fails to take advantage of that opportunity is usually estopped from questioning the validity of the assessment. This rule applies to an objection making the assessment by the front-foot rule. *Felmet v. Canton* (1919) 177 N. C. 52, 97 S. E. 728, wherein the court said: "No objection was made by the property owners, or any of them. In fact, the improvement seems to have been undertaken at the instance of a majority of the property owners in the vicinity. It nowhere appears that there is anything unjust or oppressive, either in the improvement itself or the method or amount of the assessment."

So, where councils have directed the city engineer to make an assessment for paving a street, and the property holders are notified of the time and place at which the assessment will be made and objections heard, an owner who does not attend will be held to have waived his right to protest that the entire improvement was assessed on the front-foot basis, when part of the abutting property for long stretches should have been exceptionally assessed. *Scranton v. Davidson* (1894) 3 Lack. Jur. (Pa.) 141.

In *Wright v. Forrestal* (1886) 65 Wis. 341, 27 N. W. 52, which was an action to declare void and set aside certain tax certificates issued on a tax sale for the nonpayment of special assessments for a local street improvement, on the ground that the assessment was an arbitrary one, based solely on the cost of work in front of each lot without consideration as to actual benefits, the court, in dismissing the complaint, said: "Certainly the record does show that quite a large number of the lots were not charged with benefits to an amount equal to the estimated cost of the work in front of the same, nor anything near that sum. Any mistakes which the board may have made in charging lots with a greater sum as benefits than it might be made to appear they would receive from the construction of the street would furnish no ground of relief, so long as such charge was not made fraudulently and for the purpose of

making the owners pay more than their just proportion of the costs of such improvement. Mistakes of judgment or opinion in this respect can only be corrected by appearing before the board at the proper time, and having them corrected by an appeal to the board or to the common council, as provided by the charter. After the time for reviewing the assessment has passed, the legality or justice of the award of benefits can only be impeached by showing that the award was not made upon the proper basis, or that it was fraudulently made. Mere mistake of judgment cannot avail to vitiate the proceedings."

So, a property owner who signed a petition for the construction of a sewer, and made no objection to the assessment on grievance day, is not estopped from asserting that the assessment is excessive in taxing all property, without regard to depth, by the front-foot rule. *People ex rel. Miller v. Smith* (1915) 166 App. Div. 412, 152 N. Y. Supp. 299.

It has generally been held that where a property owner objects to an assessment because it was made according to the valuation of the land, instead of according to the benefits conferred, he is estopped from raising the question in a suit to enjoin the collection of the assessment, having failed to do so before the city council after notice. *New Whatcom v. Bellingham Bay Improv. Co.* (1896) 16 Wash. 131, 47 Pac. 236, affirmed in (1899) 172 U. S. 314, 43 L. ed. 460, 19 Sup. Ct. Rep. 205. See to the same effect *Northwestern & P. Hypotheek Bank v. Spokane* (1898) 18 Wash. 456, 51 Pac. 1070; *Heath v. McCrear* (1898) 20 Wash. 342, 55 Pac. 432; *Annie Wright Seminary v. Tacoma* (1900) 23 Wash. 109, 62 Pac. 444; *McNamee v. Tacoma* (1901) 24 Wash. 591, 64 Pac. 791.

However, it has been held that a property owner, by his failure to appear before the city council, as provided by statute, and object to the validity of an assessment levied by the front-foot rule without consideration of benefit conferred, is not estopped from attacking the constitutionality of the statute under which

the assessment was made, on the ground that it is in violation of the 14th Amendment of the Constitution of the United States. *Montgomery v. Birdsong* (1899) 126 Ala. 632, 28 So. 522.

So, a failure to present an objection to the preliminary notice of an intended improvement does not estop a property holder from objecting to the city council, after an assessment has been made, that it was done wholly without reference to the value of the property or the benefits accruing thereto by reason of the building of a sewer being grossly unequal and discriminatory. *Pueblo v. Colorado Realty Co.* (1908) 44 Colo. 590, 99 Pac. 318, wherein it was said: "While both the preliminary order and notice are required to contain the estimated cost of the improvement and the cost per front foot, and while no contract can be let for any amount exceeding the estimate made, this cost is only approximate, and not intended to be final. In the nature of things the entire cost of the improvement, and the exact amount to be assessed against each property owner, cannot be ascertained until after the contract for the improvement is let and the work finished and accepted. The only respect in which property owners are, by the statute, concluded by failure to file objections or complaints in response to the preliminary notice, is that when the council thereafter passes an ordinance authorizing the improvement, and therein finds that the same was duly ordered after notice duly given, and that the petition therefor was presented and subscribed by the required number of owners, such finding is made conclusive in every court or other tribunal. Property owners are not estopped, by a failure then to object, thereafter to complain of the basis adopted in making the assessment, or of the cost of the improvement, or of the amounts apportioned to them. Indeed, such ascertainment can only be determined when the city council passes the assessing ordinance, which, under the statute, cannot be done until after the work is completed and accepted. . . . It thus appears, . . . from the unambiguous language of the

statute, that property owners who, in response to the preliminary notice, do not object to the creation of an improvement district, or the construction of a public improvement, are not concluded by the preliminary order or notice as to the approximate cost thereof, or the apportionment to the several tracts of land affected, as set forth in such order or notice, but may thereafter, within the statutory time and in accordance with the statute, in response to the final or second notice given by the city clerk after the completion of the work and before the assessment ordinance is put upon its passage, file, and are entitled to have decided, the objections which they make thereto. If they are not then given a hearing, or if, upon such hearing, the decision is against them, they are entitled to be heard in a court of equity."

A paving assessment which on its face shows that a property was charged with double the amount authorized and directed by law, as where corner lots are assessed on both streets according to frontage, is void, and an owner is not obliged to take an appeal to the board of supervisors, but may raise the question for the first time in defense of an action to enforce the assessment. *Kenny v. Kelly* (1896) 113 Cal. 364, 45 Pac. 699.

And where a statute provided that an assessment against property could be made thereon only to the extent of 150 feet of depth, and the assessment was in fact made by the city council on the whole property, regardless of depth, it has been held that a property owner does not waive his right to object because no complaint was made before the city council, when the manner of assessment was not disclosed until after the meeting for hearing objections. *Hedge v. Des Moines* (1909) 141 Iowa, 4, 119 N. W. 276.

Similarly, an objection to an assessment that it is inequitable as placing property at a distance from sewers on an equal basis with abutting property, and assessing both by the front-foot rule, is not waived by a failure to appear on the grievance day and file objections to the assessment. *People ex rel. Empire v. Smith* (1915) 166 App.

Div. 406, 152 N. Y. Supp. 295, rev'd on other grounds in (1915) 216 N. Y. 95, 110 N. E. 174. See to the same effect, *People ex rel. Kennedy v. Smith* (1915) 166 App. Div. 413, 152 N. Y. Supp. 300.

Where a city charter provides that street improvements may be made and the cost assessed against abutting property owners, an assessment according to front footage, without regard to benefits, is void; and the further provision that the failure to call on the city council to revise and correct errors shall estop the owner from denying the correctness of the assessment roll does not provide for a hearing on the question of benefits received, nor estop the owner from objecting on the ground of unconstitutionality. *Hutcheson v. Storrie* (1899) 92 Tex. 685, 45 L.R.A. 289, 71 Am. St. Rep. 884, 51 S. W. 848.

Where a sidewalk assessment itself discloses that it is made in a manner not prescribed by statute, it is void on its face, and an owner of property thus assessed is not required to appeal to the city council for the correction of the assessment, but may, as a defense in an action to enforce the same, rely upon its inherent invalidity. This rule applies where the statute requires an assessment to be based on the frontage of the property improved, and the assessment, as made, proportions the benefit according to the square foot of the improvement. *City Securities Co. v. Harvey* (1917) 176 Cal. 682, 169 Pac. 380.

It has been held, however, that equity will not restrain the collection of an assessment for a sewer improvement on the ground that it was made according to the square foot of the property to be benefited, where it appeared that the complainant had not availed himself of either remedy given by statute, of objecting to the city council, or appealing to the district court. *Minneapolis & St. L. R. Co. v. Lindquist* (1903) 119 Iowa, 144, 93 N. W. 103.

(1) Extra charges included in assessment.

Where an opportunity is given by notice to present objections to an as-

assessment before a municipal board, and, if dissatisfied with its decision, to appeal therefrom, a property owner who does neither is estopped, in an action to enforce collection of the assessment, from setting up a defense that he was charged for other items besides the cost of the improvements. *Woodlawn v. Durham* (1909) 162 Ala. 565, 50 So. 356.

Likewise, an objection that a large amount of extra work is included in the assessment which was not provided for by the contract cannot be raised after the confirmation of the assessment. *Miller's Case* (1861) 12 Abb. Pr. (N. Y.) 121, wherein the court said: "It is not alleged that the work was not performed, or not well performed, or that it ought to have been done for less. But the want of these allegations is not here referred to as an answer to these objections. The first objection does not present such an irregularity as would affect the jurisdiction of the common council in confirming the assessment. Had the objection been made before either board of the common council, they might have thought proper not to pay the contractor who had performed the extra work without a legal contract. The work may have been fairly done, and the common council may have felt equitably bound to pay for it. There is no pretense to allege that it would be fraudulent, in a proper case, so to do. However this may have been, the objection comes too late."

It has also been held that an objection to an assessment, on the ground that it includes items for the expense of inspection and engineering which were included in the cost price, is waived, if not raised before the city council at the time set for hearing. *Young v. Tacoma* (1903) 31 Wash. 153, 71 Pac. 742.

So, where the city council is made the initiatory tribunal for the hearing of objections, an owner who fails to protest against an assessment on the ground that it includes paving between street car tracks, which duty is by its franchise placed on the car company, cannot raise the question in later proceedings. *Ibid.*

An objection to an assessment that it includes an amount, as incidental expenses, for engineering and printing, is waived by a failure to appeal to the board of supervisors as provided by statute, and cannot be raised as a defense to an action for collection. *Boyle v. Hitchcock* (1884) 66 Cal. 129, 4 Pac. 1143.

The contention that an assessment for street improvements included a charge for work not authorized to be done under the contract, where the statute so provides, must be raised in due appeal to the board of supervisors, and an owner, having failed to do this, cannot raise the question in an action to enforce the collection of an assessment. *Fanning v. Leviston* (1892) 93 Cal. 186, 28 Pac. 943.

Where the superintendent of streets, in making an assessment, includes items of expense which are not named in the plans and specifications attached to the contract, the assessment is not rendered void thereon, and a property owner who fails to appeal as provided by statute is estopped from objecting in an action on the assessment. *Perine v. Forbush* (1893) 97 Cal. 305, 32 Pac. 226.

And where it appears that the contractor has constructed a sidewalk on a strip not included in the area to be improved, so that the work done is without authority and the cost should not be included in the assessment, made to cover the total cost of the improvement, the assessment is not void, and the property owner, having failed to exercise his right of appeal to the city council, is estopped from asserting it in a later proceeding. *Oak Hill Water Co. v. Gillette* (1910) 13 Cal. App. 605, 110 Pac. 316. The court said: "Had it done so, and the attention of the council been directed to the fact that not only was the work incomplete by reason of the failure of the contractors to construct the sidewalk in front of the lots instead of on and across the ends thereof so projecting into the street, but also to the fact that the cost of the sidewalk so constructed had been included in the assessment for the total cost of the work, no doubt the council would have

met the objections by an exercise of the power vested in it by § 11, and caused the errors to be corrected."

So, an objection that an item of expense for searching the record of the property abutting on an improvement, to ascertain the exact frontage of the lots, is included in the assessment, is waived by an owner who fails to appeal to the city council. *Ahlman v. Barber Asphalt Paving Co.* (1919)—Cal. App.—, 181 Pac. 238, wherein it was said: "Of course, it must be presumed that if he had called the attention of the council to the fact that his assessment was thus excessive to the extent of \$1, that tribunal would have relieved him from the burden of this charge. Such appeals contemplate the correction of errors like this, and it is entirely just and right that, if a property owner fails to avail himself of this privilege thus accorded him by the law, he should thereafter be precluded from urging the objection."

Compare *Donnelly v. Howard* (1882) 60 Cal. 291, wherein, in an action to enforce a lien for a street assessment, the defense was that there was included in the assessment a charge for work done which was not authorized by the resolution of intention or the invitation for sealed proposals. It was held that the defendant was not estopped by his failure to appeal to the board of supervisors, as provided by statute. The court said: "The demand must be for the amount properly chargeable against the lot," and "the plaintiff is not entitled to recover unless he proves a demand for the amount legally due for the work."

(j) *Entire cost of improvement on abutting property.*

Where a property holder objects to an assessment for the reason that the entire cost of the improvement is levied on the property benefited, without any apportionment against the public, he must raise the question at the confirmation of the assessment, and, having failed to do, he is estopped from contesting the validity of the assessment on such grounds, in a proceeding for judgment and sale of the property. *Le Moyne v. West Chicago*

Park (1886) 116 Ill. 41, 4 N. E. 498, 6 N. E. 48.

So, an objection to an assessment roll that the intersection of two streets should have been assessed as the property of the town, and benefited by an improvement, cannot be raised in a proceeding for judgment, but is waived by failure to present it at the hearing for confirmation. *Walters v. Lake* (1889) 129 Ill. 23, 21 N. E. 556, wherein the court said: "It has never been held that the street upon which the improvement is made is subject to assessment as being benefited by the improvement. The ordinance has not provided for raising any money for the improvement of the street intersections by general taxation, and the commissioners have decided that there has been no public benefit to the town. The only course left for the objectors was to show upon the hearing that their lots were benefited less than the amounts assessed against them. In a case like this, the excess of the cost over the benefits received may be raised by general taxation, and, in this indirect way, a portion of the cost of the improvement may be borne by the municipality. . . . Appellants, however, failed to satisfy the jury that the benefits derived from the improvement by their lots were not equal to the amounts assessed against them."

Similarly, an objection that the ordinance authorizing an improvement is void in that it provides for a special tax on contiguous property to pay the entire cost of the improvement, except at street intersections and contiguous to a public park, without any provision limiting the tax to the benefits received, must be considered by the county court on application for confirmation, and a property owner who does not avail himself of the privilege extended to him, and have the question of benefits there reviewed and determined, is estopped from raising the question in a proceeding for judgment of sale of the delinquent property. *Hull v. People* (1897) 170 Ill. 246, 43 N. E. 984.

If an assessment roll improperly fails to charge the city with any part

of the cost of an improvement as a public benefit, the objection should be made before the court in confirmation proceedings as required by statute, and a failure to follow this remedy estops the property holder from enjoining the collection of the tax. *Cosgrove v. Chicago* (1908) 235 Ill. 358, 85 N. E. 599.

A property owner, having failed to appeal to the city council, as provided by statute, on account of irregularity in an assessment, is precluded from urging an irregularity in an action to recover the assessment, which might have been corrected on such appeal. This rule applies to an objection that the charge for curbs and sidewalks is made only against two lots, while the assessment for sewerage, regrading, and macadamizing is on the whole district, it appearing that the curbing and sidewalks are laid only in front of the said lots. *McSherry v. Wood* (1894) 102 Cal. 647, 36 Pac. 1010.

But where an ordinance for a public improvement directs that one half of the expense shall be paid by the city and one half assessed against the property owners, unless this procedure is followed an assessment on any other basis is illegal, and a property owner is not estopped by the confirmation from objecting to its validity. *Re Turfler* (1865) 44 Barb. (N. Y.) 46, 19 Abb. Pr. 140, wherein the court said: "The assessment in the first instance was illegal, because not made in conformity to the ordinance of the common council. A confirmation of it could not cure the illegality."

(k) Exclusion of property benefited.

Where it was complained that a street railroad company was not charged its full proportion of the cost of a pavement, and that for this reason the assessment against other owners was excessive, it was held that, having failed to avail themselves of the remedy at law provided by statute, they were estopped from enjoining the collection of the assessment made against them. *Regenstein v. Atlanta* (1896) 98 Ga. 167, 25 S. E. 428.

Where a paving assessment is al-
9 A.L.R.—46.

leged to be void because a lot in the district is omitted, the remedy is by appeal to the city council, and failure to make such appeal is a waiver of the objection. *Ahlman v. Barber Asphalt Paving Co.* (1919) — Cal. App. —, 181 Pac. 238.

In an action to annul the assessment for the construction of a sewer, it appeared that, in making the assessments, the city authorities exempted certain parks and various triangular tracts of land along the street. No protests were made by the plaintiffs against these exemptions, nor did they file any complaints or objections in response to a notice by the city clerk that the property named was not to be assessed. It was held that the assessment was not void, and the plaintiffs could not have relief in equity. *Spalding v. Denver* (1905) 33 Colo. 172, 80 Pac. 126, wherein the court said: "No doubt, in the preliminary stages of the creation of a sewer district, the question of exemptions of property therein from bearing its legal proportion of the expense of a local public improvement could be heard and determined, but owners injuriously affected by such exemptions must move in apt time. They will not be permitted to remain silent touching the matters of which they have notice, and then, for the first time, after the improvement has been completed and the assessment made upon their property, claim that the assessment is void because of matters which might have been corrected had they interposed their objection before the expense of construction was incurred. The omission of property from bearing its proportion of a special assessment does not render the entire assessment void. The most that plaintiffs could claim would be that an unjust burden was imposed upon their property because of the exemptions of other property in the district benefited by the sewer. The law has provided a forum, namely, the city council sitting as a board of equalization, to determine the question of assessments and apportionments. The plaintiffs have not seen fit to avail themselves of the opportunity thus afforded to have their as-

assessments reduced, if, under the law and facts, they would have been entitled to such a reduction, and therefore cannot appeal to a court of equity for the relief which they might have obtained in the special forum the law has provided."

In *Denver v. Dumars* (1905) 33 Colo. 94, 80 Pac. 114, it appeared that streets and highways in the district, as well as certain property, were excepted from the assessment. In holding that an objection to this exclusion was not timely in an action to invalidate the assessment, the court said: "That property in an improvement district is improperly excepted from bearing its proportion of the cost of a local improvement can no doubt be raised, if parties affected present the question in apt time. Where, however, as in this instance, no question is raised with respect to the exception until after the completion of the work, and no effort made to have the city authorities act upon that matter, it is too late to raise the question in the courts. The omission of lots from an assessment does not make the entire assessment void. . . . The most that plaintiffs could claim is that if property was improperly excluded which should have been included, then such exclusion would result in imposing upon the property assessed an unjust burden, to the extent of the amount which should have been assessed against the excluded property. This matter should have been called to the attention of the city council by filing objections, and thereafter presenting them to that body, sitting as a board of equalization. The plaintiffs failed to invoke the remedy provided by statute, and are, therefore, not now in a position to assert alleged rights which could have been secured by that remedy."

And in *Hildreth v. Longmont* (1909) 47 Colo. 79, 105 Pac. 107, the court said: "It is urged that if the public parks had been included in the assessments made for the construction of the sewer system some \$3,000 of the assessment would have been made against these parks. The omission of property which should have been as-

sessed to pay the cost of a public improvement does not render the assessment or the proceedings void. All that could be claimed in such circumstances would be that the assessment on property taxed for such improvement should be reduced to the extent it would have been had the omitted property been charged with its proportionate share of the expense. But parties seeking this relief must apply in the first instance to the special forum which the law has vested with authority to determine such questions, which in the case at bar was the city council. In the objections and complaints made by plaintiffs, no question was raised on the score of the omission of the parks. Not having availed themselves of the opportunity thus afforded to have their proposed assessments reduced, if, under the law and facts they would have been entitled to such a reduction, they cannot appeal to a court of equity for the relief which they might have secured in the special forum the law has provided."

"When a person is summoned before a tribunal to challenge a charge against his property, he may not avoid the effect of nonattendance by averring in a different proceeding that he was misled as to the tribunal's intended course of action." Under this rule, a property owner cannot object to the exemption of certain property from an assessment, thereby increasing his own, where he had notice of the meeting to hear such objections, but did not attend because he was told by the city engineer that the exempted property would have to pay its proportionate share of the improvement. *Gorman v. State* (1901) 157 Ind. 205, 60 N. E. 1083.

So, an objection that property benefited by an improvement was not included in an assessment cannot be raised in an action for judgment of sale on a delinquent tax, when it appears that the question was disposed of by the court on confirmation of the assessment, although the court took no action to carry its decision into effect. *Johnson v. People* (1898) 177 Ill. 64, 52 N. E. 308.

Similarly, in *Minnesota & M. Land & Improv. Co. v. Billings* (1901) 50 C. C. A. 70, 111 Fed. 972, wherein it was contended that the enforcement of a tax for a sewer should be enjoined for the reason that no assessment was levied against a large portion of the land which lay within the improvement district, it was held that, even if the excluded property ought to have borne its burden of the improvement, the objection came too late, as the time to object to the omission was prescribed by statute.

An objection that no part of the expense of grading a street was assessed against a railroad company, whose track occupied a portion of the street, cannot be raised in an action to foreclose a lien for the assessment, in the absence of an appeal to the board of supervisors. *McVerry v. Boyd* (1891) 89 Cal. 304, 26 Pac. 885, wherein the court said: "The mere fact that a portion of the street was occupied by a railroad company, whose duty it was to improve, or to bear the expense of improving, a part of the street, does not impair the prima facie correctness of the assessment. The apportionment of the expense of the work is given by the statute to the superintendent of the streets, and the defendant, if dissatisfied with the assessment, should have appealed to the board of supervisors, as provided by § 12 of the act in question. Having failed to do so, he cannot now complain of any matters from which he could have obtained relief by applying at the proper time to the proper authorities."

In New York, however, it has been held that where assessors did not follow the provisions of the ordinance regulating the assessment of benefits as to the property to be included, but omitted a large proportion, thereby increasing the assessment on other property, an owner is not estopped by the confirmation of the common council from objecting on these grounds, and he may restrain the collection of the assessment. *Hassen v. Rochester* (1875) 65 N. Y. 516, wherein the court recited the provisions of the city charter, as follows: "All assessments and

reassessments heretofore made, or that hereafter may be made, for local improvements, shall be and are hereby declared to be valid and effectual, notwithstanding any irregularity, omission, or error in the proceeding relating to the same, and all questions concerning the same shall be determined in all courts and places liberally to sustain such proceedings and with reference to the very right of the case, and not strictly." Referring to this provision it was said: "The terms of that provision clearly show that it was intended to apply to cases where, without it, some irregularity, omission, or error of a formal nature, in some of the proceedings relating to an assessment, and not affecting the substantial merits, might have invalidated it, and that it does not relate to the principle or rule adopted by the assessors in making an assessment, or to a clear violation of an express requirement of law, prescribing and defining what property was to be assessed, or regulating the amount of the assessment to be imposed. This construction is, I think, sustained by the direction that all questions concerning the same shall be determined in all courts and places liberally to sustain such proceedings, and with reference to the very right of the case, and not strictly. That direction assumes and contemplates that some assessments are properly to be subject to review by the courts, and may be held invalid, but in determining the question of their validity, the merits, without regard to mere irregularities, omissions, or errors, not affecting substantial rights, are only to be considered. If it was intended by the provision to declare that every irregularity, omission, or error of any kind, affecting or relating to an assessment, was to be disregarded, there would have been no necessity or propriety in adding anything further, after declaring that all assessments made or to be made for local public improvements were valid and effectual. All that is subsequently provided would be useless. The intention was to render a technical irregularity, omission, or error unavailable and ineffectual,

as a ground for setting aside such an assessment. It would be an unreasonable construction of that provision to hold that the legislature, after carefully providing that certain measures and proceedings, tending to protect the rights of persons whose lands were to be assessed, should be pursued, nevertheless intended to declare that they might be entirely disregarded, and that every assessment which the common council might direct to be imposed would, notwithstanding such disregard, be valid and effectual. Such a construction cannot be justified and is unwarranted."

(1) Improvement as general.

"The right to be heard carries with it the right to relief," and where landowners do not avail themselves of the opportunity provided by law to present their grievances before the city council, they are bound by the assessment unless the proceedings are void. Under these circumstances an injunction to restrain the collection of an assessment for the construction of a sewer, on the ground that it is a general improvement and not a local one, will not be granted. *Greensburg v. Zoller* (1901) 28 Ind. App. 126, 60 N. E. 1007.

An objection to the construction of a sewer by landowners outside of the city limits, that its purpose is solely as an outlet for the city sewerage, and not as a drain for surface water, is waived where the owners are notified and requested to appear before the committee appointed to view the outlet and the lands, but do not do so, and they make no objection until after the committee has reported to the council and the petition for the drainage of the city has been docketed. "It is the general rule that such objections must be made at the earliest opportunity, so that the proceeding shall not be allowed to proceed to a fruitless result with accumulation of cost; and if not so made they will be deemed to be waived. . . . Having failed to make said objection at the first opportunity, the same, even if tenable, was waived." *Valparaiso v. Parker* (1897) 148 Ind. 379, 47 N. E. 330.

Where objections to an ordinance are not made in confirmation proceedings, "the rule is that the ordinance can be attacked on the ground it is void, but on this ground only, for if the ordinance is void, the court, in the assessment proceeding, had no jurisdiction, and all the proceedings based upon the ordinance are consequently void." The question of the validity of the ordinance is a jurisdictional one within this ruling, and may properly be raised in a proceeding for judgment and sale. *O'Neil v. People* (1897) 166 Ill. 561, 46 N. E. 1096. In that case the objection was that the improvement provided for in the ordinance was not a local improvement, but included structures of a general character, such as the location of a city hall, pumping works, and standpipes. It was held, however, that the ordinance was, at most, ambiguous, and that the report of the commissioners as to a "portion" of the improvement to be paid by special assessment showed that the ordinance was understood in its proper sense. The court said: "The use of the word 'portion' in their report, together with the fact that their estimate was limited to the items mentioned in the 'estimate of cost' above set forth, shows that the commissioners understood the ordinance in the restricted sense we have indicated,—that is, that the construction of reservoirs, fire hydrants, and water mains was the improvement contemplated by the ordinance, and which was to be paid for by special assessment. The fact that said report was approved by the president and trustees of the village shows that the ordinance was understood by them in that sense. Under such circumstances, and since the contract has been let and the work done, the ordinance should not be held void." See to the same effect, *Harts v. People* (1898) 171 Ill. 458, 49 N. E. 538; *McManus v. People* (1899) 183 Ill. 391, 55 N. E. 886.

(m) Property condemned or dedicated for improvement.

The omission to award damages to the owner of property is an objection which cannot be raised after the con-

firmation of the assessment. *Re Cruger* (1881) 84 N. Y. 619. The court said: "The omission to make such award cannot be properly called a substantial error in making the assessment. Notwithstanding such omission, the assessment itself may be entirely regular and accurate. The petitioner is not harmed or aggrieved by the assessment. It is by an omission back of that and which preceded it. His right to damages is not affected by it. There is no necessity of vacating it to enable the petitioner to secure his rights. . . . To hold otherwise would produce a very anomalous result. If damages had been awarded to the petitioner, the expenses of the assessment, and his proportionate part thereof, would have been increased, and practically he stands here complaining that the assessment against him was not large enough, and therefore should be vacated entirely. If the assessors unlawfully refused to award him damages, he had his remedy. Their action could have been compelled. But the remedy was not by an attack upon an assessment, which had no fault except that a possible item of expense was omitted."

So, an agreement by which a property owner dedicated land for a street, and in consideration was not to be assessed for benefits for the opening of the street, is invalid, and, even if treated as a valid agreement, cannot be used in a suit to enjoin collection of an assessment, where the owner failed to avail himself of the opportunity to make his defense before the commissioners, and again in the circuit court by way of exception. *Vrana v. St. Louis* (1901) 164 Mo. 146, 64 S. W. 180.

And, where ample opportunity is given to a party feeling himself aggrieved by the widening of a street, to be heard before the council on return by the commissioners, and, if not satisfied with their determination, then on an appeal to a court of record, equity will not enjoin the collection of an assessment made against an owner whose property has been appropriated for the improvement, and who did not pursue the remedy thus

afforded. *McBride v. Chicago* (1859) 22 Ill. 574.

Property owners who fail to object at the time the assessment roll was made up, and who pay their assessments, are estopped from raising any question going to the procedure. "All informalities, as well as all defenses going to the amount of the assessment, are merged in the order of confirmation." Under this rule falls an objection that certain moneys recovered in condemnation proceedings to make the improvement were not credited, but diverted to other uses, thus making a greater assessment than should be laid upon the property. *Sanderson v. Seattle* (1917) 95 Wash. 582, 164 Pac. 217.

Similarly, an objection to an assessment levied to pay the compensation awarded to owners of property taken for opening a street, on the ground of an irregularity in the condemnation proceedings, cannot be made in an application for judgment of sale. Such an objection must be made at the confirmation proceedings or it will be considered waived. *Bass v. People* (1903) 203 Ill. 206, 67 N. E. 806, wherein the court said: "Appellant might have objected to the confirmation of the assessment in the circuit court on the ground of want of jurisdiction in the condemnation suit, but he was concluded by the judgment of confirmation as to that and all other questions which might then have been raised and adjudicated. The application of the county collector to the county court was for the purpose of satisfying the judgment of confirmation in the circuit court, and was based upon that judgment. A property owner has a right to a hearing before his property can be burdened with a special assessment, but when he has had a hearing he cannot, in the collateral proceeding to collect the judgment, litigate questions that might have been raised on the application to confirm the assessment. The circuit court had jurisdiction to hear and determine all objections to the special assessment, and appellant appeared and made his objections, and while he

did not make this objection, he could have made it."

And, where a statute provides that the owner has a right to be heard on the question of the amount to be assessed against his property before a charge therefor finally attaches, and to notice of such right, an aggrieved party who neglects to pursue this remedy is estopped from asserting that damages awarded for the condemnation of property for a street, whereby their assessment is increased, are improper, or that the street has previously been dedicated to public use. *Michael v. St. Louis* (1891) — Mo. —, 18 S. W. 967.

So, objections to the report of commissioners as to benefits assessed and the deduction for damages awarded, due to the opening, grading, and paving of a street, must be made to the council confirming the assessment, and further by appeal to the district court, and a failure to do so will be deemed a waiver of the objection. *McKusick v. Stillwater* (1890) 44 Minn. 372, 46 N. W. 769.

(n) *Boundaries of district.*

Where a property owner fails to appear and to make objection at the public hearing given by the common council as to the area of the assessment district, and also fails to appear before the board of assessors at the time fixed pursuant to law for hearing objections to the assessment, and in like manner fails to appear before the common council at the hearing on the confirmation of the assessment, and makes no objection until after the confirmation of the assessing district and the assessment roll, he is estopped from asserting in a suit in equity to enjoin the collection of the assessment that the limits of the assessing district fail to include property which should have been included in it. *MOORE v. YONKERS* (reported herewith) ante, 590.

So, a property owner who fails to protest at a hearing afforded by law, against the creation of a sewer assessment district, or against the inclusion of his land therein, or the exclusion of that of others therefrom, waives any right he had to object to the dis-

trict as constituted. Under these circumstances, he cannot be heard, in a suit to enjoin the collection of an assessment, to say that certain of his lands are included in a district, while other lands similarly situated are omitted, and that he has thereby been discriminated against, and his burden of taxation unjustly increased. *Caldwell v. Mountain Home* (1916) 29 Idaho, 13, 156 Pac. 909.

In *New Whatcom v. Bellingham Bay Improv. Co.* (1897) 18 Wash. 181, 51 Pac. 360, which was an action to foreclose a street assessment lien, it was contended that certain exempt lots were within the assessment district and should have borne their proportionate share of the expense of the improvement. It was conceded that notice of the filing of the assessment roll and of the time fixed by the council for hearing and considering objections, as provided by statute, was duly given, but that the complainant had not filed any objections to the assessment, nor appeared before the council at the time fixed for considering the same. It was held that he was estopped by his inaction to offer the objection as a defense to the present suit.

An objection that an assessing district does not embrace all the property benefited cannot be raised in an appeal to the courts, where the statute provides for hearings before the city council, and it appears that the owner, after notice, failed to appear and make his objections. *Brown v. Grand Rapids* (1890) 83 Mich. 101, 47 N. W. 117.

Where notice and opportunity to be heard before the board of public works are given to an owner, he cannot, in a collateral proceeding, raise objection as to the inclusion of his property within a sewer assessment district. *McGhee v. Walsh* (1913) 249 Mo. 266, 155 S. W. 445.

An objection to the validity of an assessment that the district does not include all the land benefited by the opening of a street is not jurisdictional, and a property owner who does not appeal to the city council as provided by law is estopped by its deci-

sion from raising the question in an action to restrain the collection of the assessment. *United Real Estate & Trust Co. v. Barnes* (1911) 159 Cal. 242, 113 Pac. 167.

Where a statute provides that "objections to the extent of the district" shall be made in writing and heard by the city council, their decision is conclusive, and if a property owner does not avail himself of this remedy, but allows the work to progress and be completed without objection, he cannot be heard in an action to foreclose the assessment. *O'Dea v. Mitchell* (1904) 144 Cal. 374, 77 Pac. 1020.

In an action to enjoin a city treasurer from executing a deed to the purchasers of certain lots sold for non-payment of an assessment for a street improvement, a property owner is estopped from setting up the claim that the assessment district did not include all the property fronting on the streets improved, having failed to object to the boundaries of the district before the city council. *Duncan v. Ramish* (1904) 142 Cal. 686, 76 Pac. 661, wherein the court said: "It must be held that the property owner, having this right, must avail himself of it, or be concluded by the decision of the council. It does not appear that any objection was made to the boundaries of the district, and hence it must be held that the decision of the council as to its extent was correct. There is nothing in the law which requires the assessment district fixed by the council to include all the property fronting on the streets. The court cannot say that it might not be possible that some of the property fronting on the streets would not be benefited by the improvement."

On the other hand, it has been held that authority to levy a special assessment must be found in the statute, and where it is provided that assessment shall be made on adjacent and abutting property, there is no authority for a sewer assessment on nonadjacent property, where the line has been drawn by the council at 150 feet from the sewer, and an objection for this reason is not waived by failure to appear before the city council or to

appeal from its decision. *Bennett v. Emmetsburg* (1908) 138 Iowa, 67, 115 N. W. 582.

It has also been held that where the power of a common council to levy assessments is limited by statute to lands "liable to be assessed," which term also is defined and fixed, a property owner whose land is not within the district "liable to be assessed" for paving, though it is located in the neighborhood of the proposed improvement, need not appear before the common council at any stage of the proceeding for the purpose of protecting his property from an unlawful assessment, but may rest on the assurance afforded by the statute, and his right to object is not waived by his inaction. *Buckingham v. Kerr* (1918) — Ind. App. —, 120 N. E. 422.

Although various streets in widely separated sections of a city may be included in the preliminary resolution referring the work to the engineer for consideration, it seems clear that if he finds the work to be done embraces, in the matter of special benefits, separate and distinct districts, he must make a separate report as to each of such districts, so that the expense of the work in any one district may be apportioned to and borne by the property of that district alone. Where a district, therefore, is made up of widely separated sections, an objection to an assessment made on that basis is one which is available in an action to enforce payment, notwithstanding a failure to make objection before the legislative body. *Southwick v. Santa Barbara* (1910) 158 Cal. 14, 109 Pac. 610.

And where a sewer covers two districts, but the topography of the land is such as to drain only one, the property of the district not drained is not liable for the assessment, and the failure of a property owner to object to the construction of the sewer does not estop him from subsequently contesting the validity of the special tax bill issued therefor, when he at the time had no knowledge of the invalidity of the proceedings. *St. Joseph ex rel. Danaher v. Dillon* (1895) 61 Mo. App. 317.

So, a property owner, by his failure to appear at the confirmation proceedings and file objections, is not estopped from contesting the validity of an assessment, where it appears that the notice to him covered only one lot, and he had no means of knowing that other property was included in the assessment district. *Van Zanten v. Grand Haven* (1913) 174 Mich. 282, 140 N. W. 471.

(c) *Description of property assessed.*

An objection that some of the tracts of land assessed for a street improvement are so inadequately described that a surveyor cannot ascertain where they are situated and therefore they cannot be identified, cannot be made on application for judgment of sale. Such an objection is waived if not raised at the hearing confirming the assessment. *Harman v. People* (1905) 214 Ill. 454, 73 N. E. 760.

Similarly, an objection that the lots affected by an assessment for a sewer are not described by street numbers, as required by law, is waived when not made at the trial of confirmation, and cannot be raised afterwards. *Laimbeer v. New York* (1850) 4 Sandf. (N. Y.) 109.

So, where an assessment referred to a diagram of lots affected, attached as "exhibit A," which diagram was not in fact made a part thereof, it was held that such an objection was purely technical, and, as it could not affect any substantial right or interest of the owner, it was waived by a failure to appeal to the board of supervisors as prescribed by statute. *Dyer v. Parrott* (1882) 60 Cal. 551.

However, in *People ex rel. Kochersperger v. Eggers* (1897) 164 Ill. 515, 45 N. E. 1074, where it appeared that certain land had been assessed for laying a water pipe, the assessment confirmed, and the lots returned as delinquent, in an application for a judgment of sale, the owner objected because no such lots were shown of record or otherwise. It was proved that a certain block had not been subdivided into lots, and on this ground the application for judgment against the supposed lots was denied. The court said: "It is admitted that the objec-

tion sustained would have been a good one if made upon the application for confirmation, but it is claimed that it was too late to make it in this proceeding for a judgment of sale. If the judgment of confirmation was not void, but merely erroneous, this would be true, and the only remedy for such a judgment would be by appeal or writ of error; but if the judgment of confirmation was void it could be resisted at any time or place, and as well upon an application for a judgment of sale as elsewhere. . . . A proceeding of this character is against the land, and the subject-matter of the judgment must be capable of identification or the judgment will be void. Where it is impossible to tell what land was assessed, or against what land the judgment of confirmation was entered, the assessment and judgment will be void."

If the description given by the assessment and diagram is insufficient to identify the land assessed, the assessment, unless corrected, will necessarily be void on its face, and hence the failure to appeal cannot cure it. On the other hand, if on the whole diagram and assessment the description is sufficient, the assessment will be good. *Blanchard v. Ladd* (1901) 135 Cal. 214, 67 Pac. 131, wherein it was said: "An arrow is not an essential part of an assessment diagram, though it may, when used, be in some cases an essential part of the description. Thus, if the work be for the grading of a crossing of two streets as in the former case, it is obvious that a diagram showing the streets in the vicinity of the crossing, and these streets only, and representing the lot assessed as at one of the corners, would be insufficient, without an arrow, scroll, or something equivalent to show direction; for, otherwise, the lot as represented might be in either of the corners. . . . But there are other ways of representing direction. Thus, the course might be written on one of the boundaries of a street or on that of one of the lots, or the direction of the lines might be otherwise indicated; and, not having the diagram

before us, we cannot say that this is not so in the present case."

(p) Assessment by instalments.

In Illinois, the assessments for sewers may, under some circumstances, be divided into instalments.

Under that rule, a property owner who has failed to object to an assessment at the confirmation and judgment of sale therefor is estopped from invoking the aid of equity on the ground that assessments were divided into instalments without authority of law, since the error, if any, occurred before the confirmation. *Smith v. Kochersperger* (1899) 180 Ill. 527, 54 N. E. 614.

Similarly, an objection that the ordinance for an improvement divides the special tax into a greater number of instalments than is authorized by the statute is waived if not made on the application for confirmation of the assessment, and cannot be raised in an action for judgment of sale. *Harman v. People* (1905) 214 Ill. 454, 78 N. E. 760.

b. Appearing and filing other objections.

1. Generally.

The broad general rule appears to be that, where a property owner makes objection to an assessment for a street improvement on certain specified grounds, he thereby waives other objection thereto.

Colorado.—*Hildreth v. Longmont* (1909) 47 Colo. 79, 105 Pac. 107.

Illinois.—*Murphy v. Peoria* (1887) 119 Ill. 509, 9 N. E. 895; *Murphy v. People* (1887) 120 Ill. 234, 11 N. E. 202; *Walters v. Lake* (1889) 129 Ill. 23, 21 N. E. 556; *Quick v. River Forest* (1889) 130 Ill. 323, 22 N. E. 816; *Walker v. Aurora* (1892) 140 Ill. 402, 29 N. E. 741; *White v. Alton* (1893) 149 Ill. 626, 37 N. E. 96; *Rich v. Chicago* (1894) 152 Ill. 18, 38 N. E. 255; *Illinois C. R. Co. v. People* (1897) 170 Ill. 224, 48 N. E. 215; *Hewetson v. Chicago* (1898) 172 Ill. 112, 49 N. E. 992; *McManus v. People* (1900) 183 Ill. 391, 55 N. E. 886; *Hintze v. Elgin* (1900) 186 Ill. 251, 57 N. E. 856; *Dickey v. People* (1904) 213 Ill. 51, 72 N. E. 791; *Marshall v. People* (1905) 219 Ill. 99, 76 N. E. 70; *Chicago v.*

Marsh (1911) 251 Ill. 298, 96 N. E. 250; *Lincoln v. Chicago & A. R. Co.* (1914) 262 Ill. 11, 104 N. E. 277; *Oak Park v. Swigart* (1914) 266 Ill. 60, 107 N. E. 158; *Watseka v. Orebaugh* (1915) 266 Ill. 579, 107 N. E. 887; *Lovington v. Gregory* (1919) 287 Ill. 169, 122 N. E. 504.

Indiana.—*Lake Erie & W. R. Co. v. Bowker* (1893) 9 Ind. App. 428, 36 N. E. 864.

Iowa.—*Reed v. Cedar Rapids* (1907) 137 Iowa, 107, 111 N. W. 1013; *Andre v. Burlington* (1908) 141 Iowa, 65, 117 N. W. 1082.

Kentucky.—See *Allen v. Woods* (1898) 20 Ky. L. Rep. 59, 45 S. W. 106.

Michigan.—*Auditor General v. Maier* (1893) 95 Mich. 127, 54 N. W. 640; *Gregory v. Ann Arbor* (1901) 127 Mich. 454, 86 N. W. 1013; *Gates v. Grand Rapids* (1903) 134 Mich. 96, 95 N. W. 998; *Stewart v. Detroit* (1904) 137 Mich. 381, 100 N. W. 618.

Missouri.—*Louisiana v. McAllister* (1904) 104 Mo. App. 152, 78 S. W. 814; *Salem ex rel. Roney v. Young* (1910) 142 Mo. App. 160, 125 S. W. 857.

New Jersey.—See *State, Brinley, Prosecutor, v. Perth Amboy* (1861) 29 N. J. L. 259; *State, Central R. Co., Prosecutor, v. Bayonne* (1889) 51 N. J. L. 428, 17 Atl. 971.

New York.—*Re Spuyten Duyvil Park-way* (1884) 67 How. Pr. 341; *People ex rel. Stow v. Kingston* (1899) 89 App. Div. 80, 56 N. Y. Supp. 606; *Brown v. Otis* (1904) 98 App. Div. 554, 90 N. Y. Supp. 250, modified on other grounds in (1906) 185 N. Y. 303, 78 N. E. 64. See also *Merritt v. Portchester* (1877) 71 N. Y. 309, 27 Am. Rep. 47.

North Dakota.—*Robertson Lumber Co. v. Grand Forks* (1914) 27 N. D. 556, 147 N. W. 249.

Oklahoma.—*Weaver v. Chickasha* (1912) 36 Okla. 226, 128 Pac. 305.

Pennsylvania.—*Pepper v. Philadelphia* (1886) 114 Pa. 96, 6 Atl. 899; *Brown v. Philadelphia* (1886) 3 Sadler, 45, 18 W. N. C. 256, 6 Atl. 904.

Washington.—*Chandler v. Puyallup* (1912) 70 Wash. 632, 127 Pac. 293; *Great Northern R. Co. v. Leavenworth* (1914) 81 Wash. 511, 142 Pac. 1155; *Ann. Cas.* 1916D, 239; *Sampson v.*

Leavenworth (1914) 81 Wash. 700, 142 Pac. 1160.

With respect to objections to the jurisdiction, however, as distinguished from objections based on mere errors or irregularities in the proceedings, a different rule has been laid down in a few cases, the view being taken that an objection to the jurisdiction may be raised at any time, and is not waived by specifying other objections. *Southern Constr. Co. v. Howells* (1913) 21 Cal. App. 330, 131 Pac. 756; *Andre v. Burlington* (1908) 141 Iowa, 65, 117 N. W. 1082; *Auditor General v. Stoddard* (1907) 147 Mich. 329, 110 N. W. 944; *Re Lange* (1881) 85 N. Y. 307; *Great Northern R. Co. v. Leavenworth* (1914) 81 Wash. 511, 142 Pac. 1155, Ann. Cas. 1916D, 239. See also *Reed v. Cedar Rapids* (1907) 137 Iowa, 107, 111 N. W. 1013; *Hitchcock v. Springfield* (1876) 121 Mass. 382; *Marvin v. Town* (1890) 56 Hun, 510, 10 N. Y. Supp. 148; *Hanson v. Town* (1890) 56 Hun, 648, 31 N. Y. S. R. 665, 10 N. Y. Supp. 150.

2. Sufficiency of petition.

Where the petition for a street improvement is defective in that it is signed in behalf of an estate, by the executor, instead of the heirs at law, the defect is waived by a property owner who appears before the council and protests against the assessment on other grounds. *Stewart v. Detroit* (1904) 137 Mich. 381, 100 N. W. 613.

3. Validity of statute or ordinance.

Where a property owner appears before the board of confirmation, and his objection to a sewer assessment does not question the validity of the ordinance relating thereto, he waives the right to raise this question later. *Robertson Lumber Co. v. Grand Forks* (1914) 27 N. D. 556, 147 N. W. 249.

So, in *Watseka v. Orebaugh* (1915) 266 Ill. 579, 107 N. E. 887, it appeared that in written objections filed the particulars in which a street improvement ordinance was alleged to be defective were specified, but the want of an established grade was not included in the specifications. It was held that,

having enumerated particular objections, all others were waived.

However, it has been held that an objection to the validity of an ordinance providing for the construction of a sewer, on the ground that no legal notice was given of the proposition for the completed improvement, was not waived by a property holder who filed a general remonstrance against the whole proceeding. *State, Brinley, Prosecutor, v. Perth Amboy* (1861) 29 N. J. L. 259, wherein the court said: "It is urged that this objection to the ordinance was waived by the act of the prosecutors in presenting objections after the assessment was made, as was held in the case of *State, Townsend, Prosecutor, v. Jersey City* (1857) 26 N. J. L. 447. It appears by the minutes of the council that, at a meeting for hearing objections to the assessments, a remonstrance was presented; but the contents of the remonstrance are not given. The grounds of it are testified to generally by the clerk of the council. He says that objections were made to the proceedings that they were unjust and unfair, that the sewer was uncalled for, and that each property holder should have been consulted. These objections seem to refer to the whole proceedings, and to include those that relate to the ordinance and to the want of notice. This cannot be regarded as an admission of any notice or of a waiver of a right to notice, but it expressly complains of a want of it, and that the property owners were not consulted. In the case referred to, the remonstrance presented specific objections, but did not include any against the ordinance, and that was held to be a waiver of objections against it. But this case is not like that, and no waiver can here be implied."

4. Conformity of proceedings to statute or ordinance.

Where property owners appear before the city council, and the sole objection made by them is that the several assessments for all street improvement are not equal according to benefits, they are estopped from later questioning the validity of the assessment on the ground that the city has

no power under its charter to incorporate in a resolution providing for a street improvement a provision for the construction of a sewer. *Gates v. Grand Rapids* (1903) 134 Mich. 96, 95 N. W. 998. So, it has been held that an objection to a parkway assessment on the ground that no jurisdiction was acquired by the commissioners of estimate and assessment, or by the court, for the reason that a parkway was neither a street, road, nor avenue within the meaning of the statute, could not be raised after the confirmation of the assessment, where the moving parties were heard on other objections, at every step and stage of the proceedings. *Re Spuyten Duyvil Parkway* (1884) 67 How. Pr. (N. Y.) 341.

An objection to the engineer's report on a paving improvement, in that it fails to show the proportionate amount of cost which should be borne by the property within the district, the lots specifically benefited by the improvement, and the estimated amount of the cost to be borne by each lot, is waived by property owners who appear at the hearing before the city council and make specific objections on other points. *Great Northern R. Co. v. Leavenworth* (1914) 81 Wash. 511, 142 Pac. 1155, Ann. Cas. 1916D, 239, wherein the court said: "The property owners who appeared and objected to the improvement being undertaken did not point out any defect in, or urge any objection on account of, the report of the engineer. The question was raised for the first time in the form of an objection to the confirmation of the assessment roll. The defect in the engineer's report not being a jurisdictional matter, it was waived by the appellants, who appeared before the council in response to the notice and failed to offer any objection touching the report. . . . The rule appears to be that, where a property owner makes objection to the assessment proceeding upon certain specified grounds, he thereby waives other objections which are not jurisdictional in the sense that they cannot be waived. The rule as stated in *Page & Jones on Taxation by Assessment*, vol. 2, § 1029, is: 'If the prop-

erty owner makes objection to the assessment proceedings upon certain specified grounds, such action is not merely an omission on his part to object on other grounds which he does not specify, but it also tends to mislead the public authorities to believe that the grounds of objection thus urged are the only grounds upon which the property owner complains of the assessment, and are the ones upon which he intends to rely. Accordingly, the conduct of the property owner in filing certain specified objections is held to prevent him from subsequently relying upon other and different objections to defeat the assessment.'" See to the same effect, *Sampson v. Leavenworth* (1914) 81 Wash. 700, 142 Pac. 1160.

An insufficient notice of proposal for bids for the construction of a sewer is waived where the owner appears before the city council and, filing other objections, fails to raise this particular point. *Andre v. Burlington* (1908) 141 Iowa, 65, 117 N. W. 1082. But where a contract for paving a street was duly let, and later, without publication of proposals for bids, the pavement was widened by resolution of the city council, it was held that a property owner who protested before the council and before the board of review against the widening of the pavement, basing his protest on other grounds, was not estopped to assert, in an action to enforce the collection of the assessment, that the resolution of the common council was unauthorized and void. *Auditor General v. Stoddard* (1907) 147 Mich. 329, 110 N. W. 944, wherein the court said: "Contestant has not lost his right to complain. He is not invoking the aid of the court. He is defending against a tax imposed without jurisdiction. He is not estopped. . . . It would be otherwise if the defect were a mere irregularity, not injuriously affecting the contestant's rights." Likewise, it has been held that a landowner was not precluded from questioning the validity of a street assessment against his premises, on the ground that the work was not let by contract, because he appeared and objected to its con-

firmation and demanded its reduction before the board of revision, which had no authority to vacate it on account of its invalidity. In *Re Lange* (1881) 85 N. Y. 307, wherein the court said: "It is a plain proposition that parties are only concluded by a judgment in respect to matters of which the court rendering it had jurisdiction, and which it had the power to decide, and that a decision upon a matter not within its jurisdiction concludes no one, and cannot be pleaded as *res judicata*. *Embury v. Conner* (1850) 3 N. Y. 511, 55 Am. Dec. 325. Conceding that the board of correction and revision, in deciding upon objections to assessments, act judicially, it is, we think, a plain answer to the point that the petitioner is concluded in this case that the board had no jurisdiction to set aside and vacate the assessment, for want of power in the corporation to impose any assessment whatever, for the particular work to which it relates."

A property owner who appears at a meeting or hearing in connection with a street improvement proceeding, and files other objections to the proceeding, thereby waives all objections with respect to the notice of the meeting or hearing. *Hildreth v. Longmont* (1909) 47 Colo. 79, 105 Pac. 107; *Murphy v. Peoria* (1887) 119 Ill. 509, 9 N. E. 895; *Murphy v. People* (1887) 120 Ill. 234, 11 N. E. 202; *Walters v. Lake* (1889) 129 Ill. 23, 21 N. E. 556; *Quick v. River Forest* (1889) 130 Ill. 323, 22 N. E. 816; *Walker v. Aurora* (1892) 140 Ill. 402, 29 N. E. 741; *White v. Alton* (1893) 149 Ill. 626, 37 N. E. 96; *Rich v. Chicago* (1894) 152 Ill. 18, 38 N. E. 255; *Illinois C. R. Co. v. People* (1897) 170 Ill. 224, 48 N. E. 215; *Hewetson v. Chicago* (1898) 172 Ill. 112, 49 N. E. 992; *McManus v. People* (1900) 183 Ill. 391, 55 N. E. 886; *Hintze v. Elgin* (1900) 186 Ill. 251, 57 N. E. 856; *Dickey v. People* (1904) 213 Ill. 51, 72 N. E. 791; *Marshall v. People* (1905) 219 Ill. 99, 76 N. E. 70; *Chicago v. Marsh* (1911) 251 Ill. 298, 96 N. E. 250; *Lincoln v. Chicago & A. R. Co.* (1914) 262 Ill. 11, 104 N. E. 277; *Andre v. Burlington* (1908) 141 Iowa, 65, 117 N. W. 1082; *Chandler v.*

Puyallup (1912) 70 Wash. 632, 127 Pac. 293; *Gregory v. Ann Arbor* (1901) 127 Mich. 454, 86 N. W. 1013.

Thus, it has been held that an injunction to enjoin the collection of an assessment, on the ground that no notice was given fixing a time for hearing objection, would not be granted, where it appeared that the complainants, in compliance with notice alleged to have been given, appeared at the time designated and presented their objections, but made no objection to the notice as given. The court said that, having appeared and presented their objections without raising any question as to the sufficiency of the notice requiring them to do so, they could not complain that the requisite notice was not given. *Hildreth v. Longmont* (1909) 47 Colo. 79, 105 Pac. 107. Similarly, in *Hintze v. Elgin* (1900) 186 Ill. 251, 57 N. E. 856, it was held that an objection to the form of notice in that the property holders were required thereby to appear not at the first day of the next term, but at a later day within such term, was waived by appearing and filing general objections. The court said: "The objections, whether meritorious or not, were waived by appellants by their full appearance under objections going to the merits of the cause. The cause as to appellants' property was continued from the October to the November term, a jury was waived, and all the objections heard and overruled. Appellants, having appeared and urged their general objections, cannot now contend that they were not properly notified. The court had jurisdiction of the subject-matter, and obtained jurisdiction over them and their said property by the proceedings, and their appearance, even if the notice was insufficient." In *Rich v. Chicago* (1894) 152 Ill. 18, 38 N. E. 255, wherein it was objected that the notice published was insufficient, under the statute relating to assessments for street improvements, to give the court jurisdiction to proceed to the confirmation of the assessment roll, the court said: "We do not deem it important to determine whether the objection, if made

in apt time, would have prevailed or not. The filing of the petition, under the statute, gave the court jurisdiction of the subject-matter. The objectors, appellants here, severally appeared, and without objecting to the jurisdiction of the court, and without challenging the sufficiency of notice, filed objections to the confirmation of the assessment roll, and proceeded to the hearing, both of objections to the court and of objections triable by jury, without objection. Objectors cannot now be heard, for the first time, that they were not served with the proper notice of the pendency of the proceedings in the county court. The proceedings and judgment, as to the lots assessed, are several, and appellants cannot be heard to object that the assessment roll, as to other lands or lots assessed, was improperly confirmed." In *Chicago v. Marsh* (1911) 251 Ill. 298, 96 N. E. 250, it was contended that a street assessment was invalid because the publication notice was insufficient, not having been published for five successive days. It was held that this objection was waived by filing a general appearance, the court saying: "Conceding that the publication notice was insufficient to give the court jurisdiction over the persons of appellants, the only way that question could be raised was under a special appearance. The faulty notice was waived by filing objections to the merits. Such objections amounted to a general appearance and cured all defects in the notice." In *Chandler v. Puyallup* (1912) 70 Wash. 632, 127 Pac. 293, wherein it appeared that a property owner, in response to a notice contained in a resolution published only once instead of twice as required by statute, appeared before the city council and remonstrated against an assessment for a street improvement, it was held that he was estopped to object to the sufficiency of the notice, where he failed to raise the question at that time. The court said: "Nowhere in the evidence does it appear, nor do the appellants in their briefs claim, that the objection now urged was ever made before the city coun-

cil or called to its attention. Having admittedly appeared in response to the defective notice, it was incumbent upon them to show that they then objected to the sufficiency of the notice." In *Illinois C. R. Co. v. People* (1897) 170 Ill. 224, 48 N. E. 215, wherein was involved an assessment for the construction of a sidewalk, it was contended that the notice published by the county collector of his intended application for judgment was irregular and void, but the court said: "As to this objection, it is sufficient to say, that the appellant entered its appearance in the court below, and there filed objections and introduced testimony in support of its objections; and, having thereby submitted to the jurisdiction of the court, it waived any defect which existed in the publication notice. In personal actions, if the defendant appears and pleads to the merits, he thereby submits himself to the jurisdiction of the court, and it makes no difference whether the notice given by publication was defective or not, or whether there was any advertisement of the notice at all or not. The same rule, which holds good in personal actions, is also applied to applications for judgment against delinquent property for taxes."

On the other hand, in *Southern Constr. Co. v. Howells* (1913) 21 Cal. App. 330, 131 Pac. 756, it was held that a property owner was not estopped from attacking the validity of a street assessment on the ground that no notice of the hearing of an appeal to the city council was published as required by statute, by the fact that she attended the hearing and urged her appeal without objecting to the failure to publish the notice.

In *State, Central R. Co., Prosecutor, v. Bayonne* (1889) 51 N. J. L. 428, 17 Atl. 971, wherein it appeared that the notices given of the filing of the preliminary map and report of commissioners of assessment for a street improvement clearly failed to comply with the city charter and the general law, it was held that the appearance for the specific purpose of objecting thereto did not estop a property owner

from contesting the validity of an assessment. The court said: "It is true that in response to these notices the prosecutor appeared, but that appearance was for the purpose of objecting to the proceedings on this ground, among others. Such an appearance is no waiver of the objection."

In *Merritt v. Portchester* (1877) 71 N. Y. 309, 27 Am. Rep. 47, it appeared that the commissioners appointed to apportion and assess the cost of a street improvement made four successive reports to the board of trustees of the village, the latter sending the same back three times for revision and correction, and the commissioners on each occasion making a new estimate and assessment and giving an insufficient notice of hearing to parties interested. It was held that each assessment was independent of every former assessment, the same steps being required for its perfection, and that the filing of written objections to the first two reports "did not waive the defective notices in respect to the last two, or cure the defects."

Although it is well established that proceedings for the special assessment of property must be in strict conformance with the statute, and the notices required thereby to be given are jurisdictional, the omission of the word "west," in notices which otherwise correctly describe the streets to be improved, may be waived, especially where the parties are not misled by the misdescription, and an owner who appears before the city council and makes objection on other grounds is estopped from thereafter raising the question of irregular notice. *Reed v. Cedar Rapids* (1907) 137 Iowa, 107, 111 N. W. 1013.

Where an owner is present at the meeting of the board of aldermen at the time the ordinance for the construction of a sidewalk is passed, and notifies the city at that time that he will not build his walk or pay for its construction, he waives the right to any additional notice of the passage of the ordinance. *Salem ex rel. Roney v. Young* (1910) 142 Mo. App. 160, 125 S. W. 857, where the court said: "The object of the law under such cir-

cumstances, requiring notice, is to enable the party interested to build the walk or have it built, as well as to allow him to make any objections he may have. The respondent in this case had the notice and, by his declarations, waived any additional notice. It would be a mockery indeed if the law should allow the defendant, before suit, to notify the city that he would neither build nor pay for the construction of the sidewalk, and then, after the expense of constructing it had been incurred and suit had been commenced against him on the tax bill, to defeat the action because he had not been served with notice. Respondent had a right to waive the notice, which he did in this case, and he is not in any position to complain because formal notice was not served upon him. He will not be allowed to blow hot and cold at will."

It has been held that an objection filed under a special and limited appearance, to the effect that certain notices relating to a street improvement, which were sent to property owners, were defective and deprived the court of jurisdiction, was waived by afterwards filing objections to the merits. *Lovington v. Gregory* (1919) 287 Ill. 169, 122 N. E. 504.

Where proper notice has been given of the time and place for hearing objections to the report of appraisers appointed in connection with a grading improvement, and property owners affected appear at such time and place, and file their objections, without raising the question that the report was not filed within ten days after the appointment of the appraisers, as required by statute, they will be deemed to have waived such irregularity. *Weaver v. Chickasha* (1912) 36 Okla. 226, 128 Pac. 305.

Where property owners appeared before the common council and objected to the confirmation of a street assessment, it was held that they could not afterwards raise the objection that the assessment was confirmed by the common council before the expiration of the time allowed to property owners to make their objections. *People ex rel. Stow v. Kingston*

(1899) 39 App. Div. 80, 56 N. Y. Supp. 606.

In *Allen v. Woods* (1898) 20 Ky. L. Rep. 59, 45 S. W. 106, it was apparently held that property owners who were present and protested against the passage of an ordinance providing for a sewer improvement were estopped later to object that the provisions of the city charter were not complied with in the publication of the proceedings of the common council.

5. Performance of work.

A change of plans by the city engineer, after the contract for a sewer is let, is waived where a property owner appears before the city council and files other objections. *Andre v. Burlington* (1908) 141 Iowa, 65, 117 N. W. 1082.

6. Assessment.

Property holders who protest to city councils against an assessment for a paving improvement cannot afterwards, for the first time, object on the ground that their property, being rural, is not subject to assessment by the front-foot rule. *Pepper v. Philadelphia* (1886) 114 Pa. 96, 6 Atl. 899, wherein the court said: "When the councils began to act, they protested, giving reasons which failed to satisfy councils that action should be postponed; they ought to have said then that the lots were rural if they intended to rely on such objection. They did more than simply to protest, they gave many reasons, and will not now be permitted to set up a thing which was not mentioned until after the work was done. They acted with knowledge of the law that the cost of paving the streets should be assessed on the owners of abutting lots." See to the same effect, *Brown v. Philadelphia* (1886) 3 Sadler (Pa.) 45, 18 W. N. C. 256, 6 Atl. 904.

It has been held that a part owner of property, who had been assessed as the sole owner and had paid general taxes as such, was estopped from objecting to a street assessment on the ground of his part ownership, where he appeared before the city council in response to a notice, and requested a postponement of the proposed im-

provement, but said nothing as to the real ownership. *Louisiana v. McAllister* (1904) 104 Mo. App. 152, 78 S. W. 314, wherein the court said: "His course of conduct, not only by remaining mute before the city council regarding the divided ownership, but in the returns made by him to the assessor, the permitting the property to be assessed to him as such owner and payment of taxes thereon as such, though the latter were suffered without any such intent or purpose on his part, were all calculated to mislead and misinform plaintiff as to the title of the realty."

Where property owners appeared on grievance day and filed a number of objections to a sewer assessment against their property, but made no complaint as to the form of the assessment, it was held that they were estopped later from objecting that the assessment was against the estate of their father, and not in their names. *Brown v. Otis* (1904) 98 App. Div. 554, 90 N. Y. Supp. 250, wherein the court said: "One of the important features in every taxing law is grievance day. The purpose of this function is to enable the taxpayer who is aggrieved to present his grievance to the assessors, and to afford the assessors an opportunity to correct any improper, unequal, or invalid assessment. The plaintiffs availed themselves of this right, and presented whatever objections they deemed proper, and they were considered by the commissioners and not accepted as tenable. Now they seek to add to those presented. We think they are concluded, and especially as the particular ground now raised, although good, could have been corrected by the commissioners and the assessment made to the owners. . . . The rule of waiver is a most salutary one when applied to the consideration of an assessment. The property within every taxing district should be assessed, and contribute its fair proportion to taxation. When one feels aggrieved by an assessment of his property he should appear and notify the assessors of his complaint. They act in a judicial capacity and with a view to

charge each parcel of property with its aliquot share of the burden. If one fails to appear the assessors have a right to assume an acquiescence in the assessment made. If he appears and presents objections, he should be precluded from stating others before another tribunal. He must act fairly with the assessors, and not conceal from them objections which he deems tenable to the assessment made. The principle finds its vindication in the case now under review. The plaintiffs were intelligent men. They for years had acquiesced in an assessment of this property to the estate of their father, the former owner. One of them, who apparently represented all the cotenants, when asked who were the owners, requested that the assessment be continued to the estate. They deemed the assessment disproportionate and unfair, and appeared and filed a written protest enumerating their objections, and orally urged their acceptance by the commissioners. With all this formality, and during all this time, there was not a hint that the assessment should be changed and placed against them as owners. A suggestion of this defect would have secured the alteration. There was no misapprehension concerning the land assessed. It was the only land they owned in the town of Gates. It had been in the family for many years. It was assessed the same as it had been since the death of the father. We think they are precluded by their conduct, and by their failure to raise the specific objection on grievance day, from urging it for the first time when they spread their cause of action in their complaint."

A landowner who has protested against a street improvement in proceedings before the auditor general cannot, in subsequent proceedings, object that his lands consist of two contiguous lots which should be separately assessed, where he failed to raise the question at the prior hearing. *Auditor General v. Maier* (1893) 95 Mich. 127, 54 N. W. 640.

Where a property owner appears before the city council and objects to the construction of a sewer, and also

appears in response to the notice of the proposed assessment, and on none of these occasions makes the objection that adjacent property is omitted from the assessment, he thereby waives his right to object on this ground, since it is nothing more than an error, irregularity, or defect in the proceedings. *Andre v. Burlington* (1908) 141 Iowa, 65, 117 N. W. 1082.

Objections that are not urged are waived. In accordance with this general principle, where, at a previous trial of objections to the confirmation of an assessment, after filing many written objections, council stated that all legal objections which he cared to raise had been presented, it was held that an owner in a second trial, had after a setting aside of the first confirmation, could not raise as a new objection that his assessment was not equitable as compared with the assessments against other parcels of property. *Oak Park v. Swigart* (1914) 266 Ill. 60, 107 N. E. 158, wherein the court said: "It would be an intolerable practice to permit objectors to have their legal objections heard by piecemeal. It is no hardship for them to be compelled to bring forward all their objections at the same time. . . . Manifestly, when counsel for appellee was requested to state his objections, he waived all objections except those he then raised. This conclusion is inevitable in this case, where he had these identical legal objections then on file that were thereafter urged on this second trial."

Where a railroad company appears before the city council and files objections to the amount of a sewer assessment, which is then reduced, and makes no objection to the description of its property or to the improper designation of the company in the record or notice of the proceedings, it is estopped from raising the question in an action to enforce the lien of the assessment. *Lake Erie & W. R. Co. v. Bowker* (1893) 9 Ind. App. 428, 36 N. E. 864.

On the other hand, it has been held that where a property holder appeared before the board of trustees of a village on grievance day, and objected

only to the amount of the assessment for the construction of a sewer, he was not thereby estopped from questioning the validity of the assessment on the ground that there was no description by which the lands could be identified. *Marvin v. Town* (1890) 56 Hun, 510, 10 N. Y. Supp. 148. See to the same effect, *Hanson v. Town* (1890) 56 Hun, 648, 31 N. Y. S. R. 665, 10 N. Y. Supp. 150. So, it has been held that an assessment of property for a street improvement by a void description rendered the judgment of confirmation void, and the fact that the property owner entered a general appearance in the case could not be construed as a waiver of his right to attack the assessment on that ground. *People ex rel. Rogers v. Owens* (1907) 231 Ill. 311, 83 N. E. 198, wherein it was said: "The authorities cited by appellee to the effect that, having entered a general appearance in the court below, appellant cannot be heard to raise the objection as to this void description in a collateral attack, are not in point on this question, because a proceeding that is absolutely void can be attacked, collaterally or directly, at any time. The judgment was entered by the county court in this proceeding against property which had no existence, and it was therefore void."

In *Hitchcock v. Springfield* (1876) 121 Mass. 382, it was held that an objection that an assessment for a street improvement was invalid, because not laid within the limitation of time fixed by statute, was not waived by filing a petition for the abatement of the assessment. The court said: "The petitioners had two grounds of objection to the assessment: That no assessment could properly have been made upon their estates; and also that, if properly assessed, the assessment was too large in amount. Each of these questions they had a right to have tried by the appropriate tribunal, and both could not have been included in a single proceeding. It might have been that, before there could have been a final adjudication of the validity of any assessment, the time, which was limited to a year,

9 A.L.R.—47.

within which they must petition the superior court for an abatement, would have expired. They were justified, therefore, in filing such petitions promptly. Because such petitions do not bring into controversy the legality of the assessments, and for the purpose of a hearing upon them it is thus impliedly admitted, it should not be held that the petitioners have waived their other and distinct right to have the legality of such assessments passed upon."

c. Failure to pursue remedy within time prescribed by statute.

1. Generally.

In many jurisdictions not only the method to be followed in objecting to an assessment for a street or sewer improvement, but the time within which the property holder must pursue his remedy, is prescribed by statute, and a failure to pursue the prescribed remedy within the time limited is usually held to bar relief in any other proceeding.

United States.—*MOORE v. YONKERS* (reported herewith) ante, 590.

Arkansas.—*Ahern v. Board of Improv. Dist.* (1901) 69 Ark. 68, 61 S. W. 575; *Board of Improv. Dist. v. Offenhauser* (1907) 84 Ark. 257, 105 S. W. 265; *Webster v. Ferguson* (1910) 95 Ark. 575, 130 S. W. 513.

Colorado.—*Jackson v. Denver* (1907) 41 Colo. 362, 92 Pac. 690; *Hildreth v. Longmont* (1909) 47 Colo. 79, 105 Pac. 107.

Idaho.—*Blackwell v. Coeur D'Alene* (1907) 13 Idaho, 357, 90 Pac. 353.

Indiana.—*Byram v. Foley* (1897) 17 Ind. App. 629, 47 N. E. 351; *Haislup v. Union Asphalt Constr. Co.* (1919) — Ind. App. —, 123 N. E. 426.

Kansas.—*Kansas City v. Trotter* (1900) 9 Kan. App. 222, 59 Pac. 679; *Wahlgren v. Kansas City* (1889) 42 Kan. 243, 21 Pac. 1068; *Topeka v. Gage* (1890) 44 Kan. 87, 24 Pac. 82; *Lynch v. Kansas City* (1890) 44 Kan. 452, 24 Pac. 973; *Hammerslough v. Kansas City* (1891) 46 Kan. 37, 26 Pac. 496; *Doran v. Barnes* (1894) 54 Kan. 238, 38 Pac. 300; *Kansas City v. Kimball* (1899) 60 Kan. 224, 56 Pac. 78; *Kansas City v. Gray* (1900) 62 Kan. 193, 61 Pac.

746; *Leavenworth v. Jones* (1904) 69 Kan. 857, 77 Pac. 273; *Union P. R. Co. v. Kansas City* (1906) 73 Kan. 571, 85 Pac. 603; *Kansas City v. McGrew* (1908) 78 Kan. 335, 96 Pac. 484; *Riverside Park Asso. v. Hutchinson* (1918) 102 Kan. 488, 171 Pac. 2; *Mason v. Kansas City* (1918) 103 Kan. 275, 173 Pac. 535.

Maine.—*Auburn v. Paul* (1892) 84 Me. 212, 24 Atl. 817.

Minnesota.—*McKusick v. Stillwater* (1890) 44 Minn. 372, 46 N. W. 769; *State v. Norton* (1896) 63 Minn. 497, 65 N. W. 935.

New Jersey.—*State, Bogart, Prosecutor, v. Passaic* (1875) 38 N. J. L. 57; *State, Schulting, Prosecutor, v. Passaic* (1885) 47 N. J. L. 273; *Goodwin v. Millville* (1908) 75 N. J. Eq. 270, 71 Atl. 674; *Cook v. Allendale* (1910) 79 N. J. L. 285, 75 Atl. 769.

Oklahoma.—*Muskogee v. Nicholson* (1918) — Okla. —, 171 Pac. 1102; *Warner-Quinlan Asphalt Co. v. Smith* (1918) — Okla. —, 173 Pac. 516.

Washington.—*New Whatcom v. Beltingham Bay Improv. Co.* (1896) 16 Wash. 131, 47 Pac. 236, affirmed in (1898) 172 U. S. 314, 43 L. ed. 460, 19 Sup. Ct. Rep. 205.

Wisconsin.—*Gaastra v. Kenosha* (1911) 146 Wis. 93, 130 N. W. 870.

"The general rule is that objections to an assessment are deemed to be waived, if not presented at the time and in the manner prescribed by law." *MOORE v. YONKERS* (reported herewith, ante, 590).

"Reasonable limitations regarding the time within which actions can be commenced attacking the validity of special assessments for public improvements are necessary. To meet the expenses of such improvements bonds must be negotiated, and unless there is some reasonable limit within which actions may be commenced to attack assessments levied for the purpose of liquidating such bonds when they mature, they could not be disposed of advantageously, because parties purchasing would never know when an action might be commenced by some dissatisfied taxpayer; and on the other hand, after the lapse of the statutory period, they would have the right to

presume no such actions could be maintained, and their rights ought to be protected by a statute which fixes a time within which suits must be commenced, unless it is apparent that thereby some constitutional right of the taxpayer has been denied or invaded." *Hildreth v. Longmont* (1909) 47 Colo. 79, 105 Pac. 107.

It has, however, been held in some jurisdictions that, where the defects in a street or sewer improvement proceeding are such as to make the entire proceeding void, a failure to pursue a prescribed remedy within the time limited does not preclude a property owner from resisting the collection of the assessment. *Steinmuller v. Kansas City* (1896) 3 Kan. App. 45, 44 Pac. 600; *Marshall v. Leavenworth* (1890) 44 Kan. 459, 24 Pac. 975; *Richter v. Merrill* (1900) 84 Mo. App. 150; *Winfrey v. Linger* (1901) 89 Mo. App. 159; *Barber Asphalt Paving Co. v. Ridge* (1902) 169 Mo. 376, 68 S. W. 1043; *State ex rel. Curtice v. Smith* (1903) 177 Mo. 69, 75 S. W. 625; *Morrow v. Barber Asphalt Paving Co.* (1910) 27 Okla. 247, 111 Pac. 198; *Southern Surety Co. v. Jay* (1919) — Okla. —, 178 Pac. 95; *Enid v. Gensman* (1919) — Okla. —, 181 Pac. 308.

2. Sufficiency of petition.

In the one jurisdiction wherein the question of estoppel to object to the petition for a street improvement by failure to pursue a designated remedy within the time prescribed by statute has been considered, it seems that if it appears on the face of the petition that it is signed by an insufficient number of property owners, the entire proceeding is void, and a failure to act within the prescribed time will not estop a property owner. *Steinmuller v. Kansas City* (1896) 3 Kan. App. 45, 44 Pac. 600, wherein the court said: "The power to charge the cost of street grading against the lots abutting upon the street so improved can only be exercised in exceptional cases, and after a compliance with certain statutory conditions. The main feature of these conditions is that there shall first be presented a petition signed by a certain number of the resident property owners, asking not merely that such

grading be done, but that it be done at the cost of the owners of the lots fronting upon the streets described in the petition. This is jurisdictional. Unless such a petition be presented, the mayor and council are without the semblance of power to assess the entire cost of the improvement against the lots on that street, and all proceedings had with a view thereto are void.

There is nothing in the petition presented in this case suggesting that the signers desired or intended that the cost of putting the street on grade should be assessed against them and other owners of property on that street. This cannot be inferred from the mere fact that they petitioned to have the work done. The right of petition exists independently of statute. It is not only proper, but is a common practice, to petition representative bodies to exercise an authority which is exclusively conferred upon them for the effecting of objects in which the petitioners are interested. It is not necessary that city officials should wait for the presentation of a petition before they proceed to the making of such general improvements in the city as they may deem necessary. But before they can deviate from the general rule, and make an improvement of this character at the cost of particular persons, the consent of such persons must be first given in the manner provided by statute. Such consent is a precedent condition which is jurisdictional, and must appear from the petition. As said in *Swift v. Williamsburgh* (1857) 24 Barb. (N. Y.) 427: "The consent of the parties interested in such improvements cannot be dispensed with. The responsibility which the conditions precedent created by the statute impose cannot be thrown off in this manner, for the effect of doing so is to shift entirely the burden of making these local improvements, to relieve those on whom the law sought to impose the expense, and to throw it on others who are not liable, either in law or morals." If it was intended in this instance that the work should be done at the expense of particular lot owners, the petition was entirely lacking in that which con-

stituted the essential fact necessary to be stated to justify the action taken upon it. It was the same as no petition."

The law, however, does not require the petition to show on its face that it was signed by the resident owners of a majority of the abutting frontage, and where the fact, if it is such, that the resident owners of a majority of the front feet did not in reality sign the petition, does not appear from the petition itself, or elsewhere on the record, the validity of the assessment cannot be challenged beyond the limited period allowed by the statute for so doing. *Kansas City v. Kimball* (1899) 60 Kan. 224, 56 Pac. 78.

See to the same effect, *Doran v. Barnes* (1894) 54 Kan. 238, 38 Pac. 300.

And where, on investigation, the petition is found to be regular in form, it "is sufficient to start the thirty-day Statute of Limitations running." *Kansas City v. Trotter* (1900) 9 Kan. App. 222, 59 Pac 679, wherein the court said further: "The action of the council in passing upon the sufficiency of the petition, and in ordering the petition spread upon the journal, is conclusive as to the validity of the petition after the expiration of thirty days. The question as to whether the petitioners were resident owners, we presume, required an investigation of facts; at least, the council was entitled to investigate and to hear any evidence which was proper, bearing upon this question. The right and power to make these investigations and to decide the questions involved in the exercise of a jurisdiction not merely ministerial, but quasi judicial in its character, and the findings are conclusive upon the property owners, after the expiration of thirty days from the time the amount due on each lot or piece of ground liable for such assessment is ascertained."

See to the same effect, *Union P. R. Co. v. Kansas City* (1906) 73 Kan. 571, 85 Pac. 603.

So, a property owner cannot object to the validity of a paving assessment on the ground that the mayor of a city signed the petition for an improvement for frontage property which be-

longed to the city and was necessary to make up the required amount, when the fact does not appear on the face of the record. In such a case the statute requiring objections to be made within a fixed time applies, and the owner is estopped when the provisions of the statute are not complied with. *Kansas City v. Gray* (1900) 62 Kan. 198, 61 Pac. 746.

3. *Validity of statute or ordinance.*

In Kansas, a statute provides that no suit to set aside a special assessment shall be brought after the expiration of thirty days from the time when the amount due on each lot liable is ascertained. It has been held that an ordinance initiating a street improvement, which describes the street to be improved by reference to a certain bridge as a landmark, is sufficiently definite to give jurisdiction to make the improvement, and that therefore the statute is applicable to an action to enjoin the assessment for the improvement. *Lynch v. Kansas City* (1890) 44 Kan. 452, 24 Pac. 973.

So, an objection to an assessment that a street improvement included in an ordinance is not within the city limits cannot be raised after the time, as fixed by statute, for bringing suit to avoid the assessment has expired. *Hammerslough v. Kansas City* (1891) 46 Kan. 37, 26 Pac. 496.

In *Leavenworth v. Jones* (1904) 69 Kan. 857, 77 Pac. 273, it was contended that a sidewalk was laid and the cost assessed pursuant to an act which had been repealed by implication. It was held that, even if the claim was tenable, the owner could not raise the objection after the time fixed by statute had expired.

It has also been held that the statute applies, with equal force, to cases where the assessments have been relieved, the limitation running from the original assessment, and the fact that the suit is based on a judgment holding the original levy void makes no difference. *Kansas City v. McGrew* (1908) 78 Kan. 335, 96 Pac. 484, wherein the court said: "The language of the statute limiting the time in which such suits may be commenced is not open to any other construction. The

proceedings to relevy usually consist of the passage of an ordinance, and nothing more. If it is regular, the proceedings on their face are likewise regular."

But where two thirds of the property owners affected by a proposed street improvement sign a protest after notice of a resolution of necessity, as provided by statute, and the city council, disregarding such protest, passes the ordinance for the improvement, enters into a contract, and proceeds with the other preliminary matters, its actions subsequent to the protest are void, and an objection to an assessment on these grounds is not waived by the provisions of the statute, setting a time limit for protesting by suit or injunction the validity of an assessment. *Marshall v. Leavenworth* (1890) 44 Kan. 459, 24 Pac. 975, wherein the court said: "All the irregularities in the proceedings upon which the aforesaid assessments were founded, except the city's disregard of the aforesaid protest, may be passed over and disregarded, for, as we think, all the other irregularities are waived and cured by the plaintiffs' failure to commence any action within thirty days after the publication, and the taking effect of the ordinance making the specific assessments upon each portion of the abutting property."

An objection to an assessment on the ground that the city council, after passing an ordinance requiring the use of a certain paving material, as requested by the property holders, passed a second ordinance repealing the first and adopting a different material, cannot be raised after the statutory period for making such objection has expired. *Warner-Quinlan Asphalt Co. v. Smith* (1918) — Okla. —, 173 Pac. 516, wherein the court said: "The trial court took the view that the city officials were without authority to repeal the resolution providing for the character of material requested by the property owners, and that the failure to use this material rendered the subsequent proceeding void. It appearing the preliminary resolution was adopted and published, and proper notice given on the hear-

ing of the return of the appraisers, this case is ruled by the case of *Chickasha v. O'Brien* (1915) 58 Okla. 46, 159 Pac. 282, and the action was barred under provisions of § 644 of the statutes, when not commenced within sixty days from the passage of the ordinance making the final assessment."

4. Conformity of proceedings to statute or ordinance.

The passage and publication of a preliminary resolution of intention are the acts by which a city council acquires jurisdiction to make a street improvement, and without such a resolution the proceedings are void and a property owner is not estopped by failure to object within the statutory period. *Southern Surety Co. v. Jay* (1919) — Okla. —, 178 Pac. 95, wherein the court said: "There is no merit in the contention that the relief sought here is barred by the Statute of Limitation. This has repeatedly been decided adversely to this contention. Limitation is applicable only when the municipality acquires jurisdiction to make the assessment, and the validity of the assessment is attacked for mere irregularity, and not upon jurisdictional grounds. *Morrow v. Barber Asphalt Paving Co.* (1910) 27 Okla. 247, 111 Pac. 198; *Muskogee v. Nicholson* (1918) — Okla. —, 171 Pac. 1102."

So, where a resolution of intention to pave a street is passed by the city council, but is not published as required by statute, all proceedings under it are void, and a property owner is not estopped from objecting to an assessment by enjoining the city, notwithstanding the statutory period for beginning an action to set aside the assessment has expired. *Enid v. Gensman* (1919) — Okla. —, 181 Pac. 308.

An objection urged against the estimate of the city engineer that there was no specification as to whether one or more layers of brick was to be used in a pavement cannot be raised after the time, as fixed by statute, for contesting an assessment, has expired. *Kansas City v. Gray* (1900) 62 Kan. 198, 61 Pac. 746, wherein the court said: "The question first to be deter-

mined in this case is whether the mayor and council obtained jurisdiction by a petition regular on its face, showing from its recitals that the requisite number of resident property owners joined in the request for the improvement. This appearing, a defective estimate made by the city engineer, which, under the provisions of the statute, seems to be required for the information of the municipal authorities, cannot be shown, to defeat the power to make the improvement, after the time permitted by law to begin an action therefor has expired. It seems probable that, had an action been commenced in time, the property owners complaining of this assessment could have defeated the same, for then the range of their attack would have been much wider, and not confined to such narrow limits. Having waited too long, they are not now in a position to obtain relief."

So, an objection, based on the ground that the council did not make any formal estimate of cost on the filing of the survey and estimate of the engineer, as provided by statute, not taken "at the time and in the manner prescribed" by statute, is waived. *McKusick v. Stillwater* (1890) 44 Minn. 372, 46 N. W. 769.

It has been held that where a city charter provides that an objection to an assessment for irregularities shall be deemed to have been waived unless made within thirty days after the passage of the ordinance assessing the benefits, a property owner, after the expiration of the time limit, cannot maintain an action to amend a paving assessment, on the ground that the city authorities did not observe certain formalities in the creation of the district within which assessments should be laid. *Jackson v. Denver* (1907) 41 Colo. 362, 92 Pac. 690.

But on the other hand, it has been held that, where a contract for paving is let without a preliminary estimate of the cost having been made by the city engineer and presented to the commissioners, the assessment is void and collection may be enjoined even after the expiration of sixty days, the statutory period for making objection.

Muskogee v. Nicholson (1918) — Okla. —, 171 Pac. 1102, wherein it was said in the official syllabus: "In an action for injunction, where the facts in the case are such as to appeal to the conscience of a court of equity, the laches of the plaintiff does not necessarily bar a recovery."

So, in an action to collect an assessment for the construction of a sewer, it has been held that the defendants were precluded from attacking the validity of the assessment on the ground that the assessors did not take the oath prescribed by law, having failed to begin legal proceedings within the time prescribed by statute, the objection not being jurisdictional. **Webster v. Ferguson (1910) 95 Ark. 575, 130 S. W. 513.**

And, where a statute provides that: "No writ of certiorari shall be allowed, or issue, to remove any assessment for any improvement in said city, unless the same be applied for within three months after the confirmation of such assessment by the city council," after such time has expired it is too late for a property owner to take exception to the regularity of the appointment of commissioners, on the ground that the ordinance was passed at a time when the municipality was a village, and the work was completed under a statute making it a city and regulating such appointments. **State, Bogart, Prosecutor, v. Passaic (1875) 38 N. J. L. 57.**

Where a particular kind of paving brick is named in the advertisement for bidders, and competition is by this means shut off, the whole proceeding is void, and a property owner is not estopped to object after the time limit of the statute has expired. **State ex rel. Curtice v. Smith (1903) 177 Mo. 69, 75 S. W. 625.**

Failure to object within the statutory time will not estop a property owner from objecting to an assessment on the ground that the contract is void because it includes maintenance and repairing, as well as construction, in contravention of the law. **Barber Asphalt Paving Co. v. Ridge (1902) 169 Mo. 376, 68 S. W. 1043.**

It has been held, however, that an objection that a contract for street improvements was void, for the reason that two of the councilmen representing the city had an interest in it, could not be raised after the time limit provided in the statute. **Topeka v. Gage (1890) 44 Kan. 87, 24 Pac. 82,** wherein the court said: "The language of this statute is such as to leave little or no room for construction. Its provisions are plain, direct, and positive, and seem sufficiently broad to cut off all defenses not asserted within the period of time named therein. It says no suit shall be brought nor any defense allowed after the expiration of thirty days from what? From the time the amount due on each lot is ascertained. It not only declares that no suit be brought to set aside or enjoin the making of the assessments, but provides that no defense to the validity thereof shall be allowed after thirty days from the time the assessment is ascertained. . . . It would have been easy for the legislature to so word the statute as to cut off all defenses except for fraud, and to say that the statute should run as against fraud from the time of its discovery. This is done in the general Statute of Limitations, but there is nothing of the kind in this statute. And as the legislature was providing a special statute of limitations, different from the general statute, we must presume that it intended it to have the effect it said it should have, and cut off all defenses of whatever kind or character. This may be a harsh rule, but that fact does not furnish a reason why we should not construe the statute as it is, though it may furnish a reason why the legislature should modify it."

So, an objection that the board of public works, after the passage of an ordinance creating an assessment district, and after the contract for a street improvement was let, changed its orders and the plans and specifications for the improvements so that they were not in accordance with the petition or contract, cannot be raised in an action to annul an assessment after the expiration of the time limit set by the ordinance for the beginning

of such actions. *Jackson v. Denver* (1907) 41 Colo. 362, 92 Pac. 690.

5. Performance of work.

It has been held that a provision in a statute, requiring objections to street improvement proceedings to be filed within sixty days from the date of the issue of tax bills, was unconstitutional as to proceedings which were void ab initio, and an owner who did not make objection within the time limit was not estopped, where the assessment was void because the improvement was not completed within the time limited by the ordinance. *Richter v. Merrill* (1900) 84 Mo. App. 150. The court said: "That part of the provision quoted as to the validity of the bill does not refer to a void bill. It has reference to a bill which is invalid by reason of some matter which may be corrected; where some action may be taken whereby the invalidity may be cured. Merely as illustrative of this, see *Girvin v. Simon* (1897) 116 Cal. 610, 48 Pac. 720, and authorities cited. If, for instance, the bill is void by reason of there being no ordinance upon which to base any of the proceedings, it ought not to be thought that the charter has by this provision attempted to make it valid. In this case, under the authorities first aforesaid, the tax bill was absolutely void, and it cannot be made valid by an omission of the property owner, who had no lot or part in bringing about its illegality. It is certainly an extraordinary proposition that a citizen who has had no lot or part in proceedings whereby it is sought, against his will, to appropriate his property, shall, after such proceedings have been closed and before he has been called upon to answer in court, come forward within a limited time and disclose his defense, or be forever barred. A man who purposes taking some affirmative legal action himself may be required to do so within a limited time (as by Statute of Limitations), else he will be shut out of the courts. But that is altogether a different matter to that of one who, being passive, hearing he is to be assaulted by another for a thing already done by others, and for which he is

not legally liable, is required to announce in advance his defense to the contemplated wrongful assault. . . . We have before us an extended argument, with free citation of authorities, in defense of the proposition that the charter provision aforesaid should be construed literally, and permitted to cut off all defense to a tax bill which had not been questioned by the written objection of the property owner within sixty days. An examination of those authorities discloses that they do not bear upon the question. They are based on estoppel, and most of them affirm the proposition that where one, after notice, stands by and permits public work to be done without objection, and the municipality to issue its bonds in payment therefor with the purpose of reimbursing itself by local assessments for the work, he is estopped to thereafter question the proceeding. Some of them are based on the provisions of law which required the property holder, on notice, to come into a tribunal provided for contesting the proposed work or tax, or both, and hold that he was precluded thereafter. In other words, that the matter had been adjudicated. But the section of the charter in controversy makes no such provision." See to the same effect, *Winfrey v. Linger* (1901) 89 Mo. App. 159; *Barber Asphalt Paving Co. v. Ridge* (1902) 169 Mo. 376, 68 S. W. 1043; *State ex rel. Curtice v. Smith* (1903) 177 Mo. 69, 75 S. W. 625.

But under a statute providing that "no suit to set aside the special assessments, or to enjoin the making of the same, shall be brought, nor any defense to the validity thereof be allowed, after the expiration of thirty days from the time the amount due on each lot or piece of ground liable for such assessment is ascertained," it has been held that the manner of doing the work cannot be inquired into after the time set by the statute. *Wahlgren v. Kansas City* (1889) 42 Kan. 243, 21 Pac. 1068.

Similarly, an objection to an assessment that the work done was not in accordance with the contract, in that defective materials were used, cannot

be raised after the time provided by statute to avoid the payment of the tax has expired. *Gaastra v. Kenosha* (1911) 146 Wis. 93, 130 N. W. 870, wherein it appeared that seventeen months had elapsed before action was taken.

6. Assessment.

A statute providing that objections to an assessment for a street improvement shall be made within twenty days after the publication of the ordinance refers to irregularities in the levying, and is mandatory to this extent. Hence an owner is estopped, in an action to collect the assessment, to question the regularity of the proceedings of the board of assessment, if he has failed to comply with the provisions of the statute. *Ahern v. Board of Improv. Dist.* (1901) 69 Ark. 68, 61 S. W. 575.

Similarly, where the statute provides a time limit within which an objector shall present his remonstrance against a street improvement, and he fails to do so, he cannot thereafter be heard to complain as to the method of assessment. *Haislup v. Union Asphalt Constr. Co.* (1919) — Ind. App. —, 123 N. E. 426, wherein the court said: "These facts conclusively show that the appellant and his property were both subject to the jurisdiction of the board, and that, under the law as above set out, he had his remedy, had he chosen to use it. Having failed to assert it under the law, and having stood by and silently watched the improvement, he cannot now avoid the payment for the benefits he has received."

The apportionment of the cost of grading a street between abutting property owners, even if irregularly made, does not affect the jurisdiction of the city council, and an objection to an assessment cannot be raised after the time set by statute for making remonstrance by suit or otherwise. "Where jurisdiction is once obtained, irregularities can only be corrected in the manner and within the time prescribed by statute; and the time having been fixed by statute within which to bring an action to correct such irregularities, it must govern."

Wahlgren v. Kansas City (1889) 42 Kan. 243, 21 Pac. 1068.

Where the statute supplies a remedy, by way of objection within a limited time, for overvaluation in the apportionment of an assessment for a sewer, the objection is waived if the remedy provided for is not followed within the time prescribed, and cannot be set up in defense of a suit for the tax. *Auburn v. Paul* (1892) 84 Me. 212, 24 Atl. 817.

The action of a city council in including certain property within the territorial limits of a sewer district, notwithstanding the owner has already been permitted or required to connect his property with the sewer in an adjoining district, does not amount to such a "fraud or demonstrable mistake" as warrants the court in declaring the action of the city council in so doing void, and the owner, having permitted the time allowed by statute to elapse without making objection, is estopped from raising the question in defense of an action to enforce collection of the assessment. *Board of Improv. Dist. v. Offenhauser* (1907) 84 Ark. 257, 105 S. W. 265.

In *Riverside Park Asso. v. Hutchinson* (1918) 102 Kan. 488, 171 Pac. 2, in the official syllabus, it was said: "The statutory limitation that an action cannot be maintained to enjoin or contest a special assessment for the improvement of a street, unless it is begun within thirty days after the amount due on each lot or piece of ground assessed is ascertained (Gen. Stat. 1915, § 1217), applies to invalidity as well as irregularity in the proceedings, including objections that the taxing district extends over too much ground, and also where the land assessed included abutting ground not platted, and also lots and blocks lying beyond the unplatted part, which did not abut on the improved street. Invalid proceedings of the kind named, which would defeat an assessment if attacked in time, are not open to attack if the time limit has expired."

Where a statute provides that no suit shall be brought to set aside an assessment, or any objection heard to the validity thereof, after the expira-

tion of thirty days from the date when such assessment is due, an objection that property is assessed for a sewer improvement according to the front foot, in excess of the benefits conferred, cannot be raised after the time fixed by the statute has expired. "If a property owner does not see fit to make his protest or initiate his objections to the action of the council or board of trustees, and the assessment authorized and levied by them within the time prescribed by the statute, he should be precluded from thereafter doing so. So long as he is not entirely deprived of and precluded from the exercise of such right, he cannot object to the limitation of time placed upon him where that limitation is not unreasonable. Where he has had the several notices as required under the statute to be given in course of the proceedings, and is also given the further period of thirty days from and after the confirmation of the assessment by the board of trustees, he cannot complain on the ground that he has not had sufficient time and opportunity to file his protest or make his objections or institute his proceedings." *Blackwell v. Coeur D'Alene* (1907) 13 Idaho, 357, 90 Pac. 353.

Similarly, an objection that land assessed for a street improvement is not contiguous to and does not touch the boundaries of the city cannot be raised after the expiration of the time fixed by statute. *Mason v. Kansas City* (1918) 103 Kan. 275, 173 Pac. 535.

So, the fact that the property of an abutting owner is not benefited by the paving of the street to the extent of the assessments is an objection which cannot be raised in an action to annul the assessment, when it is begun after the time limit fixed by the ordinance for the commencement of such actions. *Jackson v. Denver* (1907) 41 Colo. 362, 92 Pac. 690.

A property owner who does not appear and object within the time prescribed may not thereafter attack an assessment for a street improvement, as not having been made according to benefits. *New Whatcom v. Bellingham Bay Improv. Co.* (1896) 16 Wash.

131, 47 Pac. 236, wherein the court further held that a statute allowing ten days from the last publication of notice did not unreasonably limit the time to object.

After the work has been done and assessments made, it is too late to interpose the defense that a sewer does not benefit the property against which the assessments are made, where the statute provides a remedy for the property owner by permitting him to remonstrate, within the time fixed by the statute, and if he fails to do so he must abide by the decision of the board of public works. *Byram v. Foley* (1897) 17 Ind. App. 629, 47 N. E. 351.

The right to object to an assessment for a street improvement that it is in excess of the value of property is lost, where the property owner fails to avail himself of the opportunities afforded by law to question the assessment within the time provided by statute. *State v. Norton* (1896) 63 Minn. 497, 65 N. W. 935, wherein the court said: "While the extraordinary spectacle is presented of the expense of public improvement in excess of the value of the property against which the expense is assessed, yet it appears that the defendants took no steps to prevent or right this apparent wrong. They had notice that a contract had been let for this improvement, that the assessment therefor would be confirmed at a certain place and time, and that bonds would be issued for the amount necessary to make such improvement; and with an opportunity to be heard, they remained silent and inactive; without protest or objection. And when the city council finally confirmed the assessment, they did not appeal therefrom to the district court as provided by law. Nor did they take any legal steps to protect their rights until more than two years after the issuance of the improvement bonds. The law gave the defendants ample time and opportunity to be heard in regard to the council proceedings in making assessments for improvement, but, by their acquiescence or supineness, they allowed the time to pass by for so doing, and they must be con-

cluded by the proceedings against them. Such a rule is essential to the due administration of justice. If they desired to repudiate the entire proceedings, they should have moved at the first opportunity, or within the time allowed by law; and, failing to do so, the action of the city council is made final and conclusive. . . . It is quite apparent that the method adopted by the city council in levying and enforcing these assessments is an oppressive one, but the defendants should have acted with reasonable promptness in defending their rights when they had an opportunity. If the law affords ground for oppression of the citizen, relief may be found in its repeal, or, if it is enforced harshly and arbitrarily, perhaps a change of municipal officers might prove a solution of this seeming injustice."

In New Jersey, the remedy for an irregularity or error in the imposition of an assessment for a street or sewer improvement is by writ of certiorari, but the application must be made within sixty days after confirmation or the right is lost. Where a property owner allows this time to elapse, a court of equity will not grant relief because certain properties along the line of a sewer are not assessed for benefits. *Goodwin v. Millville* (1908) 75 N. J. Eq. 270, 71 Atl. 674.

Objection that the amount assessed against several lots liable for a street improvement was ascertained by the city clerk, instead of by the council, cannot be made after the expiration of the statutory time limit of thirty days to make objections to an assessment. *Topeka v. Gage* (1890) 44 Kan. 87, 24 Pac. 82.

So, an objection to an assessment that the owner is not liable, because of the provisions of a statute declaring that in the extension of any street no assessment shall be levied against lands which have paid for the opening of the street so extended, comes too late when made after the expiration of the time allowed by law. *State, Schulting, Prosecutor, v. Passaic* (1885) 47 N. J. L. 273, wherein the court said: "The immunity from a share in the burden of payment, which

seems to have been granted to them, rested on a fact which they should have made known at the proper time in their relief, if they designed to avail themselves of the privilege. The Constitution has not, in their case, been violated in any of its provisions. A law has been overlooked or disregarded by the respondent which, as may be conceded, granted them a privilege such as they might assert or waive at their option. Their laches puts them in the position of having waived such privilege. They are too late now to be heard."

But where property owners have no notice of the report of commissioners, and therefore have no opportunity to object to an assessment until the statutory period has expired, they will be permitted to show that the assessment is inequitable. *Re New York* (1823) 1 Cow. (N. Y.) 74.

So, where the mayor and city council fail to meet to hear and adjust any complaint and review an assessment at the meeting called pursuant to the statutory notice, it was held that the assessment was void, and a statute limiting the time within which objection to an assessment must be made, and barring objections not made within the prescribed time, did not apply. *Morrow v. Barber Asphalt Paving Co.* (1910) 27 Okla. 247, 111 Pac. 198.

d. Failure to appeal.

1. Generally.

Where it is provided by statute that a person aggrieved by the orders and decisions of the municipal council or judicial tribunal having the authority to confirm proceedings for a street improvement shall have the right of appeal therefrom, it follows of necessity that having appeared before the designated tribunal and made known his grievances, and having failed to appeal from the order made thereon, a property owner is thereafter estopped to question the assessment or maintain an action to enjoin its enforcement.

Alabama.—*Strenna v. Montgomery* (1888) 86 Ala. 340, 5 So. 115.

Arizona.—*English v. Territory* (1907) 11 Ariz. 87, 89 Pac. 501, af-

firmed in (1909) 214 U. S. 359, 53 L. ed. 1030, 29 Sup. Ct. Rep. 658.

Connecticut.—Bridgeport v. Giddings (1876) 43 Conn. 304; Peck v. Bridgeport (1903) 75 Conn. 417, 53 Atl. 893.

Illinois.—McBride v. Chicago (1859) 22 Ill. 574.

Indiana.—Balfe v. Lammers (1887) 109 Ind. 347, 10 N. E. 92; Alley v. Lebanon (1896) 146 Ind. 125, 44 N. E. 1003.

Iowa.—Nixon v. Burlington (1908) 141 Iowa, 316, 115 N. W. 239; Clifton Land Co. v. Des Moines (1909) 144 Iowa, 625, 123 N. W. 340.

Maryland.—Hazelhurst v. Baltimore (1872) 37 Md. 199; Dashiell v. Baltimore (1877) 45 Md. 615.

Massachusetts.—Whiting v. Boston (1870) 106 Mass. 89; Custy v. Lowell (1875) 117 Mass. 78; Leominster v. Conant (1885) 139 Mass. 384, 2 N. E. 690; Hester v. Collector of Taxes (1914) 217 Mass. 422, 105 N. E. 631.

Michigan.—Rentz v. Detroit (1882) 48 Mich. 544, 12 N. W. 694, 911; Gates v. Grand Rapids (1903) 134 Mich. 96, 95 N. W. 998.

Mississippi.—Union Sav. Bank & T. Co. v. Jackson (1920) — Miss. —, 84 So. 389.

Missouri.—Barber Asphalt Paving Co. v. Kiene (1903) 99 Mo. App. 528, 74 S. W. 872.

Nebraska.—Burkley v. Omaha (1918) 102 Neb. 308, 167 N. W. 72.

New York.—Murray v. Graham (1837) 6 Paige, 622; Morewood v. New York (1851) 6 How. Pr. 386; Sorchan v. Brooklyn (1875) 3 Hun, 562.

Oklahoma.—PARTEE v. CLEVELAND TRINIDAD PAVING CO. (reported herewith) ante, 606.

Oregon.—Colby v. Medford (1917) 85 Or. 485, 167 Pac. 487.

Pennsylvania.—Philadelphia v. Nock (1899) 12 Pa. Super. Ct. 44; Re O'Mara (1899) 194 Pa. 86, 45 Atl. 127; Re Harrison (1899) 194 Pa. 92, 45 Atl. 1092; Re Ober (1899) 194 Pa. 93, 45 Atl. 1093; Re Mellon (1899) 194 Pa. 93, 45 Atl. 1093; Ziegler's Appeal (1899) 194 Pa. 94, 45 Atl. 1093.

Washington.—White v. Tacoma (1898) 20 Wash. 361, 55 Pac. 319.

Wisconsin.—Nelson v. Waukesha (1911) 147 Wis. 163, 132 N. W. 887.

A property holder who desires to appeal from the confirmation of an assessment must do so within the statutory period allowed in such cases, and his failure to do so will act as a waiver of his objections to an assessment. *White v. Tacoma* (Wash.) *supra*.

A landowner who has failed to appeal where the city council did not comply with its statutory duty and definitely designate the period of time over which the street improvement bonds should extend, such time being subsequently fixed by the superintendent of streets without authority, cannot object to the irregularity, especially after the issuance of the bonds, where a curative provides that the bonds, by their issuance, shall be conclusive evidence of the regularity of proceedings of such a nature. *Cohn v. Thompson* (1920) — Cal. App. —, 190 Pac. 381.

The rule, however, will not apply where it is found that the council, or other administrative body, was wholly without jurisdiction in the premises. *Chicago, M. & St. P. R. Co. v. Phillips* (1900) 111 Iowa, 377, 82 N. W. 787; *F. M. Hubbell, Son & Co. v. Bennett Bros.* (1906) 130 Iowa, 66, 106 N. W. 375; *Comstock v. Eagle Grove* (1907) 133 Iowa, 589, 111 N. W. 51; *Bennett v. Emmetsburg* (1908) 138 Iowa, 67, 115 N. W. 582; *Mitchell v. Milwaukee* (1864) 18 Wis. 93; *Pier v. Fond du Lac* (1875) 38 Wis. 470; *Johnson v. Milwaukee* (1876) 40 Wis. 315; *Watkins v. Zwietusch* (1879) 47 Wis. 515, 3 N. W. 35; *Harrison v. Milwaukee* (1880) 49 Wis. 247, 5 N. W. 326; *Watkins v. Milwaukee* (1881) 52 Wis. 98, 8 N. W. 823; *Lieberman v. Milwaukee* (1895) 89 Wis. 336, 61 N. W. 1112; *Kersten v. Milwaukee* (1900) 106 Wis. 200, 48 L.R.A. 851, 81 N. W. 948, 1103; *Spence v. Milwaukee* (1907) 132 Wis. 669, 113 N. W. 38.

2. Sufficiency of petition.

In Pennsylvania, it has been held that the question as to whether a majority in interest and number of the property owners signed the petition for a street improvement must be de-

terminated by an appeal to the common pleas court as provided by statute under penalty of estoppel, and cannot be raised by exceptions to the report of viewers. *Re O'Mara* (1899) 194 Pa. 86, 45 Atl. 127. See to the same effect *Re Harrison* (1899) 194 Pa. 92, 45 Atl. 1092; *Re Ober* (1899) 194 Pa. 93, 45 Atl. 1093; *Re Mellon* (1899) 194 Pa. 93, 45 Atl. 1093; *Ziegler's Appeal* (1899) 194 Pa. 94, 45 Atl. 1093.

3. *Validity of statute or ordinance.*

Where a property owner is afforded the right to appeal to a jury for a revision of a sewer assessment within three months after receiving notice of it, and does not avail himself of this remedy, he waives his right to object that the vote on the passage of an ordinance was not recorded at the time, especially if the vote was subsequently recorded. *Leominster v. Conant* (1885) 139 Mass. 384, 2 N. E. 690.

On the other hand, it has been held that the failure to appeal from the confirmation of a street assessment will not estop a property owner from contesting the validity of the proceeding on the ground that the ordinance passed does not provide for the making of a local improvement, but simply authorizes the levy of a special tax to pay for work already done. *Freeport Street R. Co. v. Freeport* (1894) 151 Ill. 451, 38 N. E. 137.

4. *Conformity of proceedings to statute or ordinance.*

A court of equity will not entertain a bill to restrain the sale of property for the nonpayment of a street assessment, on the ground that proper steps were not taken to ascertain and determine that a pavement or sidewalk needed repairs, where it appears that the owner made no objection to the proceedings before the recorder, nor took an appeal, as allowed by the statute. *Strenna v. Montgomery* (1888) 86 Ala. 340, 5 So. 115.

Where assessors have assumed jurisdiction with respect to a street assessment, their acts must stand until reviewed by appeal from their determination, and failure to appeal estops an aggrieved owner from objecting to the form of oath taken by them. *Sor-*

chan v. Brooklyn (1875) 3 Hun (N. Y.) 562.

A property holder is estopped from objecting to a street assessment on the ground that one of the viewers was not a freeholder, as required by law, by the confirmation of their report and his failure to appeal therefrom. *Pittsburg v. Cluley* (1874) 74 Pa. 262, wherein the court said: "The confirmation of the report has all the legal effects and incidents of a judgment or a decree of a court of competent jurisdiction, one of which is that it must be treated as valid and binding until reversed or set aside, and cannot be assailed except for fraud or collusion. It is not pretended that any injustice was done by the assessment. The defendant had notice of the proceedings, and did not appeal to the councils or apply to the court of quarter sessions to have the assessment set aside or abated, on the ground that it was inequitable and unjust. It is not alleged that his property is not benefited to the extent of the amount assessed upon it, or that the assessment is in any respect unequal or excessive. His only complaint is that one of the viewers by whom it was made was not a freeholder. This objection would have availed if it had been made in time. But it comes too late, and cannot be set up here. The confirmation of the report must be regarded as conclusive of the assessment."

Likewise, where a property owner fails to appeal from a street assessment, as allowed by statute, he cannot restrain the collection of the tax because of a mere mistake in describing the property. "The law is that all questions which are properly triable on appeal must be so tried, and not by injunction, except such questions as go to the power and jurisdiction of the common council." *Balfe v. Lammers* (1887) 109 Ind. 347, 10 N. E. 92, wherein the court said: "The mistake in the description in a mortgage is a mutual mistake of the contracting parties, but in such a case as this there are no parties to the contract except the city and the contractors. In such a case as this, one of the principal questions for trial on

appeal from the precept is whether the estimate properly describes the property. That is a question directly in issue, and one that must be decided, for, in strictness, the proceedings are against the property. *New Albany v. Smith* (1861) 16 Ind. 215. It is evident, therefore, that a judgment in favor of the contractor settles the question as to the validity of the estimate and the sufficiency of the description. Estoppels by judgment are mutual, and surely a property owner could not enjoin the enforcement of a decree rendered on an appeal from a precept, on the ground that the estimate was invalid because the property was not properly described."

Failure to appeal from the decision of the commissioners to the common council will not estop an owner from objecting to a street assessment on the ground that no estimate of the cost of an improvement was filed as required by statute, and a court of equity will grant relief. *Weller v. St. Paul* (1861) 5 Minn. 95, Gil. 70, wherein the court said: "It is urged that the street commissioners constituted a tribunal from which the city charter has provided a special remedy by appeal to the common council. *Sess. Laws* (1854), p. 29, chap. 7, § 2. And that, where the statute has provided a special remedy, parties must pursue that in the first instance. The section above quoted provides that 'any person deeming himself aggrieved by an act of the board of street commissioners may, at any time, appeal to the common council, who shall inquire into, examine, and correct the act or order complained of, as shall be just and proper.' The question presented under this provision is whether the remedy here given is exclusive of all others. I do not think such is the proper construction. The terms of the act do not, in themselves, convey the idea that the party aggrieved is compelled to appeal to the common council as his only means of redress. It is a privilege accorded to him if he chooses to avail himself of it; he 'may' appeal. If the intent of this section is to make this appeal to the common council exclusive of other remedies, its effect

would be to deprive the party aggrieved of a trial by jury, in a case involving the title to real estate, since there is no method provided for reviewing the action of the common council, and the only way of doing this suggested by the counsel for the defendant is by certiorari to the supreme court."

An objection that a meeting of council to confirm a sewer assessment was several times adjourned is an irregularity which cannot be raised in a suit to enjoin collection, where the notice was regular, and the property owner did not appeal to the city council in writing or file any objections to the report of the commissioners. *Ottawa v. Chicago & R. I. R. Co.* (1860) 25 Ill. 43. The court said: "As was said in the case of *McBride v. Chicago* (1859) 22 Ill. 574, which is like this, so we now say, that by the charter of the city of Ottawa ample opportunity was given to the defendants to be heard as to their objections, legal or equitable, before the city council on the return by the commissioners of the assessment, who can revise and correct the assessment, or confirm or annul it in their discretion, and direct a new assessment to be made. If a party lies by, having notice, and fails to present his objections to the city council, he must be held in a court of equity to have waived all irregularities, and cannot in that court have a hearing which he has failed to avail of at law. If, as seems to be complained, by reason of the general terms in which the notice to persons interested in the assessment was published, and thereby the party had not notice, when the proceeding did come to his knowledge, he could have removed the record of the proceedings from before the city council to the circuit court by certiorari, and if they were defective in a substantial matter, they would be quashed. An ample and complete remedy at law being within the power of the party, a court of equity ought not to take jurisdiction for these irregularities, or even for want of a compliance with some material requirement of the law."

So, the failure of a property holder

to appeal from the decision of the court confirming a street assessment, on the ground that notice was not published for the required number of days, estops him from raising the question in an action for judgment of sale of the property. *Glover v. People* (1900) 188 Ill. 576, 59 N. E. 241.

Similarly, an objection that the notice of confirmation of the report of commissioners with respect to a street assessment was not acted on until nearly a month after the date named in the advertisement, in the absence of an appeal from the order of confirmation, cannot be raised in a suit to enjoin collection. *McBride v. Chicago* (Ill.) *supra*, wherein the court said: "Ample opportunity is . . . given to the party feeling himself aggrieved to be twice heard. First, before the common council on the return by the commissioners, and, if not satisfied with their determination, then by an appeal to any court of record in the county of Cook. And if the party, having notice, lies by, and fails to urge a hearing before the common council, and fails to take an appeal or remove the record of confirmation by certiorari to a court of competent jurisdiction, he must be held, in a court of equity, to have waived all irregularities, and cannot, by applying to this tribunal, have a hearing which he has failed to avail himself of at law. If he had no notice, when the proceeding did come to his knowledge, he could have removed the record to the Cook circuit court by certiorari, and if it were essentially defective, the order would be quashed. By either the appeal, or certiorari, an ample and complete remedy at law could have been had. And therefore a court of equity should not assume jurisdiction for mere irregularities, or even for a want of compliance with material requirements of the law. That a case might occur, as where the injury likely to result from the enforcement of a void assessment would be irreparable, from the irresponsibility of the officers committing the irregularity, or in a case where the whole proceeding was tainted and vitiated by fraud and corruption, a court of equity

might, by either of those means, acquire jurisdiction to inhibit the corporation from executing its order. But in cases where officers, either de jure or de facto, are exercising the functions of that office, and the law authorizes them to levy a tax, or a special assessment, a court of equity will not restrain them from acting for a want of regularity in the exercise of the power, while it might entertain jurisdiction where persons are acting neither as officers de jure nor de facto, or having pretense of legal power to levy a tax or make an assessment. But such cases should be clear and free from doubt. In this case, the various objections to this proceeding could have been fully heard and determined on an appeal, or by writ of certiorari, if the appellant had been disposed to have availed himself of his legal remedies. But failing to do so, we see no reason why a court of equity should, or, even if so disposed, could, afford the relief sought by the bill."

That commissioners gave by publication twenty-nine instead of thirty days' notice of a meeting is a mere irregularity, which might have been urged on an appeal from their decision, but cannot be raised in a proceeding to recover the costs of a street improvement. *Dashiell v. Baltimore* (1877) 45 Md. 615.

And, where a statute provided for an appeal from a street assessment to the district court, and, further, that "the remedy by appeal herein allowed shall be deemed and held to be exclusive," it has been held that a failure to take such appeal will estop a property owner from objecting to the publication of notice of a resolution of necessity. *Burkley v. Omaha* (1918) 102 Neb. 308, 167 N. W. 72, wherein the court said: "The decision of a special tribunal, where it has jurisdiction of the subject-matter and parties, is conclusive, unless reversed and modified in the mode provided by law."

In *Bridgeport v. Giddings* (1876) 43 Conn. 304, it appeared that no notice of a street assessment, as finally made by the board of review, was published. The original assessment was

made by appraisers, and notice of the time and place of hearing objections was duly given, and the assessment when made was duly published. More than two thirds of all the persons assessed appealed to the board of review, but the defendant did not. The court held that he could not complain of the want of notice of the assessment, as amended, as he was bound to take notice of the result.

An objection that the letting of a contract for a street improvement was not according to law, made before a city council sitting for the purpose of deciding such questions, is thereafter waived where the aggrieved party does not appeal from the decision as provided by statute. *Nixon v. Burlington* (1908) 141 Iowa, 316, 115 N. W. 239.

But, where a contract for grading a street was relet, without notice of publication, at a greatly advanced sum from the original bid, it is void, and failure to appeal from the decision of the common council will not estop a property owner from objecting to the assessment. *Mitchell v. Milwaukee* (1864) 18 Wis. 92, wherein the court said: "Where inferior tribunals or officers act within their jurisdiction, and the statute provides for an appeal from their acts, such acts are final and conclusive unless appealed from; or, . . . where a statute confers discretionary powers upon such officers, their discretion will not be controlled by superior tribunals. These propositions are familiar, but wholly inapplicable here. None of that class of cases shows that, where such officers act without jurisdiction, their acts are valid and binding unless appealed from. On the contrary their acts in such cases, like those of all other tribunals, indeed, are void."

See to the same effect, *Comstock v. Eagle Grove* (1907) 122 Iowa, 589, 111 N. W. 51; *Bennett v. Emmetsburg* (1908) 188 Iowa, 67, 115 N. W. 582.

B. Performance of work.

Where landowners have been heard before a competent tribunal, and have brought forward all their objections to a street improvement, but have failed to appeal from an adverse de-

cision, they are precluded thereby. Under this rule the right to object to a street assessment on the ground of collusion between the contractor and the city inspector, whereby the city was cheated, is lost by a failure to appeal. *Morewood v. New York* (1851) 6 How. Pr. (N. Y.) 386, wherein the court said: "Had fraud been charged on the part of the corporation itself, and not only charged but proved, the case might have presented a different aspect. Fraud vitiates even the most solemn judgments. But the plaintiffs have adduced no such proof. All they have shown is that the corporation was cheated."

Likewise, where an owner does not appeal from the decision of a street superintendent in accepting work before the completion of the contract, to the body prescribed by statute, he cannot raise the objection in an action to foreclose a lien for the assessment. *Diggins v. Hartshorne* (1895) 108 Cal. 154, 41 Pac. 283.

And, where work is not completed in the time named in a contract, and the remedy as fixed by statute, to an aggrieved owner, is by appeal from the decision of the street commission, equity will not restrain the collection of an assessment when the party fails to appeal. *Hazelhurst v. Baltimore* (1872) 37 Md. 199.

In *Clifton Land Co. v. Des Moines* (1909) 144 Iowa, 625, 123 N. W. 340, the original objection was that the contractor to whom the city had let a contract to build certain walks had failed in material respects to do the work according to the plans and specifications. It appeared that this objection was made to the city council at the time set for hearing remonstrances. No appeal was taken, as allowed by statute, but a suit in equity to enjoin the collection of the tax was begun. In denying the petition, the court said: "In our judgment the objection raised to the form and sufficiency of the initial steps with which the improvement in question was undertaken cannot be sustained. Confessedly, the improvement was ordered at the request and instigation of the appellant corporation, which then

owned a large number of lots in that neighborhood, for the benefit of which it desired the construction of sidewalks. It knew of the beginning and progress of the work, and made no objection thereto except as to the alleged failure of the contractor to comply with the specifications of his contract, and on such ground alone it made complaint to the city authorities. When the work was completed and opportunity given it to show cause against the assessment, it appeared before the board and filed written objection and protest, based wholly on the quality of the work performed, and suggesting no lack of jurisdiction in the city to order it, but, on the contrary, offered, in case the defective brick walks were removed, to construct cement walks in their stead. The objection and protest being overruled, appellant did not take advantage of its right to appeal to the district court, but instituted this independent action to enjoin the assessment upon the same grounds which it had unsuccessfully urged upon the attention of the city council, and, as we have already observed, it was not until nearly five years later that any claim was pleaded or presented, questioning the jurisdiction of the city in the premises. Under such circumstances, we are very clear that this objection is not now available to appellant. It may be conceded that if the city had no jurisdiction of the subject-matter, or power to provide for and order the construction of sidewalks, mere delay in raising the objection would not ordinarily be a sufficient ground for refusing to entertain it; but, on the other hand, where the officer or tribunal does have jurisdiction of the subject-matter, we know of no rule by which a property owner, to be affected by the exercise of such authority, may not by his own conduct or concession estop himself from denying the sufficiency or validity of the proceedings which he himself has invoked, and upon the assumed regularity of which he himself has acted and induced others to act. In other words, while there may be no waiver or estoppel where the law

confers no jurisdiction of the subject-matter, yet, where such jurisdiction is given, mere omission or irregularity in some of the initial steps by which the proceedings are instituted, or in interlocutory matters pertaining to the conduct and development of the proceedings, may always be waived by the party entitled to object thereto, and, when that waiver once becomes effective, it cannot be withdrawn or its effect neutralized by any act on his part. Adhering to this view of the law, we think the facts, as hereinbefore set forth, constitute an effectual waiver of the appellant's right to assert the nonjurisdiction of the city to order and provide for the building of the walks in controversy."

But, where a contract was let for the paving of an alley at the established grade, but the city engineer gave the contractor the wrong grade, and the pavement was laid from 6 to 8 inches above the established grade, a property owner is not estopped by his failure to appeal from the confirmation of the assessment, but may maintain a suit in equity to enjoin its collection. *F. M. Hubbell, Son & Co. v. Bennett Bros.* (1906) 130 Iowa, 66, 106 N. W. 375, holding that the city had power to make such improvement only when constructed upon the established grade.

Where an appeal is noted as a mere formality, and is subsequently overruled because of lack of prosecution, the effect on a property owner's right to contest the validity of an assessment for a street improvement is the same as if no appeal had been taken. *Lambert v. Bates* (1902) 137 Cal. 676, 70 Pac. 777, wherein the court said: "The rule is firmly established that, if the owner would contest an assessment upon the ground that the work contracted for has not been fully performed, he must present that question upon an appeal to the city council for its determination. In the present case the defendant did make such appeal, but his appeal was overruled. It is, however, contended by him that, notwithstanding this fact, he is not precluded from again making the same objection to the validity of

the assessment in an action for its enforcement. We are, however, unable to assent to this proposition. . . . The legislature did not intend . . . that the appeal should be prosecuted in a perfunctory manner, or should be a mere formality. By declaring that the determination of the council shall be 'final and conclusive,' it intended that that body should be the final tribunal for the determination of all questions that might be appealed to it, so far as such determination was of a question of fact, or depended upon evidence that might be presented in support of the appeal. . . . This provision cannot be construed as authorizing a person merely to take an appeal to the council, without presenting to that body sufficient evidence, or any evidence whatever, to support his appeal, and afterwards seek to have the grounds of his appeal sustained before another tribunal and under additional or different evidence."

6. Assessment.

Where a statute provides that "if the owner of any parcel of land assessed for such improvement by special tax feels himself aggrieved by reason of the determination made by the common council, he may within twenty (20) days after the date of such determination, appeal therefrom to the district court," the remedy by appeal excludes all other remedies where the grievance complained of is one that the common council has power to remedy. *English v. Territory* (1907) 11 Ariz. 87, 89 Pac. 501, affirmed in (1909) 214 U. S. 359, 53 L. ed. 1030, 29 Sup. Ct. Rep. 658. The court said: "The common council would not have the power to remedy any grievance arising from some jurisdictional defect in the proceedings which would render subsequent proceedings void. There could be no doubt but that, under the statute, if the committee had erroneously assessed the property of appellants by applying an arbitrary front-foot rule, or by improperly including a possible use by appellants of a vacant piece of ground belonging to the city, as among the benefits accruing to the property of appel-

9 A.L.R.—48.

lants by reason of the improvement made, such errors were within the power of the common council to correct so as to give validity to subsequent proceedings. It is quite clear, therefore, that under the statutes above quoted the only remedy available to the appellants for the correction of any irregularity in the assessment in any of the respects complained of was an appeal to the district court within twenty days after the committee had reported its action to the common council and the latter had made its determination by affirming the report."

And where a property owner objected to the report of viewers as to the amount of his assessment for a street improvement, and thereupon a second view was had and a second report made, to which objections were filed, but no exceptions were filed except in one cause, and the report was confirmed by the court, it was held that he was estopped, in the absence of an appeal, from raising the same objection in a scire facias to enforce the lien of the assessment. *Corry v. Corry Chair Co.* (1901) 18 Pa. Super. Ct. 271, wherein the court said: "No appeal was taken from the final decree of confirmation, and no attempt made to have it set aside or opened. We have detailed the proceedings for the purpose of showing that the defendant not only had an opportunity to be heard, but actually appeared as a party to the proceedings and opposed the assessment, but with apparent deliberation omitted to avail itself of the ample remedies provided by the Act of 1891 for the correction of the errors of the viewers and of the court, if any there were. To declare that it would in due time file its objections in court, and then omit to do so, was, in effect, to invite the city to assume that they had been waived. And no appeal having been taken from the final decree, we see no good reason for not applying the general rule that the final judgment of a court of competent jurisdiction upon a point litigated between the parties is conclusive, so long as it remains in full force and effect, in all subsequent con-

traversies directly involving the same question. 'A judgment settles everything involved in the right, not only matters that were raised, but those which might have been raised.' *Myers v. South Bethlehem* (1892) 149 Pa. 85, 24 Atl. 280; *Re Second Avenue* (1898) 7 Pa. Super. Ct. 55. 'The rule that what has been judicially determined shall not again be made the subject of controversy extends to every question in the proceeding which was legally cognizable, and applies when a party has neglected the opportunity of trial, or has failed to present his cause or defense in whole or in part, under the mistaken belief that the matter would remain open and could be made the subject of another proceeding.' *Schwan v. Kelly* (1896) 173 Pa. 65, 33 Atl. 1107. The authorities cited in the able opinion of the learned judge below clearly show that these principles are applicable to a final decree in proceedings for the assessment of damages and benefits accruing from such improvements as this, and we do not deem it necessary to further extend the discussion of the question. If there had not been a valid ordinance, as in *Reading v. O'Reilly* (1895) 169 Pa. 366, 32 Atl. 420, or there had been no authority of law for assessing private property for the improvement, as in *Breed v. Allegheny* (1877) 85 Pa. 214, or it clearly appeared on the face of their report that the viewers exceeded their authority by arbitrarily assessing the defendant's property without regard to benefits, a different question would be presented."

The question whether the estimate was made for the proper amount cannot be put in issue by a suit for an injunction. That question must be made and tried on appeal, for appeal is the remedy provided by law, and the failure to take advantage of the remedy provided precludes a property owner from questioning the correctness of a street assessment in a collateral proceeding. *Balfe v. Lammers* (1887) 109 Ind. 347, 10 N. E. 92.

It is not permissible for a property owner, in defense of an action for an assessment, to show for the first time

that the property received no benefit from the construction of a sidewalk, the action of the council being conclusive if not appealed from. *Mexica v. Lakenan* (1908) 129 Mo. App. 180, 108 S. W. 141. See to the same effect, *Barber Asphalt Paving Co. v. French* (1900) 158 Mo. 534, 54 L.R.A. 492, 58 S. W. 934; *Heman v. Schulte* (1901) 166 Mo. 409, 66 S. W. 163.

In an action for the removal of a lien for a street improvement, the complaint alleged that the board adopted a wrong rule of assessment, and that the land in question was not at all benefited by the improvement. It was held that these were matters which could only be raised by the plaintiffs on an appeal from the assessment, and, having failed to avail themselves of that remedy, they were estopped in the present proceedings. *Peck v. Bridgeport* (1903) 75 Conn. 417, 53 Atl. 893.

And where a common council has jurisdiction of the construction of a sewer, an injunction to restrain the collection of an assessment on the ground that it was inequitable will not be granted. The remedy of an aggrieved owner is either by injunction as to the letting of the contract, or an appeal from the decision making the assessment, and, having failed to adopt either, he is estopped from taking any further proceedings. *Alley v. Lebanon* (1896) 146 Ind. 125, 44 N. E. 1003.

So, a property holder is estopped from objecting to a paving assessment on the ground that the improvement was of no benefit to his property, where he appeared before the city council, made his remonstrance and had a full hearing, and did not appeal. *Wagoner v. La Grande* (1918) 89 Or. 192, 173 Pac. 305.

So, where property owners appear before the hearing of city councils and file objections to a paving assessment on the ground that it is in excess of 25 per cent of the value of the property, but fail to appeal from the decision of the council, as provided by statute, they are estopped from raising the objection in subsequent proceedings. *Nixon v. Burlington* (1908) 141

Iowa, \$16, 115 N. W. 239, 18 Ann. Cas. 1037.

Where a statute provides for the remedy by appeal from the decision of the city authorities, an objection that the benefits assessed were excessive is waived by failure to follow the course prescribed, and equity will not enjoin the collection of the tax. *Hazelhurst v. Baltimore* (1872) 37 Md. 199.

So, an objection to a street assessment that it is excessive by reason of including improper charges, wrong computation, and a disproportionate valuation is available on appeal from the decision of the mayor and aldermen of a city, and is waived if the statutory remedy is not followed. *Whiting v. Boston* (1870) 106 Mass. 89.

Similarly, a property owner who fails to take his remedy by petition for abatement or by appeal is estopped from questioning a street assessment on the ground that it is greater than the special benefit conferred. *Hester v. Collector of Taxes* (1914) 217 Mass. 422, 105 N. E. 631.

Where an appeal from a street assessment is provided for by statute, a failure on the part of an aggrieved owner to avail himself of this remedy will act as an estoppel to resist payment of the assessment for irregularities therein, and under this rule is included an objection that no assessment was made on many parcels of land included in the assessment district. *Rentz v. Detroit* (1882) 48 Mich. 544, 12 N. W. 694, wherein it was said: "The statute gives to aggrieved parties an appeal to be taken within five days; the result of which would be likely to affect all concerned equally, and therefore justly. These parties have elected not to appeal, but to wait until the city and the majority of the persons taxed have made their payments respectively, and then resort to a remedy from which, if successful, injustice and inequality must flow of necessity. They wait until the improvement is apparently secured, and then move to escape their just share of the burden. This should not be suffered unless reasons require it, more

imperative than appear in this record."

So, an objection that only part of the land subject to a street assessment is included in the tax is waived by a failure to appeal. *Barber Asphalt Paving Co. v. Kiene* (1903) 99 Mo. App. 528, 74 S. W. 872, wherein it was said: "The defendants had their day in court to interpose their defense, and if they did not avail themselves of their remedy by appeal, they have only themselves to blame; and whether the judgment was right or wrong we are not at liberty in this action to inquire."

And where a property owner, whose land has been condemned for the opening of a street, is assessed to pay awards for other property taken, and, after presenting his objection and urging his rights before the commissioners, fails to appeal from their decision, a court of equity will not annul the assessment. *Murray v. Graham* (1837) 6 Paige (N. Y.) 622, modified on grounds not stated (1839) 22 Wend. 559. The court said: "The appropriate remedy of the complainant in such a case was to oppose the confirmation of the report in the supreme court, on the ground of this erroneous decision of the commissioners of estimate and assessment. And if that court had decided against him, he should have carried the question for final decision to the court of dernier ressort, instead of coming into this court to correct the erroneous decision of the commissioners in a collateral suit. The complainant therefore had an adequate remedy at law, which has been lost by his neglect to defend himself in the proper tribunal; and this court has no jurisdiction to grant the relief asked."

The failure to appeal from the confirmation of a paving assessment as made by the common council estops a property owner from objecting on the ground that the assessment exceeded the cost of the improvement. *Nelson v. Waukesha* (1911) 147 Wis. 163, 132 N. W. 887.

Where property is admittedly within an assessment district, an owner is estopped from objecting that a street

assessment far exceeds the amount which should properly have been assessed against his property, if, after notice, he duly appeared before the proper authority, and, having made his protest and had a hearing thereon, failed to prosecute an appeal from the decision. *PARTEE v. CLEVELAND TRINIDAD PAVING CO.* (reported herewith) ante, 606.

Similarly, where the city council levied a street assessment after finding "the special and peculiar benefit accruing upon each lot . . . and in just proportion to benefits," to be the amount so assessed, their decision is, in the absence of fraud, conclusive unless appealed from. *Colby v. Medford* (1917) 85 Or. 485, 167 Pac. 487.

So, failure to appeal from the confirmation of the report of viewers will estop a property owner from asserting that he is liable for such proportion only of the cost of a main sewer as will pay for a branch sewer sufficient to give the benefits of sewerage to his property. *Philadelphia v. Nock* (1899) 12 Pa. Super. Ct. 44, wherein the court said: "After the report has been confirmed, such a readjustment of amounts, if entered upon in a defense to the lien, would be in disregard of the effect to be given to the record of the confirmed report of the jury of view."

"The law does not permit parties to stand by in silence, see improvements made, and then appeal to the courts to set them aside for irregularities," and where, after an objection to the common council that assessments were not made according to benefits has been decided adversely, a property owner takes no appeal to test the validity of the proceedings until the work is completed, he is estopped by his inaction. *Gates v. Grand Rapids* (1903) 134 Mich. 96, 95 N. W. 998.

On the other hand, where a statute provided that a city shall have power to levy the entire cost for the construction of a sewer on "all the taxable real property within such district," and an assessment is made against a railroad, based on all its property, real and personal, it is void and the company, by failing to appeal

from the assessment, is not estopped from seeking relief in equity to restrain the collection of the tax. *Chicago, M. & St. P. R. Co. v. Phillips* (1900) 111 Iowa, 377, 82 N. W. 787.

And, where a statute provided that the cost of "grading, graveling, plank-ing, or paving streets and alleys to the center thereof shall be chargeable to and payable by the lots fronting on such street or alley," and an assessment was made only against the lots fronting on the grading done, a court of equity will grant relief, notwithstanding the owner failed to appeal from the decision of the commissioners to the common council as provided by statute. *Weller v. St. Paul* (1860) 5 Minn. 95, Gil. 70.

Likewise, a property owner is not estopped by his failure to appeal from a street assessment, but may proceed in equity to set aside the assessment where it appears that the assessment was laid solely for pretended benefits to the premises, and that such benefits were arbitrarily determined without viewing the premises, and much greater than the true amount. *Johnson v. Milwaukee* (1881) 40 Wis. 315. See to the same effect, *Watkins v. Zwietusch* (1879) 47 Wis. 515, 3 N. W. 35, wherein the court said: "It is quite obvious from the testimony that the several lots were very differently affected by the improvement. If the assessment had been made according to law, and the actual benefit to the several lots had been at all judicially considered, then such quasi judicial determination might not be questionable in this collateral manner. But this assessment was made in palpable and gross violation of the law, and of common reason and justice. Here was no mere error of judgment, but the failure to exercise any judgment at all. The actual benefit to each lot, which is the only legal basis of such estimate and assessment, is boldly repudiated, and an arbitrary basis adopted, which precluded any consideration of such benefit or the exercise of any judgment in respect to such benefit." In *Kersten v. Milwaukee* (1900) 106 Wis. 200, 48 L.R.A. 851, 81 N. W. 948, 1103, the court said:

"Section 11, subchapter 7, provides that the owner of any lot, who feels himself aggrieved by any assessment, may appeal to the circuit court and have his grievance therein determined; and it is urged that this gives him an ample and exclusive remedy. In cases where the initial steps have been such as to give the city jurisdiction to proceed, this argument appeals to us with considerable force; but this court, having held in a long line of decisions that the remedy by appeal is not exclusive where the assessment is shown to be arbitrary and fraudulent, we feel compelled to follow them." See to the same effect, *Harrison v. Milwaukee* (1880) 49 Wis. 247, 5 N. W. 326; *Liebermann v. Milwaukee* (1895) 89 Wis. 336, 61 N. W. 1112; *Spence v. Milwaukee* (1907) 132 Wis. 669, 113 N. W. 38.

And where a city charter gives a lot owner the right of appeal to the common council, and thence to the circuit court, from the decision of the board of public works "as to the amount of the benefits by them adjudged to accrue to him by reason of any improvements charged against his lot or parcel of land," this relates to the correction of mere errors of judgment, and a property owner is not estopped by failure to take that remedy, from enjoining the collection of the assessment on the ground that it includes the expense of improving the cross section of streets, which, by the charter, should be borne by the city. *Pier v. Fond du Lac* (1875) 38 Wis. 470, wherein the court said: "In this case the assessment complained of was not the result of a mere error of judgment, but it was made without authority of law. The board of public works had no jurisdiction to make it."

VI. Estoppel by acquiescence or acceptance of benefits.

a. Generally.

1. Sufficiency of petition.

In some jurisdictions it is held that an abutting owner, who, with full knowledge of a street improvement, stands by without objection during the progress of the work, is estopped to resist payment of the assessment on

the ground that the petition for the improvement was not signed by the requisite number of landowners. *Powers v. New Haven* (1889) 120 Ind. 185, 21 N. E. 1083; *Farr v. Detroit* (1904) 136 Mich. 200, 99 N. W. 19; *Sheehan v. Martin* (1881) 10 Mo. App. 285; *State, Provident Inst. for Sav., Prosecutors, v. Jersey City* (1890) 52 N. J. L. 490, 19 Atl. 1096; *Corry v. Gaynor* (1872) 22 Ohio St. 584; *Quilan v. Myers* (1876) 29 Ohio St. 500; *Tone v. Columbia* (1883) 39 Ohio St. 281, 48 Am. Rep. 438.

Thus, it has been held that a suit to enjoin the collection of an assessment, on the ground that the petition for the improvement was not signed by owners representing a majority of the frontage, would not be entertained, where the owner knew of the improvement and his property was benefited. *Farr v. Detroit* (1904) 136 Mich. 200, 99 N. W. 19, wherein the court said that the property owner was bound to take notice of the public statutes, and that under the city charter the only method of compensating for such improvements was by an assessment upon the property, notwithstanding he purchased the land after the entire proceedings were completed, the contract let, and the work had proceeded to partial completion.

So, an objection that two thirds of the resident owners of real estate in number or value did not petition for a street improvement cannot be raised in an action on the assessment by one who, while the ordinance was being passed and improvements were being made, with a full knowledge of the same, stood by and made no objection thereto, but permitted the work to be done. *Powers v. New Haven* (1889) 130 Ind. 185, 21 N. E. 1083, wherein the court said: "This doctrine of estoppel does not rest wholly upon the statutes, as contended by the appellants, but it rests upon the reasonable ground that it would be inequitable to permit a party to stand by and permit others to make improvements for the benefit of his property, without objecting, and hold such benefits and refuse to pay for the same. We see no reason why the doctrine should not be applied

to improvements made in towns as well as cities."

After the completion of an improvement it is too late for a property owner to object to an assessment on the ground that the petition was not signed by the owners of one third of the property fronting on the street, a statute providing that "if any application or petition, not signed by the requisite number of owners, shall be acted on by the city authorities in good faith, believing the same to be duly signed, and a contract for work and materials shall be entered into, or awards for damages shall thereupon be found, such application or petition shall be of like force, avail, and effect as if duly signed." *State, Provident Inst. for Sav., Prosecutors, v. Jersey City* (1890) 52 N. J. L. 490, 19 Atl. 1096.

So, where the statute provides that sewers shall be constructed whenever a majority of the property holders, resident in the district, shall petition therefor, or whenever the board of public improvements shall recommend it as necessary for sanitary or other purposes, an objection that a sufficient number of signatures were not obtained is waived where the work has been completed without hindrance on the part of the property owners. *Sheehan v. Martin* (1881) 10 Mo. App. 285.

It has been held that where trustees were authorized to order an improvement and to charge the cost thereof on the abutting lots, on petition of two thirds of the resident lot owners, such petition was prerequisite to the lawful exercise of the power, but an owner who had knowledge of the progress of the work and promised that the improvement would be paid for was estopped from showing that the petition did not in fact have the required number of property owners, where all the proceedings were regular and the trustees believed that the petition was sufficient. *Corry v. Gaynor* (1872) 22 Ohio St. 584, wherein the court said: "It was competent for the lot owners, or any of them, to waive the defect referred to. . . . The plaintiff was the owner of a large proportion of the

lots thus situated, and was correspondingly interested in the undertaking. The project was to make the improvement at the expense of the owners of the lots thus directly and specially benefited; and this project was not only favored by the plaintiff, but he had, from time to time, actively participated in the measures necessary to carry it out. In furtherance of it he endeavored to induce the requisite action by the trustees on the petition of the 19th of August; and, as he testified upon the trial, he met with the board when the project was first moved, and bought out one of the resident lot owners because he declined to sign the petition. . . . Until after the assessment was made and a controversy had arisen as to the quantity and quality of the work, it does not appear that any intimation was given by plaintiff that he intended to question the regularity of the preliminary proceedings."

In *Quinlan v. Myers* (1876) 29 Ohio St. 500, in a suit to enjoin the collection of an assessment, it was found by the referee that the petition for the improvement was not signed by a majority of owners of abutting property. It was held, however, that an owner who had acquiesced in the improvement for five years, during which time the work had been practically completed, bonds issued, and large payments made to the contractor, was estopped by his laches from objecting to the assessment. The court said: "In equity, wherever the rights of other parties have intervened by reason of a man's conduct or acquiescence in a state of things about which he had an election, and his conduct or acquiescence, or even laches was based on a knowledge of the facts, he will be deemed to have made an effectual election; and he will not be permitted to disturb the state of things, whatever may have been his rights at first."

In *Tone v. Columbus* (1883) 39 Ohio St. 281, 48 Am. Rep. 438, it was held that active participation in causing an improvement to be made will estop the party engaged therein from denying the validity of the assess-

ment on the ground that the petition did not contain the requisite number of signers. The court said: "We think the true rule is this: When the improvement is of a public street upon which the owner's property abuts, before the duty to speak can be said to exist, which is so imperative that, if he keeps silent then, he shall not afterwards be heard, it must be shown: First, that he knew the improvement was being made. . . . Second, that he had knowledge that the public authorities intended, and were making the improvement upon the faith, that the cost thereof was to be paid by the abutting property owners, and that an assessment for that purpose was contemplated. . . . Because cities may improve the public streets out of the general fund and without a special assessment. Third, that he knew of the infirmity or defect in the proceedings, under which the improvement was being made, which would render such assessment invalid and which he is to be estopped from asserting. 'At least, in the absence of any evidence of previous knowledge on his part of their unlawful action, he is in time with his protest, when they proceed to deprive him of his rights under such proceedings.' . . . Fourth, some special benefit must have accrued to the owner's property, distinct from the benefits enjoyed by the citizens generally."

The fact that one of the signers to a petition does not affix the date after his name is an irregularity which an owner will be deemed to have waived if no objection is made before the completion of the work. *State v. Several Parcels of Land* (1907) 78 Neb. 225, 110 N. W. 753.

Where a property holder has received the full benefit of an improvement, having notice and knowledge of every step taken by the municipal authorities, and has failed to make any protest or objection until after the time prescribed by statute, when the improvement is partially completed, he is estopped from objecting to an assessment on the ground that the petition for the improvement does not show on its face that the lot owners

signing are residents. *Wright v. Tacoma* (1888) 8 Wash. Terr. 410, 19 Pac. 42.

Where an open country ditch is constructed into a brick sewer, the change being of benefit to the property owner, he cannot resist the collection of an assessment on the ground that the mayor was not authorized by the council to sign the petition, and did not in fact sign it, if the owner has stood by silently and allowed the improvement to his property. *Milliken v. Fearnside* (1907) 30 Ohio C. C. 45.

So, where there is no provision in a charter that a petition for improvements shall be signed by any specified number or class of the city's inhabitants, nor expressly denying authority to the council to levy and collect special assessments except when they are made in pursuance of a petition, a property owner who knows of an improvement and makes no protest for four years loses his right to object to an assessment because a petition was not more explicit. *Auditor General v. Hoffman* (1903) 132 Mich. 198, 93 N. W. 259.

In *Burns v. Atlanta* (1918) 148 Ga. 549, 97 S. E. 536, it appeared that after a contract had been let and work commenced on a street improvement, pursuant to a petition of property owners, it was abandoned because of excessive cost. Subsequently, a later contract for a different material was made, the ordinance authorizing the same reciting that a petition of property owners was introduced before the council, and fixing a day for hearing objections. None were made and the work was completed. After the levy of the assessment, an owner filed an affidavit of illegality, on the ground that the improvement was made without obtaining a petition of the owners of property affected. The court, in the official syllabus, said: "The petition signed by the owners of abutting property and filed with council prior to March 16, 1915, had not, under the facts of this case, served its purpose, and was not functus officio. The petition, not having been withdrawn, furnished a basis for the second resolution of council and for the

paving ordinance of November 15, 1915, and gave to council jurisdiction to pave the street in question. . . . The defendant in error, having acquired jurisdiction to pave the street in question, and to assess and apportion the cost thereof against the owners of abutting property, and the street having been paved to the advantage and benefit of the property of the plaintiff in error, without objection upon his part until the levy of the paving execution, he is estopped to complain of mere irregularities in the making of the contract and in the laying of the pavement, conceding that such existed."

In other jurisdictions, it has been held that failure to object during the progress of a street improvement does not estop a landowner from resisting payment of an assessment on the ground that the petition for the improvement was insufficiently signed. *Hager v. Burlington* (1876) 42 Iowa, 661; *Holland v. Baltimore* (1857) 11 Md. 186, 69 Am. Dec. 195; *Bouldin v. Baltimore* (1860) 15 Md. 18; *Strout v. Portland* (1894) 26 Or. 294, 38 Pac. 126; *Canfield v. Smith* (1874) 34 Wis. 381.

Thus, in *Strout v. Portland* (1894) 26 Or. 294, 38 Pac. 126, the court said: "An examination of the record discloses that the court was fully warranted in its conclusion that the common council had not acquired jurisdiction to make the improvement, and the only question presented by this appeal is whether the plaintiffs, one of whom signed the petition for the improvement, are estopped by their silence and apparent acquiescence from questioning the regularity of the proceedings. The assessment of property for a local improvement is always a proceeding in invitum, and rests upon the theory that the property of the citizen has been benefited to the extent of the amount assessed against it; but before such property can be charged with any part of the cost of the improvement, the common council must, in the manner prescribed in the city charter, acquire jurisdiction of the person and subject-matter; for, with-

out it, the right to assess such property for benefits conferred does not exist, nor should it, as a grant of such power would tend to make the common council not only the agent of the owner, but his guardian as well. But it is contended that the plaintiffs, knowing that the improvement had been ordered, should have informed the council of the irregularity in the proceedings, and, not having done so, or made any objection to the improvement until it was completed, should now be estopped from taking advantage of these jurisdictional defects. The property owner is not the legal adviser of the common council, which usually has an attorney for this purpose. He is not required to interfere with the mode adopted to acquire jurisdiction, nor is he expected to object or protest after the proper initiatory steps have been taken, except to the mode or manner of the improvement, or some intermediate order or proceeding of the common council, which injuriously affects his property. Jurisdiction to improve a street is obtained by the common council only in the manner prescribed in the city charter, and not by anything the property owner did or failed to do; and he is no more estopped from questioning the council's jurisdiction upon the facts than he would be from questioning the jurisdiction of a judicial tribunal which should attempt to deprive him of his property. . . . Objection to the jurisdiction of the person may be waived by the parties interested, but want of jurisdiction of the subject-matter is never thus waived . . . ; nor is a party who undertakes to waive it estopped from afterwards questioning the validity of the proceedings. . . . While there is quite a conflict of opinion upon this subject, we think the trend of modern decisions, as well as the weight of authority and better reason, serves to establish the following rules as applicable thereto: (1) When, in proceedings for the levy of an assessment, the common council is without jurisdiction from the beginning, a person whose property is benefited by a local improvement is not estopped to deny the validity of the

proceedings on the ground that he made no objection thereto while the improvement was in progress. . . .

(2) But if, after jurisdiction has been acquired, the owner of property benefited by a local improvement, with knowledge of its progress, permitted its completion without objection, he will be estopped from questioning mere irregularities occurring in the subsequent proceedings. . . . It follows from these rules that the plaintiffs who did not sign the petition are not estopped by their silence or apparent acquiescence while the improvement of said street was in progress, from questioning the void proceedings of the common council."

So, where a statute provides that the consent of a majority of the front footage is necessary for a paving improvement, an ordinance passed without such consent is null and void, and a property owner is not guilty of such laches as deprives him of an objection, by waiting until the work is done before objecting thereto, even though he has had notice of the application and determination to pave, by publication in the newspapers. *Holland v. Baltimore* (1857) 11 Md. 186, 69 Am. Dec. 195. See also *Bouldin v. Baltimore* (1860) 15 Md. 18, wherein the court said: "In the case of *Holland v. Baltimore* (Md.) supra, this court established the doctrine that unless the owners of a majority of the feet fronting on a street to be paved assent in writing to the paving, the proceedings of the city authorities directing the paving to be done are null and void, and a court of equity has, upon application of the nonassenting owners, jurisdiction to prevent by injunction the sale of their property to pay for such paving."

A property owner who stands by in silence and sees the city expend public money on her property by the improvement of the street, without objection or protest, is not estopped from denying the validity of the assessment on the ground that the petition for the improvement was not signed by the number of property holders required by statute. *Hager v. Burlington* (1876) 42 Iowa, 661, wherein the

court said: "The abstract does not show when the work began, nor when the plaintiff became advised that the city intended to assess the cost of the improvement upon her property. If she knew the work was progressing, she may have supposed the city intended to pay for it out of the general fund. For aught that appears, she moved with promptness as soon as she discovered it was the intention to create a charge upon her property."

Where the proceedings for a street improvement are void, because undertaken without the filing of a petition of property owners as required by law, there is no estoppel by reason of delay in objecting to the assessment. *Harmon v. Omaha* (1897) 53 Neb. 164, 73 N. W. 671, wherein the court quoted with approval the passage from the opinion in *Tone v. Columbus* (1883) 39 Ohio St. 281, 48 Am. Rep. 438, above excerpted, and further said: "In this state the rule has been stated thus: A party who is not guilty of laches may invoke the aid of a court of equity to restrain the collection of a void tax or assessment. . . . The appellees had knowledge of the commencement and progress of the work, and doubtless must be charged with knowledge of the provisions of the law under which it was being done; but it will not do to say that they will be charged with notice of the illegal actions of the city officers in relation to the improvements, because of the fact that the work was ordered done without the petition required by the statute on the subject, and of this latter it is not of the record that they possessed actual knowledge. It must rather be said that they were warranted in assuming, in the absence of actual information, that the officers would and were acting and proceeding legally, in all respects as required by statute, and to rest their rights on such assumption, and in so doing they were not guilty of laches. This being true, they were entitled to call for the aid of the court in the restraint of the enforcement of the void taxes, and this without prior payment or tender of alleged benefits to their properties. Where special taxes or assessment:

against property for the payment of expenses of the improvement of streets of a city are void, they cannot be enforced solely on the ground of the benefits received by the owners of the abutting lots or lands." See also *Morse v. Omaha* (1908) 67 Neb. 426, 93 N. W. 734, wherein it was said: "From an examination of the authorities upon the question, we are of the opinion that the great weight of authority, as well as right reason, supports the conclusion which we have reached, that is, that the petition with the number of signers required by statute is jurisdictional to the right of the council, under an ordinance, to repave a street; and that, being jurisdictional, it follows that the action of the city council, when not supported by such a petition, may be collaterally attacked. We are aware that courts whose decisions are entitled to great respect hold to a doctrine opposed to the conclusion which we have reached. This is particularly true of the state of Indiana, which in several instances seems to have passed upon the question, reaching the conclusion that the action of the council, based upon a petition which was sufficient upon its face, was not subject to collateral attack. . . . But a careful examination of these decisions has led us to the conviction that they cannot be considered as authority upon the question here presented, involving, as they do, largely political rather than property rights. . . . While we concede that there is some merit in the contention of the city of Omaha, appellant, that a taxpayer should not be permitted to stand by while valuable improvements are in progress, re-doubling to the benefit of his property, and then, when called upon to pay his share of the expense, be heard to object that the council in its action had no jurisdiction, we cannot say that even such conduct, if free from laches, estops him. Every man has a right to assume that the public officers will do their duty and observe the law. If he is to be charged with notice of what the law contains, he may well be permitted to assume that the city council will not proceed with an improve-

ment without observing the law. The law does not make it incumbent upon him, in order to preserve his rights, to protest against an improvement, or to make inquiry whether the council has complied with statutory prescriptions, but it does, in our opinion, very clearly, and in mandatory tones, enjoin upon the council to proceed only upon a petition signed by those owning a certain definite proportion of the foot frontage. While it is true that he who objects to an assessment to pay for accomplished improvements, presumably benefiting his property, may not always be deserving of unalloyed sympathy, we think that, under a statute such as this, to hold him estopped, as a general rule, from basing an objection on the sufficiency of the petition at any stage of the proceedings, would result more often in hardship and injustice than would a rule, in our opinion wholly in harmony with the statute as well as the authorities, that the council, in making the improvement, acts at its peril. The law under which the council acts is plain. The work undertaken by it is of vast importance. Every circumstance is calculated to put the authorities upon their guard. Their conduct in the premises is fraught with the possibility of great hardship. The system of special assessments for local improvements, at its best, is not perfect. Even where the owners of a majority of the foot frontage have united in a valid petition, and the council has plenary power to proceed, the dissenting owners might still be able to make out a moral case of hardship. But any grievance they might have in such case must, in the nature of things, be an incident to the steady development of metropolitan life among a progressive people. Nevertheless, the owner, whose peculiar knowledge of his own affairs and the status of his property has led him to the conviction that the improvement would not be beneficial to him, if obliged to pay therefor, has the guaranty of the statute that the council cannot take valid action binding upon him, until at least a majority of the foot frontage is represented upon the petition, and upon this guaranty we think

he should, in a case such as this, be permitted to rely."

So, in *Canfield v. Smith* (1874) 84 Wis. 381, it was held that a petition of the owners of a certain number of front feet abutting on a proposed street improvement was essential to give the council jurisdiction, and where it appeared that the essential number was not represented, a property owner could object to an assessment for that reason, although he had notice of the improvement, and made no movement until the work was completed.

3. *Validity of statute or ordinance.*

(a) *Generally.*

It is generally held that, where the statute or ordinance under which a street or sewer improvement is made is unconstitutional, a property owner is not estopped to resist the assessment by remaining silent until the completion of the work.

Thus, where the proceedings for a street improvement were had under a statute which was later declared to be unconstitutional, it was held that the property owners were not estopped from contesting the validity of the assessment because they stood by without objection and saw the improvement made. *Auditor General v. Johns* (1916) 190 Mich. 601, 157 N. W. 76.

So, a property owner is not estopped from contesting an assessment for a street improvement, under a statute and ordinance which have been declared unconstitutional and void, even though she has stood silently by and allowed the city to make the improvement, with her knowledge, and without objection or protest. *HENDERSON v. LIEBER* (reported herewith) ante, 620.

Likewise, an assessment for street improvements which takes no consideration of the benefits to accrue to the abutting property, nor apportions the costs with reference to any special benefit, but places the entire cost on the abutting property on an *ad valorem* basis, is contrary to the guaranty of the Constitution of the United States that private property shall not be taken for public use without just compensation, and an owner is not es-

topped from denying the validity of the assessment because he stands by and permits the expenditure of large sums in laying out and grading streets. *Cowley v. Spokane* (1900) 99 Fed. 840. See also *Norwood v. Baker* (1898) 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187; *French v. Barber Asphalt Paving Co.* (1901) 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625; *Wight v. Davidson* (1901) 181 U. S. 371, 45 L. ed. 900, 21 Sup. Ct. Rep. 616; *Tonawanda v. Lyon* (1901) 181 U. S. 389, 45 L. ed. 908, 21 Sup. Ct. Rep. 619.

Similarly, in *Lewis v. Taylor* (1899) 18 Ohio C. C. 443, 10 Ohio C. D. 205, it was held that mere silence would not estop an owner from objecting to an assessment because laid in proportion to acreage, without regard to benefits or value of the property, under a statute which had been declared unconstitutional. In a well-considered opinion on estoppel by silence, and criticizing the decision in *Tone v. Columbus* (1883) 39 Ohio St. 281, 48 Am. Rep. 438, the court said: "An examination of that case will show that the assessments complained of in that case were made under an act of the legislature that had been held in a prior case, *State ex rel. Columbus v. Mitchell* (1877) 31 Ohio St. 592, to be unconstitutional. It is shown that in *Tone v. Columbus* (Ohio) *supra*, *Tone* was estopped to question the constitutionality of the act in question, because he had signed the petition for the improvement. The defects that *Tone* was relying on to enjoin the assessments were certain defects in the proceedings of council after they got beyond the question of the constitutionality of the act. It appears in that case that the court of common pleas had sustained demurrers to the *Tone* petition and the cases submitted with it, and the district court reserved the cases to the supreme court, and the supreme court, although it lays down this rule in regard to estoppel by mere silence, held that the petition stated a cause of action, and that the demurrers to the petition should have been overruled. Judge Okey, while he concurs in the

result of the decision, differs from his associates on the bench as to this rule of estoppel. So far as I know, and so far as this court is advised, this paragraph of the syllabus goes further on the question of estoppel than any other case of which we have knowledge; goes beyond the great weight of authority. The great weight of authority is that a man is not estopped unless, by his acts or conduct, he has induced the other party to change his condition to his disadvantage; and here is the doctrine laid down of mere silence. In *Columbus v. Agler* (1886) 44 Ohio St. 485, the opinion, on page 486, [8 N. E. 302], we think, lays down the true rule, and, as it is a later decision than that in *Tone v. Columbus (Ohio)* supra, we follow it. And it is to be noted that none of the judges who decided the case of *Tone v. Columbus* were on the bench when *Columbus v. Agler* was decided. 'The finding of the court in this case is that Mary J. Agler was not a petitioner, and that she remained silent until the improvement was made and the bonds of the city for the payment of the same had been negotiated; yet that she had knowledge that the improvement was being made at the time thereof. It is also found that her property was benefited by the improvement to the extent of \$4 per front foot, and no more. We think the judgment in this case should be affirmed. The act under which the proceedings for the improvement were had was invalid, as held in *State ex rel. Columbus v. Mitchell (Ohio)* supra, and she was in no way a promoter of the same. There is nothing in her case to distinguish it from the decision in *Wright v. Thomas* (1875) 26 Ohio St. 346. Neither the city in causing the work to be done, nor the contractor in doing it, were trespassers as to her, although the proceedings were invalid. The title to the street was in the city, and not in her. Its improvement was no injury to her, and she could not prevent it by any proceeding she could adopt, as she might have done had it been an improvement upon her own land. She was not called on to do anything until steps were taken to make

the assessment upon her property. This distinguishes the case from *Kellogg v. Ely* (1864) 15 Ohio St. 64, and similar cases.' The rule laid down by the supreme court there applies exactly, we think, to the situation of the Taylors; nor do we think that any different rule should be applied in the *Symmes* case, because of the fact that the plaintiff below in that case had demanded and received compensation for the land actually taken. And the same applies to the railroad company. We think that they in no way induced the construction of this improvement; they in no way promoted it by the mere fact that they allowed or suffered the improvement to be made across their railroad, without demanding compensation for the use of their property."

Where the statute under which an assessment is laid is unconstitutional, money paid under protest may be recovered, notwithstanding the benefits conferred and the use of the sewer by the property owner. *Smith v. Boston* (1907) 194 Mass. 31, 79 N. E. 786.

There are, however, holdings to the contrary. Thus, in *Manley v. Marshfield* (1918) 88 Or. 482, 172 Pac. 488, it was held that where, after due notice, a meeting was held for the purpose of equalization, a property holder who failed to appear, and filed no remonstrance, could not be heard to complain, after the completion of the work, that the cost of the improvement had been unfairly apportioned by the front-foot rule, in that his lot was not so deep as others.

So, it has been held that a property owner who stood by in silence, and permitted improvements to be completed without remonstrance would not be heard, in an action to annul the assessment, to object that the method of assessment was by the front-foot rule, whereas the statute provided that the abutting property should bear the expense according to the frontage of all lots in the graded district. *Denver v. Campbell* (1905) 33 Colo. 162, 80 Pac. 142.

Similarly, in *Wilson v. Salem* (1893) 24 Or. 504, 34 Pac. 9, in a suit to restrain the execution of a warrant for

the sale of the plaintiff's property for delinquent street assessments, commenced after the work had been completed and accepted by the city, it was contended that the assessment was void, as being made according to the front-foot rule. The court, however, said: "The rule for estimating the cost of making the improvement in front of a lot or part thereof, and the proportionate share to be assessed thereon, is not prescribed by the charter, but is left to the judgment and discretion of the council. In such case an assessment by the front foot is held valid and constitutional by numerous authorities. And while it may be admitted that such a measure of apportionment seems arbitrary, and likely to operate inequitably in some cases, and liable to other objections of more or less validity, yet, as Judge Cooley says, 'the question is a fairly debatable one whether they are likely to be more serious or more frequent than those which are to be anticipated from the selection of some other rule.' Cooley, Taxn. 451. And this question must be deemed settled by the legislative judgment of the council, where no mode is prescribed by the charter. . . . But whatever may have been the equitable or just mode of assessment under the charter, the one actually adopted by the city, if unwise, was at most only an irregularity which might have been corrected if brought to the attention of the council by plaintiffs at the proper time, but, having neglected to do this, we think they are now estopped from objecting to the assessment as actually made. They had notice of the intended assessment, and an opportunity to be heard before it was made, and, not having availed themselves of the opportunity thus given, they are chargeable with knowledge of the method adopted by the city, and, having suffered the work to proceed to final completion and acceptance without protest of objection, and having thus received the benefit of the improvement in the enhanced value of their property, they are now estopped from contesting the validity of the assess-

ment on the ground of any irregularity in the proceedings. . . . In this case the council had jurisdiction under the charter to make the improvement at the expense of the abutting property, and the plaintiffs had notice and were given an opportunity to be heard before the assessment was made. This being so, it is now too late to take advantage of any irregularity which may have occurred in the proceedings. 'The weight of authority,' says Judge Elliott, 'is very decidedly in favor of the rule that, where there is jurisdiction, the property owner who sees the improvement made, and offers no objection until after the work has been done, cannot defeat the assessment upon the ground that the proceedings have not been regular.' Elliott, Roads & Streets, 419. If any irregularities or informalities occurred in the proceedings of the council in directing the work, or by including in ordinance No. 242 matter that should have been in a separate ordinance, or in changing the specifications from screened to selected gravel after the assessment was made, or in any other particular not affecting the jurisdiction, it would be unjust and inequitable, after the work has been completed and accepted by the city, for a court of equity to restrain the collection of the assessment. The plaintiffs, who are residents of Salem and had actual knowledge that the work was being done, have stood by and seen the street improved for the benefit of their property without objection, and now ought not to be allowed to shift the burden of making the improvement from themselves to the general taxpayers of the city. Assessments for street and other similar improvements are upheld upon the theory that the property within the assessment district is benefited in a special and peculiar manner, in a sum equal to the amount assessed against it, and that the owner has thus received a peculiar and pecuniary benefit by the improvement which the citizens generally do not share. Unless, therefore, the proceedings under which the improvement was made are so radically defective

as to be totally void, the property owner who stood by and received the benefit with apparent willingness will be estopped to assert the invalidity of such proceedings. 'He cannot enjoy the benefits and escape the burden,' says Mitchell, Ch. J., 'unless he interferes or gives notice before the benefit is received.' . . . Whatever plaintiffs' rights may have been in the beginning, they have stood by and acquiesced until the rights of others have intervened, and they must now in equity be deemed to have made an effectual election to waive any and all irregularities in the proceedings under which such rights have been acquired. This, it seems to us, disposes of the question of the validity of the assessment; for, as soon as it is ascertained that the council had jurisdiction to make the improvement, and the property owner an opportunity to be heard on the question of his assessment, the other objections are mere irregularities which cannot now be urged in a suit to restrain the tax, but which might and should have been raised by some proper proceeding before the work was completed." See to the same effect, *Barkley v. Oregon City* (1893) 24 Or. 515, 33 Pac. 978; *Wingate v. Astoria* (1901) 39 Or. 603, 65 Pac. 982.

A property owner who has notice of a paving improvement before it is made and during the progress of the work, and permits the city to expend money, is estopped from objecting to an assessment on the ground of invalidity of the ordinance. *Durrell v. Woodbury* (1906) 74 N. J. L. 206, 65 Atl. 198, affirmed on opinion below in (1908) 75 N. J. L. 939, 70 Atl. 1100, wherein the court said: "The case shows that the city went diligently about the making of the improvement, and that the work was completed in August, 1904. Under these circumstances, the rule of the later cases, above cited, to the effect that it is now too late for the prosecutor to attack the assessment made upon him for benefits, upon grounds that relate to the invalidity of the original ordinances, should be enforced."

(b) *Lack of power in municipality.*

It would seem to be the generally accepted rule that a property holder cannot quietly permit money to be expended on a street improvement which benefits his land, under a contract with the city, and then deny the power of the city to pass the ordinance under which the improvement is made. Hence, where a statute provided that "no question of fact shall be tried which may arise prior to the making of the contract for the said improvement, under the order of council, . . . and in case the court or jury shall find, upon a trial, that the proceedings of said officers, subsequent to said order directing the work to be done, are regular, that a contract has been made, that the work has been done, in whole or in part, according to the contract, and that the estimate has been properly made thereon, then said court shall direct the said property to be sold," it was held that an objection to an assessment, under a modification of a contract duly made by an ordinance, that the city had no authority to make such modification, could not be heard after the completion of the work. *Hellenkamp v. Lafayette* (1868) 30 Ind. 192, wherein the court said: "That power may not have been acquired, owing to the omission of some steps required, or, having been acquired, it may have been forfeited, or the power exhausted by its full exercise, as it is claimed had occurred in this case; still, if there be an order of the council, and a contract under it, the only questions to determine are 'that the work has been done, in whole or in part, according to contract, and that the estimate has been properly made thereon.' "

So, in *Palmer v. Stumph* (1863) 29 Ind. 329, it was said: "The plain intent of the statute is to prevent the owner of property to be benefited by a contemplated improvement made by the common council of the street, in front of his property, from remaining silent until he has secured the full benefit of the work, and then avoiding the payment therefor. If he denies the power of the council to order the improvement, he must test the question

by injunction before the work is done. Acquiescence in the action of the council is, by law, made to estop him from going behind the making of the contract."

In *Loomis v. Little Falls* (1901) 66 App. Div. 299, 72 N. Y. Supp. 774, affirmed in (1903) 176 N. Y. 31, 68 N. E. 105, it was held that property owners who petitioned for the laying of sewer pipes, and thereafter stood by and permitted the city to do the work, and themselves reaped the benefit of it, could not question the validity of the assessment therefor on the ground that the city had no power, under its charter, to make the improvements and assess the property benefited, except in case of the refusal or neglect of the property owners to make such improvements.

Where the work on a street improvement has been completed, and the benefit conferred on a property holder, he is estopped to question the validity of an assessment on the ground that the municipality was without power to make the improvement because it thereby became indebted when its debt limit was already exceeded. *Beaser v. Barber Asphalt Paving Co.* (1904) 120 Wis. 599, 98 N. W. 525. In *O'Reilly v. Kingston* (1916) 175 App. Div. 207, 161 N. Y. Supp. 632, in support of a similar holding, the court said: "It would be a reproach to our law if the son, the contractor, could avoid a tax levied against his property on account of the moneys paid to him under the contract. His property would be benefited by it, and he would have the profits from performing the contract, and would escape liability upon the ground that the city was without power to make the contract. Evidently the mother, his surety, is in no better position to raise that question than her son would be. They are effectually stopped from the claim that the city had no power to make the contract."

So, in *Hammerslough v. Kansas City* (1891) 46 Kan. 37, 26 Pac. 496, an objection to an assessment that the ordinance for improvement included a street which was not within the city limits was held to be waived, where

it appeared that the parties permitted the city to build sidewalks along such street; that most of them joined in a petition asking the city to build the walks; that they also asked the city to extend the water mains along the street, that they might connect therewith and obtain a supply of water; and that they stood by and saw the street curbed and paved by the city, without ever objecting thereto, or making any claim to the ground being so paved.

In *Cluggish v. Koons* (1896) 15 Ind. App. 599, 43 N. E. 158, it appeared that certain street improvements were made, following the passage of an ordinance under a statute which was inferentially repealed. All the proceedings were regular in form, and it further appeared that the objector had encouraged the work, saw it in progress, and accepted the benefits. In holding that she was estopped to deny her responsibility of paying the assessment, the court said: "It is apparent from the averments of the complaint that the proceedings to improve the street were had under the statute enacted and in force April 27, 1869. Burns's Rev. Stat. 1894, §§ 4401-4403, Rev. Stat. 1881, §§ 3364-3366. On the former appeal, this court decided that the Act of 1869 was impliedly repealed by the Act of March 8, 1889. Burns's Rev. Stat. 1894, §§ 4288 to 4298, inclusive. The complaint was held insufficient because there was no law in force that authorized the proceedings in the manner pursued by the town board. But the amended complaint introduced a new element, or principle, into the case,—that of equitable estoppel. The doctrine of estoppel is one of the most important factors in an enlightened jurisprudence. There is no principle of the law which rests upon higher grounds, or is founded in more solid considerations of equity and public utility. That which one induces his neighbor to believe to be true, either by his act or by his passive acquiescence, shall be taken as true, when it has misled his neighbor to his neighbor's injury. This principle secures honesty and fair dealing; relieves from hardship and oppres-

sion; prevents wrong and injustice when all other rules fail, and tends to promote the peace and repose of society. It is pre-eminently the shield of the innocent. It is the exalted rule of equity. In *Daniels v. Tearney* (1880) 102 U. S. 415, 26 L. ed. 187, the court, by Justice Swayne, said: 'The principle of estoppel thus applied has its foundation in a wise and salutary policy. It is a means of repose. It promotes fair dealing. It cannot be made an instrument of wrong or oppression, and it often gives triumph to right and justice, where nothing else known to our jurisprudence can, by its operations, secure those ends. Like the Statute of Limitations, it is a conservator, and without it society could not well go on.' According to the averments, the appellants were acting in the utmost good faith; they believed that the statutes under which the town board assumed to act were in force, and were valid laws; they had taken legal advice and were so informed. The appellee knew that the improvement was being made; she knew that the appellants were expending their labor upon the improvement; she knew her property was being benefited. She did not protest, object, or forbid it. On the contrary, she stood by, acquiesced in, and consented that the improvement be made. She has received a benefit; her property has been enhanced in value. Shall she or her property receive the benefit of appellants' labor honestly done, and money honestly expended, without making compensation? If so, then she acquires something for nothing, and injustice and wrong will be done. It would be a lame system of jurisprudence that would sanction such a result. It is here that the principle of estoppel comes to the rescue and prevents injustice. It has been, time and time again, decided that a property holder who quietly permits money to be expended, or labor to be done by another, which benefits his lands, under a contract with a municipality, or other constituted authorities, is estopped to deny that the municipality or authorities had the power to make the contract. . . . It is true that

there is a class of cases which hold that where the proceedings are so defective as to be absolutely void, or for want of notice, or for want of jurisdiction of the parties or subject-matter, that the assessments are void and incapable of enforcement. . . . But in those decisions the question of estoppel did not enter. It is said that there was no law at all that authorized the proceedings, and that consequently such proceedings could have no vitality; that the appellants were bound to know the law, and to know that there was no such law in force, and that the labor bestowed under such circumstances was voluntarily done, and no recovery can be had therefor. It must be conceded that there was no law authorizing the proceedings; but there was a statute upon the books that purported to authorize the proceedings. There was the semblance of a law, at the least. Nor does the fact that the lawyer whom the appellants consulted, was mistaken, prevent the operation of the principle of estoppel. Repeals by implication are not favored. Those who are learned in the law are likely to be misled as to the repealing effect of one statute upon another, particularly where the latter is silent as to the former. So long as all concerned are acting in good faith, the principle of estoppel applies. Operating under this semblance of a statute, the appellants, in good faith, bestowed labor and expended money that benefited appellee's property. The principle of estoppel is so far-reaching that it will often come to the relief of the honest and innocent in the absence of a valid law. An unconstitutional law is a nullity. It has no validity whatever. Every person may disregard it and treat it with contempt. Of itself it can neither confer nor take away rights. Yet such a statute has the semblance of a valid law until declared unconstitutional by the courts; and, until that is done, parties may, in good faith, act under or in pursuance of it. One person may thus secure a benefit and another may suffer an injury. It is well settled that one who receives a pecuniary benefit under

an unconstitutional law may, under certain circumstances, be estopped from denying its constitutionality. This rule applies to the remedies given by the act, as well as to the right acquired under it."

"Where the ordinance under which a street required to be improved is void for want of authority in the city to pass it, or is the product of fraud or collusion, these facts may be shown as a defense in a suit on a special tax bill for work done under the void, fraudulent, or collusive ordinance. But where the ordinance is valid in its general scope, . . . and does not, on its face, bear any evidence of fraud or caprice in its enactment, and is suitable to the subject-matter to which it is applied, the fact that it is inapplicable to the defendant's property and imposed a burden on him, without any corresponding benefits to him or the community of which he is a constituent, cannot for the first time be interposed as a legal defense in a suit against him on a special tax bill for work done under the ordinance. But he may in such circumstances have injunctive relief, if timely application is made therefor, prohibiting the issuance of the tax bill." *Heman v. Ring* (1900) 85 Mo. App. 231, wherein the court further said: "Unless the ordinance under which the work is done is wholly void on its face, or is the product of collusion or fraud, the owner of the real estate against which the special tax bill is issued should be estopped to defend on the ground that the improvement was unnecessary. If the ordinance is valid in its general scope, but unreasonable and oppressive as applied to a particular lot, it is the duty of the owner of such lot, when notified that the street commissioner intends to apply the ordinance to his lot and require the improvement to be made, to take the appropriate legal steps to test the validity and reasonableness of the ordinance as applied to his lot, before the work is done by the contractor and the tax bill is issued. The issue of the reasonableness of the ordinance, as applied to the property of the respondents, was one between the city or its

9 A.L.R.—49.

street commissioner and the respondents, not between the contractor and the respondents. The ordinance being general in its scope, its applicability to any specific lot was left to the judgment of the street commissioner and street inspectors, officers of the city, through and by whom it applied and enforced the ordinance. If they erred in their judgment by applying the ordinance to respondents' property, it was not the error of the contractor, and he should not be made to suffer for their mistake, nor should he after having performed the work be compelled to defend the correctness of their judgment in a suit on his special tax bills, issued for the contract price of the work. That issue (the applicability of the ordinance to respondents' property) should have been tested before the work was done, by an appropriate proceeding between respondents and the city or its street commissioner. Respondents, having failed to do this, have lost their day in court, and are estopped to raise it against the contractor in a suit on the special tax bill."

When it appears that the city has jurisdiction of the subject-matter, that a pavement has been laid, and that execution has been issued pursuant to law, it is too late for an abutting property owner to contest the discretionary powers of the municipal authorities in deciding the propriety of substituting a new for an old pavement. "In cases where there is jurisdiction, the property owner will be estopped from questioning the validity of the proceedings of the mayor and council, if he stands by and permits the work to be done without interposing any objection." *Draper v. Atlanta* (1906) 126 Ga. 649, 55 S. W. 929, wherein the court further said: "The Act of 1897 gives the abutting landowner an opportunity to appear before council and oppose the contemplated improvement; and if he appears, and the municipal decision is adverse to his contention that there is no necessity for the improvement, he may then apply to the courts to restrain further municipal action, provided he alleges and shows fraud or corruption on the

part of the city authorities, or that the discretion vested in them is being manifestly abused to his oppression."

In the case of *Re Lord* (1879) 78 N. Y. 109, it was held that a court of equity will vacate an assessment, where it appears that it was levied for a second or subsequent pavement, after the property had been once assessed for a like work on the same street, notwithstanding the petitioner waited seven years before asking for relief. The court said: "We do not think that the facts of this case require or justify the application to it of the equitable doctrine of laches. The only fact that appears upon the record, showing a changed position of affairs, is the payment by the city of the expenses of the work, which was done in proceedings which the city, as well as the petitioner, could have known were irregular and baseless. It does not appear that the city has ever enforced the assessment against any property or owner thereof, or that any owners have ever voluntarily paid. So far as the record shows, there has been no change in the relative position of any of the natural persons affected, or sought to be, by the proceedings. Only the city, going on without legal authority upon an unauthorized local improvement, and paying out money therefor, has thus changed its position. We doubt whether that is such a changed condition of things as would call upon a court of equity to debar a suitor of relief, for the reason that he had not come earlier into court for it. The rule we speak of is one largely of a court of equity, although it is not unknown to a court of law, especially in its application to proceedings for the review of assessments. Courts of law are wont to deny relief sought by certiorari, where there has been a lapse of time which, in the judgment of the court, should debar therefrom." On a retrial following a reversal in the case last cited, it appeared, however, that part of the assessment had been paid, and this was held to estop the property owner to object. See *Re Lord* (1880) 21 Hun (N. Y.) 555, set out at length *infra*, VII.

But where the right of the council to improve a street without the petition of abutting owners exists only where the street is in an unsafe condition, a landowner is not estopped to object to an assessment for the improvement of a street which is not in such a condition, by the fact that he made no objection to the improvement while it was in progress. *Smith v. Minto* (1897) 30 Or. 351, 48 Pac. 166.

See also *Watkins v. Griffith* (1894) 59 Ark. 344, 27 S. W. 234, wherein it appeared that the number of owners required by statute petitioned for the improvement of a street with materials named, but later, when a much more expensive improvement was ordered by the commissioners, the owners protested, and it was held that the improvement, as completed, was not within the intention of the petitioners, and that they were not estopped to deny the validity of the assessment on a bill to restrain the collection thereof. The court said: "There is much plausibility in the argument that the owners of property, having seen the improvement made, and enjoying its benefits, without active steps to prevent it, are now estopped by their acquiescence. If the defects were mere irregularities in the exercise of a power conferred, this contention, in a proper case, might be maintained. But this rule has no application in a case like the present, where there is an absolute failure on the part of the board to secure the power to act through the essential prerequisite,—the petition of the property owners for the improvement to be made."

The doctrine of estoppel has been applied in some cases where the alleged want of power to make a street improvement arose from a failure to acquire title to the property to be improved.

Thus, it has been held that the owner of property specially assessed for a street improvement could not, when application was made for confirmation of the assessment, interpose the objection that the municipal corporation had not acquired title to the ground or land on which the improve-

ment had been or was to be made, if he had stood by without objection and accepted the benefits of the improvement. *Boynton v. People* (1896) 159 Ill. 553, 42 N. E. 842, wherein it appeared that the land on which a sidewalk was laid was the property of the person against whom an assessment had been made for the improvement, and that he had received no value for the property taken, nor were condemnation proceedings pending. In holding that he was estopped from setting up this defense in an action for judgment and sale of the property, the court said: "A sidewalk was in fact built by the city as required by the ordinance, and appellant's premises have all the benefits and advantages of such sidewalk. Appellant, and all the other lot owners whose property was assessed for the construction of the sidewalk, have and enjoy the improvement that their property was assessed to pay for, and neither he nor they can justly claim to be relieved from payment of the benefits assessed against such property. Appellant has received full consideration for the assessment levied on his lot, and the question whether he has received, or is entitled to receive, compensation for the strip of ground upon which the sidewalk is placed, is not involved in this litigation. If he is entitled to compensation the law will afford him a remedy."

After the condemnation of a turnpike as a city street and the passage of an ordinance for its improvement, property owners who are cognizant of all the facts, but make no objection, allowing the improvement to be made, are estopped from denying the validity of an assessment therefor on the ground of a defective title to the street before it was taken over by the city. *Cincinnati use of Frost v. Schoenberger* (1877) 7 Ohio Dec. Reprint, 342.

In *Hammerslough v. Kansas City* (1891) 46 Kan. 37, 26 Pac. 496, it was held that property owners who stood by and saw a street curbed and paved by the city, without objecting thereto or making any claim to the ground so paved, were estopped to claim, as against a special assessment,

that the ground belonged to them and had not been by them dedicated to the city as a street.

In *Cincinnati v. Goodman* (1875) 5 Ohio Reprint, 365, it was contended that the assessment for repaving a roadway was invalid, because in making the improvement private property was taken without condemnation and against the consent of the owners, but the court held that, as the owners of property abutting on the improvement were aware of the progress of the work and took no steps, legal or equitable, to restrain it, the objection, even if valid, was waived.

So, it has been held that, after the completion of a sewer, it was not competent for the property owners assessed to raise the question whether, at the time of the passage of the ordinance and the letting of the contract for the construction of the sewer, the common council had such ownership or control of the street as properly authorized it to construct the sewer in and along the street. The court said that the question might doubtless have been raised at the proper time, by proceedings to enjoin or restrain the construction of the sewer, but it could not be set up as a defense to the action, on appeal to the circuit court. *McGill v. Bruner* (1879) 65 Ind. 421.

But where the property belongs to a married woman in legal right, and not as separate estate, the doctrine of estoppel does not apply. In the application of this principle, it has been held that where a sewer was partly constructed on the property of a married woman, without title being acquired by the city, an objection to an assessment for the construction thereof, on the ground that a portion of the sewer was not under the control of the city, could be raised after the completion of the work. *Johnson v. Duer* (1893) 115 Mo. 366, 21 S. W. 800.

So, where a sewer was laid across land without a right of way being obtained either by license or condemnation proceedings, it was held that the owner was not estopped from contesting the assessment and asking for the removal of the conduit, because he had

notice of the intention of the city to construct it across his property and did not object until after the completion of the work, where it appeared that he had said that "he would not, under any consideration, give a right of way, and if the city attempted to put a sewer across there he would fight it," and did not know of the construction of the sewer until the sewer had been dug and the pipe laid. *FRASER v. PORTLAND* (reported herewith) ante, 614, wherein the court said: "Nearly every element essential for the creation of an equitable estoppel is wanting. Mere silence, or, in the language of previous judicial opinions, 'passive acquiescence,' does not by itself create an irrevocable license or produce an estoppel. . . . The defendant, however, cannot even claim that Fraser [plaintiff] remained silent. He told the city in plain words that he objected, and would fight any attempt to lay the sewer across his property. The defendant was a trespasser when it constructed the sewer across the Fraser land."

(c) Irregularity in enactment or contents of ordinance.

In the majority of the cases passing on the question, it seems to have been considered that if the ordinance under which a street improvement is made is invalid because of some irregularity in the manner of its enactment, or because of an error or omission in the description of the proposed improvement, an owner who stands by without objection until the completion of the work is estopped to urge the invalidity of the ordinance as a defense against the assessment.

Thus, property owners who stand by and, without objecting, receive the benefits of a sewer, are estopped, in a suit by a contractor to collect an assessment, to attack the legality of the proceedings because the yeas and nays of the council in passing the ordinance were not entered on the record. *New Albany Gaslight & Coke Co. v. Crumbo* (1894) 10 Ind. App. 360, 37 N. E. 1062. So, in *Balfe v. Lammers* (1887) 109 Ind. 347, 10 N. E. 92, it was said: "The question as to

whether the yeas and nays were taken on the passage of an ordinance cannot be presented by a complaint for an injunction, unless the suit is brought before the work is done. That question, if it can be made at all after the completion of the work, can only be made by appeal from the precept." Likewise, in *Matson v. Mitchell* (1916) — Iowa, —, 156 N. W. 838, it was held that where the mayor and town council, acting in good faith, passed a resolution ordering a property owner to construct a sidewalk in front of his property, and the owner not only had this notice of the intended improvement, but knew that the work was being done, and made no objections, he was estopped by his conduct from questioning the regularity of the proceedings because it did not affirmatively appear from the record that the ordinance had been passed by a yeas and nays vote. And in *Wiggin v. New York* (1841) 9 Paige (N. Y.) 16, wherein it appeared that a property owner waited for five years, until the completion of a street improvement, and had received the benefit thereof, it was held that he was estopped from objecting to the assessment on the ground that the yeas and nays upon the passage of the ordinance were not published as required by law.

After the completion of an improvement, a property owner who is mayor of a city, and as such has signed an ordinance authorizing the construction of sidewalks and the warrants given in payment therefor, and has personally supervised the erection of crossings and the laying down of sidewalks, is estopped from objecting that no quorum of the city council was present when the ordinance levying the general tax was passed, and that a majority of the city council were not qualified under the law to hold office. *Ritchie v. South Topeka* (1888) 38 Kan. 368, 16 Pac. 332.

In *Elkhart v. Wickwire* (1889) 121 Ind. 331, 22 N. E. 342, it was held that, where property owners knew that improvements were going on, it became their duty to inform themselves as to the authority by which the common council was making the improvements,

and, the work having been completed and paid for by the city, they were estopped, in an action to annul and enjoin the assessments, from showing that the ordinance had not been published and that they were uninformed as to its enactment and contents.

After the completion of an improvement, it is too late to object to an assessment therefor on the ground that the ordinance was passed by the municipality as a village, and the work completed under a statute making it a city, and regulating assessments in a different way. *State, Bogart, Prosecutor, v. Passaic* (1875) 38 N. J. L. 57.

So, in *Eyerman v. Blaksley* (1883) 78 Mo. 145, it was held that the fact that an ordinance authorizing the construction of a sewer took effect at the same time as an ordinance establishing the district in which it was to be constructed did not invalidate it, although the municipal charter authorized the construction of sewers only in established districts, and that an objection on these grounds could not be made after the completion of the work.

Irregularities in the enactment of an ordinance on which a paving claim is based, and its variance with the terms proposed in the petition of the property holders should be objected to prior to the performance of the work, and cannot be considered in an action for the collection of the assessment. *Barber Asphalt Paving Co. v. King* (1912) 130 La. 788, 58 So. 572.

So, an objection to an ordinance in that it provides for paving streets of different widths in one contract, even if tenable, is waived, when no protest is made until after the completion of the work. *Crowley v. Arcadia Parish* (1915) 138 La. 488, 70 So. 487, wherein the court said: "Defendants contend that the said statute should be so interpreted as not to make it operate unequally or inequitably; and therefore should be understood as requiring that streets of different widths should be contracted for separately, and not together,—in other words, should not be included in one work, whereof the total cost is to be apportioned according to frontage. The

statute makes no such distinction, and were the courts to make it, they would be putting into the statute an exception, or restriction, not written therein by the legislature. But even if the said statute were susceptible of that interpretation, the proper time for the lot owners on the narrower parts of the street to object to being included in the same contract, or work, with those on the wider parts, would be when the contract is being given out; not after the work has been completed."

Likewise, a property owner who fails to protest until after the completion of the work is estopped to object that the ordinance does not name the particular streets to be paved, where the statute gives the city the right to make improvements without the consent of the property owners, and notice of the ordinance has been duly published. *State, Jelliff, Prosecutor, v. Newark* (1886) 48 N. J. L. 101, 2 Atl. 627, affirmed in (1886) 49 N. J. L. 239, 12 Atl. 770, wherein the court said: "If this clause in the tax ordinance is to be regarded as a formal part of the proceedings for assessment, then I think the property owners, by omitting to complain at an earlier stage, have waived the defect, under the common rule that when persons are notified that public moneys are about to be spent for their benefit, with a view of reimbursing the public treasury by assessment, they must take advantage of preliminary irregularities of procedure before the expenditure is made, or not at all. The ordinance for this improvement, published both before and after its passage, according to §§ 29 and 30 of the city charter (Pamph. Laws 1857, p. 116), gave the property owners ample notice to this effect, and they made no complaint until the work was done."

It has been held that a property owner was estopped to deny the validity of an assessment for sewer improvements on the ground that the ordinance did not set forth specifically the lots and lands to be assessed, when he knew, or should have known, that the work was under construction, and made no objection until the filing of a

bill to restrain the collection of the assessment. *Wilson v. Cincinnati* (1897) 7 Ohio S. & C. P. Dec. 242.

So, where a city has been permitted, to incur the expense of an improvement, without objection to the validity of an ordinance on the ground that it contained no map showing the location and character of the improvement, it is too late for a party assessed for benefits to object to the validity of the ordinance. *Greater Newark Associates v. Newark* (1910) 79 N. J. L. 331, 75 Atl. 745.

Likewise, where an owner stands by without objection until the completion of the work, he cannot be heard to object to the validity of tax bills on the ground that the ordinances under which the work was done were "vague, indefinite, unreasonable, oppressive." In addition to the question of estoppel, such objections are mere conclusions. *Walsh v. First Nat. Bank* (1909) 139 Mo. App. 641, 123 S. W. 1001.

An ordinance which allows granitoid pavements to be substituted for brick, at the option of the property owner, is not void, and a property owner who does not charge that the granitoid imposes greater cost on her than would have resulted from a brick pavement is estopped from saying that she has been prejudiced by the laying of a granitoid instead of a brick pavement. *Nell v. Power* (1908) 32 Ky. L. Rep. 952, 107 S. W. 694, wherein the court said: "There is no charge of fraud or collusion between the contractor and city authorities, and the purpose of the council, in requiring the pavement to be constructed of granitoid instead of brick, was because it would lessen the cost of the improvement to the property owner, which it did. According to the statements of the petition, and as shown by the exhibits, the work appears to have been done in substantial conformity with the ordinances, and wholly as required by the contract. . . . Moreover, it was all the while under the supervision of the mayor, city engineer, and street committee, and, having received their approval, was accepted by the city. In view of this state of affairs, it would seem that ap-

pellant is without just cause of complaint."

An objection to an assessment for a street improvement that the ordinance called for a patent pavement, and so prevented a competition among bidders, may not be raised by an aggrieved owner after a lapse of nearly three years from the passage of the ordinance, the defect being apparent on its face. *Lewis v. Elizabeth* (1874) 25 N. J. Eq. 298.

So, in *Noland v. Mildenerger* (1906) 29 Ky. L. Rep. 1179, 97 S. W. 24, it was contended that the ordinance was invalid in that it left to the city engineer the power to determine the location of catch basins and the line of levels in the construction of a sewer. As the property owner had stood by, and the work had been completed without objection, it was held that he was estopped from raising the question. In construing the statute on the subject, and distinguishing *Hydes v. Joyes* (1868) 4 Bush (Ky.) 464, 96 Am. Dec. 311, which was decided before the enactment of the statute, the court said: "We are referred to *Hydes v. Joyes*, where an ordinance was held void which directed the sidewalk on Fulton street, between Market and Water streets, or such portions of the sidewalk as the city engineer may direct, to be graded and paved. The ordinance in question determines definitely just what work shall be done, and there is nothing in the record to show that, at the time the bids were made and the contract entered into, the profiles were not on file in the city engineer's office, or that the plans and specifications upon which the contract was made did not show all the matters referred to. If it did, and the council approved the contract, nothing would be left to the discretion of the engineer. The general ordinance was necessarily drawn so as to leave the specifications in each particular case to the discretion of the engineer, for no general ordinance could regulate such matters as where the catch basins should be put in, and the like. But, aside from all this, the property owner stood by and the work has been constructed. If he had com-

plained of the construction of the work before the work was done, on the grounds insisted upon, a very different question would be presented from that which is now before us. Section 3100, Kentucky Statutes, provides: 'No error in the proceedings of the general council shall exempt from payment, after the work has been done, as required by either the ordinance or contract; but the general council or the courts in which suits may be pending shall make all corrections, rules and orders to do justice to all parties concerned.' There is no complaint that the work in this case was not done according to the contract, and, under the mandate of the statute that no error in the proceedings of the general council shall exempt from payment after the work has been done as required by either the ordinance or contract, the circuit court should have sustained the demurrer to the answer of the defendant, *Mildenberger*. Under the statutes the court has power to make all corrections and orders necessary to do justice to all parties concerned. It is not shown that *Mildenberger* has been prejudiced in any way by the matters complained of. If there was any error of the council in leaving to the city engineer, the street committee, or the mayor, any matter which it should have determined itself, this was an error in the proceedings of the general council, and, under the statute, does not exempt the property from liability after the work is done. When the case of *Hydes v. Joyes*, above referred to, was decided, no such statute was in force. The fact that the defendant protested to the council against the construction of the sewer is, under the statute, no defense, after the work has been done pursuant to the contract."

Where an ordinance was silent as to the kind of materials to be used in a street improvement, and allowed the board of public service to exercise its discretion in choosing the materials, it was held that an objection by a plaintiff who had watched the contract to completion, that this was an unwarrantable delegation by the coun-

cil of its legislative authority, could not be heard in a suit to enjoin payment to the contractor. *Emmert v. Elyria* (1905) 27 Ohio C. C. 353.

Likewise, it has been held that an objection to the validity of an assessment, on the ground that the ordinance provided that the earth excavated during the progress of the work should be hauled into any embankment required to be made in the course of the improvement, and that any earth so excavated and not thus needed should belong to the contractors, could not be made after the completion of the work as a defense to an action on the assessment. *Jenkins v. Stetler* (1889) 118 Ind. 275, 20 N. E. 788, wherein the court said: "The surplus earth, it is contended, belonged to the adjacent property holders, respectively, and the argument is that, because the 4th section of the ordinance authorized the contractors to appropriate it to their own use, the proceedings were illegal. We do not find it necessary to inquire concerning the title to surplus earth which accumulates in the course of a street improvement." It is not disclosed that there was any in fact growing out of the improvement involved in the present case, nor that the contractors appropriated any earth belonging to the appellee, or any other person. If it did so appear, the fact would not vitiate the contract so as to exonerate the appellee from paying for the benefit of a completed improvement, which presumably enhanced the value of his property to an amount equal to the sum assessed against it. The provision in the ordinance in reference to the disposition of the surplus earth relates to a matter which arose prior to the making of the contract, and by the very terms of the statute is no longer a subject of inquiry. . . .

Where a common council, by taking all the necessary preliminary steps, acquires jurisdiction and makes a contract for street improvements, a party benefited will not be permitted to stand by until the work is completed, and then claim exoneration when the contractor seeks to obtain pay for his work."

On the other hand, it has been held in some cases that failure to object before the completion of the work does not estop a property owner from objecting to an assessment on the ground that there was a defect in the contents or enactment of the ordinance.

Thus, it has been held that the fact that a property owner stood by in silence and took no steps to interfere with the progress of the work, although he was cognizant of a jurisdictional defect, did not estop him from asserting, in a proceeding in equity to cancel certain tax bills, that the ordinance under which the improvement was made was void, in that it failed to receive the votes of two thirds of the members of the council, the number requisite to its passage under the statute. *Cox v. Mignery* (1907) 126 Mo. App. 669, 105 S. W. 675, wherein the court said: "Plaintiff was quite active in opposing the passage of the ordinance which provided for the doing of the work. He was present when the ordinance was passed, and, if it is invalid because of the jurisdictional defect in its passage claimed by plaintiff, he knew of that defect, but refrained from taking any steps in court to prevent the doing of the work, and did not bring the present action until after the improvement had been completed and his property had received its share of benefit therefrom. Defendants argue from this fact that plaintiff has no standing in a court of equity, since he will not be permitted to preserve silence while his property is being benefited under an ordinance which he knows to be invalid, and then to bring forth the invalidity as a ground for the cancellation of the assessment levied against his property. Respectable authority may be found, sustaining the principle invoked, even in cases where the defect is more than a mere irregularity, but in this state it has been held on several occasions that the principle does not apply where the work is being done under a void ordinance, i. e., one passed without due observance of all the precedent conditions required by statute. The persons whose property is to be assessed

to pay for the proposed improvement have no more control over the streets than any other persons, nor can it be said that the contractor is induced by their nonaction to proceed with the work, and there is no reason for requiring them to invoke the interposition of the courts before the work is done in order to escape a liability which has no foundation in law."

Where an ordinance is void because of including in one contract the construction and maintenance of pavement, in violation of the provisions of the city charter, a property owner is not estopped from objecting to the assessment because of his silence during the progress of the work, having in the beginning filed a remonstrance. *Verdin v. St. Louis* (1895) 131 Mo. 26, 33 S. W. 480, 36 S. W. 52. See to the same effect, *Perkinson v. Hoolan* (1904) 182 Mo. 189, 81 S. W. 407.

Where a statute provides that every ordinance for improvement work shall contain a specific appropriation from the proper fund, based on an estimate of cost to be indorsed by the engineer on the ordinance, and this latter requirement is not complied with in making a paving improvement, a property owner, knowing of the improvement and demanding that it be done over in accordance with the contract, which is done, is not thereby estopped from objecting to the assessment. *Perkinson v. McGrath* (1880) 9 Mo. App. 26, wherein the court said: "The contractor, in doing the work, relies upon his contract with the city, the validity of which depends upon the validity of the ordinance. As we have already more than once said, it is the duty of the contractor to see that he has a valid contract, otherwise he undertakes the work at his own risk. The owner of the property is under no obligation to examine whether all the formalities of law have been complied with in letting out the work; and where he saw a man making improvements, or what are called improvements, on his land, without his direction or consent, under color of a valid contract with the city, which has power to make such a contract and to direct the work to be done, he had un-

doubtedly the right to suggest to the city authorities that the work should be done according to the terms which the city had assumed to impose upon the contractor. In the absence of evidence that the property holder had actual notice of the invalidity of the contract under which the work was being done, there is nothing in the fact that he insists upon the work being done according to the letter of the contract that tends to show fraud. This may be looked upon as an attempt on his part to make the best of a bad business, but is certainly no declaration that he waives all defenses to an action on the special tax bill, or that he accepts or will pay for the work."

Likewise, where an assessment was resisted on the ground that neither the paving ordinance nor the assessment ordinance was certified and presented to the mayor, as required by statute, it was held that a property owner was not estopped to restrain collection by the fact that the work was completed without objection. *Hall v. Macon* (1918) 147 Ga. 704, 95 S. E. 248, wherein the court said: "A valid municipal ordinance is the foundation of its jurisdiction. The charter confers the power to acquire jurisdiction to pave its streets, but jurisdiction, in the proper sense of the term, is not vested in the mayor and council by the provisions of the charter itself. The charter is not and was not intended to be self-operating. Where necessary jurisdiction exists, or is acquired, an owner of abutting property benefited by the improvement of the street, who has knowledge of the improvement and of the charter provisions under which it was made, will not, after the completion of the improvement, be heard to object for the first time to the levy of an assessment upon his property. . . . If jurisdiction had been acquired, the doctrine of estoppel would apply with full force to the admitted failure of the mayor and council to comply with the requirements of certain general ordinances. The ordinance of January 11, 1916, was illegal and void. 'All that was done under it was without authority of law, and no assessment upon adjacent property on

account of the' paving of the street is collectable."

Property owners are not estopped to contest the validity of a tax bill for a paving improvement because they stand by without objection and see the work done, where the ordinance is void, in that remonstrances to the proposed improvement sufficient to defeat its passage had been filed with the city council. *Hoover v. Newton* (1917) — Mo. App. —, 193 S. W. 895.

So, where a statute provides that "when the council shall deem it necessary to . . . macadamize . . . any street or part thereof within the limits of the city, for which a special tax is to be levied . . . the council shall, by resolution, declare such work or improvements necessary to be done, and cause such resolution to be published in the newspaper doing the city printing for two consecutive weeks, and if a majority of the resident owners of the property liable to taxation therefor shall not, within ten days thereafter, file with the clerk of said city their protest against such improvements, then the council shall have power to cause such improvements to be made and to contract therefor and to levy the tax as herein provided," and it appears that an ordinance was passed for a street improvement in the face of a written remonstrance signed by a majority of the resident owners of property fronting on the street improved, an owner is not estopped by his silence from objecting thereafter to an assessment on these grounds. *Forbis v. Bradbury* (1894) 58 Mo. App. 506, wherein the court said: "In the presence of such an objection, timely made as the statute provides, the city council loses its power to prosecute the work. . . . To permit such schemes to succeed would be a fraud on the law and the rights of the real owners. It seems too, without question, that before defendants undertook the work of grading and macadamizing the street they were informed of the fraud practised on the protesting owners, and were warned of this vice in the tax bills to be issued, and that plaintiff would contest the right to recover thereon.

The plaintiff, then, is not estopped as to the defendants, since he never acquiesced in or silently consented to the improvement."

3. Conformity of proceedings to statute or ordinance.

(a) Declaration of necessity or intention.

Where it appears that jurisdiction has not been obtained by a city to make a street improvement at the expense of abutting property, by reason of the failure to pass a resolution of intention as required by the charter, failure to object before the completion of the work will not estop an owner to object to the assessment. *Hall v. Macon* (1917) 147 Ga. 704, 95 S. E. 248; *Buckley v. Tacoma* (1894) 9 Wash. 253, 37 Pac. 441. See to the same effect, *Buckley v. Tacoma* (1894) 9 Wash. 269, 37 Pac. 446; *Kline v. Tacoma* (1895) 11 Wash. 193, 39 Pac. 453.

So, a resolution of intention which does not mention the streets to be drained by a sewer, or describe or determine what lots or land will be benefited thereby, or give the names of abutting property owners, renders all subsequent proceedings void, and an objection to an assessment on this ground is not waived because the property owners know of the progress of the work and make no objection. *Mulligan v. McGregor* (1915) 165 Ky. 222, 176 S. W. 1129, wherein the court said: "It is, of course, manifest that property owners are deeply concerned in ordinances and resolutions that impose burdens on their property, and they have a right to know what the city council is doing or intends to do in respect to special assessments, so that they may be in a position to take such action as circumstances and conditions may dictate. . . . That this provision in the statute is a material as well as an important one can scarcely be questioned, and to carry out what we conceive to be the purpose of the law, we think this feature of the statute should be treated as mandatory; or, in other words, as a jurisdictional declaration, indispensable to the validity of any construc-

tion plan. . . . The argument is further made on behalf of the city that the property owners knew this improvement was being made, and, not having raised any objection during the progress of the work, they are now estopped to question the validity of the proceeding after the work has been completed and accepted. But the defect in this proceeding being a jurisdictional one, the doctrine of estoppel can have no application. The property owner need not take any notice of an improvement that is made without authority. He is not to be denied the right to question the assessment of his property when it is sought to be subjected to the payment of a void tax."

But in *Kerker v. Bocher* (1908) 20 Okla. 729, 95 Pac. 981, wherein it was contended that no ordinance was passed for a paving improvement, following the resolution of intention, it was said in the official syllabus: "Abutting property owners, with knowledge that . . . paving is being done with the intention of levying a special tax upon them for payment of the same, and permitting such improvement to be done without objection to the council, and knowingly receiving the benefits, when afterwards they seek relief in equity to escape payment therefor, will be deemed to have ratified the same, and estopped from setting up any irregularity, except when it goes to the extent of jurisdiction." See to the same effect, *Weaver v. Chickasha* (1912) 36 Okla. 226, 128 Pac. 305.

And in *Pennsylvania Co. v. Cole* (1904) 132 Fed. 668, wherein it appeared that property assessed for the construction of a sewer was 700 feet distant therefrom, and the owner had no notice of the intention to make an assessment until after the completion of the work, it was held that he was not estopped, in a suit to restrain the collection of the assessment, from asserting that the common council did not, before passing the resolution ordering the sewer to be constructed, pass a resolution declaring the necessity therefor, and give notice of a time and place to be heard on that question.

So, no action will lie to enjoin the collection of an assessment for building a sewer, on the ground that the city council did not pass a resolution declaring it necessary for the board of public works to have plans prepared where the owner has stood by and made no objection to the assessment until the completion of the work. The defect is not a fatal one, and will not invalidate the assessment. *Blanchard v. Columbus* (1896) 8 Ohio S. & C. P. Dec. 676.

Similarly, a plaintiff, who has, without objection, seen a sewer completed, cannot claim exemption from an assessment therefor in a suit to enjoin collection, on the ground that there is an existing sewer. *Wilson v. Cincinnati* (1897) 7 Ohio S. & C. P. Dec. 242.

And, where a lot owner, with full notice from the city of an intended grading improvement, stands by and without objection permits the improvement to be made, he will not afterward be heard to say that the council ordering it to be made acted arbitrarily and illegally. *Starling v. Hopkinsville* (1890) 12 Ky. L. Rep. 558.

Where no protest was filed against a proposed street improvement, nor any action taken until more than five years after the expiration of the period of limitation provided by statute, a property owner is estopped from objecting that the resolution of intention was passed prematurely. *Bickel v. Warner-Quinlan Asphalt Co.* (1918) — Okla. —, 174 Pac. 537.

So, it has been held that where the city council passes two separate resolutions of intention of paving different parts of the same street, which are invalid because of the insufficiency of the published notice, and later passes a resolution for the improvement of the entire street, a property owner cannot use the invalid resolutions as a basis of contesting the assessment, when the work is actually done and the assessment made without protest, and he is chargeable with laches in waiting six years before protesting or attempting to defeat the assessment. *Colby v. Medford* (1917) 85 Or. 485. 167 Pac. 487.

In like manner, an objection to an assessment, in that no notice of the resolution of intention was served on the property holder, is waived, where, after receiving actual notice by reason of the delivery to her of a notice for her husband, she protests to the contractor against the construction of the sidewalk, but takes no action to stop the work and makes no further objection until it is completed. *Wey v. Hobart* (1917) — Okla. —, 168 Pac. 433. It was said by the court, in an official syllabus: "It is the duty of the property owner, upon discovering that labor and money are about to be expended in the actual construction of a public work which would tend to benefit his property, to promptly take action, by injunction or otherwise, against the proceedings providing for such improvements, if in his judgment said proceedings are irregular, and he cannot stand by without availing himself of this opportunity while the public work is in progress, and when the work is completed, and he is called to pay his respective assessments for the benefits received, then invoke relief by injunction in a court of equity."

(b) *Estimate of cost.*

The majority of the cases hold that the failure to have a preliminary estimate of the cost, as is often required by the charter or a statute, or a defect or omission in the estimate made, may not be objected to by a property owner who stands by in silence until the completion of a street improvement.

Thus, one who makes no objection while work on a street improvement is in progress is estopped from denying the validity of an assessment on the ground that the estimate, plans, and specifications for the work, which the charter requires to be filed, are insufficient. *Wingate v. Astoria* (1901) 39 Or. 608, 65 Pac. 982, wherein the court said: "It is the settled law of this state, supported by the weight of authority, that where the municipal authorities have jurisdiction to improve a street, a property owner, who, with knowledge of such improvement, makes no objection until after the work has been completed, cannot enjoin the collection of the assessment

on the ground that the proceedings have not been regular."

So, an objection to the engineer's estimate of the cost of a sewer, on the ground that it does not contain all the various data enumerated in the statute, is a mere irregularity which a property owner is estopped from asserting, where he stands by and accepts the benefits of the work. *New Albany Gaslight & Coke Co. v. Crumbo* (1894) 10 Ind. App. 360, 37 N. E. 1062.

In *Gratz v. Kirkwood* (1916) — Mo. App. —, 183 S. W. 1071, in refusing to entertain an objection that the estimate of cost of a street improvement was made up by an engineer not in the employ of the city, the city employing none at the time, and was signed by him and handed to the mayor, who erased the signature and placed his own on the estimate, the court said: "There is nothing whatever in this case to show that the appellant here, with full knowledge of all these matters of which he now complains, ever made any complaint; on the contrary, he stood by and allowed this improvement to be made without protest, objection, or suggestion against the validity of the ordinance or contract in any way whatever. It will not do, after receiving the fruits of the work, to permit him to turn around and contest payment for it on naked and unsubstantial technicalities."

So, it has been held that after the completion of a paving improvement, property owners could not object to the assessment of benefits against their property because the estimate of costs was not made by the city engineer, who was admitted incompetent, but by one employed to make a proper estimate. *Diederich v. Red Cloud* (1919) — Neb. —, 173 N. W. 698.

In *Elkhart v. Wickwire* (1889) 121 Ind. 331, 22 N. E. 342, it was held that where property owners knew that a sewer was being constructed, and that it was completed and paid for by the city, they were estopped from raising the question that, after the passage of the ordinance and before the commencement of the work, an estimate of its cost had not been obtained.

That no estimate of the cost of a sewer improvement is made and filed with the city engineer after it has been constructed, so as to ascertain the proportion of the cost with which an owner's property is chargeable, is an objection which cannot be raised where the owner has full knowledge of the work and makes no complaint. *Walsh v. First Nat. Bank* (1909) 139 Mo. App. 641, 123 S. W. 1001.

Where jurisdiction is obtained by a city council by resolution properly passed and notice duly posted, an excess over the cost of a street improvement as estimated by the city engineer is an irregularity which is waived by a property owner who, without objection, permits the improvement to be completed to his benefit, and then objects to the amount of the assessment. *Branting v. Salt Lake City* (1915) 47 Utah, 296, 153 Pac. 995. In that case the court, discussing the statutes of the several states as to the estimate of costs, and the question whether an excess over such estimate was an error going to the jurisdiction, said: "While it is true that our statute requires an estimate of the cost of the contemplated improvement to be published, yet the purpose and effect of such estimate are quite different under different statutes. With the assistance of the briefs and arguments of counsel on both sides, we have been enabled to go into the question presented for determination somewhat fully. In doing that we have discovered that the statutes empowering municipalities to assess abutting property for the purpose of paying the cost of public improvements, to the extent of the benefits that such property derives from such improvements, are of three kinds: (1) Those like the statute of Illinois, where the only public hearing respecting the justness, validity, and equality of the proposed assessment and tax is itself provided for in the notice in which the estimate is contained; (2) those where the municipalities are prohibited from entering into a contract to construct the proposed improvement for any amount in excess of the published estimate; and (3) our own statute. Since the

only hearings that are given to the taxpayers under the Illinois statute are based upon the notice containing the published estimate, which must be carefully itemized, and since the assessment is likewise based upon the estimate as published, it is not difficult to understand why the supreme court of Illinois arrived at the conclusion that the itemized estimate required under the Illinois statute was jurisdictional, and could not be departed from. Moreover, in view that the taxpayer, under the Illinois statute, was given no other hearing or opportunity to assail the validity of the amount of the assessment, the estimate as published was of the utmost importance. Such publication, therefore, in legal effect, constituted the notice and hearing which every property owner is entitled to under the provisions of both the Federal and state Constitutions, relating to the term 'due process of law.' What is required in that regard is very clearly as well as very tersely stated in 5 McQuillin, Mun. Corp. § 2074, in the following words: 'Before special assessments can be charged upon the property of private persons, the owners must be given notice thereof, with an opportunity to be heard and to contest, if desired, *the validity and fairness of the assessment*, and failure to give such notice, it is usually held, will render an assessment void, whether or not notice is expressly required by law. A statute or charter provision authorizing special assessments, which fails to provide for notice to property owners *and an opportunity to be heard at some stage of the proceedings*, is unconstitutional, as depriving persons of their property without "due process of law."' (Italics ours.) It is also said in that connection that, if the statute requires notice of intention to make a particular improvement to be published, such a notice may not be dispensed with. This court is firmly committed to the foregoing doctrine. See *Argyle v. Johnson* (1911) 39 Utah, 500, 118 Pac. 487; *Jones v. Foulger* (1914) 46 Utah, 419, 150 Pac. 933. In the first case referred to, the question of what consti-

tutes sufficient notice and opportunity to be heard under the due-process-of-law doctrine is discussed, and some of the leading cases, both state and Federal, are there cited. It is important not to become confused with regard to just what is required in order to constitute, or rather, to meet, the requirement of 'due process of law.' A careful reading of the terse yet comprehensive statement we have copied from McQuillin, *supra*, makes the matter quite clear. The essential requirement is that property owners must be given notice and an opportunity to be heard and to test the validity and fairness of the assessment. Now, under the Illinois statute, no opportunity was given except by the notice in which the itemized estimate of the cost of the proposed improvement was published. What is more important still is that the assessment subsequently made was entirely based upon the estimated cost as published. Not so under our statute. As we have already pointed out, appellant, by § 205, *supra*, was required to, and it is conceded that it did, publish notice to the property owners who were affected, before making the assessment and before levying the tax. In that notice the amount of the proposed tax was given, and a time and a place for a hearing were fixed, so that any taxpayer who felt himself aggrieved by the tax as proposed was given an opportunity to assail the validity, as well as the fairness or equality, of the assessment and tax. The notice required by that section, which it is conceded was given, was, under all the authorities, in and of itself sufficient to meet the requirement of 'due process of law.'

On the other hand, it has been held that the failure to file a diagram and estimate of the cost of a street improvement after a survey by the city engineer, as required by the charter, being a fatal defect, the city lacks jurisdiction to proceed, and a property owner is not estopped from objecting to an assessment after the completion of the work. *Buckley v. Tacoma* (1894) 9 Wash. 253, 37 Pac. 441. See

to the same effect, *Buckley v. Tacoma* (1894) 9 Wash. 269, 37 Pac. 446.

Likewise, it has been held that where an assessment for a street improvement is void because the requirements of the city charter as to the engineer's estimate of costs have not been complied with, an abutting owner who stands by in silence is not estopped from enjoining the collection of the assessment. *Kerr v. Corsicana* (1895) — Tex. Civ. App. —, 35 S. W. 694, wherein the court said: "It is also contended by appellee that appellants are estopped from denying liability, because their property was benefited by the improvement, and because, knowing the work was being prosecuted, they should have taken action to have prevented it, and not waited until the work was completed. The evidence shows that some of the appellants protested against the work being done, but, aside from this, we do not think the principle of estoppel applies in such a case. The city council had exclusive control over the street, and the power to make the improvement. It had the power to burden the abutting property with its proportionate part of the expense for the improvement. The appellants were authorized in presuming that the council was properly exercising its authority in the premises, and were not called upon to take any action to prevent the improvement, as they could not legally have done so. The council having failed to properly levy a tax, the appellants cannot be subjected to the payment of any part of the expense."

Similarly, an objection that no map of a street to be paved is prepared by the city engineer and presented to or approved by council before the commencement of the work is not lost by failure to raise it until after the completion of the work. Such an objection goes to the jurisdiction, and the omission renders the proceeding void ab initio. *Hall v. Macon* (1917) 147 Ga. 704, 95 S. E. 248.

(c) *Qualification of official.*

An objection to an assessment for a street improvement on the ground of the disqualification of an assessor,

because of interest, is not jurisdictional, and may be waived by failure to raise the question until after the completion of the work. *Daly v. Gubbins* (1907) 170 Ind. 105, 82 N. E. 659, wherein the court said: "There is no statute in this state in terms disqualifying or prohibiting a member of the board of trustees of an incorporated town from acting in matters of this character on account of interest, and therefore his action in such instances is, at most, voidable only, and objections on account of interest must be made at the earliest opportunity, or they will be deemed waived. . . .

No objection because of interest appears from the record to have been raised, until the filing of this paragraph of answer. So far as we are advised, appellants appear to have stood by with full knowledge of the disqualification of which they now complain, and suffered the work to go on and costs to accumulate until they had reaped the full benefit of the improvement. The action of the board was not void, and upon the facts disclosed appellants are now estopped to avail themselves of any disqualification on the part of any member of the board of trustees."

So, where property owners objected to the confirmation of the report of commissioners in condemnation proceedings for widening a street, because a commissioner was disqualified, in that he had actively interested himself against a proposed improvement and used his influence to induce the mayor to veto the ordinance, it was held that such an objection should have been made early in the sessions of the commissioners, and by waiting until they had seen the result of the commissioners' judgment, the property owners waived the right to object. *St. Louis v. Brown* (1900) 155 Mo. 545, 56 S. W. 298.

Laches on the part of a property holder will prevent him from making an objection to an assessment for laying out a street, on the ground that the oath taken by the commissioners was not in precise accordance with the provisions of the statute. *State v. Trenton* (1873) 86 N. J. L. 499.

Similarly, an objection to an assessment on the ground that the report of commissioners for a street improvement does not affirmatively show that they were taxpayers, or took the oath required by statute, is waived by a delay of two years in urging it. *State, Bergen County Sav. Bank, Prosecutor, v. Union Twp.* (1882) 44 N. J. L. 599.

(d) *Notice.*

Where the notice of an intended street improvement so far fails to comply with the provisions of the city charter as to be in effect no notice, it deprives the city of jurisdiction to proceed, and a property owner is not estopped to deny the validity of an assessment, though he makes no objections until the work is completed. *Buckley v. Tacoma* (1894) 9 Wash. 253, 37 Pac. 441. See to the same effect, *Buckley v. Tacoma* (1894) 9 Wash. 269, 37 Pac. 446; *Barlow v. Tacoma* (1895) 12 Wash. 32, 40 Pac. 382.

"It is the right of a landowner specially affected by a public improvement to be informed, either by actual or constructive notice, of the time and place appointed for the meeting of council to consider their proposed action. This is so because the act is judicial in character; it being contrary to natural justice that a person should be bound by proceedings of a judicial character affecting his person or property, without having an opportunity to be heard." *Groel v. Newark* (1909) 78 N. J. L. 142, 73 Atl. 522, wherein the court held that an ordinance, because of want of notice, either actual or constructive, was wholly ineffective as the basis of a sewer assessment, and that a property owner was not precluded from challenging the assessment by reason of the fact that he did not attempt to set aside the ordinance until after an assessment had been made under it, it appearing that he was led to believe that the general scheme of improvement was to be made at public expense, and that no assessment would be levied against his property.

So, where a statute provides that the common council shall give notice of a proposed improvement by publication

for at least two weeks, and such notice is not given, an owner, on petition for the sale of his property to satisfy an assessment, is not estopped from raising the question. *Auditor General v. Calkins* (1904) 136 Mich. 1, 98 N. W. 742, wherein the court said: "It was obligatory upon the common council to give the notice required as a condition precedent to further action. The notice is in the nature of a summons to bring a defendant into court. Its object is to summon the interested taxpayers before the council, and give them a hearing. The notice must give the time required by the law, or else the council obtain no jurisdiction, any more than a court would obtain jurisdiction by a void service of process. The council, in the inception, obtained no jurisdiction on account of a void notice. This is not a case where a court of equity will leave a party complainant to his remedy at law. The defendant is now for the first time brought into court and given an opportunity to contest the validity of the proceedings. The statute gives him the right to wait until the state moves to foreclose the tax lien upon his property, and then gives him the right to appear and make any objections which were fatal to the proceedings. He cannot, therefore, be charged with laches."

In *Fox v. Middlesborough Town Co.* (1894) 96 Ky. 262, 28 S. W. 776, it was said: "The lot owner upon whom this burden is attempted to be placed must have some notice of the intention to charge him, and when publication is required in a newspaper for a fixed period of time, the notice must be given in that mode, and the mere fact that he has witnessed the progress of the work, from its beginning to its completion, cannot work an estoppel, but the charter in this respect must be complied with."

So, where the notice of a paving improvement is insufficient in description, a property holder "is not estopped from enjoining the collection of the assessment by reason of having waited until the completion of the improvement." *Johns v. Pendleton* (1913) 66 Or. 182, 46 L.R.A. (N.S.)

990, 133 Pac. 817, 134 Pac. 312, Ann. Cas. 1915B, 454.

Likewise, a property owner may invoke the aid of equity to restrain the sale of his property for the nonpayment of a street assessment, without tendering the amount of the assessment, where the proceedings are void because of insufficiency of description in the published notice of the intended improvement; and a second notice will not cure the defect. *Ladd v. Spencer* (1892) 23 Or. 193, 31 Pac. 474, where in the court said: "The legal issue of the notice and its proper publication were for his benefit and protection, and were the means by which the council acquired jurisdiction to subject his property to the burden necessary to defray the expense of making the improvement. This was not such a notice as the charter prescribed, nor such as the owner of property adjoining said street was entitled to, since it did not inform him of the character, nor could he from it estimate the probable cost, of the proposed improvement. No jurisdiction to levy a special assessment could possibly be claimed by the publication of such a notice, and any proceedings had thereupon were void. . . . The streets of a city having been dedicated to the public, the legislature, as the trustees thereof, may delegate the power to improve them to a municipal corporation, but such corporation can exercise the delegated power only in the manner indicated in the act conferring it. 'A statute delegating power to charge the property of individuals with the expense of local improvements must be strictly pursued; whatever step the legislature has prescribed to be taken cannot be declared by the courts merely directory or immaterial.' *Merritt v. Portchester* (1877) 71 N. Y. 309, 27 Am. Rep. 47. 'The provisions in a city charter in regard to the steps required before the contracts for grading are let are conditions precedent, and every requirement must be strictly complied with before there can be any liability of adjoining lots for such work.' *Massing v. Ames* (1875) 37 Wis. 645. The recorder having exercised the full measure of the power

delegated him in issuing and publishing the first notice, and the second one having been issued and published without the request or direction of the council, did not give jurisdiction to make the proposed improvements, and any sales of property based upon the second notice were void. It is urged by appellants that in equitable proceedings the owner of property benefited by the improvement of a street adjoining his property should first tender the amount of the benefits before he can be heard to complain. Where the owner has, without objection, quietly permitted the improvements to be made, he would be estopped by his own act. It is in cases of equitable estoppel, only, where the owner has encouraged the improvements, that he would be obliged to tender the amount of benefits received. *Hawthorne v. East Portland* (1886) 13 Or. 271, 10 Pac. 342. But the respondent objected by written protest at the inception of the proceedings, and he thereby challenged the act of the council and its officers. It cannot be said that he encouraged the improvement. The charter made no provision that before a person could be heard in an equitable proceeding he must tender the amount of benefits. If an owner of property were allowed to do this as a condition precedent, before he could maintain a suit, it would tend to do away with every jurisdictional requirement in the proper levy of special assessments, as the council of a city could, without observing the requirements of a charter, order the improvement of a street and compel the owner of the property benefited to tender the amount of the benefits before he could enjoin the officer from executing a void process. Every special municipal assessment is predicated upon the theory of a benefit resulting to the property in consequence of some public improvement made in the immediate vicinity. It is, therefore, a burden upon the land benefited, and can never be a tax against the person of the owner. If it were a tax against the person, levied to support the government of a state, county, or municipality, there then

might be some good reason to require the owner to pay the tax before he could receive equity, since he owed the duty of bearing his proportion of such burdens; but in the levy of a special assessment upon his property, made by a common council without strictly observing the conditions required in the charter, in the absence of a request or other act which would estop him, he is not obliged to make a tender of the benefits before he can invoke the aid of equity." See to the same effect, *Dyer v. Bandon* (1913) 68 Or. 406, 136 Pac. 652.

Similarly, where a statute provides that the city may make street improvements if the property owner, on demand, fails to do so, demand and notice of a proposed improvement are necessary incidents to the power of the city to act, and in their absence a property owner is not estopped by his inaction or silence from contesting the validity of the assessment after the completion of the work, by injunction to restrain the sale of his property. *Brewster v. Newark* (1856) 11 N. J. Eq. 114.

The attempted confirmation of an assessment without giving the notice required by law is illegal and void, and a property owner is not estopped from objecting thereto by reason of the statute providing "that after thirty days have elapsed from the date of confirmation, . . . no certiorari may be allowed," etc. *State, Evans, Prosecutor, v. North Bergen* (1877) 39 N. J. L. 456. The court said that, the confirmation having no legal existence for want of notice, "it follows that the prescribed limitation has not yet commenced to run."

On the other hand, it has been held that one who knew of the enactment of an ordinance for the improvement of a street, providing for the collection of the assessments and the issuing of bonds to pay for the improvement, interested himself in the sale of the bonds, and assisted in disposing of them, was precluded from saying that he had no notice of the proceedings before the common council for confirmation of the assessment. Eng-

lish v. Arizona (1909) 214 U. S. 359, 53 L. ed. 1030, 29 Sup. Ct. Rep. 658.

In ruling, on an objection to a sewer assessment, that no notice was given by which persons desiring to bid on the construction of the sewer could do so intelligently, the court, in *Walsh v. First Nat. Bank* (1909) 139 Mo. App. 641, 123 S. W. 1001, said: "The defendant is a resident property owner of the city of Monett. He knew the work was being done, and stood idly by in apparent acquiescence until the work was completed and his property had received the benefits of it, and made no complaint, and he should not now be heard to complain of any defect which does not go to the validity of the tax bills themselves."

Where a landowner on the line of a sewer connects his estate by a drain with the sewer, by permission of the municipal authorities, he is estopped from objecting to the validity of his assessment for want of a previous notice to him of the laying out of the sewer. *Butler v. Worcester* (1873) 112 Mass. 541.

Failure to receive notice to appear before the viewers of a proposed paving improvement will not be permitted as a defense to an action for the recovery of an assessment, where the owner has stood by and received the benefits and allowed the city to pay the contractor without objection, especially where there is no allegation that there was no notice of the proposition, and an opportunity to be heard, previous to the passage of the ordinance. *Wilkes-Barre v. McDermott* (1891) 6 Kulp (Pa.) 345.

In *Ardmore v. Appollos* (1917)—*Okla.* —, 162 Pac. 211, in disposing of an objection to an assessment for grading and paving because of failure to give notice of the hearing of the report of the appraisers as required by law, the court said: "From the view we take of this case, the only question that we need consider in disposing of the same is the laches of the plaintiffs. It appears from the record that plaintiffs made no objections to the assessments made against their respective properties, nor did they make any objections to the construc-

tion of the improvement for which the assessments were made during its progress, or at any time until the commencement of this action, more than five years after the levying of such assessments. From a long line of decisions, it has become the settled law of this jurisdiction that where a property owner, knowing that a municipality is about to make or is making improvements for the payment of which his property will be assessed, sits idly by and permits such improvement to be made, and receives the benefits thereof, and fails to appear and protest at the proper time against the proceeding, or to make any objection thereto, he will not thereafter be afforded relief in a court of equity from the assessments made against his property to pay the costs of said improvement. . . . We are forced to the conclusion that plaintiffs, by their laches, are barred from raising this objection to the assessments levied against their respective properties. It will be noted that this meeting was held and assessments made under the notice, given long before the completion of the work. The plaintiffs made no objection to the sufficiency of the notice of said meeting, nor did they object or protest against the assessments made against their respective properties, but permitted the work to be completed, and bonds issued to pay therefor, and suffered more than five years to elapse before taking any steps to avoid the assessments made at such meeting."

The principle of estoppel because of silence was applied in *Catts v. Smyrna* (1914) 10 Del. Ch. 263, 91 Atl. 207. In that case it appeared that property owners knew that a paving improvement was being made, and that the cost was to be assessed against their land as a special benefit. By standing by without objection, it was held that they had waived the right to contest the validity of the assessment on the ground that there was an irregularity in the notice and demand made on the property owners that, on their failure to do the proposed work, it would be done by the municipality. So, where a common council passed

a resolution ordering the board of public works to construct a sidewalk before the statutory thirty days had expired, from the date of notice to the landowner to do the work, but did nothing under the resolution until after the expiration of the thirty days, it was held that the owner, having stood by and watched the work proceed without taking any steps to prevent it, was not in a position to urge that it was unlawfully done. *People ex rel. de Frece v. Lathers* (1910) 141 App. Div. 16, 125 N. Y. Supp. 753, wherein the court said: "She holds her property subject to the right of the community to impose those reasonable burdens commonly accepted by the residents of municipalities, and she is asked to pay only the cost of doing the work, which it was her duty to do, with the incidental cost of collecting the same. To permit highly technical objections to override the obvious justice of requiring the relator to pay her portion of the cost of doing the work, which it was her duty to do, would be to exalt form over substance, and to work a wrong."

(e) *Contract for improvement.*

Where landowners stand by without objection until the completion of a street improvement, they will not be permitted, in an action to annul an assessment, to say that there was irregularity in the letting of the contract. *Spalding v. Denver* (1905) 33 Colo. 172, 80 Pac. 126, wherein it was said: "Certain irregularities on the part of the board of public works were alleged and shown. These alleged irregularities may have affected the validity of the contract, had they been raised at the proper time. If the city authorities were not following the law in letting contracts, they could doubtless have been required to do so by an appropriate action in apt time, but after the contracts have been completed, it is too late to raise questions of this kind in an attack upon the validity of the assessment."

So, equity will not enjoin the collection of an assessment because of the improper manner of advertising for bids, where the property owner has delayed for a year after the assess-

ment was laid, and long after the work was completed and accepted, and has had the benefits thereof. *Byram v. Detroit* (1888) 50 Mich. 56, 12 N. W. 912, 14 N. W. 698.

Following the decision in *Byram v. Detroit* (Mich.) supra, it was held in *Lundom v. Manistee* (1892) 93 Mich. 170, 53 N. W. 161, that though there were irregularities which might have proved fatal to the proceedings for paving a street if the property owners had acted promptly, they had no standing in a court of equity where more than two years had elapsed after the assessment of the tax before the filing of the bill, during which time the work was allowed to progress without objection, the court saying that they knew that their lands were so situated with reference to the improvement that any assessment, whether on the basis of benefits or frontage upon the streets, would include such lands, and yet they allowed the contractors to go on with the work, and reaped the benefit of the same.

And in a case wherein it appeared that a contract for the work of constructing a sewer system was let after the passage and publication of an ordinance therefor, but before the date of publication had expired, it was held that this was an irregularity which was waived by the inaction of the property holder. *Coalgate v. Gentilini* (1915) 51 Okla. 552, 152 Pac. 95. In the official syllabus, the court said: "When money has been expended by a city for public improvements, and a property owner of the city sits silently by and allows the expenditures and improvements to be made, with full opportunity to prevent its accomplishment, yet without taking legal steps to prevent the same, after the money has been expended, the improvements made, and the relations of property and parties have been changed, it is then too late for him to ask a court of equity to relieve against that which his own laches has permitted to be done." In the same case the court further said: "The ordinance could have been challenged by a referendum vote. But this was not done. The legality of the proceed-

ings under the ordinance could have been challenged in a court of competent jurisdiction before any outlay was made, and before there was any change in the conditions or relations of the property or the parties. But this was not done. And since the defendant in error took advantage of none of the means at its hand to prevent this outlay of money for public improvements tending to benefit his property, can he now, in a court of equity, be heard to say that, since he has the improvements, he will not pay the price? We think not."

In passing on an objection as to the sufficiency of the publication of notice of the letting of a contract for a street improvement, which was admittedly less than the required time, the court, in *Clements v. Lee* (1888) 114 Ind. 397, 16 N. E. 799, said: "It is settled that, in case the record fails to show that any notice at all of the letting of a contract for the improvement of a street was given, objection may be taken by demurrer to the transcript upon an appeal. . . . A person about to enter into a contract with a city council must examine the records so far as to see that the common council has taken, or attempted to take, the steps necessary to acquire jurisdiction to enter into a contract. If the record fails to show that such steps were taken, a contractor, or one about to contract, has no right to rely upon it. Where it appears, however, that an attempt was made to take the jurisdictional steps, such as the giving of any sort of notice, the sufficiency of the notice cannot be inquired into after the work has been done, with the acquiescence of the parties benefited, under color of the proceedings."

Where city councils are, by statute, required to determine in advance the kind and quality of material to be used in a proposed street improvement, and they advertise for bids "for all the different kinds of modern pavements now in use," the proceedings are void, and a property owner is not estopped from objecting to an assessment thereunder by his failure to protest until the work is well advanced. *Cogge-*

shall v. Des Moines (1889) 78 Iowa, 235, 41 N. W. 617, wherein the court said: "It is insisted, however, that as plaintiffs made no objection until after a portion of the work had been done, and the expense incident thereto incurred, they are now estopped from denying the right of the city to assess their proper proportion thereof against their property. This position is disposed of by the holding of this court in *Starr v. Burlington* (1876) 45 Iowa, 87. The defect of the proceedings was not a mere irregularity, as in *Patterson v. Baumer* (1876) 43 Iowa, 477, but was jurisdictional. The council omitted to do the acts which, under the statute, are essential to their power to enter into any contract for the paving of the streets. The power to contract for the improvements must, of necessity, be acquired, before any tax can be levied to pay the expense incurred in making them."

A property owner, after having permitted the execution of the contract for a street improvement and the performance of the work under it, thus accepting benefits without objection until called on to pay for them, cannot be heard to complain that the contract was not let to the lowest bidder, the difference being slight and there being no element of fraud. *Bloomington v. Phelps* (1898) 149 Ind. 596, 49 N. E. 581.

In *Ross v. Stackhouse* (1887) 114 Ind. 200, 16 N. E. 501, it appeared that after due advertisement the city council rejected all bids for a street improvement, but subsequently reconsidered the vote and let the contract to the lowest bidder without readvertisement. The work was completed and accepted by the city. It was held that a property owner who made no objection, but stood by and accepted the benefits of the improvement, was estopped from questioning the legality of the contract. The court said: "In the present case the transcript shows that due notice was given, advertising the fact that on a day named the contract would be let. It shows that bids were received, and that the contract was let upon what the common council

adjudged to be a sufficient notice. Having acquired jurisdiction by the publication of notice to let the contract, the statute effectually precludes any inquiry into such merely incidental facts as the rejection of the bids in the first instance, and the subsequent reconsideration of its vote by the common council. Regardless of the statute, however, it must be considered as settled by the decisions, and upon established principles, that where it appears, in a proceeding of this character, that an attempt was made to give notice, and that some notice was given, which the body charged with the duty of acting adjudged to be sufficient, a party whose property is to be benefited by the improvement cannot quietly stand by and receive the benefit, and then question the regularity of the proceedings. . . . Unless the proceedings are so radically defective as to be totally void, a contractor who has executed the work may invoke the doctrine of estoppel for his protection. Where the record of the proceedings shows color of jurisdiction, the property owner, until the contrary appears, will be presumed to have had notice of the progress of an improvement from which his property was being benefited, . . . and having notice, and failing to object and arrest the improvement until the benefit has accrued, he will be deemed to have ratified the proceedings as fully as does one who receives the proceeds of a judgment or sale with knowledge of inherent infirmities which render it voidable or even void. . . . Unless, therefore, the law under which the assessment is imposed makes no provision for notice, or unless the proceedings under which the proposed improvement is to be made are totally void for want of the observance of some condition necessary to the attaching of jurisdiction, the work cannot be arrested at any stage; and in any event, one who acquiesces, with knowledge, until after the improvement has been completed, cannot escape payment for the actual benefits received, even though the proceedings turn out to be void, provided the contractor proceeded in good faith

and without notice from the property owner. He cannot enjoy the benefits and escape the burden, unless he interferes or gives notice before the benefit is received."

See also *Brownell Improv. Co. v. Nixon* (1910) 48 Ind. App. 195, 92 N. E. 693, 95 N. E. 585, wherein, following the decision in *Ross v. Stackhouse* (Ind.) supra, it was held that property owners who accepted the benefit of a street improvement, without objection, were estopped from questioning the regularity of the proceedings on the ground that, after notice to bidders, the specifications were changed, but the improvement remained the same as described in the original resolution.

In *Gibson v. Owens* (1893) 115 Mo. 258, 21 S. W. 1107, wherein it appeared that the lowest bidder for the grading and paving of a street failed and refused to enter into a contract, and the city engineer thereupon gave the contract to the next lowest bidder without readvertisement, which action was confirmed by the city council, it was held that a property owner would not be permitted, after the completion of the work, to avoid his assessment on these grounds. The court said: "Regardless of the terms of the ordinance, we think the principle well established that, in case all the jurisdictional steps have been taken which authorize the letting of a contract, a property owner who stands still, without objection, until the work has been completed, and receives its benefits, is estopped to question the legality of the action of the proper officer in awarding the contract." The principle announced in *Gibson v. Owens*, supra, received support in *Johnson v. Duer* (1893) 115 Mo. 366, 21 S. W. 800, wherein, under similar circumstances, it was held that after the work was completed it was too late to attack the assessment for the construction of a sewer on the ground of irregularity in the contract, the court saying: "The ordinance providing for letting contracts for public works to the lowest and best bidder, and authorizing the engineer or other person acting to reject any and all bids if deemed too

high, intrusts to that officer a large discretion in the matter of letting these contracts. After the contract and bond have been approved and confirmed, as this one was, by an ordinance of the common council, and after the work has been done thereunder, it is too late in this proceeding to question its regularity. . . .

There is no doubt that a court of equity will grant relief to a taxpayer to remove the shadow cast upon the title to land by an illegal assessment of benefits, but, when the relief is not sought until after the work has been completed at a great cost to the contractor, and when the complaining landowner has received the benefits of the improvement, the relief should not be granted except upon an exceedingly strong showing. As was well said by Elliott, Ch. J., in a recent Indiana case: "The assessment is made upon the theory that the benefit to the property is equivalent to the expense. The owner, therefore, receives a thing of value, and he ought, in equity and good conscience, to pay for it, notwithstanding the fact that the local officers may not have obeyed the statute in every regard. It is just to protect his title when he offers to pay for the things of value rendered him in the form of the benefit resulting from the improvement; but it is not just to relieve him from paying the assessment because the local officers have made mistakes." *Jackson v. Smith* (1889) 120 Ind. 520, 22 N. E. 432."

An error in computation as to the cost of excavating for a sewer, by which a contract is not let to the lowest bidder, is an objection which should be made before the completion of the work. *North View Land Co. v. Cedar Rapids* (1918) — Iowa, —, 169 N. W. 644, wherein the court said: "There was no intentional fraud or bad faith in the acceptance of the bid by the city council. The contract has been fully performed in strict accord with the specifications. Its benefits have inured to abutting owners. Sound reason dictates that, if the bid could have been purged in advance by action of the city council, it ought not to be forbidden to do so after a

full performance by the contractor. If the contract had been challenged in the inception of the proceedings, and before the contractor had constructed the improvement, the rule of conformity would have been applied with greater strictness than is justified, after the full benefits of the construction have been conferred upon the property owners without objection."

So, a property holder, objecting to a paving assessment for an irregularity such as that the commissioners accepted a bid in excess of what was a fair compensation, must act promptly to contest the assessment, and if his objection is disregarded by the commissioners, he should enjoin the proceedings by appropriate action, failing which, he will be held to have waived his protest. *DAMRON v. HUNTINGTON* (reported herewith) ante, 623, wherein the court says: "The plaintiff shows by his bill that he was fully cognizant of all the facts upon which he now relies to defeat this assessment, at the time the contract was entered into between the city and the contractor, and that he urged them before the commissioners. If there was merit in his contention that the awarding of this contract, at the price at which it was awarded, was a violation of the authority conferred upon the commissioners, should he have contented himself with making the protest before the commissioners, and, after this protest was overruled, do nothing to prevent the work from being done, or to have the merits of his contention determined by some other authority having jurisdiction to settle the question? We think not. Why did he not, upon the overruling of his protest, apply to the courts for injunctive relief against the execution of the contract? In such a suit the validity of the contract could have been, and would have been, fully determined before any of the work had been done, or any money expended. He chose, however, to take no action with a view to stopping the work, but allowed it to be proceeded with, and then, after the money had been spent and the improvement made, he brings a suit to cancel the assessments. It

seems to us that inasmuch as he was in possession of all the facts which he now claims made this contract invalid, it was his duty, if he desired to escape the burden which the same would impose upon him, to pursue all of the remedies at hand for the abrogation of it before the same had been fully performed. In *Hamilton on Special Assessments*, § 732, the author says: 'As a necessary corollary to what has preceded, action on the part of the property owner must be reasonably prompt, so that no false conclusions may be drawn from his inaction. If he object to the power of the council to order the work done, or deny the validity of a provision in the ordinance under which the work is done, requiring the contractor to employ only bona fide residents of the city, as being prejudicial to his property rights, as increasing the cost of the work, he must act in time to stay the work in limine.' . . . So *McQuillin*, in his work on *Municipal Corporations*, § 2120, says: 'It is the duty of the parties assessed for an improvement to act promptly if they wish to avail themselves of irregularities in the improvement proceedings, and not to wait until after the contracts are made and expense incurred in the doing of the work.' . . . We know there are a great many authorities which hold that if the property owner makes protest before the governing body he will not be estopped to claim the assessment invalid after it is made, but we do not think they are sound. The courts are just as open to parties before the contract is executed and the expense incurred, to enjoin the execution of it and to prevent the outlay of the money, as they are afterward to cancel the assessment for the alleged invalidity, and we conclude that, where one owning property abutting on a street proposed to be improved has full knowledge of the matters which, he claims, render the contract for the same invalid, and he does no more than protest to such body, he cannot, after the work is done, escape paying the assessment therefor. He must go further. He must avail himself of the remedies provided for

preventing the alleged injury to him, and where, as in this case, the courts are just as open to him before the contract is performed, to test its validity, as they are afterward, he cannot be said to be acting in entire good faith to permit the money to be expended, knowing that it is the intention of the city authorities to levy it against his property as an assessment, and then appeal to the courts to cancel such assessment."

Where a property owner waited until after the completion of a street improvement, having filed no exception to the finding of the viewers that the work was worth the price charged for it, it was held that he could not escape payment of his share of the cost of the improvement, which resulted in a benefit to his property, but was estopped from objecting because of an irregularity in the advertisement for bids. *Re Wabash Ave.* (1904) 26 Pa. Super. Ct. 305.

Similarly, the right to object to an assessment for paving, because the contract price exceeds the estimate of the city engineer, may be lost by inaction and acquiescence for a period of five years. *Ardmore v. Appollos* (1917) — Okla. —, 162 Pac. 211.

It has been held that where a property owner knew that a street was being paved, saw the work going on from the time it commenced until it was completed, and never at any time notified the contractor that there was any defect in the proceedings, and took no steps to stop him, she was estopped from assailing the contract because its provisions and specifications were too vague and indefinite in the description of the materials, manner, and extent of the work to admit of a competitive bidding, as required by statute. *Jaicks v. Merrill* (1906) 201 Mo. 91, 98 S. W. 753. See also *Sheehan v. Owen* (1884) 82 Mo. 458, wherein the court said: "Whether O'Rourke was the lowest and best bidder is not an open question. The mayor and council determined that he was, and awarded him the contract, which he has complied with. Property holders cannot lie by and see the work progress to completion without any com-

plaint or effort to stop it, and then defeat the contractor in his suit on tax bills on such a plea as this. . . . The work has been done by the plaintiff. No complaint is made that it was not done according to the contract, or that plaintiff is in any manner charged with notice of alleged irregularities in the proceedings of the council or the acts of the city officials, and while there may have been some irregularities, the ordinances were substantially complied with by the city authorities, and nothing done or omitted which could possibly have affected injuriously the interests of the defendant or other property holders, and we are not inclined to turn a plaintiff out of court, who has given his time and expended his money in the improvement of their property, on mere technicalities which in no manner affect the substantial rights or interests of the parties."

In *Treat v. Chicago* (1904) 64 C. C. A. 645, 130 Fed. 443, affirming (1903) 125 Fed. 644, it was alleged that a contract under which a pavement was laid contained certain illegal provisions, on account of which the bid was higher and the work cost more than it would have cost if the illegal features had been omitted. It was held that a property owner who took no action against the city authorities was estopped from enjoining the sale of his property to pay the assessment, especially where the cost was within the assessment of benefits. The court said: "How much more the record does not disclose. But the cost was within the assessment of benefits. And appellant not only fails to offer to pay his proportionate share of the just cost, but demands that the city be perpetually enjoined from collecting anything on account of the improvement. Appellant might have enjoined the city from entering into the illegal contract, or the contractor from doing the work thereunder. In either event, a legal contract could thereafter have been made, and appellant could not then have escaped paying so much of the confirmed assessment as would have been necessary to meet his pro rata share of the cost under

the legal contract. His equities certainly are not enlarged by having waited until his property has received the benefits of the improvement. To aid a property owner, under such circumstances, to escape without paying anything, would be offering a premium upon delay through carelessness or through bad faith."

So, it has been held that an objection to an assessment on the ground that the contract for the improvement was illegal because it provided for a guaranty to keep a pavement in repair for ten years, thereby increasing the cost of a pavement laid without such guaranty, was waived by one who knew of the petition, was present at the meeting of the council when the ordinance was passed, and knew of the progress of the work, which was fully completed and partially paid for at the time he applied for a writ of certiorari. *Borton v. Camden* (1900) 65 N. J. L. 511, 47 Atl. 436.

Likewise, a property owner who knew that an ordinance providing for the construction of sidewalks had been passed, and yet stood still and did not move until he saw the contract let and the work completed thereunder, until his property had, without any expense to him, received the full benefit resulting from the improvement, was held to be estopped from questioning the validity of his assessment on the ground that the contract contained a provision that eight hours should constitute a day's work. *Huling v. Bandera Flag Stone Co.* (1901) 87 Mo. App. 349.

In *Hedge v. Des Moines* (1909) 141 Iowa, 4, 119 N. W. 276, it appeared that the notice to bidders contained this provision: "All the expense of constructing said paving to be charged to the property abutting thereon, in accordance with the law governing the same, and payment for said work to be made in assessment certificates which shall be accepted by the contractor in full payment for all work done under his contract." It was not claimed that this "rider" was, of itself, prejudicial to the abutting owners, or that the contractor had any occasion to resort to it for the collec-

tion of his pay, but the contention was that the added provision was advantageous to the contractor, and was, therefore, a substantial departure from the bid, and rendered the contract void. In holding the objection to be nonjurisdictional, and to have been waived, the court said: "In view of the fact that the contract, as entered into, was never objected to in advance of its performance by the contractor, and that the contract had been fully performed in accordance with the terms of the specifications themselves, and that the 'rider' complained of has not in fact been of any benefit to the contractor, and that it was in its essence only an attempt to agree in advance on the law, and that the provision was to some degree beneficial to the city, and a compliance with its general ordinance, in protecting it against a general liability for deficiency, we would not be warranted in holding that it was such a substantial departure from the specifications as to destroy the validity of the contract."

Where a paving contract, entered into pursuant to the provisions of an ordinance, is alleged to be prejudicial to the property rights of a complainant, because, by confining the right to labor on works of municipal improvement to resident citizens, the cost of such works might thus be increased, an objection comes too late if not raised in time to stay the work in limine. *Chadwick v. Kelley* (1903) 187 U. S. 540, 47 L. ed. 293, 23 Sup. Ct. Rep. 175, wherein the court said: "He awaited the completion of the work, and until his property had received the benefits, whatever they were, of the improvement. Nor did he, on the trial, adduce any evidence from which the court might have found that the actual cost in the present case was increased by the operation of the ordinance. Possibly the effect of the ordinance in preferring the labor of resident citizens might tend to increase the cost of the work, or it might have the opposite effect, by inducing outside laborers to become resident citizens."

In *Diver v. Keokuk Sav. Bank*

(1905) 126 Iowa, 691, 102 N. W. 542, 3 Ann. Cas. 669, it appeared that certain provisions in a contract for a street improvement, as to what laborers should be hired and as to where materials should be purchased, were invalid. But the evidence showed affirmatively that they did not in any manner increase the cost price of the work, and it was held that the property owner, having made no objection to the contract until after the work was done, was in no position, after receiving the benefits of the contract, to object thereto. The court said: "There are other reasons why these objections should not be allowed to prevail. At most, they made the contract voidable, and not void. Plaintiff did not appear in response to the notices, to file objections either to the proposed improvement, the contract therefor, or to the assessment. Having failed to do so, as she might have done under the statute, she cannot now be heard to complain. In most, if not all, of the cases relied upon by appellant, objections were lodged at a proper time—while the contract was executory, and before any benefits had accrued thereunder, or any expenditures were made. As the contract was, at most, merely voidable, plaintiff was bound to make her objections at a proper time, and she could not wait until after the work was done, and then come into a court of equity and attempt to avoid payment for the same."

After the completion of a street improvement, and payment therefor, it is too late for a property owner to object to an assessment on the ground that the contractor, being a nonresident, did not file a bond as required by statute. *Russell v. Whitt* (1914) 161 Ky. 187, 170 S. W. 609, wherein the court said: "In view of the fact that appellee stood idly by and permitted his property to be improved, and made no complaint until the lien attached and appellant had become a trustee to whom the innocent holders of the bonds must look for the enforcement of the lien, it may well be said that his laches estop him from obtaining the relief sought in this action."

Where the statute provides that no member of the city council shall be interested, directly or indirectly, in any contract for work or services to be performed by the corporation, but neither provides any penalty for its violation nor declares what effect such violation shall have on the prohibited contract, a property owner is estopped from resisting a paving assessment for violation of the statute, after the work has been performed and accepted by the city. *Diver v. Keokuk Sav. Bank* (Iowa) supra, wherein the court said: "There was no actual fraud in the transaction. What was done in this connection may readily be accounted for, in the light of the testimony, on the theory of honesty of purpose, and we are not justified in such cases in inferring fraud. So that we have the simple question, What effect shall be given this section, in its bearing upon the contract? Many decisions have been announced on somewhat similar prohibitions, which we shall not undertake to review. Suffice it to say that decisions under statutes expressly making such contracts void may readily be distinguished from those which we shall cite. We shall assume that the construction company could not have brought suit on its contract against the city while the same remained executory in character. And we may also concede that anyone interested might, during this time, have challenged the contract in proper and timely proceedings for that purpose. But the question here presented is much broader than this. It is this: May a taxpayer, after the work has been performed and accepted by the city—there being no actual fraud shown—successfully resist payment therefor, because of a violation of § 948 of the Code? That question was decided adversely to appellant in *Kagy v. Independent Dist.* (1902) 117 Iowa, 694, 89 N. W. 972, where the cases from other jurisdictions are examined and commented upon. See also to the same point, *Roberts v. First Nat. Bank* (1899) 8 N. D. 504, 79 N. W. 1049; *Pickett v. School Dist.* (1870) 25 Wis. 551, 3 Am. Rep. 105; *Schenley v. Com.* (1859) 36 Pa. 29, 78 Am. Dec. 359; *Beaser*

v. Barber Asphalt Paving Co. (1904) 120 Wis. 599, 98 N. W. 525; Currie v. School Dist. (1886) 35 Minn. 163, 27 N. W. 922; Frick v. Brinkley (1895) 61 Ark. 397, 33 S. W. 527; Gardner v. Butler (1879) 30 N. J. Eq. 702; Concordia v. Hagaman (1895) 1 Kan. App. 85, 41 Pac. 133; Field v. Barber Asphalt Paving Co. (1904) 194 U. S. 618, 48 L. ed. 1142, 24 Sup. Ct. Rep. 784. While some of the cases cited by appellant seem to support her contention, most, if not all of them, are based on the language of the statutes construed. In some of them the remarks made by the judges writing the opinions were obiter, and in others a rule was announced which does not commend itself to a chancellor, who at all times is seeking to do equity."

See also *Taber v. Ferguson* (1886) 109 Ind. 227, 9 N. E. 723, wherein it was held that an objection to a street assessment on the ground that notice for proposals was insufficient must be set up by answer where it appeared from the record that some notice was given, and could not be presented by a demurrer. The court said: "A contractor has a right in a proper case, although the proceedings are irregular, to avail himself of an estoppel, and if we should hold that the property owner is not required to answer the insufficiency of the notice, where there is some notice, it would result in depriving the contractor of this right, for, as the transcript constitutes the only complaint which can be filed, and as the law directs what it shall contain, the contractor cannot inject into it any other matters. That an estoppel may be made available in a proceeding to recover a street assessment is well established by the authorities. The rule is thus stated in a late work: 'Thus, a property holder cannot quietly permit money to be expended in work which benefits his land, under a contract within the city, and then deny the power of the city to make the contract.' 2 Herman, Estoppel & Res Judicata, § 1221. This principle has been fully recognized and strongly asserted by this court."

In other cases a defect in the procedure for letting the contract for a

street improvement, or in the terms of the contract, has been held so to invalidate the entire proceeding that a property owner is not estopped to resist payment by standing by without objection until the completion of the work.

Thus, it has been said that where a statute provides for competitive bidding as a condition precedent to the letting of a contract for a street improvement, the courts have usually been strict in requiring that the contract finally entered into with the successful bidder should conform substantially to the terms and conditions previously laid down as the basis for the competitive bidding. Any other rule would open the door to favoritism, and tend to destroy fair competition. As to what constitutes a substantial conformity in a given case, there is variance in the holdings of courts. Generally speaking, it may be said that literal conformity is not required, and that the rule of substantial conformity is applied with greater strictness in cases where the right to enter into the contract is challenged at the inception of the proceedings, and before the contractor has constructed the improvement, and in those cases where there was a previous understanding with the successful bidder, which was withheld from the other bidders. *Hedge v. Des Moines* (1909) 141 Iowa, 4, 119 N. W. 276.

Competitive bidding in the letting of a contract for a municipal improvement is mandatory and jurisdictional, and where an ordinance names a particular kind of pavement, which is manufactured by only one concern, such bidding is in effect omitted, and the proceedings are invalid and void. Under such circumstances, no question of estoppel can arise, even though a property owner stands by without objection and accepts the benefits of the improvement; and he may raise the objection in an action to enforce collection. *Hoosier Constr. Co. v. Seibert* (1917) 63 Ind. App. 594, 114 N. E. 981.

When a city charter provides that all contracts for street improvements shall be let to the lowest bidder, it

means that no such contract can be let for a patented or monopolized article, for which there can be no competition in bidding, and a contract so let is void. Under such circumstances, an owner is not estopped by his silence, after making the protest as required by statute, from objecting to the assessment on these grounds. *Verdin v. St. Louis* (1895) 181 Mo. 26, 33 S. W. 480, 36 S. W. 52, where the court said: "The Barber Asphalt Paving Company contends that plaintiffs have no standing in a court of equity, for, as it alleges, they stood by in silence, and saw money invested upon the faith of the ordinance and contract authorizing the improvements, and failed to make any objection, if any they had; and that, in consequence thereof, they are now estopped by their silence and want of action. No such rule applies in case work is being done upon a public street of a city without authority, as under a void ordinance or contract. Plaintiffs had no more control over the street than any other person, whether citizen of the city of St. Louis, or of some other place. It is not like a case where one person makes valuable improvements upon the land of another, with his knowledge, and without his objection. In such case the owner will not be permitted to take advantage of his own wrong, in accepting the benefits and advantages to his property, and not make remuneration therefor, but such is not this case. . . . Plaintiffs by no act of theirs misled the contractors, or induced them to believe that they would pay for the work, but protested against it from the beginning, and notified them that they would contest the legality of the proceedings under which they were acting."

So, it has been held that an owner, who, because of the distance of his property from a sewer improvement, did not know of the intention to assess him until after the completion of the work, was not estopped in equity to enjoin the collection of the assessment on the ground that the contract was invalid, being entered into at an adjourned meeting of city councils, after a regular meeting at which there was

no quorum present. The court said that the proceedings at such adjourned meeting were void, and that a ratification at the next regular meeting did not validate them. *Pennsylvania Co. v. Cole* (1904) 132 Fed. 668.

Where a statute provides that, on a successful bidder failing to enter into a contract for a street improvement, the city council may have the work done by the street commissioner under certain restrictions, or may "readvertise for bids for such work," a contract let to a second bidder after the failure of the first, without readvertisement, is void. Hence, a property owner who, during the progress of the work, notifies the contractor and the city that he does not acquiesce in the improvement, and will not pay the amount assessed, is not estopped from setting up the facts as a defense, in an action to collect the assessment. *Zorn v. Warren-Scharf Asphalt Paving Co.* (1907) — Ind. App. —, 81 N. E. 672, same case on subsequent appeal (1907) 42 Ind. App. 213, 84 N. E. 509, wherein the court said that the contention that the notice was ineffectual, and that the owner should have made an effort by injunction to stop the improvement, and that, failing to do so until after the improvement was made, he was estopped to refuse to pay for it, was without merit.

An ordinance prescribing the mode and time for advertising the letting of a contract for a street improvement is mandatory, and when not followed the proceedings are void; hence, a property owner, who, with knowledge of the improvement, takes no steps to prevent its construction, is not estopped from contesting an assessment on these grounds. *Keane v. Klausman* (1886) 21 Mo. App. 485, wherein the court said: "There are no proper elements of estoppel against the defendant in the facts stated. The defendant did not cause the making of the contract or the building of the sewer, and was not called upon to interpose against either or else incur a liability having no foundation in law. . . . There can be no pretense here that the contractors were induced to take any steps in the work by the ac-

tion or nonaction of the defendant. No obligation was upon her to follow up the several steps leading to the contract, and assure herself of their fitness. But it did rest upon the contractors to do so, since they were to take every risk of their insufficiency."

A property owner is not estopped from denying his liability on a tax bill for the construction of a sewer, on the ground that the contract was invalid because the advertisement for the letting of the contract was made before the date on which the ordinance took effect, by reason of the fact that he knew of the existence of the proceedings and of work being done thereunder, and failed to attempt to stop it. *Ibid.*

In *Gallaher v. Garland* (1904) 126 Iowa, 206, 101 N. W. 867, it appeared that after the passage of a resolution for grading and graveling certain streets, notice for bids for graveling was given and a contract awarded for the work, including the grading, which necessitated cutting down and filling in to reach the established grade, considerably increasing the expense of the improvement. It was held that the published notices did not correspond with the ordinance and resolution, and that an aggrieved owner had not waived his objection by standing by and seeing the work done without protest. "Had he known that there would be an attempt made to charge his property with the expense of grading, this might, perhaps, be true, but the evidence shows affirmatively that he did not know of this fact; hence there was and can be no waiver."

In *Pennsylvania Co. v. Cole* (Fed.) supra, a suit to enjoin the collection of a sewer assessment, it was contended that no valid notice for bids was given, in that the city engineer advertised for bids to be received on a certain day, fixed by himself under authority of an order of council in which the date was left blank. It was held that the complainant was not estopped from raising the question after the completion of the work, when he had no knowledge at the time that his property was to be assessed.

In *Minden v. Glass* (1913) 132 La.

927, 61 So. 874, the rule was laid down that where the law requires that ten days' notice by publication shall be given for the submission of bids, a contract for a street improvement, made before the expiration of the required time, is null and void, and a property owner is not estopped from objecting to an assessment on this ground, because he stands by without protest and allows the work to be done. On rehearing, however, it was found that the court below had misinterpreted the facts, and that the contract was let after proper notice, so that the rule was not applicable.

The mere silence of a property owner will not make him liable to pay for a street improvement, made without a written contract. *Budd v. Kraus* (1881) 79 Ind. 137, wherein the court said: "No principle of equity or good faith required the defendants in the case at bar to object. The contractor was acting under authority paramount to him; he was acting under the trustees, without regard to the consent or objection of the defendant; the contractor knew or ought to have known, as well as the defendant did, that unless the trustees made a written contract their assessment could not be enforced. It does not appear, nor is it alleged in the complaint, that the contractor was influenced in the slightest degree by the alleged inaction of the defendant. The allegation that the defendant received and accepted the grade is mere surplusage; he had nothing to do with accepting the grade; he could not accept it; that was the business of the trustees."

So, where a city council, failing to receive any bids for the construction of a sidewalk after the passage of an ordinance and the statutory requirements as to preliminary proceedings were complied with, by resolution ordered the city marshal to secure material and labor and construct the sidewalk, it was held that an assessment for the improvement was void, and that a property owner was not estopped from setting up its invalidity because he stood by without objection while the work was in progress, know-

ing that money was being expended and that his property was being benefited thereby. *Clay City v. Bryson* (1903) 30 Ind. App. 490, 66 N. E. 498, wherein the court said: "The proposition of counsel for appellant is that, under the statute, the appellant had the right to make the improvement; it had jurisdiction of the subject-matter and of the appellees; and that, by reason of such jurisdiction, the decision of all other questions arising in the proceedings was but the exercise of jurisdiction; that the manner in which the work was done was a mere irregularity; that under such circumstances the owner who sees the improvement made, and offers no objection until the work is done, cannot defeat the assessment upon the ground of irregularity. Numerous cases are cited for the purpose of sustaining the position. We do not deem it necessary to discuss them. The weight of the authorities requires a substantial compliance with the statute. The letting of the contract was essential to the exercise of jurisdiction. The complaint affirmatively shows that, in a proceeding under the statute to charge the property of the appellee with a burden for the public benefit, the requirements of the law as to the exercise of power were disregarded; no bids were made; no contract let. It is claimed under the averments of the complaint that appellees, during the time said ordinance was being passed and at the time the work was being done, were aware of the facts, and stood by and allowed the work to be done without objection, knowing that the town was expending its money for the improvement, and that their property was being benefited thereby, etc., and that they cannot now object to paying therefor. To concede this claim of counsel would be to say that an estoppel can be founded on a void act of the party who invokes it. Appellant knew, as did appellees, that it was acting in violation of the statute. 'The mere silence of the defendant could not make him liable to pay for an assessment without any contract.'"

4. *Performance of work.*

(a) *Owner estopped.*

In a number of cases it has been held that a landowner, who stands by without objection until a street or sewer improvement is completed, is thereby estopped to object to the manner in which the work is done.

Thus, in *Werninger v. Stephenson* (1918) 82 W. Va. 367, 95 S. E. 1035, it was said in the official syllabus: "After the completion of a public improvement for which special assessments may be made against property specially benefited thereby, and the making and confirmation of the assessments in the manner provided by law, without objection on the part of the owners of the properties assessed, the enforcement of the liens cannot be defeated on the ground of noncompliance with the requirements of the contract under which the work was done, if the omissions or deviations complained of were not of such character as to make the work, when completed, essentially different in character from that ordered and contracted for."

Landowners are estopped from objecting to an assessment on account of the defective construction of a street, where it appeared that they knew of such defects long before the work was approved and the reserve fund paid to the contractors, and took no action to prevent such approval or payment. "They thus, by their laches, allowed the city to lose the fund it had reserved for such contingencies, and have not an equitable standing before the court." *Gault v. Columbus* (1904) 30 Ohio C. C. 335.

In *Mudge v. Walker* (1906) 122 Ky. 29, 90 S. W. 1046, wherein it was urged that the property owners should not be required to pay for a sidewalk, because the work was not completed according to contract, the court said: "The property owners stood by and saw the work completed, and it is too late to complain now. Had they desired relief from the courts, the appeal should have been made before the work was completed and accepted."

The owner of a city lot cannot defeat a special assessment levied by the city for the construction of a sewer

in the street on which such lot fronts, on the ground that there is a deviation from the provisions of the ordinance authorizing the improvement, where such change does not render the sewer less beneficial to his property. The owner, however, is not estopped from raising the question in a bill to restrain the collection of the assessment, notwithstanding he knew of the change during the time the work was being done, and made no objection thereto. *Rossiter v. Lake Forest* (1894) 151 Ill. 489, 38 N. E. 359, wherein the court said: "We do not feel called upon or even justified in entering upon a consideration of the questions as to when a court of equity will interfere by injunction to restrain the collection of a tax, or when in such cases the doctrine of estoppel in pais should be applied, although both questions are discussed at some length in the argument. Here the effort is to invoke equitable jurisdiction to redress a wrong which does not in fact exist. Unquestionably the ordinance is the authority for and the basis of a special assessment for a local improvement, and the work must conform substantially to the nature, character, locality, and description given in the ordinance, and any deviation therefrom which renders the improvement less beneficial to property assessed should entitle the owner to relief against the assessment. Any such alteration, however slight, becomes to the owner a substantial material change. The test should be not merely the identity of location in the ordinance and place of construction, but the effect produced on the assessed property."

So, an objection that a paving improvement has not been made as required by the ordinance cannot be raised at the confirmation of the assessment, after the work has been done. The remedy is by injunction before the work is completed, and, this course not having been taken, the decision of the city authorities, unless there is a fraudulent abuse of their power, is conclusive. *Haley v. Alton* (1894) 152 Ill. 113, 38 N. E. 750.

In like manner, an objection that the

construction of a street was not in accordance with the contract is waived, where a property owner, knowing of the work, stood by in silence and made no protest before the acceptance of the work and the payment of the contractor. *Russell v. Whitt* (1914) 161 Ky. 187, 170 S. W. 609.

While courts of equity will interfere to restrain any substantial departure from the terms of an ordinance relating to a street improvement, in the performance of work thereunder, if applied to in apt time while the work is in progress, where the work has been performed by the contractor and accepted by the city, and the contractor has been paid, a property owner is estopped from restraining the collection of the special assessment, on the ground that the work has not been done in substantial compliance with the provisions of the ordinance. *Callister v. Kochersperger* (1897) 168 Ill. 834, 48 N. E. 156, wherein it appeared that the work had been left in an incomplete, unfinished state, and that materials had been omitted.

A property owner cannot see a contractor go on and make a street improvement in front of his property under a contract with the city, making no objection while the work is being done, and, after the work is completed and accepted by the city as having been done according to the contract, enjoin the collection of the proper expense of the improvement, on an allegation that the materials used and the work done were not strictly in accordance with the contract. *Evansville v. Pfisterer* (1870) 34 Ind. 36, 7 Am. Rep. 214.

Similarly, in *Wilkes-Barre v. McDermott* (1891) 6 Kulp (Pa.) 345, it was held that a property owner could not defend against a paving assessment on the ground that the work was not done in accordance with the specifications, and that the defects were such as virtually to destroy its usefulness, where he stood by, as the work progressed, and permitted the city to pay the contractor, when he must

have known of the defects in the performance of the contract.

Where jurisdiction is conferred upon a municipal body to provide for paving its streets and charge the cost thereof against the property benefited, according to the method provided by law, a property owner who stands by while such work is being prosecuted, with full knowledge that large expenditures are being made for such improvement, which will benefit his property, or upon due notice fails to appear at the proper time and before the tribunal prescribed by law and present his objections, if he have any, will not, after the work is completed, be afforded relief by injunction against assessments levied against the property benefited to pay for such work. *Muskogee v. Burford* (1919) — Okla. —, 186 Pac. 949.

An objection to an assessment for a sidewalk in that the material used was not the same as that named in the ordinance is waived, where a property owner, after an unsuccessful protest, waits until the acceptance of the work before seeking to enjoin collection of the tax. *Stott v. Salt Lake City* (1915) 47 Utah, 113, 151 Pac. 938.

The owners of land on the line of a street cannot invoke the aid of equity to enjoin the city from enforcing payment of assessments against their property for the regrading of the street, and curbing and flagging the sidewalks thereof, on the ground that the work and materials are not in accordance with the stipulations of the contract, but are of an inferior quality, where the application for relief is not made until nearly a year and a half after the last payment was made to the contractor. *Dusenbury v. Newark* (1874) 25 N. J. Eq. 295.

In *Pittsburgh v. MacConnell* (1889) 130 Pa. 463, 18 Atl. 645, it was said: "A property owner who has knowledge that a street contract was fraudulently obtained from the city officials, and sees the work being badly done under it, and neglects to inform the city, or to take any steps to stop the work, has not a very strong equity to be relieved from his or her share of the cost. It is not safe to lie by under such cir-

cumstances until the owner's property has received all the benefit from the improvement, and then attempt to escape all share of the burden. In such case, where the city has in good faith accepted the work from the contractor, the owner is too late with her complaint. Even where the contractor receives the assessment bills in payment of his work, as in the city of Philadelphia, and some other places, it has been held that a substantial compliance with the contract is sufficient to enable the contractor to recover."

An objection that an improvement made in a street consists of changing the grade, where the ordinance calls only for repaving, is waived by action on the part of the objecting property owner which amounts to acquiescence. *People ex rel. Keller v. Many* (1895) 89 Hun, 138, 35 N. Y. Supp. 78, where in the court said: "There is no pretense that the relator objected to the proposed improvement when it was proposed, or that he contended that it involved a change of grade, or that he made any remonstrance on any ground at any time before the work was actually done. On the contrary, he seems to have acquiesced in the proposal and in the plans and specifications for the work. His petition shows that he subsequently presented a claim of some sort to the common council for adjustment growing out of the performance of this work. Under these circumstances, it is fair to presume that he acquiesced in the known theory that the improvement was not an alteration or change of grade. Hence, since his attack upon the respondents' jurisdiction depends upon proof of extrinsic facts, his allegation respecting those facts is met by inferences deduced from his conduct, which tends to show acquiescence in the theory of jurisdiction, that is to say that, with full knowledge of the respondents' proposal, he lies by, waits, suffers an important public improvement to be made, without objection, on the assumption that it did not involve an alteration or change of grade, until he obtains all the benefit which can arise therefrom, maybe presents his claim for damages, and

then turns about and attempts to escape payment of his share of the expense by alleging that the work, after all, really did involve a change of grade. There certainly is no equity in such a case, and if it succeeds at all it should be *strictissimi juris*. To interfere now would involve the rights of many others. Hence, upon principle, and as matter of discretion, we are disinclined to interfere on the theory of want of jurisdiction."

Likewise, it has been held that where a property owner, while an ordinance was being passed and a street improvement was being made, with full knowledge, stood by and made no objection, but permitted the work to be completed, he could not afterwards raise an objection that no grade for the street was established. *Powers v. New Haven* (1889) 120 Ind. 185, 21 N. E. 1083.

In making a similar holding, the court in *Wingate v. Astoria* (1901) 39 Or. 603, 65 Pac. 982, said: "We are clearly of the opinion that where, as in this case, the council has attempted to establish the grade, mere irregularity, or even invalidity, in the proceedings, not amounting to a want of jurisdiction, would not affect its power to subsequently improve the street according to such grade, or afford ground for an injunction by a property owner to restrain the collection of an assessment for such improvement after the work had been completed. Under the charter, proceedings for the establishment of the grade and the improvement of the street are entirely independent of each other, and governed by different provisions of law (Laws 1896, p. 558); and even if the prior establishment of a grade is necessary, there is no more reason for enjoining the collection of a street assessment because the grade was not legally made than because the street was not legally opened in the first instance. . . . So, too, proceedings for the improvement of the street cannot be collaterally attacked in a suit to enjoin the collection of the assessment, after the improvement has been made, upon the ground that some prior proceedings for the establishment

of the grade were irregular and invalid." See to the same effect, *Houck v. Roseburg* (1910) 56 Or. 238, 108 Pac. 186.

In *Realty Sav. Co. v. Southern Asphaltolene Road Co.* (1918) 180 Ky. 242, 202 S. W. 679, it was contended that the material with which a portion of a street occupied by a street railway was built was much more expensive than the other parts of the pavement, and that the city council, in so providing, had acted in collusion with the railway company for the construction of a solid roadbed at the expense of the abutting owners. It was held that a property owner who did not take legal proceedings to settle the question of fraud was estopped, by his failure to do so, to resist the assessment. It was said: "In support of the judgment, counsel for appellees insist that the improvement of streets and ways of a city is the exercise of a governmental function, and it is for the municipality to determine how and with what materials the streets are to be constructed; that the exercise of such functions involves discretionary powers vested in public officers, which are not subject to judicial control, and if the governing law has been observed, the action of the officers vested with such power may not be interfered with by the courts, except under express provisions of law, or where such officers have acted fraudulently or in bad faith, and that under such rule the averments of the paragraph of the petition to which the demurrer was sustained are insufficient to constitute a defense. The rule no doubt embodies the correct principle of the law as found in text-writers, as well as in numerous decisions from this court. . . . A rule equally well established in this state in suits of this character is that the property owner will not be permitted to stand by and allow the street in front of his property to be improved at the instance of the municipality, the contractor to expend his money in making the improvement, the work to be completed and accepted, and the apportionment made upon the faith that the cost was to be a charge upon his property, without

first making some legal objection thereto before the work shall have been done. . . . This rule is not denied by the defendants, but it is insisted that it is in the nature of an estoppel, and that such defense cannot be enforced upon demurrer, but must be pleaded in order for the party relying thereon to obtain the benefit of it. This court, however, in the case of *Louisville v. Gast* (1904) 118 Ky. 564, 81 S. W. 693, held that such conduct on the part of the property owner constituted a waiver of any right which he might have to resist the collection of the price of the improvement as apportioned to his property rather than an estoppel against him. In the case of *Caperton v. Humpick* (1893) 95 Ky. 105, 23 S. W. 875, it was held that a mere objection made by the property owner to the contractor, at the beginning of or during the progress of the work, was insufficient to save him from the consequences of the waiver, and that in order to do so he should manifest his objection by some character of legal proceeding having for its purpose the stopping of the work, unless a valid reason existed for his failure to do so. It is true the defense therein was that Breckenridge street, which was being constructed, was not a public street, but defendants stood by and permitted the work to be completed without taking steps to test that question, and in its opinion this court said: 'If Breckenridge was not at the time a public street, then the contractor who built the bridge, as well as appellee who made the improvements, were simply trespassers, and appellants might have, by legal proceedings, stopped construction of both, and it seems to us good faith required them to do so, if they did not intend to abide by and avail themselves of the benefit thereof, and thus impliedly dedicate the street, if not directly.' If good faith on the part of a property owner would require him to take legal proceedings to test the question of whether the street being improved was a public one, in order to relieve himself of the consequences of the waiver of that question, it would also

9 A.L.R.—51.

require of the property owner in a case like this (having no valid excuse) to take such proceedings as may be necessary to settle the question of the bad faith or fraud on the part of the council in ordering the improvement made. A mere notification given to the contractor of the property owner's objections to the work being done ought not to furnish grounds for the contractor to desist from his work, for in many cases such objections might be frivolous, and the contractor who entered into his contract in good faith should not have his work interrupted, nor should the interest of the public in the improvement of the street be postponed upon such unsubstantial objections as the property owner might conceive to be sufficient. He should be required to manifest his objections in more substantial form by some character of legal proceedings suitable for the purpose. In this case no such proceedings were had, since the work was completed and accepted by the city, followed by the issuance of the apportionment warrants."

Similarly, it has been held that a property owner was estopped from objecting to an assessment on the ground that the city engineer made the grade of a street different from that adopted by the city, where she made no objections during the progress of the work, which was undertaken at her instance and for the benefit of her property, and where, in addition, her agents actively aided the contractor by hauling for him and furnishing material. *McKnight v. Pittsburgh* (1879) 91 Pa. 273.

So, an objection to an assessment for the paving and curbing of a street that at one corner the sidewalk is narrowed by the curb to a width less than that required by statute is waived by a property owner who stands by and permits the city to make the improvement and incur the expense, without making protest. *Ulm v. Cincinnati* (1896) 4 Ohio S. & C. P. Dec. 185.

Where property owners stand by without objection while the work is being completed, "taking the chances of the benefits to their property," they are estopped thereafter to object that

the contractor has cut down the natural grade of the street to an unnecessary depth, rendering access to their property difficult, killing shade trees, and impeding the drainage of the surface water from the street. *De Puy v. Wabash* (1893) 133 Ind. 336, 32 N. E. 1016.

It has been held that an injunction would not be granted against the collection of an assessment for a street improvement, on the ground that the work was not done according to the requirements of the contract, and that both in materials and execution it was defective to such an extent as to render the pavement almost valueless, where the property owner stood by until after the completion of the work and payment to the contractor. *Liebstein v. Newark* (1873) 24 N. J. Eq. 200. The court said: "Equity, however, will undoubtedly readily afford relief in such cases as this, when timely application is made to the court; but such application must be made while the court has the power to do justice between the parties, without injustice to others. In such cases, the court will restrain the city authorities from paying for the work until the defects shall have been remedied; or will compel a just deduction in respect of such defects, from the contract price, if it be still unpaid, or from any part of it remaining unpaid, if sufficient for the purpose; and if not sufficient, then so far as it will go."

... But if the landowners stand by and permit the city to pay the contractor, they can have no relief against the assessment. ... In such case their inaction is a ground of estoppel, and by permitting the city to pay the contract price they have put it out of the power of this court to afford relief. And further, the question under these circumstances would simply be, whether they alone should bear the consequences of the neglect of those who must be regarded as their agents."

After the completion of a street pavement, property owners cannot complain that a street railway company was permitted to remove its rails, instead of paving the portion of the

street occupied by its tracks, as required by statute. *Diederich v. Red Cloud* (1919) — Neb. —, 173 N. W. 698. See to the same effect, *Realty Sav. Co. v. Southern Asphaltolene Road Co.* (1918) 180 Ky. 242, 202 S. W. 679, and *Caperton v. Humpick* (1893) 95 Ky. 105, 23 S. W. 875.

So, an objection that a sewer is not constructed under the supervision of the city engineer is waived where the owner knows of the improvement, and stands by without objection until the completion of the work. *Walsh v. First Nat. Bank* (1909) 139 Mo. App. 641, 123 S. W. 1001.

The alleged fact that a storm-drain sewer, as planned and constructed, has not an outlet provided, is waived by property owners by their failure to protest on that ground within a reasonable time, and having failed to protest, and therefore waived such defects in so far as the defects affect the validity of the special assessment, they cannot be heard to assert such grounds as a defense to the enforcement of the assessment lien. *Ainsworth v. Arizona Asphalt Paving Co.* (1916) 18 Ariz. 242, 158 Pac. 428.

An objection that the city council extended the time within which the contractors were to complete a grading improvement cannot be heard after the completion of the work. "The property owners could not stand by and see the improvement made without making any effort, by injunction, to prevent it, and then, after the work was done or nearly done, refuse to pay for it." *Lafayette v. Fowler* (1870) 34 Ind. 140.

An objection that "no work was done on the new street" for more than a year from the time the land was taken cannot be raised in a suit to enjoin the collection of an assessment after the owner has stood by for four years while the work was performed and expenditures incurred, without an appeal to a jury. *Whiting v. Boston* (1870) 106 Mass. 89.

After the completion of a sewer with capacity to drain an adjacent district, the property holders in the latter are precluded from objecting to the connection of their sewer with it

and being assessed therefor, on the ground that the charter provided for connection with a public sewer. *Eyer-man v. Blaksley* (1883) 78 Mo. 145, wherein the court said: "It might be questioned whether the assembly can authorize the construction of a district sewer of greater capacity than necessary to drain the district in which it is constructed, at the expense of the property holders. They might object and resist the payment of the extra cost of such a sewer, or, by timely proceeding, restrain the municipal authorities from its construction."

An injunction will not be granted at the suit of a property owner to restrain the collection of an assessment for the construction of a sewer, on the ground of fraud, by the placing therein, by the contractor, of rings instead of a more approved method of connecting the pipes, where no serious damage has been done thereby, and such owner stood by and permitted the work to be completed, instead of enjoining its completion. *Blanchard v. Columbus* (1896) 8 Ohio S. & C. P. Dec. 676.

Where the petition for an improvement refers to the street proposed to be improved as a public road already laid out, property owners who know that the line of the improved street is at variance from the old, but make no objection, will be held to have acquiesced in the improvement on the lines actually followed, and, after the town has spent money, it does not lie in their mouths to object to an assessment on that ground. *Gillman v. Bloomfield* (1909) 78 N. J. L. 67, 73 Atl. 604.

After a city pavement has been completed and in a large measure paid for, both the city and property owners having received the benefits thereof, it is too late for a property owner to resist the payment of his assessment. *Clark v. Opelousas* (1920) 147 La. —, 84 So. 433.

(b) Owner not estopped.

In other cases a property owner has been held to be entitled to resist the payment of an assessment for a street or sewer improvement because of some

defect in the manner in which the work was performed, though he made no objection thereto during the progress of the work.

Thus, in *Catts v. Smyrna* (1914) 10 Del. Ch. 263, 91 Atl. 297, it appeared that the statute under which an improvement was made provided for the paving of the street, but not for curbing or paving to the building line, and it was held that an owner who stood by without objecting until the completion of the work was not thereby estopped from contesting the validity of the assessment, on the ground that the curbing was improperly located.

In order to justify an assessment for a street improvement which derives its authority solely from a petition of property holders, it is clearly necessary that the work should be done in accordance with the petition. Therefore, where a petition asks for the improvement of nine streets according to "the present established grade," and the city improves only seven streets, grading some to grades thereafter established, and one to a new grade, the petitioners are not estopped from objecting to the assessment because they did not proceed with their objection until after the work was completed. *Hutchinson v. Omaha* (1897) 52 Neb. 345, 72 N. W. 218, wherein the court said: "It is only in cases of laches that the plaintiffs are estopped by permitting the work to progress. The fact that the work was progressing was not notice to these plaintiffs that the city did not intend to proceed therewith according to the petition, and some of them had no actual knowledge of the fact. Moreover, the city had a general power to grade the streets, assessing one half the cost against the abutting and adjacent property, and that specially benefited. As it had that power, it is difficult to see how the plaintiffs could have prevented the performance of the work."

So, it has been held that the provisions of a statute that a defendant in an action to recover the apportionment of the cost of a street improvement from a property owner should not be allowed to make the defense

that the work was not done according to contract, meant only that objections as to the quality of the work, the kind of materials used, and like defects, if any, could not be set up as a defense to the action after the work had been completed and received by the proper authorities and apportionments made, but did not mean that a party sued for street improvements was estopped from presenting the defense that the improvements were made at a place other than that provided by the ordinance. *Petter v. Allen* (1899) 21 Ky. L. Rep. 1122, 54 S. W. 174.

Where a statute provided that "no officer of such city shall be interested, directly or indirectly, in any contract with such city, or with any of the officers thereof, in their official capacity, or in doing any work or furnishing any supplies for the use of such city or its officers in their official capacity; and any claim for compensation for work done, or supplies or materials furnished, in which any such officer is interested, shall be void, and if audited and allowed, shall not be paid by the treasurer," it was held that a property holder who did not object, but remained passive until the property was improved, was not thereby estopped from objecting to the validity of a street assessment. *Northport v. Northport Townsite Co.* (1902) 27 Wash. 543, 68 Pac. 204.

A property owner is not estopped from resisting payment of an assessment for the construction of a sewer on the ground that it was not completed within the time named in the contract, though he has connected his property with and uses the sewer. *Neill v. Trans-Atlantic Mortg. Trust Co.* (1901) 89 Mo. App. 644, wherein the court said: "Defendant had no lot or part in employing the contractor to build the sewer. The street is his property, subject to the easement of the public. . . . He, therefore, finds upon his property (which he may rightfully use for any purpose not inconsistent with public use and control) an underground drain called a sewer. Why may he not use it without paying for it, when it has been put there without his request, and, it may

be, against his consent? We have the highest authority for saying that, when one finds a structure upon his property which has been placed there without his request, or direction, or consent, he cannot be made liable for its cost by using it."

In *Schumm v. Seymour* (1873) 24 N. J. Eq. 143, departures from the contract specifications for a street improvement were alleged to have been made in the flagging, the bridge stone, and the curbing. It was also charged that the road was not graded and excavations filled in, as the specifications required, and that the sand filling was not in fact furnished, and that the covering to be put on top of the road-bed was not of the quality required by the contract. It was held that, payment not having been made, an owner might have relief in equity to restrain the collection of the assessment, and had not waived his right by remaining silent and accepting benefits. See also *Brewster v. Newark* (1856) 11 N. J. Eq. 114.

In *Wingert v. Tipton* (1907) 134 Iowa, 97, 108 N. W. 1035, it was contended that inferior materials were used in the construction of a street pavement, and it was pleaded by the contractor, the action being a suit in equity to declare the assessment invalid, that all the matters complained of in respect to the character of the paving work were known to the plaintiffs while the work was in process of construction, and that they made no objection; further, that in response to the notice published pursuant to a resolution of the city council, none of the plaintiffs appeared and filed objections addressed to the character of the work. The court, however, said: "It is said that out of this situation an estoppel arose in favor of defendants, in the face of which plaintiffs should not be heard to insist upon the matters of defect and failure now pleaded by them to prevent payment being made under the contract. It is not easy to see how an estoppel could thus arise. In the first place the individual property owners of the city cannot be held to a precise knowledge of the terms of the contract; the sub-

ject-matter was within the control of the city council, not only to make the contract, but to attend to its execution. And most certainly the individual property owners were under no obligation to stand about watching the work, and make protest because of this or that according to their individual interpretation of the contract. The contractors were familiar with the provisions of the contract, and they owed the duty to the city and to each individual taxpayer to execute the work according to such contract. It would be a monstrous doctrine that would permit a recovery by them; notwithstanding conscious and flagrant violations of the contract, because, forsooth, some of the individual property owners, in passing by the work, observed the manner of its performance. No case can be found in the books to countenance such a doctrine. Moreover, that an equitable estoppel bottomed on silence may arise, there must be not only a duty to speak, but the silence must amount to a legal fraud, in that thereby the other party, ignorant of the truth, was misled into doing that which he would not have done but for such silence. If both parties know the truth, there can be no estoppel by silence."

Where objection is made before final payment by the city, equity will relieve the property owner from a street assessment where the work has been defectively performed, and will also restrain the city from paying the contractor the full amount of his contract, deducting a sum to cover the deficiency in workmanship, notwithstanding the owner has stood by and accepted the benefits of the improvement. *Schumm v. Seymour* (N. J.) *supra*.

Mere silence on the part of an owner, and failure to make objections to the kind of curbing being laid as different from that petitioned for, is not such acquiescence as will estop an owner from denying the validity of an assessment. *Winnebago Furniture Mfg. Co. v. Fond du Lac County* (1902) 113 Wis. 72, 88 N. W. 1018, wherein the court said: "It must be borne in mind that, to arouse estoppel

from mere silence, the plaintiff must, at least, have had reasonable ground to suppose that the work was proceeding upon the expectation of charging expense to it. Of this also there is an entire absence of evidence. The plaintiff presumably knew that it was not under liability, except by its own consent. It knew it had given consent only upon condition of a block pavement. It knew that the plan for a block pavement had been abandoned, although it does not appear that it knew that others had signed a petition and agreed to be liable in case of a macadam pavement. In all this there was nothing to notify the plaintiff that the city purposed or expected to charge it with the expense of curbing. The city had a perfect right to put in such pavement at the expense of the general funds of the city, and nothing to indicate a different policy was brought to plaintiff's notice. We therefore feel constrained to disagree, both with the finding of fact that there was no objection, and with the conclusion of law that plaintiff, by silence or acquiescence, has estopped itself from denying liability for the improvement made."

So, where it appears that not only were sidewalks improved by grading, curbing, and flagging, the gutters by paving, and the street by grading, as provided for in the ordinance, but that the street was also improved by macadamizing, it was held that a property owner is not estopped by his silence from objecting to the assessment of the entire improvement on the ground that the macadamizing was unauthorized. *Burnett v. Boonton* (1907) 75 N. J. L. 467, 70 Atl. 67, wherein the court said: "Nor is the prosecutor estopped from denying the validity of the assessment, so far as the benefit of the macadam is concerned. If the defect consisted of an irregularity only, this contention might prevail, since the prosecutor was inactive and silent in the face of the progress of the work. But this improvement, so far as paving with macadam is concerned, was unauthorized by the ordinance under which the work was instituted. The inaction and silence of the prosecutor, there-

fore, worked no estoppel or laches on his part. He had a right to rest upon the fact that he was not to be assessed for the benefit of this unauthorized work any more than he would have been if it had been done by some mere volunteer."

In *Chehalis v. Cory* (1911) 64 Wash. 367, 116 Pac. 875, it appeared that a city council had authority to levy assessments for a street improvement to the amount of \$6,000, but could not go beyond that amount without notice. It was held that property owners were not estopped from contesting an additional amount of more than \$8,000 by any subsequent acts, on which the contractors did not rely in making a larger assessment. See also *Collins v. Ellensburg* (1912) 68 Wash. 212, 122 Pac. 1010, wherein the court said: "The obvious purpose of the estimate is to advise the property owners of the probable expense of the proposed improvement, that they may protest against it if it exceeds what they are willing to pay for the improvement. It requires no argument to show that, when the actual cost is grossly in excess of the estimated cost, the publication of the estimate is much more prejudicial to the interests of the property owner than if no estimate whatever had been given. It is actually misleading. If no estimate be given, he could, in response to the published notice, protest against further proceeding until it be furnished, and, if overruled, would not be estopped to enjoin the enterprise or contest the assessment on that ground. But where an estimate is given, he has the right to rely upon it, and the city should be estopped to assert any jurisdiction to exceed the estimate in the actual cost assessed. Since the legislature might have dispensed with any estimate, the failure of the council to make any would doubtless be held an irregularity which might be waived by a failure to protest. This is also on the ground of estoppel; but obviously no estoppel against the property owner can be grounded upon his action, induced by erroneous information upon which he had the legal right to rely."

Where a petition for a street im-

provement is for grading only, and the contract provides not only for the grading of the street, but also for metaling and the placing of gutters, an assessment for the whole work is void, and a property owner is not estopped from contesting it because he remains silent during the progress of the work. *State, App, Prosecutor, v. Stockton* (1898) 61 N. J. L. 520, 39 Atl. 921, wherein the court said: "The presentation of the petition is a jurisdictional fact which, being wanting, left the council without any power whatever, and the presentation of a petition for one character of improvement did not authorize the council to proceed to make another and very different one. The jurisdiction of the council was to proceed to grade this street, and not to metal, macadamize, and curb it. The power of the council in that matter of this character of street improvements was a specially delegated authority, and the proceedings thereunder were legal only when in strict conformity with its direction. *State, Terhune, Prosecutor, v. Passaic* (1879) 41 N. J. L. 90. The presentation of this petition was a condition precedent to the exercise of the power to grade this street, and was a jurisdictional requisite. The improvement, if any was ordered made at all, must have been confined to that requested in the petition, and cost and expense incurred could only be for the grading, and an assessment for any other expense would be a void assessment. . . . It is contended that the prosecutors are estopped from denying the validity of this assessment. If the defect consisted of an irregularity only, this contention might prevail. It is said the prosecutors were inactive and silent in the face of the progress of this improvement, and that they are in laches and estopped from making the objection now urged against the assessment. But this improvement, out of which this assessment arose, not being within the power of the council of the town to make, and unauthorized by the act under which it could have exercised this power, the alleged inaction or silence of the prosecutors during the progress of the

work created no laches or estoppel on their part. They had the right to rest upon the fact that they could not be assessed for the cost of this absolutely unauthorized work, even if they had the knowledge that it was being done, any more than they would have been chargeable if it had been done by some mere volunteer. They were chargeable only with the knowledge that they had applied for certain work to be done, and that the council were unauthorized to do any other work the expense of which could be imposed upon their property. Where municipal officers exercise powers not conferred by charter in the making of street improvements, they are in no sense agents or representatives of the property owners, and no liability attaches to the latter from their mere inaction or silence, for improvements so made. The doctrine of equitable estoppel has no place in a case where usurped powers have been exercised by municipal officers, who, in so doing, were contravening public policy, as well as known positive law."

Likewise, where an ordinance was passed for the repair of a road at a certain price per square yard, and after the contract was let, the council decided on a larger improvement at greater expense, it was held that their decision as to the necessity of the extra work was not binding on an adjoining owner, and that he might resist the payment of the assessment, notwithstanding he made no effort to enjoin the progress of the work. *Reynold v. Clearwater* (1859) 3 Ohio Dec. Reprint, 169, wherein the court said: "It is said we ought not to interfere because the city council have adjudicated, by ordering the improvement to be made and accepting it after the work was done, thereby ratifying the acts of the city officials, as well as those of the plaintiff. These proceedings, it is supposed, concluded all parties, except in the case of actual fraud, or where fatal defects are found to exist in the ordinance, or the mode in which the contract is claimed to have been performed. The question, then, is simply this: Can we supervise the acts of the city authorities after they

have been performed, when it is very clear we might have enjoined them for the commission of those acts, if our equitable power had been invoked before they were complete, or while they were threatened to be done? It seems to us the preventive process of the court could not have been denied, if an application had been made, upon the evidence now adduced, for an interference at any time during the progress of the work, as it is clear we should but have thereby awarded a clear legal right to avoid an unjust assessment, and saved the landholder from a burden that ought not to have been borne. Nor does it follow, because a restraining order was not obtained, that the omission to seek that remedy is a waiver of any right on the part of the defendant, to dispute the regularity of the course pursued by the agents of the city. . . . We cannot then permit the idea to be entertained that there is no supervision over the official acts of municipal agents, or that their action is conclusive in any case, where they are empowered to levy an assessment. Such a doctrine would leave a party, injured by gross official delinquency, without remedy. In every ordinary case, where the final action of a judicial tribunal is had, there may be a supervision by appeal or writ of error, but in the case before us there is no such remedy; nor would the ordinary process of certiorari reach the point, as the complaint is not of the act of the council, but of the agents of the city, in exceeding the power alleged to have been conferred by the ordinance."

If material for a street improvement is furnished and work is done which are not provided for in the contract, or properly authorized, a landowner who stands by and allows the improvement to be completed, and accepts the benefits of it, is not estopped from enjoining the collection of an assessment in so far as the extra items enter into it. *Schumm v. Seymour* (1873) 24 N. J. Eq. 143, wherein the court said: "The work and materials in these several items appear to have been bargained for, or directed to be

furnished, at different times, by some of the individual commissioners, or by the engineer acting for them. No action respecting them was taken by the commissioners, as a collective or corporate body. There was no written or definite bargain as to price or other particulars, between the commissioners in their lawful capacity on the one side, and the contractor on the other, and no advertisements or competitive bids. As a necessary consequence of this absence of any contract by the commissioners, either directly or through an authorized agent, this part of the alleged improvement is altogether without authority of law, and I can discover no grounds on which any part of the cost of it can be assessed upon the lands of the complainant. The affairs of a corporate body can be transacted only at a corporate meeting. Its legislative and discretionary powers can be exercised only by the coming together of the members who compose it, and its purposes or will can be expressed only by a vote embodied in some distinct and definite form. . . . A resolution is shown to have been regularly passed, directing the execution of the original contract according to the bids, but all the work and materials now in question appear to have been ordered by no person lawfully empowered to do so by the commissioners as a corporate body. . . . In the present case, it was urged on behalf of the defendants that the complainant and others similarly interested cannot be permitted in equity to avail themselves of the illegality of the contract, after permitting the improvement to go on and receiving its benefits. The doctrine of equitable estoppel is a familiar one, and of frequent application, but it has no place in transactions like the present, where usurped powers have been exercised by municipal officers, who, in so doing, were contravening public policy, as well as known positive law. There can be no pretense of ignorance, or accident, or mistake, or of having been misled by the party to whom the alleged benefit would accrue. In their illegal assumption of power, they were in no sense agents or representatives

of property owners, and no liability attached to the latter from mere inaction or silence."

A landowner who, with knowledge that a street was being improved and that an attempt would be made to assess the cost on the abutting owners, stands by during the progress of the work without making any objections thereto, is not estopped to question the validity of the assessment for the reason that the supposed street was not a city street, and therefore the city had no authority to pave it. *Turner v. Sievers* (1920) — Ind. App. —, 126 N. E. 504.

5. Assessment.

(a) Owner estopped.

Generally, where a property owner knows of a street improvement on which his land abuts, and makes no objection, he is estopped from questioning his liability for a portion of the expense. *Nowlen v. Benton Harbor* (1903) 134 Mich. 401, 96 N. W. 450.

But an assessment is not illegal because a taxing district or an assessment district is not established, and an owner who knows or should know of the building of a sewer cannot enjoin the collection of the assessment, where he remains silent until after the completion of the work. *Wilson v. Cincinnati* (1897) 7 Ohio S. & C. P. Dec. 242.

So, where a property owner remains inactive and allows the city to let a contract, and the contractor expends money in paving and improving a street, he cannot escape the legal burden which has been placed upon his land as a result of the improvement. By his inaction he is estopped from objecting to the inclusion of his property within the assessment district. *Granite Bituminous Paving Co. v. Fleming* (1913) 251 Mo. 210, 158 S. W. 4.

Similarly, an objection to being included in an assessment district is waived by acquiescence in a street improvement and the assumption that the property has been benefited. *Farington v. Mt. Vernon* (1900) 51 App.

Div. 250, 64 N. Y. Supp. 863, affirmed in (1901) 166 N. Y. 233, 59 N. E. 826.

A delay of five or six years is such laches as will estop a property owner from objecting to an assessment for opening a street on the ground that it is largely in excess of the benefits conferred. *State, Wetmore, Prosecutor, v. Elizabeth* (1879) 41 N. J. L. 152. See also *State, Weart, Prosecutor, v. Jersey City* (1879) 41 N. J. L. 510 (sewer), wherein the court said: "That the passage of time should afford some degree of stability to the acts of municipal corporations is, I think, obvious. The policy of such a rule is very apparent when applied to those acts which concern the revenues of the city. Within this class of acts are those imposing general taxes, upon which the municipality depends for the means of executing its corporate functions, and the levy of special assessments, for any default or failure in the collection of which the city must respond. Five years passed from the date when the report of the board was filed until the allowance of these writs. During that time the city has conducted its financial affairs, and provided for its current and future expenses, upon the supposition that it would not be called upon to supply a deficiency caused by the vacation of these assessments. This condition of affairs, when considered in connection with the method in which these assessments were made, presents an instance where the court should, in the exercise of its discretion, illustrate the maxim '*nam vigilantibus et non dormientibus jura subveniunt.*'" See to the same effect, *State, Kirkpatrick, Prosecutor, v. Street & Sewer Comrs.* (1880) 42 N. J. L. 510.

A delay of a year and a half after the completion of work and payment on the contract will estop property owners from objecting to a sidewalk assessment, on the ground that it was levied without regard to the benefit derived from the improvement, but in proportion to the number of linear feet owned by them. *Dusenbury v. Newark* (1874) 25 N. J. Eq. 295.

So, in *Ross v. Portland* (1901) 105 Fed. 682, it was held that while

a rule of measurement arbitrarily placing the entire burden of a street improvement on the abutting owners, by the front foot, without any provision for a proper inquiry as to the special benefits accruing from the improvement, is taking property without due process of law, after such an assessment has been levied for a period of seven years, it is too late to question its validity, and an injunction to restrain the sale of the land will be refused.

And where a property owner waits for more than two years before questioning the validity of an assessment, on the ground that, instead of assessing the cost of the improvement against the abutting lots on the part of a street that was improved, each block was made a taxing district, he is estopped from asking for a reapportionment because of the irregularity. *Arends v. Kansas City* (1896) 57 Kan. 350, 46 Pac. 702, wherein the court said: "In compliance with the notice given to the property owners in 1889, a large number of them paid the amounts of the assessments in full; and the remaining property owners have, with few exceptions, paid annual assessments, and continued to pay them until the commencement of this proceeding. Only a part of the property owners asked for a reapportionment of the cost of the grading, and they have not availed themselves of the remedies pointed out by the statute where special assessments are informally or illegally made."

And a property owner who makes no objection to an apportionment of the cost of a street improvement, but on the contrary acquiesces in it, is bound by it, and the fact that some part of the assessment is not levied on certain lots, in the absence of any evidence that there is any injustice, does not present any legal grounds for invalidating the assessment or enjoining the levy. *Bloch v. Godfrey* (1904) 26 Ohio C. C. 781.

Moreover, a property owner who admits that the improvement of a street as a whole has been of benefit to him, will not be permitted to object to the amount of his assessment on the

ground that certain cuts necessary for the grade, made some distance from his property, and increasing the amount of damages, were not of special benefit to him. *Boyd v. Wilkinsburg* (1897) 183 Pa. 198, 38 Atl. 592.

Where a party is active in the promotion of an improvement, appearing at the meeting of the commissioners, consenting and desiring the street to be opened, he is estopped from objecting to the assessment levied, on the ground that incidental expenses and fees are included in the amount. *Lewis v. Utica* (1879) 67 Barb. (N. Y.) 456, wherein the court said: "It is a familiar rule that he who will not speak when he should, shall not speak when he would. A party, by assenting to proceedings, aiding them and approving them, until others act upon his assent and approval, contributes to the creation of an estoppel against himself which binds him. It has been repeatedly held that a party may waive a statutory and even a constitutional provision in his favor. . . . These principles, applied to the facts found by the referee, lead to the conclusion that Albertus Lewis cannot be heard to raise technical objections to the proceedings he has promoted, assented to, and co-operated in, until after a report therein was made which was a surprise to him as to the amount of the assessment of lands, to protect which he appeared in the proceedings."

So, where a city constructed a sewer, the cost of which was paid equally by it and the state, and, although the charter provided that abutting property owners should be assessed to pay the cost of construction, no assessment was made, but a resolution was passed, providing that property owners should be allowed to connect with the sewer at a certain amount for each house, it was held that one who made his own connections through the pipe of a neighbor waived the irregularity of assessment, and impliedly promised to pay the reasonable amount fixed by the resolution. *Fergus Falls v. Boen* (1899) 78 Minn. 186, 80 N. W. 961, wherein the court said: "If it was the duty of

the council of the city in question to proceed to collect the cost of construction by an assessment upon abutting property, and if there was a neglect of duty in this respect, the defendant as a taxpayer, or as a frontage property owner, could have compelled the performance of the duty. He could have easily obtained an assessment to cover the cost and to reimburse the city,—exactly what he now insists is the only manner in which the cost can be collected. But this he has not done. Proceeding in his own way, and in defiance of the resolution, he has connected his premises with the sewer, and now refuses to pay the sum fixed as a condition for making this connection. His position is that, because the council proceeded improperly and irregularly by prescribing terms upon which the sewer could be used by the abutting property owners, instead of making an assessment under the charter, he may also proceed improperly and irregularly to connect his premises with it. He had no more right to do this than he would have had to tap a water main, or to connect with an electric light plant belonging to the city, simply because the authorities had proceeded in an improper manner when prescribing terms and conditions for using water from the main, or current from the electric plant. And when the defendant proceeded to make the connection in question, and to avail himself of the sewer privileges, he waived the irregularity of the action of the council, accepted the terms and conditions imposed by the resolution, and by implication promised to pay the amount fixed therein."

So, in an action to restrain the collection of an assessment for a sewer, the complainant cannot be heard on the question as to the illegality of the assessment because all of the property abutting on the sewer was not assessed, where he has not been injured or his assessment increased by reason of the failure to apportion differently, and where he knew of the improvement. His remedy is by an action to enjoin the levy of the alleged increase, and, having failed to avail himself thereof, he cannot be heard

to complain in an application for an injunction. *Wilson v. Cincinnati* (1897) 7 Ohio S. & C. P. Dec. 242.

In *New Haven v. Fair Haven & W. R. Co.* (1871) 88 Conn. 422, 9 Am. Rep. 399, it appeared that an assessment for the paving of a street was levied against a street railway company which, under its charter, was required to keep in repair the street between its tracks, and a certain portion on each side. In holding that the defendant had waived its right to object on the ground of a want of special benefit, the court said: "The defendant suffered the city to go forward and incur the expense, with full knowledge of the proceeding, and without objection at the time. The defendant must have known that the improvement would largely benefit it in the matter of repairs, that the proceeding was under the statute, and consequently at the expense, in part at least, of the parties benefited. There was no reason to suppose that the city was doing the work of the defendant at its own expense, or at the expense of other parties. The presumption therefore is, in the absence of any finding to the contrary, not only that the defendant consented to the making of the improvement by the city, but that there was an implied understanding that the defendant was to bear its fair proportion of the expense. We think, therefore, that the defendant should be estopped from setting up this claim. That the defendant is benefited to some extent by the improvement is apparent. Whether it is benefited to the extent of the assessment, and whether the assessment is a fair proportion of the whole expense for the defendant to pay, are not now open questions. Those questions could only be heard on an application for relief under the statute."

Where a property holder knows of an improvement and watches the progress of the work, it is too late to object to an assessment on the ground that in computation no allowance has been made him for damages caused by the new grading of a street, necessitated by the building of a sewer. *State, Stewart, Prosecutor, v. Hoboken*

(1894) 57 N. J. L. 330, 31 Atl. 278, wherein the court said: "In the present case the report of the commissioners was confirmed December 3d, 1891. The testimony shows that the prosecutor was informed, while the improvement was in course of execution, that the grade of the street was to be raised. He says that he saw the work progressing, and that the foreman told him that they were running a sewer through the street, and that they were also going to raise the grade. He seems to have paid no further attention to the matter. He made no arrangements to be informed, either directly or through his local agents, of the progress and completion of the work, or of the assessment."

In *Ferguson v. Stamford* (1891) 60 Conn. 432, 32 Atl. 782, a suit to set aside an assessment of benefits for a city sewer, it was held that the complainant's contention that the assessment was improperly made, as covering unimproved land, could not be heard, where he had stood by until the work was completed without objection.

In *Muscantine v. Chicago R. I. & P. R. Co.* (1890) 79 Iowa, 645, 44 N. W. 909, it appeared that land assessed for a street improvement was described as lying "between the south line of Water street and the Mississippi river." Formerly, the street fronted on the river itself, but subsequently the line of Water street was moved north and its former site acquired by the defendant for railroad purposes. It was insisted that there was no such line of Water street, and that the description was impossible, but it was held that even if the contention was good, the defendant was estopped from contesting the validity of the assessment on this ground, after the work was completed and the assessment was made.

A property holder, who makes no objection until after a street improvement has been completed and payment has been made to the contractors, cannot allege that other property was assessed for less than the actual benefit. *Lent v. Tillson* (1887) 72 Cal. 404, 14 Pac. 71, wherein the court said: "If there was a valid law authorizing the

improvement, and the board was authorized to act, and the county court obtained jurisdiction, the plaintiffs cannot complain here of mere irregularities, or bad conduct on the part of the commissioners, for which that court could have afforded relief. The alleged frauds were all such as, by the exercise of a proper diligence, ought to have been known by the interested parties in time to present to the county court. This action is by the property owners on the east side of the street; the property taken was immediately opposite. It is averred that the commissioners wilfully and intentionally determined the value of lots taken to be more than three times as much as they in fact were, and omitted from their estimate of benefits to the same lots about two thirds of the actual benefit. This overestimate of damages, and underestimate of benefits, so far as I can judge from the statement of the case in the record, seems to be fully sustained. But the report showed fully what the estimates were, and the injustice was so obvious that a mere inspection by those familiar with the property, as the plaintiffs were, could not fail to disclose the fact. . . . But admitting the validity of the statute, and that the preliminary steps were taken which authorized the work to be done, the plaintiffs cannot now maintain this action. The statute, as I have already stated, manifested very plainly that the improvement was to be made for their special benefit, and that they were to bear the entire cost. They were afforded an opportunity, even after the board was organized, to arrest proceedings, if a majority in value of frontage should be of opinion that it would not be to their advantage, and were distinctly notified that if they permitted it to be completed, their acquiescence would be deemed an absolute acceptance by them of the lien created by the act. Under such circumstances they could not remain silent, and permit the money obtained of the bondholders to be expended in the improvement of their property, and then escape liability on the plea that the officers charged with the work, who were in a sense,

their agents, were guilty of misconduct and fraud, which they by proper diligence could have prevented."

Where property owners were active in securing the action of the common council in providing for a sewer, and stood by without objection until after the work was completed, it was held that they could not be heard to object to an assessment on the ground that 75 per centum of the cost was levied against them, alleging that the sewer was constructed mainly in the interests of the public. *W. F. Stewart Co. v. Flint* (1907) 147 Mich. 697, 111 N. W. 352.

Where a statute provides the method of assessment for grading streets, a property owner who stands by until after the completion of the work cannot raise the question, in an action to annul the assessment, that it is in excess of benefits. *Denver v. Campbell* (1905) 33 Colo. 162, 80 Pac. 142, wherein the court said: "The charter prescribes that the cost of grading streets, except at the intersection of streets and alleys, shall be assessed upon all the lots abutting on the streets graded, in the proportion that the frontage of each lot is to the frontage of all the lots in the graded district. This rule, though arbitrary, does not contravene the law that assessments for local public improvements shall be in proportion to the benefits, because it appears to be a fair one. Where the rule works an injustice, relief may be granted. A distribution of the cost of grading under this rule cannot be set aside, because it may appear that in a few instances the assessment was in excess of the benefits accruing to particular lots. In other words, such a condition would not render the entire assessment void, but would entitle those aggrieved to appropriate relief. The method of apportioning the cost of grading to the several lots in the district follows the rule prescribed by the legislature. This rule is capable of producing reasonable equality, and the provisions of the charter on the subject are not illegal or invalid. In conclusion, it is perhaps not amiss to add, although not deciding the point, that the trend

of the decisions of recent years, involving questions affecting the validity of municipal improvements, is to be less technical than formerly, and to require owners whose property may be assessed for such improvements to be at least reasonably diligent in protecting their rights before the improvements are completed. . . . Elliott, in his work on *Roads & Streets*, 2d ed. 590, says: "There is sound reason for extending, rather than abridging, the principle of estoppel in street assessment cases." Owners ought not to be permitted, by their silence, to mislead contractors, municipal authorities, and those supplying the money to pay for improvements by the purchase of bonds, respecting matters which could have been corrected had the attention of the municipal authorities been called thereto in apt time."

Likewise, an objection to an assessment that it is for several kinds of improvements, on different parts of a street, if tenable, is waived by failure to protest before the completion of the work. *State, Provident Inst. for Sav., Prosecutor, v. Jersey City* (1890) 52 N. J. L. 490, 19 Atl. 1096, wherein the court said: "The grading in this case was for sewerage purposes, and was necessarily incident to the work of properly paving the gutters and roadway. It also appears that an amount in excess of the entire cost of grading was cast upon the city at large. If, therefore, it was necessary or proper that separate assessments should have been made, the relators did not make that objection in the remonstrance which they presented to the confirmation of the assessment, and they have failed to show that any injustice is done to them by the neglect to make separate assessments, or that any undue burden has been put upon them. Under these circumstances, the prosecutors are not entitled to demand a new assessment, and as they neglected to take advantage of irregularities in the proceedings before the work was completed and paid for by the city, the writ of certiorari should be dismissed, with costs."

A property owner who does nothing for six months after the confirmation

of a street assessment is guilty of laches, and a court of equity will not grant relief by vacating the judgment and enjoining collection of the tax, though it appears that the assessment against her is in an amount greatly exceeding that named in the notice sent to her by the commissioners. *Meadowcroft v. Kochersperger* (1897) 170 Ill. 356, 48 N. E. 987, where it was said: "The judgment of confirmation was entered June 14, 1893, and complainant had notice of it six months afterwards, but did nothing to assert any supposed equity until she filed this bill after the county treasurer had applied for judgment against her lands as delinquent, at the July term, 1895. The special assessment was the fund relied upon to pay for the improvement, and it appears from the averment of the bill that the improvement had not enhanced the value of complainant's property, that the work had been completed, and the necessary expense incurred. For aught that appears this work was done after she had notice of the judgment. The record of the judgment was fair on its face, and the city was entitled to rest secure in the belief that it was regular and valid. If it was not so, for any reason known to complainant, it would be inequitable to allow her to lie by until the improvement was made and then, for the first time, make known a defect not apparent in the record."

Land within the limits of a city, although used for agricultural purposes, is subject to local assessment for street improvement, and a property owner who stands by without objection until the completion of an improvement is estopped from raising the question. *Barber Asphalt Paving Co. v. Garr* (1903) 115 Ky. 334, 73 S. W. 1106, wherein it was said: "In determining the liability of the property for the cost of the improvement after it has been made, the court has a very different question before it than would be presented if the objection was now made to the annexation of the property between Fortieth street and Shawnee avenue, and the propriety of the annexation was the question to be determined, or even if the property own-

ers had enjoined the construction of the street at their cost when ordered by the council. But they stood by and allowed the improvement to be made, and, without notice to him, allowed the contractor to expend his money in making it, upon the faith that the cost was to be a charge upon the abutting property. This distinction has often been pointed out by this court. . . . In *Elliott on Roads & Streets*, § 590, it is well said: 'The fact that a street is being improved by order of public officers ought to put the property owner upon inquiry, and to him should be applied the familiar rule that one put upon inquiry is chargeable with notice of all the facts which a reasonably diligent investigation will disclose. Public works are undertaken, as everyone knows, under authority delegated by law to public officers, and there is little or no reason why a property owner who has full notice of what is being done should be allowed to stand by in silence until the work is completed, and then escape paying for the benefit his property has received. If he would avoid this result, he should act promptly, and if he fails he should not demand that the persons who have done the work should go unpaid.'

Where the owner of land, through her agent, has knowledge of a street improvement, and has the benefit of the work on her land, she cannot be permitted to object to the want of regularity in the mode of procedure in making the assessment. *Stetler v. East Rutherford* (1900) 65 N. J. L. 528, 47 Atl. 489.

And where a street improvement has been completed and the contract complied with, a property owner cannot evade payment of an assessment because of the method by which it was reached. *Cooper v. Nevin* (1890) 90 Ky. 85, 13 S. W. 841.

Where a statute provides that the assessment for a street improvement shall be referred to the city commissioners, and the council refers it instead to a street and alley committee, the error is not jurisdictional, and a property owner who, with full knowledge of all the facts, both as to the

construction of the work and the assessment therefor, stands by without objection until the completion of the work, is thereby estopped from raising the other objection. *Boswell v. Marion* (1907) 40 Ind. App. 289, 79 N. E. 1056.

Similarly, a property owner has been held, by waiting for eleven years, to lose the right to object to a paving assessment on the ground that the board of assessment returned the roll to the common council without attaching thereto, or indorsing thereon, a certificate showing that the assessment of the property was made in accordance with the provisions of the charter. *Tuller v. Detroit* (1901) 126 Mich. 605, 85 N. W. 1080, wherein the court said: "We think it wholly unnecessary to discuss or determine the question whether a formal certificate to the roll was necessary to its validity. The complainant now, after the lapse of so many years, and after sitting by and seeing the improvement made and her property benefited thereby, cannot be permitted to set up such irregularity, if it be an irregularity, to defeat this assessment."

Where a property owner has ample notice of the proceedings for a street improvement at their inception, but delays objecting until the improvement is completed and the assessment is levied, he cannot be heard with regard to any errors in procedure prior to the assessment. Under this rule a party is estopped to object to an assessment on the ground that it was levied by the common council, and not by the board of city assessors. *Tusting v. Asbury Park* (1905) 73 N. J. L. 102, 62 Atl. 183.

(b) Owner not estopped.

It seems, however, to be the more general rule that an owner may stand by without objection during the progress of a street improvement, without precluding himself from taking advantage of errors or irregularities in proceedings to lay the assessment, subsequent to the completion of the work.

Thus, a property owner who stands by and sees work being done on a street improvement without interfer-

ing by injunction is not thereby estopped to enjoin the collection of an assessment on the ground that it has been laid in a manner not authorized by law. "Where jurisdiction has been obtained to do such work by local assessments, acquiescence on the part of the abutting owner may be invoked against a claim of mere irregularities on his part, but no such principle can be applied when the assessment is one not authorized by law, as in this case." *New Whatcom v. Bellingham Bay Improv. Co.* (1894) 10 Wash. 378, 38 Pac. 1024. See also case under the same title (1894) 9 Wash. 639, 38 Pac. 163.

So, the owner of a corner property, the shorter side of which abuts on a street improvement, is not estopped from objecting to an assessment based on the longer frontage, notwithstanding he had full knowledge of the improvement and that it would benefit his property. *Rooney v. Toledo* (1894) 4 Ohio C. D. 23, 9 Ohio C. C. 267.

That they stood by and made no objection while paving was being done under a contract does not estop property owners from denying the validity of tax bills, on the ground that rebates were given certain other owners, in consideration of their signing the petition for the improvement. *Rider v. Parker-Washington Co.* (1910) 144 Mo. App. 67, 128 S. W. 226.

Where a city charter contains no provision that street railways shall pay any part of the cost of a street improvement, but, on the contrary, imposes the whole of such cost on the city and the abutting property holders, an assessment against such a company is void, and an objection on these grounds is not waived by the fact that the work is prosecuted and completed under the contract without any objection or protest on the part of the railway company. *Louisville Improv. Co. v. Baton Rouge Electric & Gas Co.* (1905) 114 La. 534, 38 So. 444, wherein it was said in the official syllabus: "The mere silence and inaction of a street railway company, while streets traversed by its tracks are being paved, do not estop it to plead the absolute want of power and jurisdic-

tion in a city council to levy a special tax against the company for street improvement. See *Elliott, Roads & Streets*, § 689. This doctrine is especially applicable to a case where the contract was let on the basis of payment by the city and abutters, and the evidence shows no benefits accruing to the railway from the work."

And where the charter conferred no authority on a city to assess the expense of building a sewer on abutting property owners, it was held that a property owner was not estopped, by connecting the drains on his premises therewith, from contesting the validity of the assessment, as a defense to an action to recover for the construction of the sewer. *Watertown v. Fairbanks* (1875) 65 N. Y. 588.

So, where a city council was without authority to levy a special tax on the property beneficially affected, to pay the expenses incurred in curbing or otherwise improving the streets, it was held that equity would restrain the collection of the tax, notwithstanding the inaction of the property owners. *Albuquerque v. Zeiger* (1891) 5 N. M. 674, 27 Pac. 315, wherein the court said: "It is well settled that, where public functionaries, individuals, or corporations have power to act, and are proceeding in the execution of that trust in an irregular or unlawful manner, courts of equity will not ordinarily interfere; but if they depart from the 'power which the law has vested in them,' or 'if they assume to themselves a power over property which the law does not give them,' they are not considered as acting within the scope of their authority, and such unauthorized acts may be enjoined. Courts of equity will also restrain the collection of a tax levied without authority of law."

Where the entire block of property abutting on a street improvement is owned by a university, and six sevenths are used for educational purposes, an assessment against the entire block is void. Nor will the court permit a reassessment putting the entire cost on the portion not actually used by the university, and the right to object to the assessment is not

waived by standing by and allowing the contractor to expend money on improvements in front of the property. *Raisch v. University of California* (1918) 37 Cal. App. 697, 174 Pac. 943.

In *State, Frevert, Prosecutor, v. Bayonne* (1899) 63 N. J. L. 202, 42 Atl. 773, it appeared that the expense assessed against abutting property for a sewer was greatly in excess of the benefit received. It was held that a delay of two years did not prevent the owners from asking for a reassessment, the court saying: "While unreasonable delay will ordinarily induce this court to refuse its prerogative writ to review an assessment for defects in procedure or alleged excessiveness, and perhaps should always have that effect where there is no way of subjecting the lands affected to a proper share of the public burden, there seems to be no good reason for denying just relief, where there is a power of reassessment, as there is in the case now before us. . . . There are precedents for the setting aside of illegal or defective assessments, where there was power of reassessment, although there was laches greater than that in this case, even if we reckon from the original confirmation of the assessment."

Local or special assessments cannot be imposed on the property in one district to pay the cost of improvements made in a locality outside of the district, or for the general improvement of the city, and a property owner who has petitioned, with others, for the building of a sewer and other street improvements, is not estopped by this fact, or by his silence during the progress of the work, from disputing the assessment as including the cost of the improvements outside his district. *Rector v. Board of Improvement* (1887) 50 Ark. 116, 6 S. W. 519, where in the court said: "If a city council lay off a district for the purpose of making an improvement therein, and, upon a petition of owners of real property in the district, appoints a board of improvement, and imposes an assessment on the real property in the district to pay the cost of the improvement, and the board, on the faith and

by means of the assessment, causes the improvement to be made or constructed, that an owner of real property in the district, who knows of the formation of the district, of the assessment, that the improvement is being made on the faith of the assessment, and of the defects or infirmities in the proceedings which make the assessment invalid, and remains silent while the improvements are being made, notwithstanding he has an opportunity to speak, will ever afterwards be estopped from disputing the validity of the assessment. The assessment being made for the special benefit and improvement of his and the other real property in the district, he cannot stand by in good faith and receive the benefit of the improvement in the enhanced value of his property, and refuse to pay his proportion of the assessment, on the faith of which it was made. Under such circumstances it would be his duty to speak and assert his rights, and, failing to do so, he would thereby waive them. Having failed to speak when in the exercise of good faith he ought to have done so, he will not be permitted to do so when in the exercise of the same good faith he ought to remain silent. On the other hand, if the improvements were extensive and expensive, and were made outside of the district, he would not be estopped from disputing the liability of his property to an assessment to pay for the same. In the latter case there would be no liability or semblance of an obligation, in law or equity, to pay, no duty to speak. No one would have a right to rely on the assessment imposed upon his property to make improvements in the district, for the purpose of constructing or making improvements outside. The statutes, equity, justice, reason, and good conscience forbid; and it would be most unnatural and unreasonable to do so. No one would have a right to assert the silence of the property holder in the latter case as an estoppel against him."

Likewise, in an action to annul and set aside a special tax bill for grading a street, a property owner is not estopped from objecting to the inclu-

sion of his lot within the assessment district, when by statute the only provision for remonstrance and objection open to the property owner is as to "the proposed improvement" and the kind of material and manner of construction. *Collier Estate v. Western Paving & Supply Co.* (1904) 180 Mo. 362, 79 S. W. 947, wherein the court said: "The plaintiffs might well have been willing and anxious to have King's highway improved in the manner and of the material used, and still they would have the right to object to being taxed in an unauthorized manner for such improvement. There was no time or place where they could object, or have their objection heard, to the establishment of the area district, prior to the issuing of the tax bills. All that they demand is that this district shall be laid out and defined as the charter provides."

A street assessment in excess of the statutory limitation is void, and a property owner is not estopped from objecting to it as a defense in an action for its enforcement, because of his acquiescence or failure to object earlier in the proceedings. *Covington v. Schlosser* (1911) 141 Ky. 838, 133 S. W. 987, wherein the court said: "The city also complains of the action of the lower court in sustaining a demurrer to that paragraph of the answer, pleading that the appellees were estopped to object to the assessment of their property by their acquiescence in the improvements, and their failure to object when the apportionment of the cost was assessed. In disposing of this question it does not seem necessary that we should go into a discussion of the acts or conduct of the property owner that would estop him from objecting to an assessment against his property for local improvements. The only question involved in these cases is whether or not the assessments exceeded the statutory limit. If they did, the city had no right to impose them, and the assessments in excess of the authority conferred were absolutely void. The power to make these assessments is granted alone by the statute, and by its terms alone the validity of the amount that

9 A.L.R.—52.

may be charged against the property is to be determined. No question of estoppel can be brought into a case like this. A property owner cannot be estopped by his acts or conduct from objecting to the collection of assessments that are made in excess of the authority to make them. The excess assessment is void from the beginning. Or, to put it in a better way, there could be no assessment for the excess, and so the property owner could not be estopped from contesting the validity of a void act."

And where a statute provides that the grading and improvement of streets shall be assessed against all taxable real estate within the corporate limits, an owner is not estopped from contesting an assessment for sidewalks which includes the cost of grading the street, by waiting until the completion of the work, after filing a protest that he would not be responsible for the costs of the improvement. *Keys v. Neodesha* (1902) 64 Kan. 681, 68 Pac. 625, wherein the court said: "The first [contention] is that the plaintiffs' cause of action, if they ever had any, is barred by their own laches, or, putting it more exactly, they are estopped because they did not enjoin the city from building the sidewalks before it created the obligation; that, having waited until their property was greatly enhanced in value by this improvement, they cannot now be heard to say that the assessment or charge therefor is illegal. This contention would have force if it were true that plaintiffs had done any acts to encourage the city to perform the work and make the improvements. The facts are to the contrary. They served written notices on the mayor, street commissioner, and contractors not to build the walks. This is as far as the law requires them to go. It does not demand that they institute a litigation to keep the city from improving their property."

By acquiescing in the making of a street improvement a property owner does not estop himself to object to the assessment because, in violation of a statute, it exceeds 25 per cent of the value of the property. *Birdseye v.*

Clyde (1899) 61 Ohio St. 27, 55 N. E. 169. See to the same effect, Hays v. Cincinnati (1900) 62 Ohio St. 116, 56 N. E. 658.

It has been held that a landowner was not estopped from attacking, by direct proceedings, the validity of a sewer assessment which was void because not levied according to benefits, but solely according to location, contrary to statute, by silently standing by and allowing the improvement to proceed, and accepting the benefits thereof after knowledge of the manner in which it was to be made, as he had a right to assume that the assessment would be levied at least under color of statute. *Crawfordsville Music Hall Asso. v. Clements* (1894) 12 Ind. App. 464, 39 N. E. 540, 40 N. E. 752. In denying a petition for a rehearing, the court said: "It is earnestly insisted by the appellee's learned counsel that this court, in holding that there was no estoppel in the present case, has committed a grave error and ignored numerous precedents of the supreme court. In support of this contention the counsel cite, among other cases, that of *Ross v. Stackhouse* (1888) 114 Ind. 200, 16 N. E. 501. It is decided in that case that a property owner may estop himself from denying the validity of the assessment in such a case by standing by. But this holding is expressly placed upon the supposition or presumption that the assessment is not totally void. One of the prerequisites to the validity of the assessment is that the work has been done and the contract let by proceedings under color of the statute; that the work has been done in whole or in part according to the contract, and that 'an estimate has been duly made of the work.' These questions, as the case of *Ross v. Stackhouse* (Ind.) supra, decides, are the very issues that are to be tried in a case like this, where the appeal is from the precept. But how can it be claimed that the estimate 'has been duly made' when it was not made according to the statute at all, but according to the number of lineal feet front of the property to be assessed? Can it be said that the property owner

is estopped because he knew the assessment was to be made by an illegal method, and made no objection thereto, but stood by and used the sewer to drain his property? Indeed we know of no way in which the appellant could have known such a thing. If it was informed by the officers of the city, before making the assessment, that this was to be the mode, it was not bound to give credence to any such declaration, for it had the right to assume that the officers would follow the law. If it connected with the sewer after the assessment was made, this would not estop it from insisting that the assessment should be collected only according to the statute by which it is authorized. Suppose the council had chosen to place the entire assessment upon the appellant's property, when it owned but an insignificant proportion of the property benefited, and it were found that the appellant had stood by without objecting, and had made use of the sewer by draining into it, can it be possible that by such acts, or failure to act, such an estoppel would be created as would preclude the appellant from contesting the validity of such an assessment? If it could estop itself in a case like the present one, it could do so in the supposed case. The case cited gives no support or sanction to any such doctrine, but expressly declares that an estoppel can arise only where the proceedings are not so radically defective as to be totally void. An assessment for a public sewer, made under the statute for street improvements, and placing the assessment not according to the benefits received, but according to the lineal measurement of the property fronting on the sewer, is void when appealed from. As said by us in our former opinion, the appellant had a right to assume that its property would be assessed, at least under color of the statute, and where the remedy sought is not a collateral, but a direct proceeding attacking the assessment, there is no estoppel. We think the case of *Ross v. Stackhouse* (Ind.) supra, is in support of the conclusion we have reached, and gives no support to the appellee's contention."

Where a statute creating a commission and authorizing sewers to be built, failed to provide a legal method of assessment, and the commissioners proceeded on no recognized legal rule, but assessed the property to be drained by the square foot, in such amount as seemed in their judgment just and equitable, it was held that the assessment was void, and that a landowner was not estopped from contesting its validity by making connection with the sewer. *State, New Brunswick Rubber Co., Prosecutor, v. Street & Sewer Comrs.* (1875) 38 N. J. L. 190, 20 Am. Rep. 380, wherein the court said: "Connecting with the sewers cannot be regarded as an acquiescence on their part; their right so to connect is not made to rest on condition of paying the assessment; the consent of the commissioners, and their own willingness, is all that is needed for that. It would be as reasonable to hold a man to the payment of an illegal assessment upon his lands for the paving of a street, because, after the assessment, he drove his carriage over the pavement, as to oblige him to pay an improper assessment for building a sewer, for the reason that he had connected the land so assessed with the sewer. The improvement is made for the public benefit, and in the use of it the prosecutors, as part of the public, are entitled to share. . . . All that the silence, acquiescence, and acts of the prosecutors can bind to is submission to a proper tax or assessment, when legally imposed, for the payment of their just proportion of the reasonable costs of the improvement."

It has also been held that where benefits for the construction of a sewer were assessed at a flat rate per square foot, and the amount of territory involved forbade the possibility that such assessment was according to benefits, a property owner was not estopped from raising the objection in a suit to collect the tax, notwithstanding he permitted the work to be undertaken and completed, taking no steps to prevent such action, and apparently being willing to receive the benefits of the sewer at the expense of others.

Auditor General v. Bishop (1910) 161 Mich. 117, 125 N. W. 715, wherein it was said that the contrary rule "has usually been restricted to cases where relief has been sought in equity, and has been denied upon the principle that 'he who seeks equity must do equity,' and except in drain cases, which seem to have been considered exceptional, the rule has not been applied against a defendant."

In *Lyon v. Tonawanda* (1889) 98 Fed. 361, reversed in (1901) 181 U. S. 398, 45 L. ed. 908, 21 Sup. Ct. Rep. 609, on the ground that the front-foot rule is not unconstitutional, a suit in equity to restrain the collection of a special assessment for a street improvement, wherein it appeared that four years had elapsed between the time of the assessment and the filing of the bill, it was held that the complainant was not guilty of laches, since the time had been consumed in various actions and efforts at agreement to set aside the assessment, which was declared void as apportioning the entire cost of the improvement upon the abutting land according to the front-foot rule, without regard to the size and value of the parcels or the benefits derived from such improvement.

In *Bennett v. Emmetsburg* (1908) 138 Iowa, 67, 115 N. W. 582, it was held that an objection that a sewer assessment was not laid according to benefits, the only distinction being between residence and business lots, might be presented as ground for restraining the enforcement of the assessment, notwithstanding the owners knew of the prior proceeding and waited until the completion of the work. The court said: "We do not see how the knowledge of plaintiff respecting the resolution of necessity can avail defendants anything. Plaintiffs may have been entirely content to have a sewer system put in, the expense to be paid in part from the general fund, and in part by a tax to be levied upon the property within the sewer district. The resolution did not warn them that a special assessment was to be resorted to, and they were under no duty to remain upon guard to see to it that the council did not

subsequently attempt to change such method of providing for payment. This is elementary in the law on the subject, and it will be sufficient to refer to cases already cited. There is no evidence that plaintiffs had legal notice or knowledge of a purpose to assess specially for the cost of the main and the three lateral sewers, until the assessment resolution was brought forward." The foregoing decision was criticized and overruled, in so far as it held that jurisdiction once properly obtained may be lost, in *Clifton Land Co. v. Des Moines* (1909) 144 Iowa, 625, 128 N. W. 340; but the holding hereinbefore stated was not affected.

Where a contract for sidewalks calls for driveways, a property owner who consents to and receives the benefit of such an improvement is not estopped to object to an additional charge in his assessment on this account. *De Ridder v. Lewis* (1916) 139 La. 903, 72 So. 447.

Where a resolution of a city council provided that the expense of constructing a sewer should be met from the general fund, but later an assessment was laid on the abutting property and on property supposed to be benefited thereby, for the reason that the borrowing capacity of the city was insufficient to meet the cost, it was held that a property owner who saw the work progressing and accepted the benefits was not estopped from asserting the invalidity of the assessment. *Spaulding v. Baxter* (1900) 25 Ind. App. 485, 58 N. E. 551, wherein the court said: "It is no doubt true that if appellants had knowledge of a resolution ordering an improvement, and the resolution said nothing about the manner of payment, they would be held to know that their property was liable to be assessed. But this would not necessarily be true where the resolution expressly provides that the expense is to be paid from the general fund. Upon the facts as pleaded, the doctrine of estoppel does not apply as to the appellants. It is true they saw the work progressing, and made no objection, but the council had said by a resolution that the expense was to be paid out of the general fund. The

question of a special assessment against appellants' property was not presented during the progress of the work."

So, it has been held that where a board of public service, under a pretense of levying an assessment in proportion to the benefits conferred on the several lots abutting on the improved street, did in fact make no such apportionment, but merely divided the cost of improvement by the number of feet abutting thereon, regardless of the depth of the lots and of the relative value of each after the improvement was made, it was held that a property owner was not estopped by the completion of the work, but might enjoin the collection of the assessment. *Nulsen v. Cincinnati* (1905) 27 Ohio C. C. 383.

Similarly, where a statute provides that prior to the levying of an assessment for the construction of a sewer a report shall be made, containing "a description of each lot or parcel of lot benefited thereby, together with the owner's name," a property owner is not estopped from attacking the validity of the assessment for uncertainty, where he makes no objection until after the completion of the work. *Pennsylvania Co. v. Cole* (1904) 132 Fed. 668.

In *Edwards v. Cooper* (1907) 168 Ind. 54, 79 N. E. 1047, it appeared that there was no official finding, as required by statute, that the benefits conferred by a proposed sewer improvement were equal to the cost estimated. It was held that the objection was jurisdictional, and might be raised as a defense to an action foreclosing the lien. With respect to the contention that because the owner did not enjoin the making of the improvement before completion she should be treated as estopped, the court said: "This court has never intimated that a failure to take steps to arrest the improvement would preclude the making of a defense, where the defect consisted of more than an irregularity. The cases cited by counsel, to the effect that a landowner who has stood by without objection while his property was being improved may be denied

an injunction to prevent the enforcement of the assessment, rest on entirely different grounds, since nothing but conscience, and good faith, and reasonable diligence can call the powers of a court of equity into activity, and where these are wanting the court is passive and does nothing. . . . In the circumstances mentioned, the failure to make objection, as against a contractor who was acting in good faith and under color of law, might be treated as an acquiescence in what had been done. . . . An acquiescence is tantamount to assent, and might even cut off a defense. But where the omission in a public improvement proceeding is jurisdictional, and, instead of standing by, the landowner gives timely notice to the contractor that he will contest the assessment if the improvement is made, it would be flying in the face of principle to deny to him the right to urge by way of defense that his property was being taken from him in defiance of those provisions of the statute which were really intended as limitations upon the power of the assessing tribunal. We have found no case which questions this view of the law; but many are the implied holdings and intimations to the contrary. As was said by the supreme court of Kansas, where property owners had served due notice upon the officers and contractor: 'This is as far as the law requires them to go. It did not demand that they institute a litigation to keep the city from improving their property.' *Keys v. Neodesha* (1902) 64 Kan. 681, 68 Pac. 625."

b. Dedicating land for improvement.

A property owner who dedicates land for a street improvement is estopped by this act of dedication from questioning the validity of the statute under which the street is opened and improved, on the ground that it contains no provision for notifying the owners of the property to be assessed in advance of the assessment, or at any time pending the consideration of the cause by the jury. *Wight v. Davidson* (1900) 181 U. S. 371, 45 L. ed. 900, 21 Sup. Ct. Rep. 616.

So, it has been held that an objec-

tion that a sewer was built under a street not yet platted could not be raised in a suit to restrain the collection of an assessment levied for the improvement, where the property owners had dedicated the land through which the street was to be laid out, as such dedication would be construed as a waiver. *Warren v. Grand Haven* (1874) 30 Mich. 24. The court said: "The dedication of land to the purposes of a village or city street must be understood as made and accepted with the expectation that it may be required for other public purposes than those of passage and travel merely, and that, under the direction and control of the public authorities, it is subject to be appropriated to all the uses to which village and city streets are usually devoted, as the wants or convenience of the people may render necessary or important."

In like manner, it has been held that where a property owner dedicates land to be used as a street, he is estopped from questioning the validity of the statute under which the street is opened and improved, on the ground that it arbitrarily fixes the amount of benefits to be assessed on the property, irrespective of the amount of benefits actually received or conferred on the land assessed by the opening of the street. *Wight v. Davidson* (U. S.) *supra*, wherein the court said: "Prior to the filing of the petition of the commissioners, the authorities of the District had taken no steps towards the contemplated extension of these streets. In fact, under the act they had no power to do so. The power was called into action by the dedication of the Kall tract. By such dedication the appellees put the act into operation, and voluntarily subjected themselves to its provisions, including the mode of assessment. The constitutional right against unjust taxation is given for the protection of private property, and may be waived by those affected, who consent to such action to their property as would otherwise be invalid."

Similarly where, at the time a city passed an ordinance and let a contract for grading and paving a street,

there had been of record for twenty years a plat dedicating the street to public use by the supposed owner, and, just before the passage of the ordinance, the defendant took from the person thus dedicating the street by plat, a deed for property in front of which the improvement provided for in the contract was made, bounded, in the description in the deed, by the street in question, and corresponding in its description with the recorded plat; and the defendant, instead of remonstrating against the progress of the work, took and put on record, during its progress, other deeds from the same grantor, recognizing the same plat and the existence of the street as a public highway at the point of improvement; and it did not appear that either the city or the contractor knew, or might have known, that the person who located the street by plat had not full authority to do so, as owner of the property described in the plat; it was held, in a suit on a special tax bill for the work done in macadamizing and paving the street, that the defendant was equitably estopped by acts in pais from denying that the street was a public highway at the time of the improvement, and that evidence tending to show that the person who attempted to dedicate the street by plat was not the owner of the ground at the time of the recording of the plat did not suffice to overthrow the prima facie case made by the special tax bill. *Grimm v. Shickle* (1877) 4 Mo. App. 586.

c. Consenting to or suggesting change in work.

Where property owners, with full knowledge of the making of a street improvement and of the nature of the work and materials, during the progress of the work, and when it was nearing completion, joined in a petition for a change in the specifications, which was made, it was held that they were estopped to deny that the work was done according to the contract, and that their property was liable for the assessment. *Lux & T. Stone Co. v. Donaldson* (1903) 162 Ind. 481, 68 N. E. 1014.

Similarly, where it appeared that the

husband of a property owner was present during the progress of the work on a street, and at one time made complaint that the grade was too low in front of her property, and it was changed to comply with his wishes, it was held that the owner was bound by his acts as her agent, and was estopped from contesting the validity of the assessment on the ground that the work of guttering and curbing was not done in accordance with the ordinance and specifications. *Arnel v. Ft. Dodge* (1900) 111 Iowa, 152, 82 N. W. 495.

In *Jackson v. Detroit* (1862) 10 Mich. 248, it appeared that before a street was ordered to be paved, an ordinance was submitted to the property owners and accepted by them, whereby they were allowed to ornament and inclose a wide strip on each side of the street, and the work of paving was to be completed within eighteen months. Under these circumstances, it was held that the property owners were estopped from objecting that the work was not done within a year, in accordance with the provisions of a statute requiring that a contract must be fulfilled within the year when ordered, and that no extension of time was permissible. The court said: "As the time had been fixed so as to allow the work to be done within eighteen months, we can hardly presume that it was the design of the parties, in accepting the proposition of the city, to destroy this important provision. Taken together, we think that the terms of the consent were merely designed to permit the city to get at the proper assessments, and to collect them in the usual manner, but not to require contracts to be limited to the year 1860, or to make any new advertisement, inasmuch as the plans and specifications for paving had, as appears from the contract itself, been already adopted, and are expressly assented to."

Where notice of a street improvement and bids received for the work called for natural stone for the curbing, and an abutting owner, after the bids had been received, petitioned the common council to substitute artifi-

cial stone in place of the natural stone, which was done, and he saw the contractor put in the artificial stone curbing in front of his property, and made no objection thereto, it was held that he was estopped to deny the validity of an assessment on account of the departure in the work from the notice and the bid. *Brick & Terra Cotta Co. v. Hull* (1892) 49 Mo. App. 433, wherein the court said: "The defendant not only requested the city council to change the curbing from natural to artificial stone, but he also directed the contractors to remove the old curbing in front of his property, and put in new curbing, which he knew was, by the contract, to be of artificial stone. He saw the contractor put in the artificial curbing in front of his property, and made no objection whatever thereto. It therefore appearing that the defendant, with others, having procured the substitution of the contract made for the one contemplated by the ordinance, is by every principle of right estopped to deny the validity of the assessment. And, even if he had not procured the change in the contract, he would be estopped, on the further ground that he had actual knowledge of the change, and acquiesced in the work done under it."

But a property owner is not estopped where he merely assents to a change in a street improvement suggested by the contractor, under the supposition that the contractor has a valid contract, when his contract is not valid because it authorizes the change when no such authority is given in the ordinance providing therefor; and this is the rule, though the property owner knows that the work is being done, but takes no part therein, since he is justified in assuming that the authorities are doing their duty under the law. *Galbreath v. Newton* (1887) 30 Mo. App. 380, wherein the court said: "While I recognize the legal proposition that, though the contract in this case was invalid, the defendant may be estopped from denying its validity, I do not concede that he has been shown to be in a position, or to have done anything precluding him from attacking the legality of the proceed-

ings. He has taken no part in the movement whatever. He initiated no proceedings. He did not petition for the passage of the ordinance nor the improvement of the street. He took no part in making the contract, nor did he ask that it be changed from the terms of the ordinance. Though he knew the work was being done, he, knowing the law authorized such improvements under certain restraints and conditions, might well have assumed or supposed those conditions had been complied with and those restraints provided. He had a right to rely upon the authorities doing their duty under the law. . . . 'I am, therefore, of the opinion that if it can be shown on retrial that defendant, by himself, or in connection with others, procured the substitution of the contract made for the one contemplated by the ordinance, he will be estopped to deny the validity of this assessment. So he will likewise be estopped if it can be shown that, though taking no part in the change of the contract himself, he had actual knowledge of the change or substitution having been procured by others, and knowingly acquiesced in the work done thereunder. In either of these cases he has, by his own act, induced and caused Anderson to alter his position to his prejudice, and brings himself under the correct principle of estoppel. It may be said that defendant will be presumed to have had knowledge of the ordinance and of its provisions, and, therefore, when he saw the work being done, he knew that it was not in accordance with the ordinance. It is true that, generally, one will be presumed to know of the by-laws of a municipal corporation, but in a case of estoppel by silence, of the kind here considered, there must be actual knowledge. 'There is no such thing as estoppel in pais for neglecting to speak or act, when the party did not know the facts which, if known, would have made it his duty to speak or act.' *Acton v. Dooley* (1881) 74 Mo. 63. 'An estoppel in pais is a moral question.' *Delaplaine v. Hitchcock* (1843) 6 Hill (N. Y.) 17. There must be in it some element of fraud. 'The doctrine of es-

toppel in pais always presupposes error on one side and fault or fraud upon the other.' *Morgan v. Chicago & A. R. Co.* (1878) 96 U. S. 716, 24 L. ed. 743."

So, where an ordinance provided that a street pavement should be 61 feet wide, and, after estimation of the cost and confirmation of the assessment, it was subsequently decided, by an amendment to the ordinance, materially to reduce the width of the pavement, it was held that the consent of an owner to the reduction would not waive his right to contest the assessment. *Pells v. People* (1896) 159 Ill. 580, 42 N. E. 784. The court said: "We deem it sufficient to say that consent to the reduction of the width of the pavement 8 feet did not imply any consent to the assessment as made. There is nothing in the terms of the paper signed to show that the appellants waived the right to have a new estimate made of the cost of the pavement as reduced, and a new assessment levied to raise the amount of such cost. For aught that appears to the contrary, appellants, even if they gave their consent to the reduction, had no reason to suppose that they would be required to pay the cost of a pavement 61 feet wide, instead of the cost of a pavement 53 feet wide."

And where a contract entered into by a municipality for the grading of a street was void because it was made on a petition of property owners which had been secretly changed by one of them, it was held that an objection to an assessment for this reason was not waived by an owner who, while the work was progressing, but before the grading was done, requested the contractors to do the work and said that they should be paid. *Sleeper v. Bullen* (1870) 6 Kan. 300.

It has been held that where no attempt was made to levy a special tax for a sidewalk paving, save to certify the cost of the improvement, there could be no levy, and a property owner, with knowledge of the progress of the work, could not be estopped to deny the validity of a so-called tax that was never levied, even though, by her

agent, she made suggestions which were adopted, as to certain changes. *Hall v. Moore* (1902) 3 Neb. (Unof.) 574, 92 N. W. 294, wherein the court said: "An estoppel by conduct never extends beyond the reasonable inferences to be drawn from such conduct. In this case the appellants knew the walk was being laid by the city, and allowed it to be laid without objections. At one time they suggested that it was too level, and, acting on this suggestion, the persons in charge of the work raised the stringers at one side. The most that can be said of such acts is that they warrant the inference that the appellants were willing that the walk should be laid by the city. Had they sought to enjoin the city from paying the cost of the walk, doubtless their conduct would have operated as an estoppel to deny the authority of the city to have the walk laid. It is not, however, a reasonable inference from such acts that the appellants intended or expected to pay the whole of the expense of such improvement, nor that they intended the same to become a tax lien against the property. Strictly speaking, the law does not make the cost of such improvement, or any part thereof, a tax or lien against the premises, but merely makes it the basis of a special assessment. Comp. Stat. subd. 7, § 69, art. 1 chap. 14. In other words, it is not the cost of the improvement, but the amount specially levied in accordance with the provisions of the statute just cited, that becomes a lien against the property. The record shows that not a single step was taken in that direction."

In *Atkinson v. Webster City* (1916) 177 Iowa, 659, 158 N. W. 473, it was contended that the owner was present during the progress of the work on a street improvement, and made complaint as to some matters, that changes were made to meet his criticisms, and that he was estopped from disputing the validity of the assessment on the ground that the work was not done in accordance with the specification, but was of inferior material. But it was held that his knowledge and protest as to one part of the work did not pre-

clude him from objecting that other parts were not in compliance with the specifications.

d. Assigning contract for improvement.

Where the property owners take the contracts for making a street improvement, and, after the work is done and the assessment made by the proper officer, they assign for value all their interest in the contract and the assessment, they are estopped in an action by the assignee for the assessment, to deny the validity of the contract and of the assessment on the ground that the work was not completed within the time expressed in the contract. *Callender v. Patterson* (1885) 66 Cal. 356, 5 Pac. 610. The court said: "A party cannot, for value, assign a contract and assessment, and then set up the defense that they are invalid because not in compliance with the street law. The law does not tolerate such a procedure. Having accepted a benefit under it, he cannot be heard to say that it is invalid."

But a property owner is not estopped from contesting a street assessment on the ground that it was made before the completion of the work, because of an assignment of the contract, made by the property owners before any work was done. *Union Paving & Contracting Co. v. McGovern* (1900) 127 Cal. 638, 60 Pac. 169, wherein the court, in distinguishing *Callender v. Patterson* (Cal.) *supra*, said: "There was no agreement on his part to perform any of the terms of their contract with the superintendent of streets, or on their part to pay any assessment that might be made by virtue of that contract. It does not appear that the work has yet been completed, or that any more has been done than that covered by the assessment, and, as there was no agreement on their part to pay any assessment that might be made for the work, they are not estopped from disputing the validity of the assessment sued upon. *Callender v. Patterson* (Cal.) *supra*, cited by appellant, is inapplicable. In that case the property owners had entered into the contract and completed the work, and received an assessment therefor which purported to

be a charge upon their lands, and more than a year thereafter they assigned the same to the plaintiff 'for value.' It was upon these facts that the court held them to be estopped from questioning the validity of the assessment. In the agreement between Tucker and the property owners, they do not purport to assign to him an assessment for work that had been already done for them, or any existing obligation in their favor from which a warranty of its validity might be implied. They merely agreed to assign a contract not yet entered into, and which at that time, and also at the time of its assignment, was wholly executory."

e. Acting in official capacity.

A property owner, who, after aiding in the passage of an ordinance for an improvement for grading and paving a street, accepts the position of commissioner having charge and control of the work, is estopped from denying the validity of the statute under which the ordinance was passed. *Bidwell v. Pittsburgh* (1877) 85 Pa. 412, 27 Am. Rep. 662. See to the same effect, *Ferson's Appeal* (1880) 96 Pa. 140.

However, a member of the common council which authorizes a sewer improvement, and directs the levying of an assessment therefor, is not estopped from taking exception to the assessment made against him, where he does not in any manner recognize the roll as valid, or take action on it. Hence, where the assessment roll is invalid because the provisions of the statute setting forth the proportion of benefits are not followed, the question may be raised in a suit to restrain the collection of the tax. *Warren v. Grand Haven* (1874) 30 Mich. 24.

f. Accepting damages in condemnation proceeding.

Where a property owner has accepted an award for the damages due to the condemnation of his land for the opening of a street, he is estopped from denying the validity of the assessment for the benefits conferred on him by the opening of the street. *Stockton v. Newark* (1895) 58 N. J. L. 116, 32 Atl. 67.

So, parties to condemnation proceed-

ings looking to a street improvement, who do not raise the question that the ordinance for street improvements is double, and accept the damages awarded, will be deemed to have waived the objection, and cannot raise it as a defense to assessments for benefits subsequently laid. *Re South Shelshole Place* (1910) 61 Wash. 246, 112 Pac. 228.

In *Morris v. Watson* (1893) 8 Ind. App. 1, 35 N. E. 405, an action for the enforcement of a lien for the improvement of a street, it appeared that condemnation proceedings were had against property owned by the defendant, and that she appealed from the award. On the hearing of this appeal it was held that the entire proceedings for the opening of the street were null and void. It further appeared that during the pendency of the appeal the street was opened, and the improvements were made and accepted by the city. An action against the city for trespass, instituted by the owner, was compromised and she accepted a certain sum in damages, subsequently dividing her land into lots facing the opened street. Under these circumstances, it was held that she was estopped from denying her liability on the assessment because of the decision that the original proceedings for condemnation were void. The court said: "The appellant, having elected to accept the damages for the appropriation of the land, is estopped to deny the appellee's right to the possession. . . . There can be no difference in the rule in cases where the landowner accepts the money tendered him in proceedings under the writ of assessment, and those in which the money is accepted in a suit for damages, such as the one in hand. The gravamen of the action here relied upon to constitute an estoppel was the unlawful appropriation of the appellant's land for street purposes. It is clearly shown by the averments of the complaint in that action that it was not the mere transient injury of the removal of the fences and the digging up of the earth that appellant . . . sought to have redressed in damages, but also the taking of her land for

the purposes of a street or streets. This being so, she cannot now be heard to say that the occupancy of the street by the city is wrongful, and that the municipality was powerless to make the improvements. The tender and acceptance of the money amounted to what equity will construe to be a purchase of the easement on the part of the city, and the appellant is precluded from asserting title afterwards."

Where, however, a judgment in condemnation proceedings connected with a street improvement is void by reason of combining awards for damages and assessments for benefits in one proceeding, and jurisdiction is not conferred by consent of the parties, one who accepts the award is not estopped to object to an assessment for want of jurisdiction to make such adjudication. *Michaelson v. Seattle* (1911) 63 Wash. 230, 115 Pac. 167. See to the same effect, *Seattle School Dist. v. Seattle* (1911) 63 Wash. 245, 115 Pac. 173.

So, where a sewer was constructed over private property which had not been condemned, it was held that an assessment made under a subsequent statute, providing for the condemnation of the land, was not thereby rendered valid, and that the owner was not estopped, because she had accepted damages for the land so taken, from contesting the assessment on the ground of the failure to publish the notice as required by law. *Holliday v. Atlanta* (1895) 96 Ga. 377, 23 S. E. 406.

Likewise, it has been held that the fact that other owners had accepted payment of their damages did not estop a property owner who refused to accept, from contesting the validity of the proceedings on the ground that both awards and assessments were made in one report by the commissioners, whereas the statute required the payment of the awards before the city acquired a right to open the street. *Meredith v. Perth Amboy* (1899) 63 N. J. L. 520, 44 Atl. 971, wherein the court said: "Their prompt refusal to accept that check gave the city immediate notice of their position, and no degree of diligence in applying for

a certiorari would have prevented the payment of the other awards. These circumstances, we think, refute the charge of laches and estoppel. The assessment is defended on the ground that the certiorari was not applied for within six months after confirmation of the assessment, as the statute requires. But this statutory limitation upon the allowance of a prerogative writ cannot be enforced for the protection of an assessment which the legislature could not constitutionally authorize. . . . By the failure of the city to make and tender a valid award to the prosecutors for their land, needed in the opening of the street, the city failed also to acquire a right to furnish to the prosecutors the special benefit, for the enjoyment of which this assessment was levied. When the assessment was laid the city had not obtained, nor had it taken the proper steps to obtain, the power of opening the street. No equivalent, therefore, in the form of special benefits arising from a public improvement, was offered to the prosecutors for the burden thus imposed upon their lands. Under such circumstances it is not within the constitutional power of the legislature to sanction a special assessment."

Similarly, the fact that a property owner demands and receives compensation for lands taken for a street improvement will not estop her from contesting an assessment made according to the acreage, without regard to benefits, under a statute which has been declared unconstitutional. *Lewis v. Symmes*, decided with *Lewis v. Taylor* (1839) 10 Ohio C. D. 205, 18 Ohio C. C. 443.

VII. Estoppel by payment of assessment.

a. Generally.

Ordinarily, the voluntary payment of one or more instalments of an assessment for a street improvement precludes the property owner from questioning the validity of the subsequent instalments.

United States.—*Treat v. Chicago* (1903) 125 Fed. 644, affirmed in (1904) 64 C. C. A. 645, 130 Fed. 443.

Arkansas.—*Fitzgerald v. Walker* (1891) 55 Ark. 148, 17 S. W. 702.

Florida.—*Hampton v. Gainesville* (1912) 64 Fla. 303, 60 So. 185.

Illinois.—*McDonald v. People* (1903) 206 Ill. 624, 69 N. E. 509; *People ex rel. Ames v. Raymond* (1911) 248 Ill. 124, 93 N. E. 727.

Massachusetts.—*Harwood v. Donovan* (1905) 188 Mass. 487, 74 N. E. 914.

Minnesota.—*State ex rel. Chapin v. District Ct.* (1889) 40 Minn. 5, 41 N. W. 235.

Oklahoma.—*PARTEE v. CLEVELAND TRINIDAD PAVING CO.* (reported herewith) ante, 606.

However, it has been held that the estoppel in such a case is limited to the amount of the assessment actually paid; that by a voluntary payment the property owner is precluded from questioning the assessment to that extent, but not as to the balance. *Re Hughes* (1883) 93 N. Y. 512.

Furthermore, it is generally held that, if a property owner has paid the entire assessment without protest, he is estopped to recover back the money so paid. *Kelso v. Boston* (1876) 120 Mass. 297; *Sandford v. New York* (1860) 33 Barb. (N. Y.) 147, 20 How. Pr. 298, 12 Abb. Pr. 23; *Re Mehrbach* (1885) 33 Hun (N. Y.) 136, reversed on other grounds in (1885) 97 N. Y. 601; *Re Santiago Lima* (1879) 77 N. Y. 170; *Shirley v. Waukesha* (1905) 124 Wis. 239, 102 N. W. 576. See to the same effect, *Pabst Brewing Co. v. Milwaukee* (1905) 126 Wis. 110, 105 N. W. 563.

And it has been held that, under a statute providing that on the payment, with interest, of one third of a grading assessment previously levied, the entire assessment should be canceled, the payment of one third of the assessment without interest estopped the owner from denying the validity of the assessment so as to prevent the recovery of interest. *Gilfeather v. Grout* (1905) 101 App. Div. 150, 91 N. Y. Supp. 533, affirmed in (1905) 182 N. Y. 522, 74 N. E. 1117.

While it seems to be the general rule that the payment of a street assessment estops the landowner from ob-

jecting to its validity, in some instances, because of the peculiar nature of the objection or the position of the objector, the courts have allowed the owner to question the assessment, even though it has been paid in whole or in part.

California.—*Gill v. Oakland* (1899) 124 Cal. 335, 57 Pac. 150.

Illinois.—*Freeport Street R. Co. v. Freeport* (1894) 151 Ill. 451, 38 N. E. 187; *Upton v. People* (1898) 176 Ill. 632, 52 N. E. 358; *Vennum v. People* (1900) 188 Ill. 158, 58 N. E. 979; *People ex rel. Raymond v. Church* (1901) 192 Ill. 302, 61 N. E. 496; *People ex rel. Rogers v. Owens* (1907) 231 Ill. 311, 83 N. E. 198.

Iowa.—*Tallant v. Burlington* (1874) 39 Iowa, 543.

Minnesota.—*State ex rel. Eaton v. District Ct.* (1905) 95 Minn. 503, 104 N. W. 553.

Montana.—*Lewistown v. Warren* (1916) 52 Mont. 356, 157 Pac. 954.

Nebraska.—*Wakeley v. Omaha* (1899) 58 Neb. 245, 78 N. W. 511.

New Jersey.—*State ex rel. Pierson v. Newark* (1882) 44 N. J. L. 424.

New York.—*Kennedy v. Troy* (1878) 14 Hun, 308; *Chase v. New York* (1897) 23 App. Div. 322, 48 N. Y. Supp. 333; *Re Hazelton* (1890) 58 Hun, 112, 11 N. Y. Supp. 557; *Copcutt v. Yonkers* (1891) 59 Hun, 212, 13 N. Y. Supp. 452, affirmed in (1891) 128 N. Y. 669, 29 N. E. 148.

Ohio.—*Metcalf v. Carter* (1897) 10 Ohio C. D. 269, 19 Ohio C. C. 196; *Yost v. Toledo & O. C. R. Co.* (1902) 24 Ohio C. C. 169.

Pennsylvania.—*Harrisburg v. Shepler* (1899) 7 Pa. Super. Ct. 491, affirmed in (1899) 190 Pa. 374, 42 Atl. 893.

b. Validity of statute or ordinance.

In *Harwood v. Donovan* (1905) 188 Mass. 487, 74 N. E. 914, it was held that where a landowner had paid, without protest, five of ten instalments into which a sewer tax had been apportioned, and had made use of the sewer, this was in effect an assertion on his part that he had a right to use it because of the existence of the assessment, and he was estopped from objecting on the ground that the stat-

ute under which the assessment was laid was void, because unfair and illegal assessments might be laid under it, the assessment in the case at bar being unobjectionable as excessive.

Where a statute provides that the city engineer's estimate of the cost of a street improvement shall be included in the ordinance, and makes the omission of such estimate jurisdictional, the question of the omission of the estimate must be raised as an objection to the payment of the first instalment, and a property owner who fails to avail himself of the proper remedy before the payment of the second instalment is estopped from objecting in a suit to enjoin the city from selling his property in satisfaction of the assessment. *Treat v. Chicago* (1903) 125 Fed. 644, affirmed in (1904) 64 C. C. A. 645, 130 Fed. 443.

Where a property holder, without objecting to or contesting the legality thereof, permits improvements to be made in sidewalks and gutters in front of his property, and pays a portion of the special assessment, he cannot be relieved in equity from the payment of the balance due, on the ground that the ordinance contains no estimate of the curbs and gutters, as required by the charter. *Hampton v. Gainesville* (1912) 64 Fla. 303, 60 So. 185, where in the court said: "The failure to state in the ordinance the estimated cost of curbs and gutters did not deprive the property holder of notice of the provisions that do appear in the ordinance. Even if the failure to state in the ordinance the estimated cost of the curb and gutters, as required by the city charter, may have been a ground for arresting the work when undertaken by the city, it is clearly inequitable to permit such omission to relieve the property owner who failed to construct curbs and gutters as required by the ordinance, and took no steps to test the validity of the ordinance, but permitted the city to do so without an effort to prevent it."

But where a statute provides that an ordinance for a street improvement shall be passed only on petition signed by a majority of the resident property owners abutting the improvement, or,

failing that, on the affirmative vote of three fourths of the whole number of members comprising the city council, an improvement based on neither of these methods of procedure is void, and an aggrieved owner who has paid a first instalment is not estopped, after the completion of the work, from enjoining the collection of the second instalment. *Tallant v. Burlington* (1874) 39 Iowa, 543, wherein the court said: "It is further claimed that plaintiff is equitably estopped, because she permitted the work to be completed before she commenced this action. The evidence shows that she enjoined the collection of assessments under the first contract. That by her agent she protested against the work being done and presented a remonstrance against it to the city council, and spoke to the mayor about it, who said they were doing the work under a different arrangement. That plaintiff's husband, who was her agent, repeatedly remonstrated after that, and told them he should never pay anything unless made to do it by law, and that one assessment was paid under protest to avoid being annoyed and reported as a delinquent, and that the council were informed an effort would be made to recover it. Plaintiff did all that she was required to do. Having protested and remonstrated, she was not obliged to enjoin the prosecution of the work." See to the same effect, *Freeport Street R. Co. v. Freeport* (1894) 151 Ill. 451, 38 N. E. 137.

c. Conformity of proceedings to statute or ordinance.

It has been held that an objection to the validity of a street assessment, on the ground that notices of the completion of the work and the confirmation of the assessment had never been published in the official newspaper of the city, was waived where an owner was notified of the amount of her assessment, and voluntarily paid it. *State ex rel. Chapin v. District Ct.* (1889) 40 Minn. 5, 41 N. W. 235, wherein the court said: "It will be noticed that the objection of the relator is not to the regularity of the order of the common council changing the grade, but that it never became operative, be-

cause of the alleged omission to publish the notices of the completion and confirmation of the assessment of damages and benefits resulting therefrom. The object of these notices is merely to give notice of the assessment to the property owner, so that, if aggrieved, he may first file objections, and, second, appeal. But in this instance the relator, with actual notice of the assessment, voluntarily paid it, thereby expressing her satisfaction with and acquiescence in it. Having done this, and the city having subsequently gone on and improved her property by grading the street, she cannot now be heard to resist the assessment for the grading on the ground that she had no notice of the assessment for the change of grade. It is fallacious to say that, because the board assessed her damages at nothing, therefore there was only an assessment of benefits, and that this was all she acquiesced in. It was immaterial whether they assessed the damages at nothing and the benefits at \$40, or the damages at, say, \$50, and the benefits at \$90. Equally, in either case, there would be an assessment of both damages and benefits, and the difference would be the amount payable; and by voluntarily paying the balance the relator as fully assented to the assessment of her damages at nothing, as she did to the assessment of her benefits at \$40."

In *Louden v. East Saginaw* (1879) 41 Mich. 18, 2 N. W. 182, it was held that one who asked for an extension of time for the payment of a paving assessment, and, having received it, paid the tax without objecting, was estopped from questioning the validity of the proceedings on the ground that the date for the hearing of objections was inadvertently set for Sunday. The court said that there was a waiver of the irregularity, as the action taken tended to mislead the authorities.

It has been held, however, that the voluntary payment of part of a paving assessment will not estop a property owner from contesting the validity of an assessment that is void for want of notice of the meeting of a board of equalization. *Wakeley v. Omaha*

(1899) 58 Neb. 245, 78 N. W. 511, wherein the court said: "As to the payments actually made, she might, under some circumstances, be denied affirmative relief, but why should she be held concluded against asserting the invalidity of the balance of the judgment when payment thereof is sought to be coerced? The partial payments which prevent the running of the Statute of Limitations are treated as acknowledgments of the continued validity of that which at one time was concededly valid, but that is no argument for treating as valid that which was always void. . . . The payments were purely voluntary, and no fact has been pleaded or proved which suspends appellant's right at any time to discontinue her generosity."

And where notice of a meeting to hear objections to a street assessment named a certain hour, and the council adjourned before the time set for want of a quorum, it was held that a second meeting, of which a property owner had no notice, did not meet the requirements of a statute which provided that objections must be in writing and be filed with the clerk, "who shall, at the next meeting after the day fixed in the notice to show cause, lay the said objections, if any, before the city council, which shall fix a time for hearing the same, of which the clerk shall notify the objectors; . . . and at such time. . . . shall proceed to pass upon such report." *Gill v. Oakland* (1899) 124 Cal. 335, 57 Pac. 150.

So, the payment of an assessment for a street improvement, under protest, will not estop a property owner from objecting to its validity because the statutory notice which must precede an ordinance for improvements was not given. *Chase v. New York* (1897) 23 App. Div. 322, 48 N. Y. Supp. 333.

Under a statute providing that the voluntary payment by a property owner of any instalment of a street assessment amounts to a waiver of the right to enter objections to the application for judgment of sale, an objection that a resolution of improve-

ment does not contain an itemized estimate of cost is waived by the voluntary payment of the first instalment of the assessment. *McDonald v. People* (1903) 206 Ill. 624, 69 N. E. 509, wherein the court said: "The objectors, having voluntarily paid the first instalment of this assessment, will be deemed to have waived and released their right to object to a judgment of sale for the subsequent instalments remaining unpaid. The validity of the part of § 66 of the Improvement Act, hereinbefore set out, was presented to us for consideration in *Downey v. People* (1903) 205 Ill. 230, 68 N. E. 807, and it was there held to be valid, and that the voluntary payment by the owner of any instalment of a special assessment levied upon his property was a waiver on his part of the right to object to the confirmation of the assessment roll, and to be a release and waiver on his part of any and all right to enter objections to an application for judgment for the sale of his property, to satisfy the subsequent instalments remaining unpaid."

Where a property holder has voluntarily paid the earlier instalments of a paving assessment, he is thereby estopped from objecting to a later one on the ground that the contract was made prior to the confirmation of the assessment. *People ex rel. Ames v. Raymond* (1911) 248 Ill. 124, 93 N. E. 727, wherein it was said: "The law is well settled in this state that the voluntary payment of one instalment of a special assessment, or the rendition of judgment upon one instalment of a special assessment, precludes the property owner from questioning the validity of the subsequent instalments of the assessment."

So, a property owner, by voluntarily paying prior assessments, waives his right to object to the payment of an instalment of a paving assessment on the ground that the contract was increased in price without a readvertisement and reletting. *People ex rel. Ames v. Raymond* (Ill.) *supra*.

An owner of real estate which is liable to assessment for a street improvement, having due notice of the

proceedings for making such improvement, who allows the work to be done and the assessment to be made and confirmed, and on demand pays the amount assessed against his property without objection, cannot maintain an action to recover back the money so paid, on the ground that the contract for making the improvement was not awarded to the lowest bidder, as required by law. *Sandford v. New York* (1860) 33 Barb. (N. Y.) 147, 20 How. Pr. 298, 12 Abb. Pr. 23, wherein the court said: "Proceedings for regulating and improving the streets in New York, and assessing and collecting the cost thereof, are regulated by statute, and to be valid must be collected in the manner prescribed. Every party interested in such proceedings is entitled to notice thereof, and may, at the proper time and place, object to such proceedings, or to any claim made in relation thereto; and all such objections must be considered and adjudicated in the manner provided by statute. When an assessment has been duly confirmed, the amount assessed upon every parcel of land, and the owner thereof, becomes *prima facie* an adjudicated indebtedness of such owner, and a lien upon the land. If, however, there has occurred in the proceedings any such error or irregularity as renders them void, for the reason that jurisdiction to make the improvement or assess the cost thereof has not been acquired, such supposed indebtedness and lien will be ineffectual and invalid; but if jurisdiction be obtained, and the proceedings are irregularly conducted, other questions not going to the jurisdiction, as I understand the law, must be taken and determined in the course of the proceedings; and if not so taken, they cannot afterwards be made the reason for resisting the collection of the assessment or questioning the validity of the lien on the land. The objections stated in this complaint to the assessment in question should, in my judgment, have been taken in the course of the proceedings, and made the ground for opposing any action by the assessors, or contesting the allowance by them of any compensation to

the contractor, or for reducing the amount by him demanded. But I do not consider them sufficient cause for declaring the whole assessment void or illegal, as against this plaintiff. Nor can she, in my opinion, be permitted in this action to demand relief against the assessment, after having omitted to take the objections at the proper time, and when duly notified."

So, an objection that a paving contract was let at an excessive price cannot be made in a suit to enjoin the collection of an assessment, where it appears that the owners stood by until the completion of the work, and paid the first and second instalments without objecting. *Fitzgerald v. Walker* (1891) 55 Ark. 148, 17 S. W. 702.

Likewise, in *Bacas v. Adler* (1904) 112 La. 806, 36 So. 739, it was held that a property owner who paid part of an assessment, promising to pay the remainder, and remained silent for a number of years, was estopped from objecting to an assessment on the ground that in advertising for bids a single material was named, and, as it was alleged, all competition was excluded.

But, on the other hand, it has been held that a property owner who has paid an assessment for a street improvement under protest is not thereby estopped from raising the question of the invalidity of the assessment, in that the work was done without advertisement for bids or competitive bidding. *Chase v. New York* (1897) 23 App. Div. 322, 48 N. Y. Supp. 833.

And it has been held that a property owner, who had paid four instalments of an assessment without objection, was not estopped to allege that the contract for paving a street was not properly executed, in that it lacked the certificate of the city comptroller, although this defect might be later cured by the signature of the comptroller, after the completion of the work and the ratification of the act by city councils. *Harrisburg v. Shepler* (1899) 7 Pa. Super. Ct. 491, affirmed in (1899) 190 Pa. 374, 42 Atl. 893.

A property owner is estopped from resisting the payment of an instal-

ment of a paving assessment on the ground that the contract contained a provision fixing the rate to be paid laborers and teams, and providing that the work should be performed by persons resident in a particular locality, where he has voluntarily, and without raising the objection, paid earlier instalments of the same assessment. *People ex rel. Ames v. Raymond* (1911) 248 Ill. 124, 93 N. E. 727. And in *McDonald v. People* (1903) 206 Ill. 624, 69 N. E. 509, it was held that objections and stipulations as to hours of work and alien laborers were waived by the voluntary payment of prior instalments of a paving assessment.

d. Performance of work.

In *People ex rel. Raymond v. Church* (1901) 192 Ill. 302, 61 N. E. 496, an application by a county treasurer for judgment of sale of certain real estate, to satisfy the fourth instalment of a special assessment for the cost of a pipe sewer, the owner was permitted to attack the validity of the assessment on the ground that the sewer was constructed on a line different from that laid down in the ordinance.

e. Assessment.

In *Re Lord* (1880) 21 Hun (N. Y.) 555, it appeared that an assessment was invalid, because in violation of a statute forbidding a second paving of a street at the expense of abutting owners. It was held that the payment of a part of the assessment, together with delay and the intervention of the rights of third persons, estopped a property owner to object.

In *Casey v. Trout* (1914) 114 Ark. 359, 170 S. W. 75, it appeared that a property owner, prior to a public improvement, had himself graded and curbed his sidewalk, and when his claim for a set-off on his assessment, because of the use of his material, was denied by the board of improvement, he paid annual assessments for four years, and did not prove his claim until sued by the city. It was held that he was not guilty of laches, and that his right to resist the assessment had not been lost. The court said: "A period of only four years had elapsed,

and there is nothing in the record to show that the condition of the parties had been changed in the slightest degree during these four years. No disadvantage had come to appellants from the loss of evidence, change of title, intervention of equity, or from any other cause."

Where a property owner has voluntarily paid the first instalment of an assessment for a street improvement, without objection to the description of her property therein, she is not estopped, on an application for judgment of sale for the second instalment, from attacking the validity of the assessment on the ground that there is no such property as is described. *People ex rel. Rogers v. Owens* (1907) 231 Ill. 311, 83 N. E. 198, wherein the court said: "If the description was void, the previous payments can only be regarded as voluntary contributions on the part of appellant, and she is not estopped from objecting to further compulsory payments. . . . The cases of *Downey v. People* (1903) 205 Ill. 230, 68 N. E. 807; *Gross v. People* (1901) 193 Ill. 260, 86 Am. St. Rep. 322, 61 N. E. 1012; *McDonald v. People* (1903) 206 Ill. 624, 69 N. E. 509; *Fischback v. People* (1901) 191 Ill. 171, 60 N. E. 887, and others of similar nature, cited by appellee in support of the contention that if the first instalment is paid the objector cannot afterwards object to paying the second instalment, were all instances in which the proceedings were not void, but only voidable if objections had been raised at the proper time."

Property assessed for taxes must be described so as to be capable of identification by some lawful mode, such as a government survey, a reference to an authenticated plat, or by metes and bounds, and unless it is so described as to be capable of such identification the assessment and judgment will be void. Therefore, where in an assessment for a sewer there is reference in the description to a division and an assessor's plat, and there is no evidence of the existence of such division or plat, the proceedings are void, and a property owner is not estopped to object, by having paid pre-

vious instalments of the assessment. *Upton v. People* (1898) 176 Ill. 632, 52 N. E. 358, wherein the court said: "It was proved that the conveyance of the lands to appellant was by another description, and not by the assessor's plat, or school trustees' subdivision, or by any description contained in the delinquent list, and the elements of an estoppel are lacking. In the case of *Harts v. People* (1898) 171 Ill. 373, 49 N. E. 539, cited by appellee, Harts had voluntarily acknowledged the plat and adopted it by describing the property in two conveyances according to such plat. He could not be heard to say that it was not a valid plat of the lands, while here no such acknowledgment was ever made. If the descriptions were void, the previous payments can only be regarded as voluntary contributions on the part of appellant to the special assessment funds, and he is not estopped from objecting to further compulsory payment." In *Vennum v. People* (1900) 188 Ill. 158, 58 N. E. 979, on a similar state of facts, it was said: "In proceedings for taxation, property must be described by reference to government surveys, or by metes and bounds, and, if it is divided into lots, then by a reference to authenticated plats. Where the property described in the application for judgment is designated as a certain lot in a certain subdivision, and there is no such lot, as so described, in the subdivision referred to, then it is clear that judgment ought to be refused, because a judgment for taxes cannot be rendered against property which has no existence. . . . The judgment in a proceeding of this character will be void, unless the land, which is the subject-matter of the judgment, is capable of identification. Where it is impossible to tell what land is assessed, the assessment and judgment will be void."

An objection to a street assessment, on the ground that the cost of the improvement assessed on the property has been increased by the allowance of improper and fraudulent items, is waived where the property owner stands by until all proceedings have

9 A.L.R.—53.

been completed, and the work and the assessment have been confirmed, and where, in addition, he has voluntarily paid his assessment. *Sandford v. New York* (1860) 33 Barb. (N. Y.) 147, 20 How. Pr. 298, 12 Abb. Pr. 23, wherein the court said: "Payment of the assessment was demanded as of right. The plaintiff acquiesced in the demand and paid the amount. She now alleges that the payment was made under a mistake of fact; that is, that she and her agent then believed that the proceedings in relation to the assessment had been regular, honest, and correct, and that she was legally liable to pay the amount demanded, and that it constituted a lien on her real estate. It is stated in the complaint that the alleged frauds, errors, and irregularities now complained of appear by the assessment roll and papers thereto annexed; that is, by the record of the proceedings for making the assessment, or by other papers referred to; and there is no allegation of any concealment or misrepresentation by the defendants or any other person, or that any of such supposed frauds, errors, or irregularities were not patent on the face of said proceedings and papers, and might not have been discovered and known to the plaintiff or her agent, by examination of said proceedings and papers, at any time before such payment was made. It appears then, in effect, that the plaintiff, on request to pay these assessments, claimed to be due upon and by virtue of proceedings taken pursuant to statute, and of which she had full notice, paid the amount demanded without objection or examination, and she now seeks to recover back the sums so paid, on the allegation that the said proceedings, which are of record, and the other papers referred to, show upon their face that she could not have been compelled to pay such amount if she had refused to do so. In my opinion the facts so alleged do not constitute a cause of action against the defendants. When payment of the assessments was so demanded, the plaintiff had the means of ascertaining whether or not she or her property was liable therefor; and

having paid them without objection, she must, as I think, be held to have paid voluntarily, and cannot recover back the money."

In an action to recover money paid under protest on an assessment for a sewer, the plaintiff will not be permitted to show that the assessment is invalid by proving that several persons who entered their drains into the sewer, and who by more remote means received benefits thereby, were not included in the assessment, as provided by statute, since if the assessment was erroneous it could have been revised on certiorari. *Kelso v. Boston* (1876) 120 Mass. 297.

The payment of a street assessment without objection by the agent of a property owner, with full knowledge of the proceedings, is regarded as a voluntary payment, and will estop her to object on the ground of excess over benefits. *Shirley v. Waukesha* (1905) 124 Wis. 239, 102 N. W. 576. See to the same effect, *Pabst Brewing Co. v. Milwaukee* (1905) 126 Wis. 110, 105 N. W. 563.

A property owner who has paid the first instalment of a paving assessment is estopped from enjoining the collection of the second, unless he shows that the board of commissioners was wholly without jurisdiction, and an objection to the amount of his assessment, when his property is admittedly within the assessment district, cannot be heard. *PARTEE v. CLEVELAND TRINIDAD PAVING CO.* (reported herewith) ante, 606.

On the other hand, where a county ordinance directs that one half of the expense of improving a street shall be levied against abutting owners, and the other half shall be paid by the city, the latter is not estopped, because some of the taxpayers have paid their proportion of the amount assessed against the city, from asking for a reassessment on the ground that the assessment is unreasonable. *State ex rel. Pierson v. Newark* (1882) 44 N. J. L. 424.

A property owner, having knowledge of a paving improvement, and having paid three of six instalments of his assessment, is not thereby es-

topped from contesting its validity on the ground that, the lot being a corner one, with the opening on the shorter side, he should be assessed by that frontage, and not by the longer frontage actually abutting the improvement. *Metcalf v. Carter* (1899) 10 Ohio C. D. 269, 19 Ohio C. C. 196.

The right to object to an assessment for the construction of a sewer, in that the assessors, in making the assessment, had included only those lands the surface water of which could flow into the sewer, while other lands would be benefited, is not lost because some owners of the lots assessed pay the tax. *Kennedy v. Troy* (1878) 14 Hun (N. Y.) 308.

In *Yost v. Toledo & O. R. Co.* (1902) 24 Ohio C. C. 169, it was held that a property holder who made no objection to a paving assessment at the time it was made, and paid seven of ten yearly instalments, was not estopped from contesting further payment on the ground that it had already paid as much as the special benefits accruing to its property, where it appeared that the owner had not received notice of the proposed improvement and assessment, and that such steps had not been taken with its knowledge, and that it had not participated in the carrying forward of the improvement in such a way as to preclude it from interposing the objection.

In *State ex rel. Eaton v. District Ct.* (1905) 95 Minn. 503, 104 N. W. 553, it appeared that certain owners, assessed for a paving improvement, paid their tax without questioning its validity. Application for judgment as to others was denied on the ground that the board of public works had no jurisdiction to make the assessment, because of a failure to hold an essential meeting as required. On a reassessment, new property was added to the district, but that which had paid the first assessment was omitted, and in the new assessment property, similarly benefited to that which had paid, was assessed a considerable sum less, the arrangement operating as a penalty on those who had paid without entering into a contest, and as a

premium to those who were delinquent. It was held that those who had voluntarily paid were not thereby estopped from contesting the assessment.

A property owner who has paid a first instalment of an assessment is

not thereby estopped from objecting to further payment, on the ground that the district established is much smaller in area than that prayed for in the petition. *Lewistown v. Warren* (1916) 52 Mont. 356, 157 Pac. 954.

W. M. C.

PEOPLE OF THE STATE OF ILLINOIS EX REL. P. L. DORRIS,
County Collector,

v.

CHARLES LE TEMPT et al., Appts.

Illinois Supreme Court—April 20, 1916.

(272 Ill. 586, 112 N. E. 335.)

Drainage — payment of assessment — effect.

1. Mere payment of assessment under drainage improvement for the cost of which bonds have been issued does not estop property owners from insisting that the assessment against their property exceeds the benefits.

[See note on this question beginning on page 842.]

— levying of assessment — absence of certificate.

2. An assessment for a drainage improvement can be levied by the commissioners or in pursuance of a certificate of the auditor of public accounts only in the manner provided by statute, and any assessment levied without proper certificate is illegal.

[See 9 R. C. L. 653.]

— sufficiency of certificate.

3. Failure of the certificate for collection of drainage assessments to separate the various amounts required for payment of principal, interest, and costs of collection does not invalidate it where the statute requires only a certificate setting forth the estimated amount of interest, or interest and principal together, with ordinary costs of collection and disbursements.

— effect of signing petition.

4. A statutory provision that signing a petition for a drainage improvement is conclusive against the signer that he has accepted the provisions of the statute as to benefits and damages does not bind him to any assessment of benefits that may be made, or deprive him of the constitutional right that his property shall not be assessed more than it is benefited.

— participation in classification — effect.

5. Participation by a property owner

in a classification of lands for a drainage improvement does not deprive him of the right to insist that an assessment against his land shall not exceed the benefit.

— petition for bonds — estoppel.

6. Owners of land in a drainage district who, with knowledge of the amount of assessment against their land, petition the commissioners to divide the assessment into instalments and issue bonds therefor, thereby inviting investors to purchase the bonds, are estopped to urge that the assessment exceeds the benefit from the improvement.

— failure to object to method of classification — waiver.

7. Failure of owners of land in a drainage district to object to the classification of their lands with others in government subdivisions prevents their taking advantage of such erroneous classification upon application for judgment for confirmation of the assessment.

[See 9 R. C. L. 659.]

— assessment on right of way.

8. Land occupied by the right of way for a drainage improvement should not be included in an assessment upon abutting property for the cost of the improvement.

[See 9 R. C. L. 656; 25 R. C. L. 115.]

APPEAL by objectors from a judgment of the Saline County Court (Stillwell, J.) in favor of relator in proceedings for the collection of a drainage assessment. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Kane & Wise for appellants.
Messrs. W. F. Scott and A. H. Baer for appellee.

Cartwright, J., delivered the opinion of the court:

The county collector of Saline county applied to the county court for judgment against lands of the appellant Charles Le Tempt for an assessment levied by the Middle Fork special drainage district, organized under the Farm Drainage Act, which was due in 1914. The application was continued from term to term until an application was made for judgment for a subsequent assessment due in 1915, when both of the appellants, Charles Le Tempt and G. W. Farley, filed objections. It was agreed that all of the objections should be consolidated and tried as one cause. Accordingly there was a trial on the objections of Charles Le Tempt for the years 1914 and 1915, and of G. W. Farley for 1915. The court reduced the acreage of the land assessed by taking out the parts of tracts owned by other persons, and rendered judgment on the basis of the original classification according to acreage against the lands of the objectors. From that judgment; this appeal was prosecuted.

Bonds had been issued by the district and registered in the office of the auditor of public accounts, and the assessments were levied on certificates of the auditor made in 1913 and 1914 of the amounts estimated and determined by himself and the state treasurer necessary to pay interest and principal on the bonds, together with the costs of collecting and disbursing the same. The first objection was that the certificates did not specify, separately, the items of principal and interest and cost of collection making up the aggregate. An assessment can only be levied by the commissioners, or in pursuance of a certificate of the

auditor of public accounts, in the manner provided by the statute, and an assessment levied without a proper certificate is illegal.

Drainage—levying of assessment—absence of certificate.

People ex rel. Lusk v. Garner, 267 Ill. 396, 108 N. E. 344. By virtue of that rule it was held in the case of People ex rel. Trobaugh v. Glenn, 207 Ill. 50, 69 N. E. 568, that a certificate of the drainage commissioners in a gross sum, which included, with the interest and principal maturing on evidences of indebtedness, the cost and expenses of carrying on the work of drainage and repairs of the drains and ditches and ordinary and contingent expenses, was insufficient to authorize an assessment. That decision was on the ground that the taxpayer has a right to be informed for what purpose his property is being taxed, and the taxpayer has no other means of knowing what is to be expended for carrying on the work of drainage and making repairs and ordinary and contingent expenses, unless the several amounts levied for such purposes are stated separately. This case is different, for the reason that the certificates only stated the amount necessary to pay the principal maturing and the interest upon the registered bonds, with the cost of collection and disbursement. Section 68 of the Farm Drainage Act merely requires the auditor to make out and transmit to the county clerk a certificate setting forth the estimated amount of interest, or interest and principal, due and accrued or to accrue for the current year on registered bonds, together with the ordinary cost of collection and disbursement. These matters are already known to the landowner, and the total amount is a mere matter of computation.

—sufficiency of certificate.

The second objection was that the assessments were for more than the premises were or would be benefited,

and the objectors offered evidence to sustain that objection. The people objected to the evidence on the grounds: First, that the objectors signed the petition for the organization of the district; second, that there was a classification of the lands of the district, which had become final, and the objector Le Tempt had appeared and obtained a reduction as to his lands; third, that bonds had been issued and registered with the state auditor and sold, and both objectors had voluntarily paid an assessment in 1913, and Farley had paid an assessment due in 1914. The court decided that for these reasons the objectors were estopped to make the objection that their lands were not benefited to the amounts of the assessments.

The signing of the petition only pledged the signers to the fact that in their opinion the lands lying within the boundaries of the proposed district required a combined system of drainage. The provision of § 15 (Hurd's Rev. Stat. 1913, chap. 42, § 89) that the signing of the petition shall be taken as conclusive against the persons so signing that they have accepted the provisions of the act as to their benefits and damages thereunder can apply to nothing except statements contained in the petition signed, and that provision was so construed in *People ex rel. Quisenberry v. Bentley*, 268 Ill. 470, 109 N. E. 289. It was there said that the provision does not

—effect of signing petition.

mean that a signer of a petition agrees to accept any assessment of benefits that may be made, and that he is not deprived of the protection of his constitutional right that his property shall not be assessed more than it is benefited. The estimated amount in the organization is only as to the probable aggregate amount of benefits, and is not conclusive as to the amount which may be raised by an assessment, or that an assessment may not exceed the benefits. *Little Beaver Special Drainage Dist. v. Livingston*, 270 Ill. 582, 110 N. E. 806.

There had been a classification of

the lands of the district, and one of the objectors had secured a lower classification on a hearing, but the classification only fixes the proportion which the several tracts of land should pay of any valid assessment within constitutional limits. The classification settles no question as to the actual results of the work, and even the classification is only permanent in case it is found, from experience and results, to be just. Section 21 of the act provides for a reclassification where it appears, from experience and results, that the first classification was not fairly adjusted on the several tracts of land according to benefits. The fact that there has been a classification does not deprive the landowner of the right to insist that

—participation in classification—effect.

an assessment against his land shall not exceed the benefits. *People ex rel. Vaughn v. Welch*, 252 Ill. 167, 96 N. E. 991; *People ex rel. Kellogg v. Brown*, 253 Ill. 578, 97 N. E. 1075; *People ex rel. Freeman v. Whitesell*, 262 Ill. 387, 104 N. E. 688.

If landowners in a farm drainage district, with knowledge of the amount of the assessment against their lands, petition the commissioners to divide the assessment into instalments and issue

—petition for bonds—estoppel.

bonds therefor, thereby inviting investors to purchase the bonds, the landowners are estopped to urge that the assessment exceeds the benefits from the improvement. But that is based upon well-recognized rules of estoppel. *People ex rel. Abb v. Soucy*, 261 Ill. 108, 103 N. E. 570. That doctrine does not apply to this case, in which the objectors did not ask the commissioners for a division of the assessment into instalments, and did not in any manner induce the issuing of the bonds. The mere fact that they paid an assessment due in 1913, and one of them paid an assessment due in 1914, contains no element of estoppel. Any payment in excess of benefits was merely a voluntary contribution to the drain-

—payment of assessment—effect.

age district, from which the district derived a benefit, and which did not cause any change in its action. *People ex rel. Farman v. Cincinnati, I. & W. R. Co.* 261 Ill. 582, 104 N. E. 252; *People ex rel. Heikes v. Jonkman*, 266 Ill. 229, 107 N. E. 159. The court erred in sustaining the objections to the evidence.

The third objection to the assessment was that descriptions of parts of the tracts of land were illegal and void. One tract owned by the objector *Le Tempt* was described as the south part of a 40-acre tract, containing 15 acres, which would be a rectangular piece of land, while, in fact, his land was not in that form. A part of the tracts of land of the objectors was taken up, in part, by the right of way and ditch of the drainage district, for which deeds had been made to the district. The Illinois Central Railroad Company owned a part of the land occupied for its right of way, and a tract assessed as 40 acres was partly occupied by the village of Rileyville, with church and school sites and additions to the village. The court deducted the number of acres that had been deeded to the district for a right of way and the land owned by the railroad company and others, and entered judgment according to the classification upon the acreage remaining. The lands were classified in 40-acre tracts, and, so far as they were owned by different persons at the time of the classification, the law permitted the landowners to object to a classification of their lands in combination with others and allowed an appeal. They

—failure to
object to method
of classification
—waiver.

could have had the method of classification corrected, and it was too late, after an opportunity to do so, to

make the objection on the application for judgment. The original classification is binding until a new classification is made. *People ex rel. Gifford v. Chicago & I. Traction Co.* 267 Ill. 510, 108 N. E. 687; *People ex rel. Freeman v. Whitesell*, *supra*. assessment on right of way. So far as that right

of way deeded to the district was concerned, it ought to have been eliminated and not included in the assessment. The landowner ought not to be required to appear and incur attorney's fees and expenses to relieve his lands from payment of an assessment including lands of the district itself. So far as it was the fault of the objectors that their lands were classified in combination with the lands of others, in failing to have the classification corrected, the deduction by the court of lands which should have been separately classified was all they could ask.

For the errors pointed out, the judgment is reversed, and the cause remanded.

NOTE.

The loss of the right to contest an assessment in drainage proceedings by waiver, estoppel, or the like is the subject of the annotation following *GEIB v. MORRISON*, post, 842. The reported case (*PEOPLE EX REL. DORRIS v. LE TEMPT*, ante, 835) with the other cases bearing on the specific points decided therein, is cited in subdivisions III. a, 6, and IV. a, 5 (b).

The loss of right to contest assessment in proceeding for street or sewer improvement by waiver, estoppel, or the like is treated in the annotation following *Bartlesville v. Holm*, ante, 634.

JOSEPHINE GEIB, Appt.,
v.
COUNTY OF MORRISON, Respt.

Minnesota Supreme Court — November 1, 1912.

(119 Minn. 261, 138 N. W. 24.)

Drain — standing by — right to contest.

1. A person who, with knowledge of the proceedings to establish a public drain which benefits his lands, stands by while such drain is being constructed, knowing that the expense thereof must be assessed against the lands benefited, cannot, after the lapse of more than three years, invoke the equity powers of the court to remove the cloud cast upon his said lands by the assessment made in the proceedings, on the ground that these were without jurisdiction.

[See note on this question beginning on page 842.]

— posting notices — failure of proof — effect.

2. A finding that the proceedings to establish a drain under chapter 230, Gen. Laws 1905 (Rev. Laws Supp. 1909, §§ 2651-44 to 2651-106), were regular, is not impugned by another finding that

certain proof of the publishing or posting of a required notice is lacking or insufficient, for the statute does not require proof of the publication, mailing, or posting of the notices therein specified to be filed or preserved in the records of the proceedings.

Headnotes by HOLT, J.

APPEAL by plaintiff from a judgment of the District Court for Morrison County (Nye, J.) in defendant's favor in an action brought to remove the apparent lien cast upon plaintiff's land by the spreading upon the records of the tabular statement of benefits assessed against the land in an alleged invalid ditch proceeding. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. A. H. Vernon, for appellant:

The requirements of the statute as to the giving of notice were not complied with, and hence the county board was without jurisdiction to act in these proceedings, and the apparent lien attempted to be imposed upon plaintiff's lands thereby is void and a nullity.

Curran v. Sibley County, 47 Minn. 313, 50 N. W. 237; State ex rel. Utick v. Polk County, 60 L.R.A. 161, and note, 87 Minn. 325, 92 N. W. 216; Hamilton, Special Assessments, §§ 191-323, 348; Gray, Limitations of Taxing Power, § 2002; Heinz v. Buckham, 104 Minn. 389, 116 N. W. 736; Johnson v. Morrison County, 107 Minn. 87, 119 N. W. 502; State ex rel. Wickstrom v. Isanti County, 98 Minn. 89, 107 N. W. 730; Cassidy v. Souster, 115 Minn. 191, 132 N. W. 292; Overmann v. St. Paul, 39 Minn. 120, 39 N. W. 66; Sewall v. St. Paul, 20 Minn. 511, Gil. 459; Hawkins v. Horton, 91 Minn. 285, 97 N. W. 1053;

McCauley v. McCauleyville, 111 Minn. 423, 127 N. W. 190, 20 Ann. Cas. 828; Lyle v. Chicago, M. & St. P. R. Co. 55 Minn. 223, 56 N. W. 820.

Plaintiff is not barred from relief because she had taken no action, either by injunction, certiorari, or otherwise, to test the validity of the ditch proceedings or the tax attempted to be collected thereunder, and the action to remove the cloud created by the ditch lien from her title is a proper one.

Curran v. Sibley County, 47 Minn. 313, 50 N. W. 237; Hamilton, Special Assessments, § 438; Hawkins v. Horton, 91 Minn. 285, 97 N. W. 1053; Scofield v. Lansing, 17 Mich. 437; Cushing v. Spokane, 45 Wash. 193, 122 Am. St. Rep. 890, 87 Pac. 1121; Marsh v. Brooklyn, 59 N. Y. 281; Monroe County v. Rochester, 154 N. Y. 570, 49 N. E. 139; Minnesota Linseed Oil Co. v. Palmer, 20 Minn. 468, Gil. 424; Sewall v. St. Paul, 20 Minn. 511, Gil. 459; Cass

County v. Plotner, 149 Ind. 116, 48 N. E. 635; Atkinson v. Newton, 169 Mass. 240, 47 N. E. 1029; Atwell v. Barnes, 109 Mich. 10, 66 N. W. 583; State v. Tuck, 112 Minn. 493, 128 N. W. 823.

Mr. D. M. Cameron, for respondent:

Inasmuch as all the proceedings were in accordance with law, the appellant had notice by mail of the ditch proceedings, and, having such notice, she is not in position to avoid the assessments by reason of the defects found by the court below.

Pittsburgh, C. C. & St. L. R. Co. v. Machler, 158 Ind. 159, 63 N. E. 210; Grimes v. Coe, 102 Ind. 406, 1 N. E. 735; Wolpert v. Newcomb, 106 Mich. 357, 64 N. W. 326; Wabash Eastern R. Co. v. East Lake Fork Special Drainage Dist. 134 Ill. 384, 10 L.R.A. 285, 25 N. E. 781; Blake v. People, 109 Ill. 504; Patterson v. Baumer, 43 Iowa, 477; Haines v. Campion, 18 N. J. L. 49; Kellogg v. Ely, 15 Ohio St. 64; Oliver v. Monona County, 117 Iowa, 43, 90 N. W. 510; Dakota County v. Cheney, 22 Neb. 437, 35 N. W. 211; State v. Johnson, 111 Minn. 255, 126 N. W. 1074; Curran v. Sibley County, 47 Minn. 313, 50 N. W. 237; Fajder v. Aitkin, 87 Minn. 445, 92 N. W. 332, 934; Kerr v. Waseca, 88 Minn. 191, 92 N. W. 932.

Holt, J., delivered the opinion of the court:

The action was brought to remove the apparent lien cast upon plaintiff's land by the spreading upon the records of the auditor's tabular statement of benefits assessed against the land in an alleged invalid ditch proceeding under chap. 230, Gen. Laws 1905 (Rev. Laws Supp. 1909, §§ 2651-44 to 2651-106). Findings were made, and judgment entered pursuant thereto, denying plaintiff relief. She appeals from the judgment.

The return does not contain a settled case or bill of exceptions, so that the correctness of the judgment must be determined by reference to the pleadings and findings alone. It appears therefrom that in February, 1906, proceedings were instituted before the board of county commissioners of Morrison county to establish county ditch No. 17. In September following the order was made establishing the ditch, and in December thereafter, pursu-

ant to the order, the auditor made and recorded the tabular statement charging the land of plaintiff and other lands with the assessments for the construction of the ditch. Plaintiff has been at all times in question a nonresident. The answer alleged that the ditch was actually constructed under the proceedings; that plaintiff's lands were thereby benefited; that the then owner of the land described in the complaint knew that the ditch was being constructed, and made no protest until long after the work had been performed, except by protesting to the payment of the ditch assessment after it had been levied. There was no reply, hence the allegations as to benefit to plaintiff's lands from the construction of the ditch, her knowledge of the work while being done, and her failure to object till long after its completion, stand admitted.

The only basis for an attack on the ditch proceedings results from the irregularities found by the court, as appears from the first of these two paragraphs of the findings:

"III. That the proceedings so had and taken by said board of county commissioners were in certain respects irregular in this: That the printer's affidavit of publication of notice of hearing upon said petition does not show that the same was sworn to by the person purported to have made and signed the same; that the proof of posting of notice of hearing to consider the engineer's and viewer's reports is defective, in that it fails to show that such notice was posted in township 39, range 28, in which township a part of said ditch was located; that the notice of the meeting of the county commissioners to act upon said engineer's and viewer's reports was in fact posted at the courthouse door not more than twenty days before the date of said meeting; that the notice of such meeting was in fact posted in township 39, range 29, in which township a part of said ditch was located, not more than eleven

days before the day of such meeting; but in all other respects the proceedings had and taken by said board of county commissioners in reference to the establishment, laying out, and construction of said ditch were in accordance with law.

"IV. That the ditch heretofore referred to was in fact constructed under the proceedings instituted therefor; that the plaintiff's land was in fact benefited thereby; and that no objection to such proceedings was made by the plaintiff prior to the bringing of this action, nor was any action taken at any time, either by injunction, certiorari, or otherwise, to test the validity of said proceedings, or the taxes attempted to be collected thereunder prior to the bringing of this action."

The two irregularities first specified by the court cannot be material. The finding that all the proceedings were in accordance with law amounts to a finding that the notice of hearing was duly published and posted. Undoubtedly it is commendable practice to preserve proof of such publication by filing an affidavit of the printer as to the paper

and issues thereof in which the notice was published, and also proof

as the law so prescribes, it must be done. But it is to be observed that the statutes relating to these proceedings are silent on the matter.

The county commissioners are required to satisfy themselves that the prerequisite notice has been given, and their order establishing the ditch is prima facie proof thereof. Gen. Laws 1905, § 48, chap. 230

(Rev. Laws Supp. 1909, § 2651-91).

So, also, the finding that the proof of posting the notice of hearing to consider the engineer's and viewer's reports is defective, in that it fails to show that such notice was posted

in town 39, range 28, in which township a part of the ditch is located, is not material, for it is not a finding to the effect that such notice was not in fact posted.

The court, however, does find that

the notice on the engineer's and viewer's reports was not posted for the requisite number of days before the hearing at the courthouse, and in the township where is plaintiff's land and part of the ditch. Whether the failure so to do ousted the commissioners' jurisdiction, if they had acquired it by the due notice of the hearing on a proper petition for the ditch, or whether they could not obtain any jurisdiction because the notice was not posted in the places mentioned in the findings the length of time required, or whether, plaintiff being a nonresident, the service of the notice by mail, as required by the statute, was sufficient to give jurisdiction as to her interest in the land, we need not stop to consider in this case, for we are of opinion that the record shows that plaintiff is not in position to invoke the aid of the court. Her knowledge of the construction of the ditch is established by failure to reply to the answer alleging such knowledge. The ditch benefited her lands. She permitted the county and persons interested to incur the expense of the enterprise, knowing that the same would be assessed against lands benefited. No objection was made by her in the ditch proceeding, and no appeal taken from the order therein. She waited almost four years after the work was done before bringing the present action.

Her conduct has been such that her standing by—right to contest. suit at this time

ought not to move the court of equity to her aid. In State v. Johnson, 111 Minn. 255, 126 N. W. 1074, the court intimates that, where a property owner stands by and witnesses the expenditure of public funds in improvements which confer special benefits upon his property, and where the character of the improvement is such that it must be paid for by an assessment upon the land benefited, he ought not to be permitted to question the validity of an assessment for improvements made under color of law. This rule is firmly established in Indiana, as

appears from *Cass County v. Plotner*, 149 Ind. 116, 48 N. E. 635, and the cases therein cited. In *Atwell v. Barnes*, 109 Mich. 10, 66 N. W. 583, a case to enjoin the collection of a drainage tax, the contention was made that the defects in the drain proceeding were jurisdictional. The court says: "Where this is the case, no waiver can cut off the rights of the party, or interfere with his right to complain. We need not determine what would be the right of complainant at law. The cases above cited [*Byram v. Detroit*, 50 Mich. 56, 12 N. W. 912, 14 N. W. 698; *Lundbom v. Manistee*, 93 Mich. 170, 53 N. W. 161; *Goodwillie v. Detroit*, 103 Mich. 283, 61 N. W. 526] do not turn on the principle of waiver, but hold that where a party stands by and sees work of

this kind go on, with full knowledge that he is to be assessed therefor, and knowing that those who do the work can be compensated in no other way than by an assessment for benefits, and when, as in the present case, the complaining party actually receives a benefit from such work, equity will not interpose to relieve him." *Kellogg v. Ely*, 15 Ohio St. 64.

We therefore hold that, plaintiff having stood by while a ditch was constructed which benefited her land, with full knowledge of the proceedings and that the expense thereof would necessarily be assessed against lands benefited, she cannot now, after a lapse of more than three years after completion of the enterprise, invoke equitable relief.

The judgment is affirmed.

ANNOTATION.

Loss of right to contest assessment in drainage proceeding by waiver, estoppel, or the like.

- I. Introductory, 843.
- II. Waiver by express contract, 843.
- III. Estoppel by petitioning for or promoting improvement:
 - a. Signing petition:
 - 1. Generally, 844.
 - 2. Sufficiency of petition, 845.
 - 3. Validity of statute, 845.
 - 4. Conformity of proceedings to statute, 845.
 - 5. Performance of work, 847.
 - 6. Assessment, 847.
 - b. Active participation in proceeding:
 - 1. Generally, 847.
 - 2. Sufficiency of petition, 848.
 - 3. Validity of statute, 849.
 - 4. Conformity of proceedings to statute, 849.
 - 5. Performance of work, 854.
 - 6. Assessment, 854.
- IV. Estoppel by failure to resort to legal remedy:
 - a. Failure to object:
 - 1. Generally, 855.
 - 2. Sufficiency of petition, 856.
 - 3. Conformity of proceedings to statute:
 - (a) Establishment of district generally, 857.
 - (b) Qualification of official, 859.

IV. a, 3—continued.

- (c) Estimate of cost, 861.
- (d) Notice, 862.
- (e) Report or finding of commissioners, 863.
- (f) Letting of contract, 864.
- (g) Issuance of bonds, 865.
- 4. Performance of work, 865.
- 5. Assessment:
 - (a) Method and legality of assessment generally, 865.
 - (b) Classification of lands, 866.
 - (c) Discrimination or unfairness, 868.
 - (d) Excessiveness of assessment generally, 868.
 - (e) Land not benefited, 869.
- b. Appearing and filing other objections:
 - 1. Generally, 872.
 - 2. Sufficiency of petition, 872.
 - 3. Validity of statute, 873.
 - 4. Conformity of proceedings to statute, 873.
 - 5. Performance of work, 877.
 - 6. Assessment, 877.

IV.—continued.

- c. Failure to pursue remedy within time prescribed by statute, 878.
- d. Failure to appeal:
 - 1. Generally, 880.
 - 2. Sufficiency of petition, 880.
 - 3. Conformity of proceedings to statute, 880.
 - 4. Performance of work, 884.
 - 5. Assessment:
 - (a) Excessiveness in general, 884.
 - (b) Classification of lands, 885.
 - (c) Land not benefited, 887.

V. Estoppel by acquiescence or acceptance of benefits:

- a. Delay or acquiescence:
 - 1. Generally, 888.
 - 2. Validity of statute, 890.

1. *Introductory.*

The present annotation is confined strictly to a consideration of the loss of the right, by waiver, estoppel, or the like, to contest an assessment in drainage proceedings. A similar question with respect to street or sewer improvements is discussed in the note to *Bartlesville v. Holm*, ante, 634.

While this annotation considers the necessity of timely objection in the drainage proceeding in order to save the right to question the assessment because of defects in the proceedings (see *infra*, subd. IV.), it discusses this question only with reference to the waiver or estoppel resulting from the neglect of the property owner. The conclusiveness in a collateral proceeding of an adjudication made in the course of a drainage proceeding, and the extent of judicial review of administrative orders in such a proceeding, involve no element of waiver or estoppel, and are not herein discussed.

II. *Waiver by express contract.*

As distinguished from the effect as an estoppel of a consent to or active participation in drainage proceedings (see *infra*, subd. III.), the waiver by express contract of the right to object to an assessment in such proceedings seems rarely to have been involved in the decisions.

In *Hoisington v. Price* (1913) 32 S. D. 486, 143 N. W. 776, it appeared

V. a.—continued.

3. Conformity of proceedings to statute:

- (a) Establishment of district or corporation generally, 891.
- (b) Resolution or finding of necessity, 891.
- (c) Qualification of official, 892.
- (d) Acquiring right of way, 892.
- (e) Notice, 892.
- (f) Contract, 895.
- (g) Issuance of bonds, 896.

4. Performance of work, 896.

5. Assessment, 899.

b. Accepting damages awarded, 901.

VI. Estoppel by payment of assessment, 902.

that a number of landowners, affected by drainage ditch proceedings, entered into a written contract providing in part as follows: "We hereby waive all objection to the proceedings by reason of any defect in the proceedings already taken or to be hereafter taken, and consent to our assessments and proportion of benefits as they are laid and determined, or shall be laid and determined in the future, and stipulate that we will not make any objection to any part of said procedure in any manner." Holding that the defendants in the case at bar, who were among those signing the contract, were thereby estopped thereafter to question the regularity of the proceedings, the court said: "We are of opinion the trial court was clearly right in holding the defendants estopped from questioning the regularity of the proceedings of the county commissioners in the establishment of the ditch, or the validity of said assessment certificates. The trial court expressly finds that the course of the ditch, as petitioned for, was changed and extended, pursuant to and in compliance with the request of appellant Price, and others, and with his consent and knowledge. Appellant in the written stipulation expressly agrees that he 'will not make any objection to any part of said procedure in any manner,' and consents to his assessment and proportion of benefits, 'as they shall

be laid and determined in the future.' In this class of cases defects in the proceedings of county commissioners, whether of such character as to occasion a loss of jurisdiction or otherwise, may be waived, and appellant is clearly estopped from asserting that the commissioners lost jurisdiction of the proceedings by a change in the direction or termini of the ditch, or by any other alleged irregularities in the proceedings."

Where the original plans for a drainage improvement were not carried out, but part of the project was abandoned by agreement among the landowners, it was held that none of them was in a position to object to an assessment on this ground and the consequent loss of benefit to him. *Christenson v. Hamilton County* (1918) — Iowa, —, 168 N. W. 114.

In *Walker v. Sundermeyer* (1915) — Mo. —, 175 S. W. 185, it appeared that a property owner who had not been notified of a proceeding to establish a drainage district appeared in the circuit court and expressly waived in writing all objections to such want of notice. It was held that as she was barred of all right to question the validity of the proceedings on that point, all other persons were thereby prevented from raising the point.

In *Drainage Dist. v. Armstrong* (1906) 44 Wash. 23, 87 Pac. 52, wherein certain property owners sought to offset, as against an assessment for benefits, damages alleged to have accrued to them by reason of a dam which cut off navigation from their warehouses, it appeared that when the petition for the formation of the drainage district was being circulated, they signed an agreement by which they waived any claim for damages by reason of the construction of the dam. It was held that evidence was not admissible to show that the property owners signed the waiver of damages on the sole consideration that no assessment for benefits should be made against their lands, it not appearing that the person alleged to have made such representation had any authority to release anyone from the payment of benefits; and, further, it was

held that the waiver was not without consideration, since it was stated therein that it was important to the property owners that a drainage district should be organized, and that certain individuals residing within the territory of the proposed district declined to sign the petition for the formation thereof unless the waiver was made.

Under a statute in Georgia, owners of land assessed for construction of drain improvements, who neglect or fail to pay the full amount of their assessments to the county treasurer within the specified time, shall be deemed as consenting to the issuing of drainage bonds, and, in consideration of the right to pay their assessments in instalments, they thereby waive their right to any defense against the collection of the assessments because of irregularity, illegality, or defect in the proceedings prior to that time (Acts 1911, pp. 108, 128, § 33; Park's Anno. Code, § 439 (gg)), with specified exceptions. Following the provisions of this act a property owner is estopped to object to an assessment on the ground that the contractor failed to complete the work within the time specified and agreed upon. *Perkins v. Drainage Comrs.* (1918) 148 Ga. 292, 96 S. E. 418.

III. Estoppel by petitioning for or promoting improvement.

a. Signing petition.

1. Generally.

The effect as an estoppel of signing a petition for a drainage improvement, together with other acts of participation in the drainage proceeding, is treated *infra*, in subd. III. b. The rule that a petitioner is a party to the drainage proceeding so that adjudications made therein bind him is not considered as being within the scope of this note, since it is based on the doctrine of *res judicata* rather than on an estoppel resulting from signing the petition. The general rule, subject to some exceptions, seems to be that the signer of a drainage petition is estopped to object to any proceedings which naturally result from the filing of the petition. See the cases cited in

the following subdivisions, wherein the application of the rule to particular defects is considered.

The rights of persons who, by operation of law, have been placed in the position of petitioner were discussed in *Yancey v. Thompson* (1892) 130 Ind. 585, 30 N. E. 630. In that case, in construing a statute which provides, in effect, that where lands not named in the petition are named in the report, they shall be regarded as having been in fact described, and the owners named, in the petition, the court said: "It is evident from this provision, we think, that the new parties brought in by the report shall have the same rights as the others would have at that stage of the proceedings. The time has then passed for a person whose lands were in fact described in the petition, and who was in fact named in the petition, to raise any objection to the petition, to the competency of the drainage commissioners, or for two thirds of them to remonstrate and dismiss the petition. The new parties occupying the same attitude, and having only the same rights as the old ones at that time, they can raise none of those objections. If by reason of the new parties having had no notice of the proceedings up to this date, they can go back and remonstrate and dismiss the case, they certainly would on the same ground go back and object to the form and sufficiency of the petition and to the competency of the drainage commissioners. We do not think such was the intention of the statute, but, on the contrary, it was intended to bring the new parties in by notice, and that they should occupy the same attitude and have the same rights that the other parties had at that stage of the proceedings, and which in fact gives them a hearing and protects them in all their substantial rights, and prohibiting them from raising any objection to the proceedings had up to that time." See to same effect, *Ross v. Hannah* (1910) 173 Ind. 671, 91 N. E. 232.

2. Sufficiency of petition.

A petitioner for a drainage improvement cannot ordinarily be heard at

any stage of the proceedings to question the sufficiency of the petition, as to its uncertainty with respect to the initial point of the ditch. *Smith v. Pence* (1914) 33 S. D. 516, 146 N. W. 709.

3. Validity of statute.

A petitioner, having invoked the law to establish a drainage ditch, is estopped, after the establishment thereof, to object to the unconstitutionality of the law under which the ditch was constructed. *De Noma v. Murphy* (1911) 28 S. D. 372, 133 N. W. 703.

4. Conformity of proceedings to statute.

Where landowners petition for the cleaning out of a drain, they cannot avoid payment of the expenses incurred by having the proceedings set aside for mere irregularities. They are assumed to have acquiesced in the work, and cannot be heard to complain. *Lanning v. Palmer* (1898) 117 Mich. 529, 76 N. W. 2.

Thus, a property owner who petitions for the organization of a drainage district cannot object to the extension of the district in a supplemental petition, on the ground that he had no notice of the proceedings. *State ex rel. Jones v. Young* (1914) 255 Mo. 627, 164 S. W. 579, wherein the court said: "His contention is that he had no notice that the court had ordered the commissioners to make the amendment before mentioned, changing the boundaries of the district, which is true; but there is no question but what the court had the legal authority under the statutes to make said order, and the appellant, having been in court all the time, cannot be now heard to say he knew nothing of the order nor of the change of the boundaries of the district, made in pursuance thereof. . . . The rule is universal, so far as I know, that when a person enters his appearance in a cause, or when he has been personally served, he is in the court for all the purposes of that case from that time until the final disposition of the same." See to same effect, *State ex rel. Jones v. Galloway* (1914) 255 Mo. 637, 164 S. W. 581.

But a property owner who petitions for the organization of a district and the construction of ditches is not thereby estopped from objecting to an order which did not establish the district prayed for in the petition, but another district with different boundaries. *Borah Drainage Dist. v. Ankenbrand* (1917) 277 Ill. 132, 115 N. E. 112.

A landowner who is a petitioner for a drainage improvement, but later withdraws his name, is not entitled to notice of the date of hearing of the petition, and is charged with notice of his own proceeding. He is, therefore, estopped from objecting to an assessment because no notice was given. *Pumphrey v. Hollis* (1909) 43 Ind. App. 319, 87 N. E. 255.

A fortiori, a landowner who is one of the signers to the petition for a ditch cannot complain of the sufficiency of a notice of the filing of the petition, which is not in exact compliance with the requirements of the statute, but is not so defective as to constitute no notice. *Oliver v. Monona County* (1902) 117 Iowa, 43, 90 N. W. 510. See to the same effect, *Carr v. Boone* (1886) 108 Ind. 241, 9 N. E. 110.

Likewise, where property owners file a petition for the establishment of a drain and make no objection to the appointment of another than the county surveyor as engineer, they are estopped from asserting, after the report of the commissioners is filed, that the county surveyor was disinterested and competent to act as commissioner. *Hardin v. Cook* (1914) 181 Ind. 698, 105 N. E. 231, wherein the court said: "Should it be conceded that enough facts are stated in the motion to have entitled appellants to any relief, it is sufficient to say that the motion came too late. Objections of this character should be urged at the first opportunity, and before the incurring of the expenses occasioned by the report." See to the same effect, *Grow v. Davisson* (1918) — Ind. —, 119 N. E. 145.

A landowner whose predecessor in title signed a petition for the creation of a swamp land district, and also the petition addressed to the board of supervisors for the issuance of the

bonds, is estopped from objecting to the proceedings on the ground that no notice was given of the creation of the district and the issuance of the bonds. *Scrivener v. Lamar* (1910) 97 Miss. 848, 53 So. 537. The court said: "If it is necessary for actual notice of those matters to be served upon the landowners before the board can act, such notice, of course, would be sufficient if served upon the owner of the land. If the owner waives the notice, service of notice is not necessary, and certainly, where he joins in the petition asking that the district be created and the bonds issued, he cannot complain that notice was not served upon him. Appellant has no greater right in this matter than his grantor, and, since his grantor is estopped from pleading want of notice, appellant is also."

But it has been held that where the notice of application for a ditch is without signature, and the time between the date and the return day of the notice is shorter than the period required, the defect is fatal, and a petitioner is not estopped from contesting the validity of the proceedings. *Taylor v. Burnap* (1878) 39 Mich. 739, wherein the court said: "The plaintiff must be supposed to have petitioned for legal and not illegal action on the part of the commissioner, and it would be startling to hold that, because he applied for the prosecution of lawful methods, he should therefore be precluded from complaining against unlawful ones enacted to his prejudice. Every day's experience in the courts of justice exposes the fallacy of the objection. The plaintiff is never supposed to be estopped from complaining of a wrong ruling to his prejudice, for the bare reason that he instituted the action or invoked the jurisdiction. When the party has given his assent to the specific act by procuring it or uniting in it, there is or may be good reason for refusing to hear him complain of it, and in this case the counsel might not err in saying that Taylor should not be heard to object to the petition. But the main errors are in the later proceedings, and the plaintiff is not precluded from objecting to them."

5. *Performance of work.*

An objection that a drainage ditch was not constructed in accordance with the plans and specifications, and that the board of supervisors fraudulently and negligently paid for more work than was actually done, or was required to be done according to the specifications, comes too late where the ditch was constructed at the instance of the plaintiffs, and they knew they were bound to pay therefor, and yet they took no steps to inform themselves as to whether it had been properly constructed in accordance with the specifications until it was paid for by the county. *Noyes v. Harrison County* (1881) 57 Iowa, 312, 10 N. W. 751.

6. *Assessment.*

It has been held that one who signs a petition for the formation of a drainage district is not estopped from objecting that the cost of improvements and damages will amount to more than the benefits to his land. *Shelton v. White* (1913) 163 N. C. 90, 79 S. E. 427, wherein the court said: "On the report at the final hearing, it may well be that, from the information afforded by such final report, anyone who signed the petition may find that, contrary to his previous opinion, the cost of the improvements and damages will amount to more than the benefits accruing, and he should then be entitled to ask that his land be omitted from the district, and for an issue of fact as to whether he will be benefited."

So, in *People ex rel. Quisenberry v. Bentley* (1915) 268 Ill. 470, 109 N. E. 289, it was insisted that property owners, having signed the petition for the annexation of their lands to the district, are estopped from objecting to the assessment on the ground that it is in excess of the benefits to the particular tract, and that such signing of the petition binds them to pay the full amount of any assessment levied upon the lands annexed, in proportion to the figure of classification, if the assessment does not exceed, in the aggregate, the benefits to all the lands annexed, regardless of whether the assessment on the particular 80 acres

exceeds the benefits to that particular tract. The court said: "This claim is based upon the last sentence of § 15 of the Farm Drainage Act, which provides that 'the signing of any petition referred to in this act shall be taken as conclusive against the person so signing that they have accepted the provisions of this act as to their assessments of benefits and damages thereunder.' This does not mean, however, that the signer of a petition thereby agrees to accept any assessment of damages or benefits that may be made, or waives his constitutional right that his property shall not be assessed more than it is benefited or taken without just compensation. The provisions of the act as to the assessment of benefits and damages are subject to constitutional limitations, and the signing of a petition does not deprive the signer of the protection of such limitations."

But in *People ex rel. Abt v. Soucy* (1913) 261 Ill. 108, 103 N. E. 570, it was said: "By filing their written petitions with the commissioners that the several assessments be divided into instalments and the bonds of the district be issued, appellees recognized the validity of the assessments and the liability of their lands to pay their proportionate share of the assessments levied. This action on their part amounted to an assurance to any prospective purchaser of the bonds of the district that they would not object to the validity of these assessments and that the levy of the same met with their approval. . . . Appellees are now estopped by their own act from questioning the validity of any of said assessments, or from asserting that the assessments exceed the benefits to their lands."

b. *Active participation in proceeding.*

1. *Generally.*

Under the statutes of most of the states wherein drainage for reclamation purposes is in vogue, the proceedings are in the main conducted by landowners in the district affected, and in these proceedings there is opportunity for participation of taxpayers to a greater extent than in the case of public improvements made by

municipalities. The general rule seems to be that a landowner, by participating actively in the proceedings, thereby estops himself to resist payment of the assessment because of any defect or irregularity. See the cases cited in the following subdivisions, wherein the application of the rule to particular defects is considered.

Thus, in *Hall v. Slaybaugh* (1888) 69 Mich. 484, 37 N. W. 545, the court said: "In this case we think, after a careful inspection of the record, that, in view of the various things done and suffered to pass without protest or objection by the complainant, justice and equity require that he ought not to be allowed, under all the circumstances appearing, to make the complaint he now does, and that the learned circuit judge was right in so holding. There are unquestionably some irregularities in the proceedings, if the letter of the law is required to be observed. Still, in all material matters in the case of this complainant, he was not misled by them to his injury, and no other party interested, it appears, makes any complaint. The complainant does not appear ever to have made any objection to the construction of the drain, but it does, we think, appear that he went to the commissioner, showed him where he wanted the drain dug, and requested him to put it there; that he had notice of the hearing upon the petition; that he was present on the hearing of the application for the appointment of the special commissioners, and took part in the proceedings in procuring their appointment,—named one of them, and consented to the others; that he conveyed the right of way across his land for the ditch; that he had notice of the day when the contracts to construct the drain would be made, and that he intended to be there, and bid for them; that he had notice of the day for reviewing assessments, and that he did not attend, neither did he object to letting the job for the construction of the drain, or to the assessments made against him; that he was acquainted with all the proceedings, and knew of their being had, in the authorizing and constructing of the drain, and, when present,

sided in carrying them forward, and watched after its construction, and what he did not consent to he did not object to; and after waiting until the assessments were all made for paying for the completed work, and all had paid the same except himself, and after he had received all the benefits to be derived from the construction of the work, he for the first time then comes forward, and objects to the whole proceeding as void, and asks this court to relieve him from the payment of the tax, on the ground that it is just and equitable for him so to do, and that he has no remedy at law. We think that, under all these circumstances, the complainant should be held to have waived all the irregularities of which he complains, and that he should pay the assessment made against him."

2. Sufficiency of petition.

Objections to a petition for a drain that it is not signed by the required number of property holders, and that it does not sufficiently describe the location of the drain, nor state that it is a public necessity, are waived by an owner who is one of the petitioners, releases the right of way for the drain through his land, watches every step taken in the progress of the improvement, is present at every meeting held by the commissioner in laying out and constructing the drain, and makes no objection to the finding of the commissioner of benefits. *Gillett v. McLaughlin* (1888) 69 Mich. 547, 37 N. W. 551. Compare, however, an earlier case from the same jurisdiction, wherein it was held that a petition to "clean out" a ditch, which does not on its own face show that it is signed by a majority of the owners of the property affected, does not confer jurisdiction, and an express waiver of a jury to assess damages, etc., will not estop one who has so signed from contesting the validity of the proceedings. *Harbaugh v. Martin* (1874) 30 Mich. 234.

In *Union P. R. Co. v. Leavenworth County* (1913) 89 Kan. 72, 130 Pac. 855, in disposing of an objection to the initiatory steps taken towards the incorporation of a drainage district,

the court said: "The error of description in the petition is manifestly one of form rather than substance,—one that might have been corrected at any time,—and it is, therefore, a matter of doubt whether, upon a direct attack by the state, the incorporation would be held to be invalid as to any of the territory. Besides, there is good reason for the contention that appellant is estopped to ask an injunction, because of its attitude and actions when the organization was effected and the improvements made. It made no objection when the publication notice was given of the organization of the district. But it was not content with a mere passive dissent; instead of silent opposition, or an unresisting attitude, the appellant took affirmative action and encouraged the making of the improvement and the assumption of the obligations by the district to pay for them. As we have seen, the appellant selected the location for the floodgate on its right of way, and prescribed the height of the levee and the manner in which it should be built across its right of way and tracks. Having encouraged and, in a way, induced the officers of the district to make the outlay on its property, and which necessarily benefited it, the appellant is not in a position to ask a court of equity to enjoin the collection of the taxes against its property to pay for the improvement."

3. *Validity of statute.*

An objection to a drainage assessment that the statute under which it was laid did not provide for notice to property owners to be affected by the proposed ditch is waived where the objector lives in the vicinity, has knowledge of the construction of the work, and as a subcontractor assists and receives compensation for his services, waiting nine years after the levy and after most of the assessment has been collected. *Thompson v. Mitchell* (1907) 133 Iowa, 527, 110 N. W. 901. See to same effect, *Mackay v. Hancock County* (1908) 137 Iowa, 88, 114 N. W. 552. See also *Smittle v. Haag* (1908) 140 Iowa, 492, 118 N. W. 869, wherein it was held that a land owner was estopped from questioning

the validity of the same statute, having taken an active part in the establishment of the ditch, and for twenty years accepted the benefits, the court saying: "Having clearly elected to his own benefit to treat the statute as constitutional, and the proceedings thereunder as valid, they will be deemed valid as to him, and the court will not inquire into the constitutionality of the statute."

Where the lien of an assessment for the drainage of swamp lands is fixed and a matter of record, a purchaser is estopped from denying the validity of the law under which the assessment was laid, if his grantors aided in the procurement of the statute. *Hoertz v. Jefferson Southern Pond Draining Co.* (1905) 119 Ky. 824, 84 S. W. 1141, wherein the court said: "It is alleged in the pleadings of appellee that appellant and his grantors procured the charter and its amendments, and obtained the appointing of the commissioners, and the levy of the assessment, and were its beneficiaries. The appellant was content with denying that he did the things charged in estoppel upon him and his grantors, leaving undenied the whole charge as against his grantors. The legislation, and the acts thereunder, constituting the basis of appellee's claim herein, were obtained and done in 1888 and prior thereto. The work was done and the benefits accrued then and shortly thereafter. The lien was fixed and became a public record, of which appellant had notice when he subsequently purchased. He cannot now successfully claim that his land was not bound in the matter in question by the action of those who owned it at the time. He took the land with its burdens, and he is bound by the estoppel of his grantors. That one who procures unconstitutional legislation, and receives its benefits, is estopped to deny its validity, is well settled in this state." See to the same effect, *Leahy v. Jefferson Southern Pond Draining Co.* (1905) 27 Ky. L. Rep. 286, 84 S. W. 1181.

4. *Conformity of proceedings to statute.*

A property owner who signs a petition for the establishment of a drain-

age ditch, and who applies for and is given the contract for constructing it, being paid out of the assessments laid on his neighbors' farms, is estopped from objecting to the jurisdiction of the commissioners in the matter of locating the ditch, because of irregularities in the proceedings. *Seng v. Payne* (1910) 87 Neb. 812, 128 N. W. 625.

So, where a property owner joins with others in releasing the right of way, and subsequently bids off the work for two sections, deferring objection until the entire tax, except his own, has been collected, he cannot be heard to complain of irregularities committed in the course of the proceedings. *Harwood v. Huntoon* (1883) 51 Mich. 639, 17 N. W. 216.

Similarly, in *Cook v. Covert* (1888) 71 Mich. 249, 39 N. W. 47, it was said: "A review of the record shows that there are many irregularities in the proceedings taken by the commissioner in laying out and establishing this drain, but these complainants do not occupy a position which will enable them to take advantage of any action previous to the apportionment and assessment of the taxes sought to be raised to pay for its construction, by reason of their connection with such proceedings. They were both prime movers for its construction and establishment; they both signed the petition to have it constructed, and under which petition the commissioner acted; each gave a release for the right of way; and each of them assented to all the proceedings in laying out, establishing, and constructing the drain, but objected to the proceedings taken for the purpose of raising the tax necessary to pay for its construction. Of those proceedings to which they assented, and aided in taking, they cannot now be heard to complain."

Likewise, in *New Eel River Drainage Asso. v. Durbin* (1868) 30 Ind. 173, it was said by way of dictum, in a suit to recover a drainage assessment: "The defendant was not a member of the association, nor had he contracted with it as a corporation, and was not, therefore, estopped from denying its legal existence as such at

the time of making the assessment upon which he was sued."

In *De Noma v. Murphy* (1911) 28 S. D. 372, 133 N. W. 703, the court stated the facts and its conclusions as follows: "Defendants by their answer plead that plaintiff was estopped from maintaining the present action, for the reasons that plaintiff signed the petition to the board of county commissioners, praying for the establishment of said drainage ditch; that he was present at all times, and saw said drainage ditch being constructed, and knew just what procedure was taking place in relation to the establishment and construction of said ditch; and the court found that plaintiff signed the petition, and had cognizance of and consented to the procedure and construction of said ditch; that the petition described the location of said ditch south of plaintiff's premises as being on the south side of the highway; that the board of county commissioners and surveyor changed such location to the north side of the highway; that the said ditch was put in and constructed on the north side of said highway in the presence of plaintiff, and at plaintiff's request the contractor changed the location of said drain farther out into the highway than he first started to construct it; that plaintiff was present, and saw where the contractor finally located and constructed said drain, and made no protest against the same, but acquiesced in and consented thereto, until plaintiff was called upon to pay his proportion of the cost thereof; that the said ditch was fully completed before this suit was commenced, and drains the lands of plaintiff; and that he has received and is receiving the benefits therefrom; and on this finding the court entered judgment, dismissing plaintiff's action. We are of the opinion that the action was properly dismissed." See to same effect, *Erickson v. Cass County* (1902) 11 N. D. 494, 92 N. W. 841.

Where the evidence showed that all the meetings of the commissioners of a drainage district had been held at the town hall, which was about three quarters of a mile outside of the dis-

trict, in contravention of the decisions of the court that the powers of drainage commissioners are confined to the territorial limits of the district, and must be exercised within its boundaries, it was held that a property owner who attended one meeting was not estopped from objecting that there was no valid classification of the lands of the district because the meeting of the commissioners for classification was held without the territorial limits of the district, and that there was no valid assessment because there was no assessment made at a meeting of the commissioners within the district. *People ex rel Cline v. Camp* (1909) 243 Ill. 154, 90 N. E. 215, wherein the court said: "Even if it were conceded that the appellee was estopped by his conduct from objecting to the proceedings at that meeting, he could not thereby confer authority on the commissioners to hold subsequent meetings outside the district, and would not be estopped from objecting to the proceedings at such meetings. The levy of the assessment at a meeting held outside of the district was void, and the objection to judgment was properly sustained for that reason." But in *People ex rel. Kidd v. Crowley* (1911) 250 Ill. 282, 95 N. E. 192, it was held that an objection to the existence of a drainage district because the meetings to organize the district were not held within its limits cannot be raised by a property owner who signed the petition, took part in the proceedings, and made no protest of any kind until the contract for the entire work had been let, a substantial part of it completed, large sums paid thereon, and obligations assumed for the remaining portion. The court said: "Regardless of whether there was any law for such an election, the recognition by all the parties of the legality of the district was plainly shown by their taking part in its organization and subsequent proceedings. In this connection it may be noted that § 15a was re-enacted as an emergency law on February 27, 1907 (Laws 1907, p. 273), and that thereafter the present drainage commissioners have all been elected under said law."

A property owner is not estopped from objecting to the validity of an assessment on the ground that there was no legal incorporation of the district, though he has stood by without protest until a large part of the work is completed, sums of money expended, and he has received benefit from the improvement. *Newton County Drainage Co. v. Nofsinger* (1873) 43 Ind. 566, wherein the court said: "If we are right in the conclusion at which we have arrived that there was no legal incorporation of said company, we think it must follow that there is no ground for an estoppel shown. It is not like the case where a party has contracted with a company as a corporation, and is therefore estopped to dispute its existence as such. It is not a mere irregularity in the assessment which it is sought to estop the plaintiffs to deny, and which might, in some cases, be a proper application of the doctrine; but it is the very existence of the corporation, a fact which lies at the foundation of the proceeding, and without the existence of which everything based thereon must be invalid."

So, where the final order of the court for the organization of a drainage district is void, a landowner who takes no part in the proceedings except on the hearing of the matter of the assessment of benefits and damages, appearing specifically and limiting his appearance to that of questioning the jurisdiction of the court to proceed further in the cause, waives none of his rights in the premises and does not reinvest the court with jurisdiction. *People ex rel. Williams v. Darst* (1914) 265 Ill. 354, 106 N. E. 936.

A property owner, by participating in the organization of a drainage district, is estopped from objecting to the incorporation of two district watersheds in the same district. *White v. Papillion Drainage Dist.* (1914) 96 Neb. 241, 147 N. W. 218.

A member of a drainage association, by acting as such, is estopped to allege that there was no complete survey of the line of work to be made, nor an estimate of costs, nor a proper description and specification of the

drains. *Liberty Twp. Draining Asso. v. Brumback* (1879) 68 Ind. 93, wherein the court said: "The distinction between restricting a defense against a corporation by one of its members, who has constructive, if not actual, notice of its proceedings, and is bound by its corporate acts, and who has before had his right of appeal, and not taken it, and restricting a defense by a person who is not a member of the corporation, and therefore not bound by its acts, and has before had no right of appeal, is the distinguishing difference between the case cited and the one we are deciding, and seems to us to be plain."

Where a property owner makes an agreement with drainage commissioners by which he releases the right of way over his lands for the construction of ditches for a stated sum, he is estopped from objecting thereafter that the right of way was not secured by an order of the court. *Morgan Creek Drainage Dist. v. Hawley* (1909) 240 Ill. 123, 88 N. E. 465.

An objection that drainage commissioners did not pay for and acquire title to the lands on which a drain was constructed, in accordance with the statute which required lands taken for the construction to be paid for before the commencement of the work, cannot be raised, where they entered on the lands and constructed the drain by the license of the owners, who thereby waived the provisions of the statute. *Olmstead v. Dennis* (1879) 77 N. Y. 378, wherein the court said: "The provision that the land should be paid for before the commencement of the work was for the benefit of the owners, and they could waive it."

Objections based on the fact that a jury was called to condemn land and assess the cost of drainage proceedings over land not released, which, however, was not included in the district, cannot be raised by one who consented to the proceedings and promised to do part of the work, especially where his land received the benefit. *Mabee v. Miner* (1881) 45 Mich. 568, 8 N. W. 578, wherein the court said: "The return of the commissioner shows that the said Mabee was present when

I apportioned the construction of said drain, and expressed his entire satisfaction at the part apportioned to him, and promised that he would construct his part as soon as anyone else, and then and there tried to let out a job for the same.' A party thus consenting should not, after the ditch has been constructed in part and his lands benefited thereby, as the return shows to be the fact, come into court and be heard to complain."

Where it appears that a property holder had actual notice of drainage proceedings and took an active part before and at the time the jury was struck for taking the land and assessing the costs, he is estopped from objecting to the sufficiency of the notice and the filing of proof thereof. *Dunning v. Township Drain Comr.* (1880) 44 Mich. 518, 7 N. W. 239.

A property owner who signed the petition for the organization of a drainage district was appointed one of the board of commissioners, and took active part in the proceedings until the district was completely organized and the assessment confirmed, is thereby estopped from objecting to the sufficiency of the notice of confirmation. This estoppel extends also to his grantee, if the latter bought the land with notice of the facts out of which the estoppel grew. *People ex rel. James v. Seaman* (1909) 239 Ill. 611, 88 N. E. 212, wherein the court said: "It is only objections which go to the jurisdiction of the court that can be urged against an application for judgment. . . . It was the duty of the commissioners to see that proper notice was given, and that the preliminary steps required by the statute were taken, before they called upon the court to enter a judgment of confirmation. Whatever may have been the omission in this regard, we are of the opinion that Marks is now estopped to urge that there was a want of jurisdiction in the court to enter judgment of confirmation; that he, having participated in all of the preliminary steps taken, including assessment of the benefits against his land, could not afterwards raise the objection either that the court or the drainage com-

missioners were without jurisdiction in the premises."

So, a nonresident property owner, having actual notice of the proceedings for cleaning out, enlarging, and extending a ditch, having waived any objections thereto if the drain commissioner followed the old drain on his land, which he did, and the statutory notice of the letting of the contract, assessment district, etc., having been given, cannot resist the sale of his lands for the nonpayment of the assessment, on the ground that the failure of the drain commissioner to file the papers deprived him of his remedy. *Auditor Gen. v. Crane* (1908) 152 Mich. 94, 115 N. W. 1041.

In the same jurisdiction it has been held that where the commissioner gave no notice of the time and place of letting contracts for the construction of a drain, nor notice of the time when the assessment of benefits would be made or be subject to review by the parties interested, a property owner was not estopped from objecting on these grounds because he signed the petition for the improvement, released a right of way, and was active in the proceedings for laying out, establishing, and constructing the drain. *Cook v. Covert* (1888) 71 Mich. 249, 39 N. W. 47, where the court said: "These notices were essential, and should not have been omitted, unless expressly waived; and the record does not show any such waiver. It appears, upon an inspection of the record, that no notice was ever given that the assessment of benefits would be subject to review at any time or place; and it further appears the assessments actually made were never noticed for review by those interested, and in fact were not made until about two or three months after the contracts for the construction of the drain were let, and then without the knowledge of either of the complainants."

An objection that one of the jurors was not a freeholder is waived where the property owner is present when the jurors are chosen, and takes no exception, but, on the contrary, aids in striking the panel and declares him-

self satisfied with it. *Clark v. Teller* (1888) 50 Mich. 618, 16 N. W. 167.

In *Gillett v. McLaughlin* (1888) 69 Mich. 547, 37 N. W. 551, an objection that there was a second letting of contracts for the construction of a drain, and no notice was published or posted of such second letting, as required by statute, was held to have been waived. It appeared that the property owner was present, and bid for the construction of two sections of said drain, and they were struck off to him. Although he allowed another to do the work, he gave the required bond for its faithful performance. At this time he made no objection to any of these proceedings of the drain commissioner, nor even to those on the part of the township board; and never made any objection of any kind to anyone until the tax roll containing the tax complained of was placed in the hands of the treasurer for collection, and then not until after all other owners had paid their assessments.

Where a property owner appealed from the order of the commissioners, but later abandoned the appeal, his successor in title, acquiescing in the abandonment and being active in the construction of the ditch, is estopped to object to the sufficiency of the bond. *Lee v. Clark Implement Co.* (1913) 31 S. D. 581, 141 N. W. 986, wherein the court said: "We think the finding of the trial court on the matter of estoppel pleaded in the answer is conclusive against plaintiffs' alleged cause of action. Finding No. 11 is as follows: ' . . . Thereafter these plaintiffs Lee became the owners of said land, but never continued; but abandoned, said appeal; that said plaintiffs were cognizant of each and all of the acts performed toward the establishment of said ditch, subsequent to the making of said order described in said paragraph 4 hereof; that they acquiesced therein with full knowledge thereof; that they encouraged the construction thereof, and were parties thereto; they urged upon said board of county commissioners the speedy construction of said ditch, and made no objection thereto; that they knew the land herein described and

owned by them would be benefited by and assessed for such construction, and they purchased the same after the assessment of the proportion of benefits thereto had been made, and with full knowledge thereof; that at the time of said purchase they agreed to pay all assessments that were or might be levied against said land on account of said construction of said ditch, and while the said appeal was pending and undetermined; they appeared generally before the said board of county commissioners at the meeting at which the final assessment for the construction of said ditch was laid, and at the meeting at which said certificates were ordered and were issued, and participated in said meeting; that at frequent other times when said board was in session, considering matters relating to said ditch, said plaintiffs were present and participated in said meetings; that they had full knowledge that said ditch was being constructed, and of its construction, completion, and acceptance.' It would be difficult to conceive of a case which would more justly and equitably require the application of the doctrine of estoppel than does this case, upon the facts recited in this finding. We think the trial court was clearly right in holding plaintiffs estopped from attempting to take advantage of the irregularities in the proceedings of the commissioners alleged in the complaint. Appellants' real contention upon the merits appears to be that the irregularities complained of were such as to deprive the commissioners of all jurisdiction to establish the drainage ditch and to issue the assessment certificates. Even if it were so held as matter of law, which we do not hold, the want of jurisdiction would not be more complete than would similar proceedings under an unconstitutional law." See to the same effect, *Smith v. Pence* (1914) 83 S. D. 516, 146 N. W. 709.

A property owner who knows of all the proceedings for the relocation of a ditch, and who takes a contract to dig part of it, cannot maintain a writ of certiorari to review the proceedings, on the ground of the absence of an

adequate record of the proceeding. *People ex rel. Roediger v. Drain Comr.* (1879) 40 Mich. 745.

5. *Performance of work.*

Where a landowner agreed that he would offer no objections to the construction of a public ditch, if permitted to do the work of constructing the same on his own land, it has been held that he was not estopped from enjoining the construction of the ditch on the ground that the engineer abandoned nearly a mile of the ditch, as petitioned for, and established the terminus on the private land of complainant without providing an outlet. *Juries v. Virgens* (1908) 104 Minn. 71, 116 N. W. 109, wherein the court said: "Assuming that appellant knew the county board had fixed the north terminus of the ditch at the place stated, it does not follow that he was prevented from appealing to a court of equity to enjoin the maintenance of the ditch, when subsequent events proved that it was so improperly constructed as to cause great damage to his land. Appellant, as well as the other interested parties, no doubt assumed that the outlet was sufficient; but the responsibility of laying out and constructing the ditch according to law did not rest upon appellant. The public ditch was not begun by the contractors until nearly two years after appellant had constructed his own ditch. Conceding that the engineer was led to believe that appellant would construct a proper outlet, and would maintain it and his own ditch in the future, such contract was invalid. The statute does not authorize any such proceedings. The elements of estoppel are lacking in this case, and injunction was the proper remedy."

6. *Assessment.*

Where a property holder is present at the hearing before the board of supervisors on a drainage petition and admits that the schedule submitted, giving a list of the lands of the proposed district, with the names of the owners, is true, he is precluded from alleging, in an action to enforce collection of the assessment, that there are unsold state lands within the dis-

tract which were not taxed. *Reclamation Dist. v. Hagar* (1884) 66 Cal. 54, 4 Pac. 945.

So, a landowner in a drainage district, having recognized the validity of an assessment, and consented to a compromise of differences between the landowners and bondholders of the district, whereby the latter gave up substantial rights, is estopped from disputing the validity of such assessment. *People v. Weber* (1896) 164 Ill. 412, 45 N. E. 723.

Similarly, if landowners in a farm drainage district, with knowledge of the amount of the assessment against their lands, petition the commissioners to divide the assessment into instalments and issue bonds therefor, thereby inviting investors to purchase the bonds, the landowners are estopped to urge that the assessment exceeds the benefits from the improvement. *PEOPLE EX REL. DORRIS v. LE TEMPT* (reported herewith) ante, 835.

But a property owner who is also a commissioner is not, by reason of his official participation, thereby estopped from contesting the validity of an assessment, on the ground that the county court had not jurisdiction to order a reclassification, when it appears he objected to the levy of two assessments and refused to sign the special tax list, and whatever action was taken being by the other two commissioners who formed the majority of the drainage board. *People ex rel. Heikes v. Jonkman* (1914) 266 Ill. 229, 107 N. E. 159. The court said: "Had he been a party to the making of the assessments a different question might arise, but whatever was done in the matter was done by a majority of the drainage board, without his consent and against his objection, and it cannot be said that he is estopped, or has done anything by which he would be estopped, from questioning the validity of such assessments."

A property owner, who, more than fifteen years before, had helped construct a ditch at the original depth, is not thereby estopped from objecting to the deepening of the ditch, by reason of which the water overflowed on his land. *Elliott v. Carter* (1905)

140 Mich. 303, 103 N. W. 600, wherein the court said: "The claim of estoppel rests upon the evidence that complainants and their grantors had worked in the construction of this ditch. The record does not show that they, by any acts of conduct, consented that this ditch should be dug to the depth now claimed by the defendant. Neither does it justify the conclusion that they consented to and acquiesced in the depth now claimed, and in the tile as now proposed to be put in the sluiceway."

So, where a proposed watercourse along a public highway will injuriously affect the land of an abutting owner, he is not estopped from contesting the validity of the proceedings on the ground that it is not a highway drain, but in reality for the benefit of other property, because the contract for its construction was awarded to him at public bidding, his explanation being that he wished to control and keep the work in abeyance until he could have time to file his bill, and that he resorted to a bidding to guard his rights and secure a short delay. *Conrad v. Smith* (1875) 32 Mich. 429.

IV. Estoppel by failure to resort to legal remedy.

a. Failure to object.

1. Generally.

In the statutes regulating drainage proceedings provision is ordinarily made for the filing of a remonstrance at one or more stages of the proceeding by any property owner deeming himself aggrieved, or for one or more hearings, on notice, at which objections to the proceedings may be made. While a few cases except from the rule fundamental or jurisdictional defects, the general rule seems to be that a property owner who does not object to drainage proceedings in the proceeding itself, at the time and in the manner provided by law, is estopped to urge in opposition to the assessment for the improvement any matter which could have been raised in the course of the proceeding. See the cases cited in the following subdivisions, wherein the application of the rule to particular defects is considered.

The cases applying this rule with particular reference to the failure to object within the prescribed time are discussed *infra*, subd. c, "Failure to pursue remedy within time prescribed by statute."

2. Sufficiency of petition.

Objections to a drainage petition, in order to be available, must be made before the order of judgment of the court confirming and establishing the assessment, and cannot be raised in an action for the collection of the assessment. *State ex rel. Mayfield v. Myers* (1885) 100 Ind. 487.

So, an objection to a petition that it is insufficient to authorize the establishment of a ditch comes too late, after the filing of the report of the commissioners and the entry of judgment by the court, though this judgment is subsequently vacated and the petition again referred to the commissioner. *Updegraff v. Palmer* (1886) 107 Ind. 181, 6 N. E. 353, wherein the court said: "It is clear that the objection would be unavailing, coming as late as it did, even if the record did not show a filing, as the statute declares that 'such judgment shall be conclusive that all prior proceedings were regular and according to law.' This provision has often been applied to cases similar to the present. . . . The fact that the report of the commissioners is invalid, or that the orders of the court based thereon are erroneous, will not supply grounds for dismissing the petition." See to same effect, *Blake v. Quivey* (1888) 113 Ind. 124, 14 N. E. 916.

It has likewise been held that an objection that the bond filed by the petitioners for a ditch was not signed by sureties other than the petitioners themselves is waived, when not made before the board of supervisors. *Re C. G. Hay Drainage Dist.* (1910) 146 Iowa, 280, 125 N. W. 225.

In holding that property owners who fail to avail themselves of the remedy provided by statute are estopped to deny the validity of an assessment on the ground that the petition was not signed by the required number of persons liable to an assessment for benefits, and therefore that the drain com-

missioners had no jurisdiction, the court, in *Clarence Twp. v. Dickinson* (1908) 151 Mich. 270, 115 N. W. 57, said: "Section 4346, 2 Comp. Laws, authorizes a review of the proceedings for establishing a drain by writ of certiorari. Ten days after the order of final determination is filed with the county clerk is given for the issuance of this writ, and it is distinctly provided: 'If no certiorari be brought within the time herein prescribed, the drain shall be deemed to have been legally established, and its legality shall not thereafter be questioned in any suit at law or equity.' Complainants are seeking to do what this law in express terms prohibits. They cannot succeed if the law is constitutional. Complainants' claim of a right to disregard the law is an assertion of its unconstitutionality. Is the law unconstitutional? I have no doubt cases may arise to which this law can have no constitutional application. Such a case will be presented if the proceedings before the drain commissioner violate constitutional rights. The fact that such cases may arise is no reason for declaring the law unconstitutional. It is to be presumed that the legislature intended to enact a constitutional law, and not an unconstitutional law. (Cooley, Const. Lim. 7th ed. p. 255), and it should be construed in accordance with this intent. The language of the statute indicates that the legislature intended to go to the limit of its authority, but it is also to be presumed that it did not intend to exceed those limits. Within the limits of its authority, then, the statute has a constitutional application. *Auditor v. Bolt* (1907) 147 Mich. 283, 111 N. W. 74; *Crandall v. McElheny* (1906) 146 Mich. 191, 109 N. W. 261; *Grande v. McCormick* (1907) 150 Mich. 232, 114 N. W. 80. The question, then, is the only question, for our consideration, is this: Can the statute have constitutional application to this case? The only reason advanced for saying that it cannot is this, viz., that it can afford relief whenever the drain commissioner lacks jurisdiction. It is apparent from the foregoing reasoning that the lack of jurisdiction which

will warrant relief in equity must arise from a violation of the Constitution. The objection to the jurisdiction in such cases must be a valid constitutional objection. Such objection could be urged if no notice or opportunity of hearing was given to one whose property was to be taken for the construction of the drain, for he has a constitutional right to such notice, and if that right is disregarded, the proceedings are, as to him, a nullity. If, on the other hand, the objections to the jurisdiction are not of a constitutional character, it is obvious that the legislature has a right to say how they shall be raised, or, in its wisdom, deprive one altogether of the privilege of raising them. The jurisdictional objection raised by complainant is not of a constitutional character. The Constitution does not require the petition to be signed by five property owners liable to assessments for benefits. That requirement is purely statutory. The legislature might have dispensed with it altogether. It therefore possessed ample constitutional authority to declare how objections to its nonobservance should be made. It had authority to declare that objections not so raised should be disregarded. It exercised that authority by the statute under consideration. That statute is therefore constitutional in its application to this case, and it prevents complainants' maintaining this suit."

In New Mexico, a statute provided as follows: "On the day fixed for hearing on such petition all parties owning lands, or any interests or easements in land, within said proposed district, or who would be affected thereby, may appear and contest: (1) The sufficiency of the petition. (2) The sufficiency of the signers of the petition. (3) The sufficiency of the notice. (4) The constitutionality of the law, and (5) the jurisdiction of the court." In the case of *Re Dexter-Greenfield Drainage Dist.* (1915) 21 N. M. 286, 154 Pac. 382, it was held that a property owner who petitioned for the establishment of a drainage district and appeared at the hearing without raising any objection is es-

topped from questioning the validity of the proceedings on the ground that the petition was not signed by a majority of the landowners, as required by law. The court said: "The appellant in this case undertook to raise the question of the sufficiency of the petition at a time long after the time provided for by the statute. The act provides a full and fair opportunity for all interested parties to appear and raise the very question which the appellant undertook to raise at another and later time. Undoubtedly, from a practical standpoint, it was the intention of the legislature to have these questions determined before the expenditure of large sums of money in the making of the survey and preparation of the plans, profiles, and specifications. . . . We are of the opinion that the orders of the court entered in this proceeding, finding at the conclusion of the hearing provided by law for that purpose that the petition was sufficiently signed, as above indicated, were a final adjudication of that question, and that the same could not be attacked in any method whatever, except as provided by the statute, to wit, by appealing from the order sustaining the petition within thirty days from the entry thereof; and that any other method of attack, whether in the same proceeding, or in any other proceeding, constitutes a collateral attack, and is unavailable."

3. *Conformity of proceedings to statute.*

(a) *Establishment of district generally.*

The fact that a drainage district was incorporated under the name of the "Big Lake Drainage District," instead of under the name of the "Big Lake Drainage District of Missouri," as proposed in the articles filed, is of no consequence after the incorporation. *Re Big Lake Drainage Dist.* (1915) 265 Mo. 450, 178 S. W. 110, wherein the court said: "If the landowners desired to object to such an inconsequential difference they should have done so when the decree was entered. Otherwise, the matter was waived."

So, where a drainage district is formed and the assessment for dam-

ages made and approved without objection at any stage of the proceedings, a property owner is estopped from objecting that the action of the commissioners in creating the district is void for the reason that it embraces two watersheds. *Wilkinson v. Gaines* (1910) 96 *Miss.* 688, 51 *So.* 718.

Likewise, after a ditch is constructed and suit is brought for the collection of benefits against the property, the owners are estopped from questioning the jurisdiction of the court in the proceedings for the establishment and construction of the ditch. *State ex rel. Wilcox v. Jackson* (1889) 118 *Ind.* 553, 21 *N. E.* 321, wherein it was contended that the court had no jurisdiction to order and construct a drain, part of it being within the corporate limits of an incorporated city or town, and assess city or town property for the construction of the same, and that the proceedings of the circuit court in approving the assessments and establishing and ordering the construction of the drain were void. It was held that persons who did not appear to oppose the petition for the establishment of the ditch could not object to the assessment.

Similarly, the authority of drainage commissioners to act in the matter of opening the ditch cannot be attacked for the first time on motion for a new trial, after a decree establishing the ditch and laying assessment for benefits, but should be objected to when their report is presented. *Goodwine v. Leak* (1891) 127 *Ind.* 569, 27 *N. E.* 161.

A landowner who failed to object at the preliminary hearing on a petition for the construction of a drainage ditch may nevertheless assert, at the hearing on the report of the viewers, that the proposed ditch lacks public utility, and is entitled to introduce evidence on that question, though a finding of utility was made at the preliminary hearing. *Heinz v. Buckham* (1908) 104 *Minn.* 389, 116 *N. W.* 736. The court after reviewing the pertinent statutes, said: "It is evident from these sections, and it is necessitated by other sections to which it is unnecessary here to refer, that in a

class of cases in which the court appoints a surveyor and viewers, the first hearing is merely preliminary, and determines principally that the court is justified in proceeding further; that the second hearing reviews and considers the merits of the entire matter upon a hearing of the reports of the officials and of the objections presented, and finally establishes the ditch. The ditch law follows the analogy of the preliminary hearing on the resolution of a city council initiating a local improvement, and the final hearing after the report of the board or body authorized to investigate and report the details of the proposed improvement. . . . It follows that the petitioners, by appearing at the first hearing and not objecting, and by appearing at the second hearing and demanding more damages than were awarded by the viewers, and demanding a jury trial, did not assume a position directly contrary to their assertion of the impropriety of establishing the ditch. They had a right to be heard on the public utility of the ditch, as well as upon their damages. No question is raised as to the sufficiency of the notice by which they were brought into court at the second hearing. On the contrary, they appeared generally, admitted jurisdiction in that sense, and defended. The real basis of the objection was that the court had no jurisdiction on the preliminary hearing, to establish the ditch finally, and that the court erred in refusing to entertain and hear their objections at the second hearing, and in excluding all evidence in support thereof. This position taken by the relators must be sustained. It follows that they had a right to avail themselves of the writ of certiorari to test this question of law upon the record brought to this court."

Upon an appeal from the assessments in a drainage proceeding, the plan adopted cannot be attacked where such plan was presented, published, and adopted, without objection by any of the interested parties. *Polk County v. McDonald* (1920) — *Iowa*, —, 175 *N. W.* 817.

(b) Qualification of official.

An objection that appraisers in a drainage proceeding were not properly appointed is in no sense jurisdictional, and, when not made before the board of supervisors, is waived. *Lightner v. Greene County* (1909) 145 Iowa, 95, 123 N. W. 749.

So, an objection to the qualification of the viewers does not go to the jurisdiction of the county board, and if such disqualification exists, it is an irregularity merely, which must be taken advantage of in the original proceedings and cannot be raised for the first time as a defense to an action to enforce collection of the assessment. *Martin County v. Kampert* (1915) 129 Minn. 151, 151 N. W. 897, wherein the court said: "The board acts in a capacity quasi judicial. Its determination, within the limits of its jurisdiction, is equally conclusive with that of a court. . . . One not a party, who contracts to be bound by the decision of a court or other tribunal, is bound by the decision as effectually as a party is bound, and he can attack the decision in a collateral action only in the case in which a party may attack it collaterally,—that is, on the ground of fraud, collusion, or want of jurisdiction. There being no claim of fraud or collusion, these defendants can attack the validity of the determination of the county board only on the ground of want of jurisdiction. Irregularities that do not go to the jurisdiction of the board can be urged only in the original proceeding, either before the board, or before the court on appeal."

In like manner, where no motion is made before the board of commissioners to reject or strike out the report of the viewers, an objection on the ground that one of the viewers, after his appointment, became a surety on the bond of the petitioner for the payment of costs and expenses, is waived. *Steele v. Empsom* (1895) 142 Ind. 397, 41 N. E. 822, wherein the court said: "It is a well-settled rule that questions not properly presented to the board of commissioners, except such as go to the jurisdiction over the sub-

ject-matter, cannot be made for the first time in the circuit court."

Property owners who are original parties and in court when a drain is referred to the commissioners, and raise no objection to the qualification of two of the board, when they know that the successors of both have qualified and entered on their duties before the time fixed for the report on the drain, are thereby estopped from questioning the validity of the proceedings on this ground. *Seybold v. Rehwald* (1911) 177 Ind. 301, 95 N. E. 235. The court said: "During all of this time no question was raised by appellants of the right of the commissioners to do the work they were bound to know they were engaged in. They waited until the work was completed,—until, presumably, they could determine from the report whether the nature of the drain and the amount of their assessments would be satisfactory. Conceding that a valid objection to the further acting of these commissioners had arisen, appellants waived it by their quiescence, when they might have presented the question to the court and had it determined at any time after the alleged incompetency arose."

Similarly, where the disqualification of a commissioner because of interest in the proceedings is disclosed by the record, and known to the property owners, an objection on this ground is waived if the property holders make no protest, but knowingly acquiesce in the appointment of viewers and in the commissioner's subsequent participation in the proceedings and final judgment. *Carr v. Duhme* (1906) 167 Ind. 76, 78 N. E. 322, 10 Ann. Cas. 967, where the court said: "The board should have been given an opportunity to correct its own errors while the matter was before it. Appellees' silent acquiescence in the action of the board, as shown by the record, was a waiver of the disqualification of Taylor, complained of for the first time on appeal."

So, one who interposes no objection to the qualifications of drainage commissioners as to the regularity of their appointment, when their reports are

presented, nor at any time before the finding, cannot do so for the first time by a motion for a new trial, after judgment on the assessment. *Goodwine v. Leak* (1891) 127 Ind. 569, 27 N. E. 161.

Likewise, where the order of the court to lay out ditches appointed five instead of three commissioners, contrary to the provisions of the statute, an objection to an assessment on this ground is waived if application is not made at the proper time and place for correction of the error, and cannot be raised for the first time after judgment. *Wood v. Wilson* (1869) 4 Houst. (Del.) 94.

And though an assessment made by a commissioner with a real and substantial interest in the proceedings constitutes a taking of property without due process of law, failure to object to such an assessment before its confirmation by the court waives the objection. *Union Drainage Dist. v. Smith* (1908) 233 Ill. 417, 16 L.R.A. (N.S.) 292, 84 N. E. 376.

The fact that a county judge is disqualified by interest from sitting in drainage proceedings does not invalidate a notice of the proceedings, and an owner who has received such notice is estopped from objecting because he had no opportunity to be heard on the selection of a special judge. *State ex rel. Morrison v. Stanton* (1911) 235 Mo. 222, 138 S. W. 337, wherein the court said: "When the defendant was duly notified of the proceeding and through his own neglect failed to enter his appearance and file his answer or remonstrance at the time he ought to have filed same, he cannot be heard to complain that he was not given an opportunity to agree with the plaintiffs upon a competent lawyer to sit as a special judge and try the cause, before the regular judge ordered the election of a special judge."

Similarly, in *Brown v. Powers* (1914) 182 Ind. 145, 104 N. E. 857, it appeared that several remonstrances were filed, and by agreement one was heard and resulted in the appointment of a special judge. It was held that, by failing to make any objection to his appointment, the parties had

waived the right to a consideration of any question relating to the validity of the appointment.

But a property owner is not estopped from objecting to the qualifications of a commissioner on the ground of interest, because he did not raise the question at the time of appointment, but waited until the report of the commissioners was filed. *King's Lake Drainage & Levee Dist. v. Jamison* (1903) 176 Mo. 557, 75 S. W. 679, wherein the court said: "The 270 acres belonging to the wife of the commissioner Seaman were subject, or partly subject, to overflow, and were embraced in the drainage district described in the petition, and would be reclaimed, protected, and rendered valuable by the drains and levee. They were, therefore, very properly included in the proposed district. Her husband was appointed one of the commissioners, with the result that her land was excluded from the drainage district, with the result, according to the uncontradicted testimony as disclosed by this record, that her land would be benefited, reclaimed, protected, and rendered valuable, and she would not be charged with any part of the original cost of the work, nor with any part of the recurring annual expense of keeping the work in repair. The result of all of which is that, by as much as her land was benefited and she was exempted from paying therefor, the burden thus taken off of her land was necessarily added to the burden placed upon the lands of the other owners of land in the district, of whom the defendant is one. This was clearly unjust and wrong. The commissioner Seaman had a marital right to the land during the life of his wife, and if he survived her he would have an estate by the curtesy in the land. He was, therefore, directly and personally interested in the case, both as to benefits received and to be received, and as to burdens taken off of the land. He therefore sat as a commissioner in a case wherein he was personally interested, and by the report of the commissioners was enabled to derive the benefits of the proposed drains and levee, but was relieved from

the burden of paying anything therefor."

A statute providing that objection shall be made to the qualification of drainage commissioners within ten days, or be deemed to be waived, is to be construed as meaning ten days from the time opportunity is given to object. Hence a landowner, brought into court for the first time in response to a notice that his lands have been assessed for the construction of a ditch by the report of the drainage commissioners, may at that time question the competency of such commissioners to act, on account of their kinship to some of the petitioners. *Small v. Buchanan* (1905) 165 Ind. 549, 76 N. E. 167, wherein the court said: "It is a fundamental principle that all tribunals clothed with judicial or quasi judicial functions shall be disinterested and unbiased in all matters brought before them. Any other rule or doctrine would be abhorrent to a natural sense of justice, and incompatible with judicial action. Courts will not construe a statute so as to deny to parties a right so elementary and important as that of having a fair and impartial tribunal to determine property interests, unless such construction is forced upon them by the very terms of the act. . . . Correctly speaking, a waiver can only occur when the party having the opportunity fails seasonably to assert a known right. Appellants, not having been parties to the proceeding or aware of its pendency until after notice of the filing of the commissioners' report making assessments against their lands, were not called upon to act, had no rights to assert, and no opportunity to appear, and the statute cannot reasonably or justly be construed to mean that their silence during this period operated as a waiver of the disqualification of commissioners, in whose selection they did not participate or acquiesce. . . . Appellants consented neither to the selection nor the serving of the incompetent commissioners, but on the contrary made their objections at the earliest opportunity afforded. A majority of the drainage commissioners were, upon the facts shown, disquali-

fied on account of kinship. Appellants did not waive such incompetency, but made seasonable objection thereto. The report of the drainage commissioners was voidable as against appellants, and should have been rejected upon their motion." See also *Seybold v. Rehwald* (1911) 177 Ind. 301, 95 N. E. 235, wherein it was said: "We have no doubt that parties to a drainage proceeding, whose lands are affected by the proposed work, may in a proper case, at the first available opportunity, raise the question of the competency of the drainage commissioners by motion. As to those who are made parties by the petition, the statute fixes the first opportunity for objecting to the commissioners at a time within ten days after the docketing of the proceeding as a cause and the reference to the commissioners, after which time the right to question their competency is deemed waived. As to additional parties who are brought in by the assessment of their lands by the commissioners in their report, who were not original parties, it is held that they may raise the question of the competency of the commissioners by a timely and proper motion to reject the report, made within ten days after they are brought in by notice as parties."

Failure to object before the board of supervisors to an illegality which the board could have readily cured by correcting its procedure, such as that the commissioners appointed by the board never in fact qualified and acted as such, and that they did not in fact inspect the lands, nor classify the same, nor make the purported report which the board acted upon, amounts to a waiver of this objection. *Bloomquist v. Hardin County* (1920) — Iowa, —, 177 N. W. 95.

(c) *Estimate of cost.*

An objection to drainage proceedings on the ground that the detailed plans and estimate are insufficient should be made and corrected on the hearing for the apportionment of benefits, and if it is not then urged, it is waived. *White v. Papillion Drainage Dist.* (1914) 96 Neb. 241, 147 N. W. 218.

So, the sufficiency of an itemized statement of accounts filed with the petition by drainage commissioners is not jurisdictional, and cannot be inquired into, when the question is not raised in the confirmation proceedings where, if it had been found to be insufficient, it could have been corrected by amendment. *Sny Island Levee Drainage Dist. v. Shaw* (1911) 252 Ill. 142, 96 N. E. 984.

But where the taxpayer is given no opportunity to contest an assessment before the commissioners or the board of supervisors, he has the right to urge any objection going to the validity of the assessment against his land in an action brought for the enforcement of the same, and under this rule an objection that a statement of approximate costs does not meet the requirements of the statute as to a proper plan and estimate may be raised. *Reclamation Dist. v. Bonbini* (1910) 158 Cal. 197, 110 Pac. 577, wherein the court said: "There is no statement from which an inference can be drawn as to the character or amount of ditch work to be done, its estimated cost, or the location of any proposed ditches. All these matters are apparently left for future determination by the trustees. Nor is there anything from which one can know how many pumping plants are proposed, or their estimated cost. We have simply an aggregate estimate of \$25,000, stated to be needed for drainage ditches to be dug and pumping plants to be installed. In such a matter as a proposed system of drainage ditches, we think the law clearly contemplates a plan showing in some detail and with some degree of certainty the extent and character of the proposed work, and the general location of the proposed ditches."

(d) Notice.

Failure to remonstrate within the statutory period as to the sufficiency of a notice of a drainage proceeding waives the right to object later on this ground to an assessment. *McMullen v. State* (1886) 105 Ind. 334, 4 N. E. 903, wherein the court said: "The notices were required to give the court jurisdiction over the landowners

named in the petition. That such notices had been given was a jurisdictional question, which the court was required to determine before ordering the petition to be docketed. The fact that the court assumed to exercise jurisdiction, and ordered the petition to be docketed as a pending action, is proof of record that it determined that the proper notices had been given.

. . . If the case were here upon appeal, it would be a different matter. The statute requires notices of the filing of the petition to be posted. Here notices were posted, but they were notices that the petition would be filed and presented, and not that it had been filed. The court decided that the notices were sufficient." See to the same effect, *Hackett v. State* (1888) 113 Ind. 532, 15 N. E. 799.

So, where the notice of drainage proceedings lacks one day of meeting the requirement of the statute, it is not such a defect as to render the proceedings void, and advantage of it cannot be taken for the first time in an action to enforce an assessment. *Jackson v. State* (1885) 104 Ind. 516, 3 N. E. 863. See to the same effect, *Pickering v. State* (1886) 106 Ind. 228, 6 N. E. 611. See also *Deegan v. State* (1886) 108 Ind. 155, 9 N. E. 148, wherein substantially the same objection was raised.

Similarly, it has been held that an objection to a drainage assessment, on the ground that notice was posted before the filing of the petition, should be taken on direct appeal, and cannot be raised for the first time in an action to enforce collection. *Deegan v. State* (Ind.) supra.

Likewise, an objection to the sufficiency of the publication of notice for the hearing of objections cannot be raised after the confirmation of the assessment. *Blake v. People* (1884) 109 Ill. 504, wherein it was said: "All objections which could have been urged at the time of the confirmation of the assessment roll, and which were not then urged, must be considered as waived, and cannot be urged for the first time on application for sale of lands for a delinquent assessment. Such has been the repeated ruling of

this court in cases of special assessments for the opening, repair, and improvement of streets, and there is no difference in principle between those cases and the present."

Where a petition for certiorari to review proceedings of a drainage commissioner expressly avers that a proper notice was given of a meeting of the commissioners, property owners cannot urge for the first time on appeal that there was a defective notice as to one of the meetings, in that there was a blank in the copy where the date of the meeting should have appeared. *Deslauries v. Soucie* (1906) 222 Ill. 522, 113 Am. St. Rep. 432, 78 N. E. 799.

(c) Report or finding of commissioners.

Where a report of drainage commissioners is not filed within the time fixed by order of the court, but no objection is made at the time of the filing, nor any motion made afterwards to reject the report because it was not filed at the proper time, the right is lost, and it is too late to object for the first time on an appeal from the final order and proceedings of confirmation. *Munson v. Blake* (1885) 101 Ind. 78. So, while persons whose lands are or may be affected by the construction of a drain which has been petitioned for may have the petition dismissed in case the drainage commissioners, without an order of the court extending the time, fail to make their report at the time fixed therefor, the motion to dismiss or to reject the report must be made at the earliest opportunity. Manifestly, the motion comes too late, after the person making it has so far recognized the validity of the report as to remonstrate, or ask leave to remonstrate, against it upon its merits. *Blake v. Quivey* (1888) 113 Ind. 124, 14 N. E. 916, wherein the court said: "In the present case, Munson waived his right to insist upon a dismissal of the petition, on account of the failure of the drainage commissioners to file their report at the time appointed, by appearing to the report when it was filed, and by challenging, or asking leave to challenge, its merits by a remonstrance. Having, by an appeal to this court, es-

tablished his right to take issue with and contest the report upon its merits, he will not now be heard to say, in effect, that he was not in earnest when he asked leave to file a remonstrance, or in prosecuting an appeal in order to establish his right to remonstrate, notwithstanding the irregular report of the commissioners. It may be assumed that if the motion to dismiss or reject the report had been made in the first instance, or as soon as the opportunity to do so was presented, the petition would then have been dismissed or withdrawn by the petitioner. Having, however, elected to waive his right to ask that the petition be then dismissed, and having, at the petitioner's cost, established his right to remonstrate, Munson must now proceed to make his remonstrance good or withdraw it." Likewise, an objection that the report of drainage appraisers was not filed within the time required by statute is waived, if not first raised before the board of supervisors. *Farley Drainage Dist. v. Hamilton County* (1909) 144 Iowa, 476, 123 N. W. 241.

In *Dakota County v. Cheney* (1887) 22 Neb. 437, 35 N. W. 211, the objection to drainage proceedings was that the board of commissioners did not find that the petitioners were owners of the land to be affected by the proposed ditch. In holding that the objection was waived, the court said: "If the petitioners were not owners of lands affected by the ditch, the defendant in error should have made his objections to the board, and thereby called their attention to the fact that they were proceeding without jurisdiction. His failure to make such objection to the board is strong evidence that he could not truthfully so allege. The jurisdictional facts are: (1) The petition signed by one or more landowners to be affected by the proposed ditch; (2) the undertaking required by the statute; (3) that the proposed improvement is necessary, and will be conducive to the health, convenience, and welfare of the public; and (4) the statutory notice. All these facts sufficiently appear in the record of the county board, and were sufficient to give it jurisdiction. If errors occur

in the proceedings, they may be corrected in the mode pointed out by the statute. A party, however, who objects to the construction of a proposed ditch upon the ground of want of jurisdiction of the board, should proceed with reasonable promptness in asserting his objections. He should not wait until the ditch is completed, and be enabled to receive all the benefits to be derived therefrom, before asserting such want of authority."

So, where a landowner, objecting to an assessment on the ground that a proposed ditch will not be "conducive to the public health, convenience, or welfare," and that the route of the ditch is impracticable, fails to file a remonstrance before the board of commissioners against the finding of necessity, he is estopped from raising it in the circuit court on appeal. *Metty v. Marsh* (1890) 124 Ind. 18, 23 N. E. 702, wherein the court said: "We are of the opinion that it was the intention of the legislature that all grievances growing out of the establishment and construction of a ditch like this should be presented to the board of commissioners and settled in that tribunal, where they could be settled cheaply." See to the same effect, *Strayer v. Taylor* (1903) 163 Ind. 230, 69 N. E. 145.

Property holders who do not remonstrate against a first report of drainage commissioners are thereby estopped from remonstrating to a second report, made under instructions of the court because of a remonstrance filed by others, when the second report contained no new matter affecting in any way the lands or rights of those seeking to object. *Wiley v. Peckinpaugh* (1912) 178 Ind. 618, 99 N. E. 307.

After all preliminary proceedings have been had, and a levy and assessment made, it is too late to attack the authority of the directors to apportion benefits and make assessments, on the ground that the record does not state that the county board formally found that the improvement would be conducive to public health, convenience, or welfare. *White v. Papillion Drain-*

age Dist. (1914) 96 Neb. 241, 147 N. W. 218.

So, an objection to a second assessment for the reason that the record of the commissioners fails to show the object of the assessment, or that the amount was necessary to complete the work, or for maintenance and repair, is waived, where the owners do not appear before the commissioners when they meet to confirm the assessment and interpose proper protest. *Moore v. People* (1883) 106 Ill. 376.

(f) *Letting of contract.*

Where all bids under a first advertisement for bids for the construction of drains were rejected, and a readvertisement was ordered, it was held that objection to the sufficiency of the readvertisement was waived by failure to raise it before the board of supervisors. *Lightner v. Greene County* (1909) 145 Iowa, 95, 123 N. W. 749, wherein the court said: "It is argued that to readvertise for bids means a republication of notice for the time required originally, and, to say the least, there is great force in this argument. We do not feel called upon to decide this point, however, for we are constrained to hold that Lightner waived it by not making any such objections before the board. The defect, even if there be one, was not jurisdictional in the sense that it deprived the board of the power to act at all in the premises. It may have been a reason for defeating the assessment, had proper objection been made thereto; but it did not deprive the board of power to act in the making of the assessments. . . . It is not a case of no notice at all, but of a defective notice, and as no such objection was made before the board it must be considered as waived. In a sense, no doubt, some notice was jurisdictional, as indicated in the cases relied upon by appellee. But where a notice is given, defects therein must be pointed out in the objections filed with the board. Irregularities in the proceedings cannot be considered jurisdictional, and they are waived unless they are presented to the proper tribunal and in the manner pointed out by statute."

But where a statute authorizing the surveyor to keep public ditches in repair requires that a notice of the letting be posted, and that the work be let by contract, and there is a total failure to comply with the statute as to notice and the letting of the contract, the proceedings are void, and a property holder, by his failure to appear, is not estopped to have the assessment overruled. *Brett v. Pretorious* (1911) 48 Ind. App. 527, 96 N. E. 211.

(g) Issuance of bonds.

An objection that a drainage district had no authority to issue bonds to pay for the construction of a ditch comes too late, when raised for the first time as a defense in an action to enforce the lien of an assessment. *State ex rel. Roberts v. Eicher* (1915) — Mo. —, 178 S. W. 171.

4. Performance of work.

Where a railroad company is a party to the proceedings for the construction of a ditch, and on assessment for benefits does not object that the ditch is on its right of way, it cannot later assail such location, even if it was erroneously made. *Steele v. Empsom* (1895) 142 Ind. 397, 41 N. E. 822. See also *Baltimore & O. S. W. R. Co. v. Jackson County* (1900) 156 Ind. 260, 53 N. E. 837, 59 N. E. 856.

5. Assessment.

(a) Method and legality of assessment generally.

The landowner cannot, by a suit for an injunction, have a review of the assessment of benefits and damages from the construction of a drain. Questions of this kind must be litigated in the commissioner's court, or on appeal. "If the proceedings are void, then an injunction will issue, but where the proceedings are not void, a suit for injunction cannot be maintained, no matter how erroneous the proceedings may be. . . . Where there is jurisdiction of the subject-matter and notice, or an appearance, there is jurisdiction, and no irregularity can be made available in a suit for an injunction." *Sunier v. Miller* (1886) 105 Ind. 393, 4 N. E. 867.

9 A.L.R.—55.

Thus, objections to irregularities in the mode of making assessments for drainage purposes, which can be interposed when the commissioners make the confirmation, will be waived by failure to interpose them at that time. *Morrell v. Union Drainage Dist.* (1886) 118 Ill. 139, 8 N. E. 675.

Similarly, a property owner cannot be heard to complain of the method pursued by the appraiser in determining the relative portion of the costs and expenses to be assessed against each tract, where he interposed no objection at the hearing before the board of supervisors. *Re Jenison* (1909) 145 Iowa, 215, 123 N. W. 979. To the same effect, see *Re C. G. Hay Drainage Dist.* (1910) 146 Iowa, 280, 125 N. W. 225, wherein the court said: "Equally without merit is the contention that the board of supervisors was without jurisdiction to make assessments against plaintiffs on account of the method in which the benefits were apportioned by the appraisers. So far as we can see, the appraisers' proceedings were substantially in accordance with the statute; but, however this may be, there is nothing in the record to indicate that the result was not equitable and just, and there is no authority for holding that the method of making the appraisal is a jurisdictional matter."

So, where the appraisers did not follow the statute in making their classification and assessments, in that they did not fix a graduated scale of benefits, and did not number the lands accordingly, it was held that an objection to an assessment on this ground must be considered waived, if not made before the board of supervisors. *Lightner v. Greene County* (1909) 145 Iowa, 95, 123 N. W. 749, wherein the court said: "At most, the defect was a mere error or irregularity, which did not defeat the jurisdiction of the board. This part of the statute may well be regarded as directory only, and failure to comply therewith a mere error which will not defeat the assessment in the absence of a showing of prejudice."

That "the assessment was made upon lands in pieces or parcels, many of

which severally comprise and contain lands owned by various and different individuals or persons in severalty," is an irregularity, and contrary to the directions of the statute. But since this irregularity might have been corrected if the parties affected made proper application to the supervisors, if they fail so to do, they cannot defeat the collection of the taxes. *Patterson v. Baumer* (1876) 43 Iowa, 477, wherein the court said: "While the work of constructing the ditch was undertaken because demanded by the public interests, yet the petitioners, being landowners in the vicinity of the improvement, were interested therein. They must all be presumed to have had notice of the action of the county in ordering the work, and in causing it to be prosecuted. Some of them signed the petition to the supervisors, asking that the work be done. They cannot be presumed to have been ignorant of any irregularities up to and including the letting of the contract. They should have objected thereto before the expenditure of money and labor by the county and contractor. The law will not permit them to remain silent until after the work is done, and then raise such objections to defeat the collection of taxes."

The legality of a drainage assessment cannot be tried or called in question in a suit to recover the amount of it. Error in it must be established elsewhere by proceedings in certiorari, and if not offered in that matter, the objection is waived. *State, Craig, Prosecutor, v. Mackey* (1886) 48 N. J. L. 363, 7 Atl. 494.

A misdescription of lands in a drainage assessment, in that 443 acres were said to lie in township 29, whereas only 150 acres were in that township, the balance lying in township 28, is sufficient to put the owner on inquiry, and he is barred from objecting if he does not file a remonstrance. *Smith v. State* (1893) 8 Ind. App. 661, 36 N. E. 298.

In an action for debt by drainage commissioners against the commissioners of highways on account of the benefits of drainage to the road, it was held that the highway commis-

sioners were not estopped from introducing evidence to show that the road had been vacated or abandoned, by their action in appearing and failing to raise the question at a meeting of the drainage commissioners to consider and discuss the classification of the road in controversy. *Big Lake Special Drainage Dist. v. Highway Comrs.* (1902) 199 Ill. 132, 64 N. E. 1094.

The sufficiency of a petition of commissioners for an additional assessment cannot be raised for the first time in a bill to foreclose a lien. "If the petitions were insufficient to authorize the court to order the assessments, the appellant had ample opportunity to present that question, or any other which called in question the regularity of the proceedings, when application was made to confirm the judgment, and, having failed to appear and contest when he had the right to do so, the judgment of confirmation concludes him." *Riebling v. People* (1893) 145 Ill. 120, 33 N. E. 1090.

(b) *Classification of lands.*

Where no objection to classification of lands within a drainage district is made before the board of supervisors, a property owner is estopped thereafter to complain, especially where it appears that the assessment is not arbitrary, but in substantial compliance with the statute. *Farley Drainage Dist. v. Hamilton County* (1909) 144 Iowa, 476, 123 N. W. 241.

Similarly, it has been held that where property owners do not appear at the meeting to consider the classification of lands in a proposed district, and make no objection thereto, they are not in a position to raise questions of mere error in the proceedings. They can only be heard on the ground that the assessment is void, and they cannot be heard to object to the payment of the assessments against them, on the ground that a mistake was made in the classification of land of someone else. *Shabbona Special Drainage Dist. v. Cornwall* (1917) 281 Ill. 551, 117 N. E. 990.

An objection to an assessment on the ground of the omission by the drainage commissioners to classify certain lands within the drainage dis-

tract, and their failure thereby to indicate whether such lands are benefited, cannot be raised on application for judgment of sale by one who did not appear and object before the commissioners. *People ex rel. Barber v. Chapman* (1889) 127 Ill. 387, 19 N. E. 872, wherein the court said: "Assuming, as we must, that appellee was served with the notice, as required by this section, and the commissioners being, by the next section of the act, authorized and required, at the time and place mentioned in such notice, to 'hear whatever objections may be urged by any person interested,' and to correct any injustice shown to exist in such classification, appellee must be presumed to have appeared before the commissioners at the time they were sitting in review of their classification of the lands within this district, and to have then objected to any injustice to him by reason of such classification; and if appellee failed to so appear and object, he must be held to have waived all objection to the action of the commissioners relating to such classification. The law gave him ample opportunity to be heard touching the classification of the lands, before a tribunal with ample power to afford him relief. It required him to be notified in time to interpose any objections he might have thereto. The law also gave him the right of appeal from the decision of the commissioners upon his objections, to three supervisors, who were invested with power to correct any error shown to exist in the classification. Thus, the rights of the property owner, in respect to the classification of lands within the district, are fully and perfectly protected; and if the property owner neglects to avail himself of the right of redressing any wrong, and of correcting any error and injustice, he ought not to be heard to complain at another time and in another forum."

So, a property owner who is notified of the classification of his lands, so that if he desires he may appear before the commissioners and make objection, cannot, on application for a judgment against the lands for a drainage tax,

raise the objection that his lands were classified as town lots instead of farm property. *People ex rel. Thompson v. Hulin* (1908) 237 Ill. 122, 86 N. E. 666, following and quoting the decision in *People ex rel. Barber v. Chapman* (1889) 127 Ill. 387, 19 N. E. 872. See to same effect, *People ex rel. Thompson v. Gunzenhauser* (1908) 237 Ill. 262, 86 N. E. 669.

Likewise, where lands are classified in 40-acre tracts, and, so far as they are owned by different persons at the time of the classification, the law permits the landowners to object to a classification of their lands in combination with others, and allows an appeal, it is too late, after an opportunity to do so, to make the objection on the application for judgment. *PEOPLE EX REL. DORRIS v. LE TEMPT* (reported herewith) ante, 835.

An objection that part of a tract of land is not within a drainage district, and therefore not subject to assessment therein, should be raised on petition for judgment of sale, and, when not so raised, it will be deemed waived. *People ex rel. Colvin v. Boyd* (1912) 256 Ill. 9, 99 N. E. 863.

But in *People ex rel. Gifford v. Chicago & Interurban Traction Co.* (1915) 267 Ill. 510, 108 N. E. 687, the court said: "While the rule undoubtedly is that where lands have been classified by the commissioners, and due notice given, the landowner failing to appear at such meeting is precluded from thereafter raising any question as to the correctness and propriety of the classification roll, as finally adopted by the commissioners. . . . This rule has no application to a case such as the one at bar, where the objection is not to the rate of classification, but that no classification whatever has been made of the lands of the property owner, in the manner required by the statute, and consequently there is no valid tax or assessment. Where no classification is in fact made, the landowner does not waive his right to urge such failure to classify his lands, on application for judgment, by his failure to appear and urge such objection at the meeting to hear objections to the classification of the lands as made

by the commissioners. Until his lands have been duly classified at some rating on the graduated scale, as required by the statute, there is no classification or rating to which the property owner can appear and urge objections. A property owner cannot well be said to have waived his right to object to the rate of classification of his lands, until there has in fact been a rating and classification of his lands made, to which he might appear and urge objections."

(c) *Discrimination or unfairness.*

An objection that the commissioners did not assess all parties benefited by a drainage system, but exempted some arbitrarily, must be made before the court confirming the assessment, and, if not so made, is waived. *Wheeler & Silber v. Bogue Phalia Drainage Dist.* (1914) 106 Miss. 619, 64 So. 375.

And the fact that notice of a drainage proceeding was not given to certain owners will not avail to relieve one who had actual notice, of the consequences of failure to object to the assessment, on the ground that other property was not assessed. *Grimes v. Coe* (1885) 102 Ind. 406, 1 N. E. 735, wherein the court said: "It is argued that, as no notice was given to one of the parties against whom an assessment was levied, the proceedings are void as to all the persons assessed. We are not inclined to adopt this view, for we are unwilling to hold that persons properly notified can take advantage of the failure to name in the notice other persons against whom benefits are assessed, unless it be shown that the failure to give such notice will prevent the construction of the ditch. The township of Lauramie, the artificial person that it is said was not notified, is not here complaining; it has not appealed; and without a showing that the failure to notify it, conceding that there was such a failure, prevents the construction of the ditch, it cannot be held that those who were notified can escape liability."

(d) *Excessiveness of assessment generally.*

A failure to appear and object to a drainage assessment because of its ex-

cessive amount is a waiver of the objection, where the statute provides that "all objections thereto must be made in writing and filed with the county auditor on or before noon of the day set for such hearing." *Patch v. Boards of Supervisors* (1916) 178 Iowa, 283, 159 N. W. 694.

So, a landowner who does not avail himself of the right given to appear within the time allowed by statute, and protest as to the amount of his assessment, cannot complain if, on a belated appeal to the court, he is denied the redress he might have obtained by a seasonable application. *Dickinson v. Cypress Creek Drainage Co.* (1919) — Ark. —, 213 S. W. 1.

And though a property owner had no actual notice of the pendency of the petition for a drainage ditch, if the time and place fixed for hearing were published according to the requirement of the statute, he is estopped from objecting to an assessment, on the ground that he had received no compensation in damages for the construction of the ditch on his land. *Cupp v. Seneca County* (1869) 19 Ohio St. 173, where the court said: "Nothing is better established as law than that such rights may be affected and lost to the owner, by a proceeding in rem, and upon merely constructive notice. The law of all such proceedings rests in the necessity of the case, and in no instance, perhaps, is that necessity more plainly apparent than in the construction of public roads, and other improvements of like nature. Without the aid of some such proceeding, the construction of roads and ditches would be next to impracticable. A similar proceeding is provided, and a like provision as to the waiver of claims is made, in the law for the establishment of roads. *Swan & C. Stat.* 1286, § 8. Some such provision of law seems indispensable. The owner of land necessary to be used for a road or ditch may be absent or unknown. The title may be in dispute. The legal title may be in one, and the equitable title in another. One may have the present estate, and another the reversion or remainder. The owner may make a secret conveyance on purpose

to evade the law. Without the power to proceed in some such form against the land itself, the right guaranteed to the public by this provision of the Constitution, to take the land for public uses, would be of little avail. In the construction of such improvements of any considerable length, personal notice, if at all practicable, would be attended with great inconvenience and uncertainty. It was the duty of the legislature to provide some reasonable means for securing, both to the public and to the owner of land, these rights so guaranteed by the Constitution. To require in such cases personal notice to the owners would, in our judgment, be quite as unreasonable as to require that owners of lands should, as was said in the case of *Miller v. Graham* (1866) 17 Ohio St. 1, 'maintain some kind of an agency in the vicinity of the lands, through which they may be informed of proceedings affecting them.' They are presumed to know of the existence of this act, and therefore to have notice that their lands are liable at any time, upon four weeks' publication of notice to that effect, to be taken for the use of a ditch, and that their nonclaim will be taken and held as a waiver of all right to compensation or damages. There is no greater hardship in this implied waiver, after notification beforehand that silence will be taken for consent, than there is in the analogous cases of creditors of a bankrupt or insolvent, or of claimants upon any fund in the hands of a court for distribution, whose failure to present their claims is made to work a forfeiture of the same."

See to the same effect, *Portage County v. Gates* (1910) 83 Ohio St. 19, 93 N. E. 255.

The question of the validity of a contract between commissioners of highways and a drainage district, fixing the amount of an assessment, objected to on the ground that the former had no authority to bind the town, is one which could have been presented upon the application for confirmation of the assessment roll, and is waived when not so raised. *Dix Highway Comrs. v. Big Four Drainage Dist.*

(1903) 207 Ill. 17, 69 N. E. 576, where the court defined the rule as follows: "In a proceeding to collect the amount of the assessment, no objection to the assessment will be considered which could have been urged at the time of the confirmation of the assessment roll. Objections which could have been made then, and which were not made then, must be considered as waived. . . . Objections which question the jurisdiction of the county court are excepted from the operation of this rule, but such objections, being a collateral attack upon the judgment of the county court, will not be considered unless they appear from the record of that court."

On application for judgment against lands to pay a special assessment ordered by a drainage district, the owner is not entitled to a set-off or credit for the value of old ditches on his land used by the drainage district. Under the Drainage Law such allowance should have been made at the time the assessment was levied, and request therefor comes too late, after the assessment has been confirmed. *People ex rel. Barber v. Chapman* (1889) 128 Ill. 496, 21 N. E. 507.

(c) *Land not benefited.*

Where a property owner, assessed in a drainage proceeding, does not appear before the board of review to complain of the excess of the assessment over benefits, nor sue out a writ of certiorari, he cannot, in the absence of fraud, question the legality of the drain. *Jones v. Gable* (1907) 150 Mich. 30, 113 N. W. 577.

It is a duty resting on drainage commissioners to determine what property is benefited, and what is not, and their determination cannot be called into question for the first time on the application for judgment against the land assessed. *Moore v. People* (1883) 106 Ill. 376, wherein it was said: "This, and other like objections, if appellant desired to rely upon them, should have been made at the meeting of the commissioners to confirm the assessment. If the commissioners had denied the relief, the statute gave an appeal. A complete remedy was there-

fore open to appellant, if he had availed of it at the proper time."

So, a property owner who has notice of the inclusion of his lands in an assessment district, and makes no protest, is estopped from afterwards asserting that he has not benefited by the construction of a ditch. *Oliver v. Monona County* (1902) 117 Iowa, 43, 90 N. W. 510, wherein it was said that, if he "thought that his land was improperly included within the district proposed to be benefited by the contemplated improvements, he should have raised the question when the district was created. He cannot now . . . impeach the correctness of the original determination. Having assisted in the proceedings for the creation of such districts, with ample notice thereof, and having allowed the contemplated improvement to be contracted for, he cannot now say that his land is not benefited thereby, and escape payment of his proportion of the assessment."

Likewise, where an owner was notified of the intended inclusion of land within a drainage district for the purpose of securing an outlet, with plans and the cost of the improvement made known to him, and he offered no objection, he is estopped from denying that the drain is of some benefit to him. *Read v. Hamilton County* (1919) — Iowa, —, 171 N. W. 23.

So, where a property owner fails to file a remonstrance to the report of commissioners within the time allowed by law before the confirmation by the court, he loses his right to object, notwithstanding illness prevented him from complying with the provisions of the statute, and the fact that his lands would not be benefited by the improvement. *Hays v. Tippy* (1883) 91 Ind. 102, wherein the court said: "This proceeding is not, in any proper sense, a civil action or a civil case. It is a special proceeding, authorized by the general assembly for the express purpose of promoting public health or improving public highways. Throughout the entire statute it is manifest that the legislature did not intend that such a proceeding, for such public purposes, should be subjected to any of the de-

lays ordinarily incident to the trial of a civil case. It is provided that 'three days shall be allowed to any owner of lands affected by the work proposed, to remonstrate against the report;' and if, during such three days, the appellant was prevented by disease from presenting his remonstrance, that would seem to be his misfortune rather than the fault of the law."

On the same principle, in holding that a property owner was estopped to deny the benefits to his lands, and to object that they should not have been included in the district, the court said, in *Northern P. R. Co. v. Pierce County* (1908) 51 Wash. 12, 23 L.R.A. (N.S.) 286, 97 Pac. 1099: "It is possible that an investigation to determine the benefits flowing from a proposed improvement might develop the fact that none of the lands in the district would be benefited by the improvement. In such case every owner could put forth the same objection to the payment of his share of the preliminary expenses as does the appellant here; and for the same reason. The improvement not having been made, there seems to be no reason in equity why all the lands in the district should not proportionately pay the expenses which were necessarily incurred in determining the question whether the improvement should be made, it being borne in mind that those expenses were not incurred in making an improvement which failed to benefit certain lands, but were expenses preliminary to determining the question above stated, a question entirely foreign to any question of assessment of damages or benefits from or by the construction of the improvement. So that, no objection having been made by the appellant at any stage of the proceedings to the formation of the district and the inclusion of its lands in said district, nor to the petition and proceedings under which the decree determined the amount of the indebtedness of the district, the right of appeal from all of such proceedings existing, it is estopped to object to anything but the constitutionality of the law under which the assessment is

sought to be made and the tax collected."

In like manner, an objection to an assessment for a drainage ditch, in that it was spread on lands which had natural drainage in the opposite direction, and included the lands by mistake of the drainage commissioner, comes too late when raised for the first time after the expense of constructing the drain had been incurred, and orders issued for the work. *Walker Twp. v. Thomas* (1900) 123 Mich. 290, 82 N. W. 48. See to the same effect, *Wilson v. Woolman* (1903) 133 Mich. 350, 94 N. W. 1076.

So, one who has due notice of the day set for hearing of objectors to a petition to annex her lands to a drainage district, and who makes no defense, is estopped from raising the question of benefits conferred. *Trigger v. Drainage Dist.* (1901) 193 Ill. 230, 61 N. E. 1114, wherein the court said: "If she desired to question the right of the commissioners to take her lands into the district, because they would not be benefited at all by the work to be done, she should have appeared at the time of the hearing upon the complaint filed, when the annexation was sought to be made. In that complaint it was alleged that her lands would be benefited by the work done and to be done in the drainage district, \$180, and she in no way attempted to deny or disprove that allegation. By her default she voluntarily allowed her lands to be annexed to the district, upon the allegation that they would be benefited, and she ought not now, after they have become a part of the district, be allowed to insist that no assessment whatever should be made upon them."

But a landowner, who has had no opportunity to be heard on the question of value or benefits, may, in an action to enforce payment of an assessment, show that his land is not swamp or overflowed land, and would not be benefited by the improvement, especially where the question does not appear to have been decided by the board of supervisors. *Lower Kings River Reclamation Dist. v. Phillips* (1895) 108 Cal. 306, 39 Pac. 630, 41

Pac. 335, where the court said: "It is not pretended that the defendant had any opportunity to be heard as to the propriety or legality of the assessment, before this action was commenced; but it is claimed that, having been heard as to the propriety of the formation of the district and the inclusion of his lands therein, the order of the board of supervisors including his lands is conclusive of the legality of the subsequent assessment of them. But the legality of no subsequent assessment was in question, or could have been questioned, before the supervisors, on the hearing of the petition for the formation of the district. While, as we have seen, the order of the board of supervisors was conclusive, as against the defendant, that the district including his lands was lawfully organized, it was not and could not have been so far-reaching as to touch the question whether subsequent assessments would be lawfully imposed according to benefits. It is further contended that defendant's defense is a collateral attack upon the determination of the assessment commissioners, and therefore not permissible. Conceding it to be a collateral attack (which I think questionable), yet a collateral attack is precluded only where the judgment, order, or determination attacked was, or may be presumed to have been, the result or effect of due process of law, which implies that the party against whom such judgment, order, or determination was rendered or made was heard, or had an opportunity to be heard, in his defense. But where it does not appear, and cannot be presumed, that such party was heard, or had an opportunity to be heard, any judgment, order, or determination against him is without due process of law and void; and, consequently, may be attacked collaterally." See to the same effect, *Reclamation Dist. v. Glide* (1895) — Cal. —, 41 Pac. 278.

So, in Illinois, special assessments are levied by virtue of § 26 of the Farm Drainage Act, which formerly contained a § 27 providing for an appeal to the county court, but the act was amended in 1901 by striking out

§ 27, since which time the property owner has no opportunity to be heard on any matter in reference to the special assessment, until application has been made for judgment and sale of his lands for delinquent taxes, and objection may therefore be made in the latter proceeding that the assessment is in excess of the benefits conferred. *People ex rel. Vaughn v. Welch* (1911) 252 Ill. 167, 96 N. E. 991; *People ex rel. Freeman v. Whitesell* (1914) 262 Ill. 387, 104 N. E. 688; *People ex rel. O'Connell v. De Young* (1918) 284 Ill. 530, 120 N. E. 479.

b. Appearing and filing other objections.

1. Generally.

As a general rule, a property owner who files a remonstrance in a drainage proceeding, or otherwise appears therein, thereby waives any objection to the proceeding not specifically assented to at the time of appearance. There are naturally instances where, because of the peculiar circumstances of the case, or because the defect complained of is so far fundamental as to vitiate the whole proceeding, the rule is not applicable. See the cases cited in the following subdivisions, wherein the application of the rule to particular defects is considered.

2. Sufficiency of petition.

An objection that the petition for the formation of a drainage district was not signed by a majority of the landowners cannot be raised by those who appeared before the county court and filed objections to the merits. *Briar v. Job's Creek Drainage Dist.* (1900) 185 Ill. 257, 56 N. E. 1042.

So, where a property owner appears before the court in confirmation proceedings, and makes objections on other grounds, he is thereby estopped from later raising the question that the petition does not give the names of all the landowners in the drainage district. *Sny Island Levee Drainage Dist. v. Shaw* (1911) 252 Ill. 142, 96 N. E. 984.

Likewise, where property owners are duly notified and regularly brought within the jurisdiction of the board of commissioners, by voluntarily appear-

ing and submitting their case, they are estopped from objecting to the sufficiency of the drainage petition, because their names are not subscribed in the usual place. *Plew v. Jones* (1905) 165 Ind. 21, 74 N. E. 618, wherein the court said: "Special objections to the jurisdiction in a particular case must be promptly made, or they will be lost by waiver. Appellants, by not making timely objection, and waiting until after final judgment, waived all question as to the sufficiency of the petition."

An objection to amendments to a petition for a proposed drainage district is waived where the objecting property owner does not specially limit his appearance to the question of jurisdiction, but enters a general appearance. *North Richland Drainage Dist. v. Karr* (1917) 280 Ill. 567, 117 N. E. 770.

Where an owner appeared before the board of supervisors, authorized to hear and determine protests in a reclamation proceeding, and interposed no objection to the sufficiency of the petition, except that it proposed to include in the district his lands, which were under a Mexican grant, it was held that he could not be heard, in certiorari proceedings, to object that the petition did not state what lands within the district had been sold, and what remained unsold. *Hagar v. Yolo County* (1874) 47 Cal. 222, wherein the court said: "Instead of taking steps promptly to arrest the proceeding if the petition was insufficient, it does not appear that he made any movement in that direction until more than six months had elapsed, and it may be that large sums were expended in the interim in reclaiming the lands. Under these circumstances, when the petition is assailable on technical grounds, we should construe it liberally and indulge in every reasonable intendment in its support. In the language of Chief Justice Shaw, even though the record should 'appear to be defective and informal, when substantial justice has been done,' or 'very mischievous consequences would ensue,' or 'where the parties cannot be placed in statu quo,' the court, in the

exercise of a sound discretion, may deny the writ. Acting on this rule, we must decline to quash these proceedings on the ground that the petition omits to state with sufficient precision what lands within the district had been sold, and what remained unsold."

3. *Validity of statute.*

An objection that a drainage act is unconstitutional because it does not give the landowner who has not had actual notice of the proceedings an opportunity to appear and be heard on the question of damages cannot be raised by a property owner who has appeared before the board in response to a notice of reassessment, and made no such objection. *Howard v. Emmet County* (1908) 140 Iowa, 527, 118 N. W. 882.

4. *Conformity of proceedings to statute.*

It seems to be the rule that the failure to give a notice required by statute in drainage proceedings, or the giving of an insufficient notice, is waived where a property owner entitled to notice appears generally and fails to object to the lack of notice, or to the form thereof.

Thus, it has been held that defects in notices at different stages of the proceedings are waived by subsequent appearance. *Gilkerson v. Scott* (1876) 76 Ill. 509. And where property holders have appeared before the county court and filed other specific objections to a drainage improvement, they cannot be heard to protest that proper notices were not given of the various proceedings. *Briar v. Job's Creek Drainage Dist.* (1900) 185 Ill. 257, 56 N. E. 1042.

Where all the landowners in a proposed drainage district are either present in person or are represented at the hearing on the petition for the organization of the district, an objection that notice of the hearing was not given as required by statute is waived. *Merkle Drainage Dist. v. Hathaway* (1918) 260 Ill. 186, 102 N. E. 1004. So, where property owners appear and submit to a hearing on the merits in the commissioners' court, without objecting to the form or sufficiency of the notice

of the pendency of the petition for the construction of a ditch, they waive the right to raise the question in the circuit court. *Coolman v. Fleming* (1882) 82 Ind. 117. See to the same effect, *Morrison v. Faust* (1882) 82 Ind. 601; *Carr v. Boone* (1886) 108 Ind. 241, 9 N. E. 110. Likewise, it has been held that a contention that a landowner was not a resident of the drainage district, and was not notified of the filing of the petition for the organization of the district, could not be entertained by the court, where the landowner had voluntarily appeared and contested the assessment on its merits, thereby waiving want of notice. *Birds Drainage Dist. v. Cairo, V. & C. R. Co.* (1912) 257 Ill. 57, 100 N. E. 141.

In *Ross v. Wright County* (1905) 128 Iowa, 427, 1 L.R.A. (N.S.) 431, 104 N. W. 506, it appeared that a property owner who was not served with notice of a proposed drainage proceeding subsequently appeared and filed a claim for damages. Holding that her appearance operated as a waiver by her of all objections based on the want of notice, and that no other property owner could raise the objection, the court said: "Generally speaking, at least, no one is entitled to raise the objection except the party entitled to the notice. Assume, for instance, that proceedings for the establishment of a highway several miles in length, and passing through the lands of many different persons, are instituted, carried through to the final order, and the road is established and opened to travel. If, a year or two later, it be discovered that a nonresident owner of a single small tract was, by some mistake, omitted from the notice for which the statute provides, we may concede that, as to such land and such owner, the order of establishment is voidable or void; but it would be a somewhat startling proposition to hold that failure to notify this one owner is a jurisdictional defect of which every other owner along the line may take advantage, even though he himself was duly and properly notified. Moreover, when the omitted owner voluntarily appeared to the proceedings, and procured an allowance of her

claim for damages, we think it will be held to operate as a waiver by her of all objections based upon the failure to serve her with notice. The only interest the other landowners could have in her being properly made a party was that her property might be compelled to bear its share of the expense in case the ditch should be constructed, and when she voluntarily appeared, the only possible ground of objection on their part was removed." See to the same effect, *Hoyt v. Brown* (1911) 153 Iowa, 324, 133 N. W. 905.

Making and entering of record a motion to require the petitioners in drainage proceedings to amend their petition waives any defect there may have been in the notice, and this is so without regard to the fact that the person making the motion assumes to appear specially for that purpose. A special appearance may be entered for the purpose of taking advantage of any defects in the notice or summons, or to question the jurisdiction of the court over the person in any other manner; but filing a demurrer or motion which pertains to the merits of the complaint or petition constitutes a full appearance, and hence is a submission to the jurisdiction of the court. *Gilbert v. Hall* (1888) 115 Ind. 549, 18 N. E. 28.

A defective notice of the hearing on the commissioners' report in a drainage proceeding is waived where the persons seeking to take advantage of it appear generally, and do not offer their objection by a special appearance. *Drainage Dist. v. Extension Ditch Co.* (1919) 32 Idaho, 314, 182 Pac. 847, wherein the court said: "It is a general and well-settled rule that 'a failure to give notice or any irregularity in giving it, is waived if the persons entitled to notice appear and take part in the proceedings in the matter or matters concerning which they are required to be notified.' Lewis, Em. Dom. 3d ed. p. 1028, and numerous authorities there cited." So, appearance at a hearing before the commissioners for a review of the apportionment of benefits from the establishment of a drain precludes a property owner from objecting to the insufficiency, as to him, of the notice

of the hearing. *Hinkley v. Bishopp* (1908) 152 Mich. 256, 114 N. W. 676. Likewise, persons who appear generally in a drainage proceeding and do not enter a special appearance or specially object that the notice of the hearing on the assessment roll is insufficient under the statute, thereby waive such objection and submit to the jurisdiction of the court. *Little Beaver Special Drainage Dist. v. Livingston* (1915) 270 Ill. 582, 110 N. E. 806.

A property owner who files a special appearance at the hearing of the petition to levy assessments for a drainage improvement, and moves to dismiss the proceedings for want of sufficient notice, cannot raise the same point again, when in the meantime he has appeared generally at the hearing on application for confirmation of the assessment roll, and contested the proceeding on the merits. *Freese v. Scott County Drainage & Levee Dist.* (1918) 283 Ill. 536, 119 N. E. 625.

Objection to the sufficiency of the delinquent list and advertisement of notice of application for the sale of the property is waived, where the owner of property affected by a drainage improvement enters a general appearance and urges objections against the assessment. *Ottis v. Sullivan* (1905) 219 Ill. 365, 76 N. E. 487, wherein the court said: "In such case it becomes immaterial whether the delinquent list as advertised, and the notice and certificates belonging to the same, are correct or not. The purpose of such advertisements is to obtain jurisdiction of the property and person, and when personal appearance is entered and a general defense made the owner of the property has had all the benefit that a correct advertisement could give him." So, in *Waite v. People* (1907) 228 Ill. 173, 81 N. E. 837, it was held that an objection to an application for judgment of sale, based on an alleged variance between the delinquent list and the published notice of application for sale in the name of the delinquent property owner, was waived by a general appearance. And in *People ex rel. Arnold v. Warren* (1907) 231 Ill. 518, 83 N. E. 271, the court said: "Had the question of variance

between the delinquent list and the advertisement of the collector been raised by special appearance, the objection must have been sustained. As a general rule, a general appearance by the owner in a proceeding to sell land for delinquent taxes cures all defects in the notice of application for judgment. . . . The variance between the delinquent list and advertisement was waived by the filing of general objections, and by not confining the objections solely to the question of jurisdiction."

In *Perkins v. Hayward* (1892) 132 Ind. 95, 31 N. E. 670, it appeared that a trial and judgment were had establishing a drainage ditch. The entry of the judgment, however, did not include costs, and a motion to make such an entry was made, the remonstrants entering a special appearance and moving the court to dismiss the motion for the reason that they had had no notice of it, which was necessary to confer jurisdiction on the court, in the absence of a voluntary appearance or a waiver of notice. Instead of insisting on a ruling the owners filed a counter motion, and it was held that this was a general appearance and waiver. The court said: "If they desired to save the question they might have done so by requiring a ruling upon their special appearance, and by an exception before filing their counter motion. Their motion, however, went to the merits of the entire proceeding. Made as it was, before a ruling had been made on the question raised by their special appearance, and even ruled upon before the other questions were decided, it is, we think, clear, according to the great weight of authority, that it was a complete waiver of notice."

Where the statute requires notice of the dissolution of a drainage district to be published in a certain way, an objection to the sufficiency of the notice is waived by a property owner who appears at the hearing and files certain other specified objections to the dissolution. *Hollenbeck v. Detrick* (1896) 162 Ill. 388, 44 N. E. 372, wherein the court said: "The objection to the sufficiency of the notice was

not then made and is first raised in this court. This objection, if made to the jurisdiction of the court in the trial court, would have been well taken if appellant, by his appearance and filing objections which did not raise the question now made, had not waived it so far as he was concerned. He cannot, for the first time, raise it here."

In *Indiana*, it has been held that any defects in a notice required in drainage proceedings are waived by filing a remonstrance. *Sunier v. Miller* (1886) 105 Ind. 393, 4 N. E. 867; *Updegraff v. Palmer* (1886) 107 Ind. 181, 6 N. E. 353; *Ford v. Ford* (1887) 110 Ind. 89, 10 N. E. 648; *Sites v. Miller* (1889) 120 Ind. 19, 22 N. E. 82; *Steele v. Empsom* (1895) 142 Ind. 397, 41 N. E. 822; *Pittsburgh, C. C. & St. L. R. Co. v. Machler* (1902) 158 Ind. 159, 63 N. S. 210; *Kramer v. Fishback* (1913) 180 Ind. 178, 102 N. E. 831.

In *Ford v. Ford* (1887) 110 Ind. 89, 10 N. E. 648, supra, it was said that filing a remonstrance, like filing an answer or other pleading in a cause, constitutes an appearance in the case, and, so far as the remonstrant is concerned, is a waiver of all questions pertaining to the jurisdiction of the court over his person. So, in *Sunier v. Miller* (1886) 105 Ind. 393, 4 N. E. 867, the court said: "We can perceive no reason for holding that one who joins in a remonstrance can assail the proceedings upon the ground that no notice was given. It has often been held that if no objection to notice is made its validity cannot be assailed, even on appeal, and surely, if objection cannot be made on appeal, none can be successfully urged in a collateral attack." In *Updegraff v. Palmer* (1886) 107 Ind. 181, 6 N. E. 353, it was said: "We have many decisions in highway cases, holding that, where parties appear and remonstrate, they will be confined to the grounds of objection stated in their remonstrance. This long-settled rule is a reasonable and just one, for it enables the trial court and parties to correct errors, thus repressing litigation. If the question were an open one, we should not be inclined to a different view from that which has so long prevailed; but

as the question is well settled we need not now discuss it." In *Pittsburgh, C. C. & St. L. R. Co. v. Machler* (1902) 158 Ind. 159, 63 N. E. 210, the court said: "The record shows that appellant was personally served with such notice twenty days before the petition was docketed, and within the time prescribed by the statute it appeared and filed its remonstrance, challenging the assessment against its right of way upon all permissible grounds. Having appeared before the court and pleaded to the merits of the proceeding and assessment, without making any objection to the sufficiency of the notice, or the regularity in filing the petition, that act will be held to be a waiver of all questions pertaining to the jurisdiction of the court, growing out of such matters."

However, it has been said that while landowners who appear at the hearing on the petition for the enlargement of the boundaries of a drainage district, and urge objections to the granting of the petition, waive all defect of notice as far as they themselves are concerned, yet they have the right to insist that the proceedings shall be valid as a whole, and on this theory they are not estopped from objecting that an improper publication was a fatal defect of notice, and a consequent defect of jurisdiction. *Mason & T. Special Drainage Dist. v. Griffin* (1890) 134 Ill. 330, 25 N. E. 995, wherein the court said: "It is probably true that, by appearing generally and contesting the petition upon its merits, they waived any defect of notice to themselves, and, so far as such waiver went, they must now be held to be bound by it, and to have subjected themselves to all the legal consequences resulting therefrom. If jurisdiction of their persons, and through them of the particular lands of which they were the owners, was all that was required to make the order of the commissioners granting the petition binding so far as they were concerned, it must be admitted, we think, that they have no standing here to object that the statutory notice was not given. But their relations to the subject-matter of the petition were such as to give them the

right to insist that the annexation of the lands proposed to be included in the district should be valid as a whole. All of said lands, upon the theory of the petition, were involved in the same system of drainage, and therefore, if brought into the district by valid annexation proceedings, liable to contribute their due proportion of the expense of constructing and keeping in repair the ditches and drains of the district, thus lightening, to the amount of such contributions, the burden resting upon all the other lands in the district. The subject may be illustrated thus: Suppose the proceeding was for the original organization of a drainage district, embracing lands belonging to one hundred different proprietors. No sufficient notice having been given, five of said proprietors, owning but one twentieth of the lands in the proposed district, appear generally and contest the organization of the district, but, their objections being overruled, an order is entered assuming to organize a district embracing the lands of the one hundred proprietors. Such organization would be invalid as to nineteen twentieths of the land, and could impose no burdens thereon, but if the five owners who had appeared should be held to be estopped to insist upon such invalidity, the organization would, as a legal consequence, be held valid as to them, and all the expenses and burdens of the district would fall upon their lands. The true view, we think, is that each landowner in the district, whether he appeared and contested the organization of the district or not, would have such interest in the question of the legality of the organization as to the lands of the other owners, as would give him the right, in any proper proceeding brought to test the question, to allege want of jurisdiction of the persons of the other landowners in the district, and of the lands owned by them, and to insist that for that reason the entire organization of the district was illegal and void. The same reasoning applies with equal force to a proceeding like the present for the annexation of lands to a district already formed. In this case large portions of the lands

sought to be annexed belonged to owners who did not appear or contest the petition, some of whom appear to have been minors. As to them the annexation proceedings were clearly illegal and void, and, being void as to them, we are of the opinion that they were void in toto."

So, in *Wright v. Wilson* (1884) 95 Ind. 408, it was held, apparently, that property owners who appeared in a drainage proceeding without notice did not thereby waive the right to assert the invalidity of the proceedings because other necessary parties were not notified and did not appear.

In *Tennessee Drainage Dist. v. Moyer* (1913) 258 Ill. 296, 101 N. E. 580, it was held that the failure to post notices, as required by the statute, in ten different places in a drainage district, made the organization of the district fatally defective as to any of the property owners who appeared specially in the court below, but did not file objections waiving defects in the posting of such notices. The court said: "The plaintiffs in error here did not file any objections in the court below, although at the August term, 1912,—the next term after the order organizing the district had been entered in the county court,—they entered a special appearance, asking that the court correct the record so as to show that no objections had been filed by any property owner as to the organization of the district. By making this motion, thus limited, they did not waive the defect in the posting of the said notices."

Where a property owner appears before the board of supervisors and urges certain objections to the report of the engineer in proceedings to establish a drainage district, she cannot, on appeal, complain of other defects in the report, which do not deprive the board of supervisors of jurisdiction to order the improvement. *Lyon v. Sac County* (1912) 155 Iowa, 367, 136 N. W. 324.

5. Performance of work.

An objection to a drainage assessment for lack of benefit, and because the ditch deviates from the original plan, is waived where the property owner, after notice, appears before the

commissioners, the jurisdiction thus obtained not being lost, if the ditch is established substantially on the route described in the petition. *Brown v. Corrigan* (1911) 85 Kan. 33, 116 Pac. 226, wherein the court said: "The appellant's land was described in the petition, and the point of commencement, although upon the line of a public highway, was still upon his land, for the fee was still in him. Conceding, however, that because it did not appear from the petition that any of his land except that within the highway was to be taken, and that the ditch should therefore be considered as passing through lands not described in the petition, then clearly he had ample opportunity to present his claim after the commissioners and the surveyor had laid off and marked the route upon his own land, of which fact he had personal knowledge. Besides this, the appellant was an active party to the proceedings, which were in progress for nearly a year. He was bound to take notice of any step taken therein by the commissioners, after they acquired jurisdiction in the first instance, that they were authorized by law to take afterward. One of these steps, necessarily incidental to the power delegated to them, was to determine the starting point, which, as we have seen, was not required to correspond exactly with the description in the petition."

6. Assessment.

Where a property owner, in answer to a notice of the petition for the construction of a ditch, appears and files a general remonstrance, but does not object to the inclusion of his lands within the boundaries of the district, he waives the right to object to the assessment on that ground. *Mackay v. Hancock County* (1908) 137 Iowa, 88, 114 N. W. 552.

So, where a property holder appears before the board of supervisors, and files a written protest against including his lands within a proposed drainage district, on the ground that he claims and holds them under title derived from the Mexican government, but does not claim that his lands are not swamp and overflowed, he should

be considered as estopped in certiorari proceedings from asserting to the contrary. *Hagar v. Yolo County* (1874) 47 Cal. 222.

In *Baker v. Morrill Drainage Dist.* (1915) 98 Neb. 791, 154 N. W. 533, it was held that where a property owner appeared before the board of directors of a drainage district and objected to the assessment of benefits against his property, and, when his objections were overruled, appealed to the district court, he thereby waived any right to insist that no apportionment of benefits had been made. The court said: "Conceding that the proceedings of the board, or, to speak more accurately, the record made by the board of its proceedings, may not have been in all respects regular, the appellants are not in a position to claim that no apportionment of benefits was ever made. If that allegation be true, what did they appeal from? They appeared before the board and made their objections. When those objections were overruled, they appealed to the district court. In so doing, they waived any right to insist that no apportionment of benefits had been made. It certainly would be a unique procedure for them to go to the district court, and say in one breath that they appeal from an apportionment of benefits made by the drainage district, and in the next breath tell the court that the drainage district had not made any assessment. By their appeal they submitted their cause to the court, and invoked its aid in reviewing the apportionment which had been made. They thereby asked the court to take evidence, investigate the facts, and determine whether their assessment was unjust or inequitable."

A property owner who appears before the board of supervisors and specifies certain other objections to proceedings to establish a drainage district cannot, on appeal, object to the apportionment of costs against her property, recommended by the commissioners appointed for that purpose; but she is not estopped to object to an increase by the board of supervisors of the assessment so recommended by the commissioners.

Lyon v. Sac County (1912) 155 Iowa, 367, 186 N. W. 324.

c. Failure to pursue remedy within time prescribed by statute.

Under the Michigan practice, if a property owner does not, within the time given by law, review drain proceedings by certiorari, he is estopped from questioning the legality of the drain, unless there is some constitutional objection. *Crandall v. McElheny* (1906) 146 Mich. 191, 109 N. W. 261; *Grandchamp v. McCormick* (1907) 150 Mich. 232, 114 N. W. 80.

So, in Indiana, where the statute fixes the time within which a remonstrance against a proposed ditch may be filed, the right to remonstrate is lost if not taken advantage of within the prescribed period. *Tolin v. Jones* (1904) 33 Ind. App. 423, 71 N. E. 678. See to the same effect, *Ross v. Hannah* (1910) 173 Ind. 671, 91 N. E. 232. And this rule has been applied to an amended remonstrance. *Smith v. Biesiada* (1910) 174 Ind. 134, 90 N. E. 1009. So, a landowner brought into the proceedings for the first time by the report of the drainage commissioners must exercise his right to remonstrate within the days after service of notice of the hearing of the report, or he will be held to waive it. *Pittsburgh, C. C. & St. L. R. Co. v. Hodge* (1911) 175 Ind. 669, 94 N. E. 324.

Where an order of court, docketing the petition for establishing a ditch, is irregular for the want of an indorsement on the petition fixing the time for such docketing, an objection to this irregularity is waived, after the three days' time allowed by statute for filing a remonstrance has expired. *Smith v. Smith* (1884) 97 Ind. 273, wherein the court said: "The irregularities complained of and attempted to be reached by appellants' motion to dismiss the petition, and to set aside the orders docketing and referring the same to the commissioners of drainage, were such as would not render the proceedings void, but were cured by the judgment confirming the assessments. And we think, also, that appellants' failure to present their objections to such irregularities within

the time limited by statute must be regarded as a waiver of such objections." See to the same effect, *Carr v. State* (1885) 103 Ind. 548, 3 N. E. 375. So, an objection to a petition for a drain, in that it fails to show on its face that the lands of the petitioners, sought to be drained, do not lie within the corporate limits of any town or city, is waived if not made within ten days as required by statute. *Hardin v. Cook* (1914) 181 Ind. 698, 105 N. E. 231. Similarly, in Michigan, certiorari to review the proceedings taken by drain commissioners must be applied for, and notice of the writ served on the commissioner, within ten days after his determination, and an objection to the sufficiency of a petition for cleaning out, widening, and deepening a part of a public drain is lost, if application for the writ is not made within the statutory period. *Blumfield Twp. v. Brown* (1902) 130 Mich. 504, 90 N. W. 284.

Property owners who are interested in a proposed drain, although not named in the petition, have the right to be admitted on application, and to file a remonstrance, if the time for filing the same has not expired; but it is their duty to make application at the first opportunity. Under this rule, where an owner knows of the drainage proceedings, and that certain names have been left out of the petition with the fraudulent purpose of defeating a remonstrance, before the original parties by lapse of time have lost their right to file a remonstrance, and fails to take the necessary steps to be made a party and file a remonstrance, he will not be permitted to file it after that time has expired. *Keiser v. Mills* (1903) 162 Ind. 366, 69 N. E. 142, wherein the court said: "The rule is well settled that, in cases where a party is entitled to relief from the fraud of another, he must act promptly upon its discovery, and, to render his pleading sufficient, the facts stated therein must be such that the court can say therefrom that he has so acted, and that by the exercise of ordinary diligence the discovery could not have been before made. Even if appellees' application to file

said remonstrance were otherwise sufficient,—a question we need not and do not decide,—it is clear that no facts affirmatively showing diligence were alleged."

So, where the contract for the construction of a drain has been let and money expended in the construction of the work, an objection that the drain commissioner did not file his opinion as to the necessity of the drain will not be heard, in a suit to restrain the completion of the work. In such case, a property owner failing to bring certiorari within the time allowed by law is guilty of laches, which bars his right to review defects, either by certiorari or by a bill in equity. *Swan Creek Twp. v. Brown* (1902) 130 Mich. 382, 90 N. W. 38.

Where a notice to landowners to file claims for damages is sufficient in so far as a particular property holder is concerned, he is estopped from objecting to its regularity if he does not file his claim with the board until the statutory time limit has expired. *Collins v. Pottawattamie County* (1912) 158 Iowa, 322, 138 N. W. 1095.

Likewise, where property owners receive notice of a drainage assessment in time to review it by certiorari, and fail to do so before the time limited for such review has expired, they are estopped thereafter to question the assessment by bill in equity. *Clinton Twp. v. Teachout* (1907) 150 Mich. 124, 111 N. W. 1052.

A Louisiana statute provides "that whenever a debt has been incurred and bonds ordered to be issued and a forced contribution or acreage levied, as provided for in the previous section, any landowner having property situated within the limits of the area proposed to be drained, shall have the right during sixty days next following the date of the publication of the resolution required by the preceding section to appeal to the courts for the purpose of testing the validity of such proceedings, after which time the right to resort to the courts shall be forever barred." In accord with the provisions of this statute, a suit filed after the expiration of the sixty days, and after a debt had been created, and

bonds issued and negotiated therefor, was held too late, in *Hubert v. Vial* (1920) — La. —, 84 So. 901.

d. Failure to appeal.

1. Generally.

The statutes relating to drainage proceedings ordinarily provided for an appeal to the courts by an aggrieved property owner, from one or more of the decisions made by the administrative officers having control of a drainage proceeding, or by a court having power to make interlocutory orders therein. The general rule, subject to some exceptions arising from peculiar circumstances, or from the fundamental nature of the defect complained of, seems to be that a property owner who fails to take an appeal thus allowed is estopped thereafter to raise any question which could have been urged on the appeal. See the cases cited in the following subdivisions, wherein the application of the rule to particular defects is considered.

The closely related proposition that an order made in the course of a drainage proceeding is conclusive on collateral attack is considered as involving no element of estoppel, and is excluded.

2. Sufficiency of petition.

Where the right of appeal is given from practically every determination of the county board in regard to a ditch, a property owner who fails to exercise his statutory right of appeal is estopped from questioning the validity of the assessment because the petition is defective in the description of the route. *Smith v. Pence* (1914) 33 S. D. 516, 146 N. W. 709.

3. Conformity of proceedings to statute.

An order of a court for the construction of a ditch is a final proceeding, in a competent court having jurisdiction over the subject-matter and over the parties to the record. Accordingly, if a property owner is injured by the drainage proceeding, he should appeal from the order, and if he does not do so he is bound by the assessment. *Chambers v. Kyle* (1879) 67 Ind. 206.

Similarly, a railroad company which does not appeal from the decision of

drainage commissioners to place a ditch along the right of way is estopped thereafter to claim that such a location of the ditch was unauthorized. *Baltimore & O. S. W. R. Co. v. Jackson County* (1900) 156 Ind. 260, 58 N. E. 837, 59 N. E. 856.

However, equity will restrain the construction of a drain, though no appeal was taken from the decision of the commissioners, and no attempt was made to review the proceedings by certiorari, where the commissioners are charged with fraud in locating the drain along the right of way of a railroad, instead of across private property, the statute providing that no drain shall be constructed along the line of any railroad, without the consent of the company owning or operating such road, if it shall appear to the special commissioners or jury that such drain can equally well be laid on private lands. *Toledo, S. & M. R. Co. v. Shafer* (1916) 190 Mich. 89, 155 N. W. 712.

A drainage assessment cannot be attacked because of error in the establishment of the district, by one who appeared at the hearing where the establishment was considered, and did not appeal from the decision there made. *Kelley v. Drainage Dist.* (1912) 158 Iowa, 785, 138 N. W. 841, wherein the court said: "The only remedy of an owner of lands contained therein, made a party to the hearing on the petition for the establishment of the drainage district, is by appeal to the district court, and a failure to avail himself of that remedy is waiver of all other remedies." See to the same effect, *Herron v. Drainage Dist.* (1912) — Iowa, —, 138 N. W. 846.

A property owner is estopped from objecting to drainage proceedings on the ground that there was no necessity for the improvement, where the decision of the commissioner establishing the fact of necessity is not appealed from within the statutory period. *Horner v. Biggam* (1877) 36 Mich. 243.

So, an objection to an assessment that the contemplated drain was not of public utility cannot be made in an action to enforce payment. *Smith v.*

Clifford (1884) 99 Ind. 113, wherein the court said: "In such cases, all irregularities before the county board are waived by not appealing from their judgment."

On the same principle, it was held in *Simpson v. Kossuth County* (1917) 180 Iowa, 1330, 162 N. W. 824, that a landowner was estopped to object that the report of the engineer did not fix definitely and specifically the exact boundaries of the land, the court saying: "The omission in question was one that the board of supervisors had authority to direct the engineer to correct, and doubtless would have done so, had their attention, at the time, been called thereto. The engineer could readily have marked out the boundaries on his plat with precision. It therefore seems clear that the omission is only an irregularity, which could easily have been corrected by the engineer, and that appellant, failing to appeal from the finding and order of the board, must be held to have waived such irregularity."

But the return by the commissioners on the assessment roll that they had jointly viewed and assessed the lands, as required by statute, is not conclusive, when in fact it appears that they had not done so. Such a failure by the commissioners to perform their duty is jurisdictional, and an owner may raise the question for the first time in defense of an action to recover the assessment, though he did not appeal from the confirmation. *People v. Hagar* (1874) 49 Cal. 229.

The confirmation of a drainage assessment is ordinarily considered to be an adjudication that all notices required in the course of the drainage proceeding were properly given, and a property owner who fails to appeal from the order of confirmation is estopped to resist payment of the assessment on the ground of an insufficient notice.

Thus, an objection that a property owner was not notified of the resolution and order of the commissioners, making special assessment, and of the filing of the assessment roll, and that he did not, in fact, learn of the same until after the time allowed for an ap-

9 A.L.R.—56.

peal therefrom had expired, cannot be heard in an application for judgment of sale. *People ex rel. Barber v. Chapman* (1889) 127 Ill. 387, 19 N. E. 872, wherein the court said: "From the time the drainage commissioners assume to exercise the powers conferred on them, and which are to result in the levying of a special drainage assessment, the proceedings may not inaptly be likened to a suit in court. The commissioners, as a first step, make a classification of the lands; the property owners are then brought before them by notice,—residents by personal service, and nonresidents by publication,—and the succeeding steps to be taken, both by the property owner and by the commissioners, follow in regular progression, and without unnecessary delay. And for the same reason that a party over whose person the court had acquired jurisdiction is required to take notice of the different steps taken in his cause, the property owner in a drainage district, who has been notified of the classification of the lands, must also be required to take notice of each succeeding step taken by the commissioners to effect the object for which the district has been organized."

So, the order of court approving and confirming drainage assessments, when no appeal is taken, is conclusive on all landowners over whom the court has acquired jurisdiction, and an owner is estopped thereby from objecting to an assessment on the ground that the notice of the petition served on him was not issued by the clerk, and was issued and served before the petition was filed. *Shaum v. Harrington* (1910) 173 Ind. 610, 91 N. E. 226.

Similarly, an objection to the service of notice of the application for the appointment of drainage commissioners, in that the return stated that it was served upon the heirs of the deceased owner, without giving their names, should be made by appeal from the proceedings of the commissioners, and when not so made, is waived. *Re Beehler* (1886) 3 N. Y. S. R. 486.

On the same principle, an objection to the sufficiency of notice of proceedings for the establishment of a swamp

land district, as to the names of owners and the description of lands, is finally decided by the court confirming the action of the commissioners when the question is raised, where no appeal was taken from the decree. *Wofford v. Williams* (1916) 110 Miss. 637, 70 So. 823.

The collection of drainage assessments cannot be defeated, where proper notices have been given, by reason of any defect in the proceedings occurring prior to the order of the board of supervisors establishing the ditch or drain, and such order is conclusive and final that all prior proceedings were regular and according to law, unless they are appealed from. This rule is applicable to an objection to the irregularity in the publication or service of notice of the pendency of a petition for the establishment of a drainage district, which, when not made before the board, is waived. *Lightner v. Greene County* (1909) 145 Iowa, 95, 123 N. W. 749.

So, a property owner is estopped from objecting to a drainage assessment on the ground that the notice by the auditor of the pendency of the proceeding does not contain a sufficient description of the public highway assessed for the construction of a ditch, having failed to appeal from the decision of the board of commissioners, which is final and cannot be attacked collaterally. *Argo v. Barthhand* (1881) 80 Ind. 63.

Likewise, where a notice of the filing of the petition is given in substantial compliance with the statute, but is defective in not stating the name as it appears of record, and the commissioners hold that the notice is sufficient, a failure to appeal therefrom estops the owner from asserting the invalidity of the proceedings. *Kepler v. Wright* (1893) 136 Ind. 77, 35 N. E. 1017, wherein the court said: "It is the policy of the law, and in this instance it is the letter of the law, that the order and judgment of the commissioners shall be conclusive of the questions of the regularity of the proceedings. To say that a great system of drainage, 11 miles of which have been completed, with the expenditure

of large sums of money and promises of great public and private benefits, may be stopped, the expenditure wasted, and a pond or lake created, because of a slight irregularity, is not sanctioned by the law, and cannot receive the aid of equity."

But, where the name of an owner of land does not appear in the notice given by the auditor of the filing of the petition, nor in any of the proceedings before the county board, jurisdiction as to him is not acquired, and the assessment made on his lands is void. Under these circumstances, he is not estopped from contesting the validity of an assessment in an action to enjoin collection, notwithstanding the decision of the board of commissioners. *Vizzard v. Taylor* (1884) 97 Ind. 90. See also *Brosemer v. Kelsey* (1886) 106 Ind. 504, 7 N. E. 569, holding that an owner's right could not be affected by a proceeding to which she was in no way a party, and of which she had no notice. See to same effect, *McCullum v. Uhl* (1891) 128 Ind. 304, 27 N. E. 152, 725.

So, where property owners have no actual notice of the pendency of drainage proceedings until after the rendition of judgment confirming the assessment of benefits, they are not estopped from questioning the validity of the assessment. *Scott v. Brackett* (1883) 89 Ind. 413, where the court said: "It will be observed that this statute makes no provision for personal notice. The only notice required is constructive. With such notice, a lien may be fixed upon the land affected by the proposed work. Without it, no lien can be acquired, though it is so declared. This is elementary, as every man must have 'his day in court.' . . . This lien is given by statute, and in order to acquire it the provisions of the statute must be pursued. This is especially true in the observance of those provisions which confer the authority to proceed. These are jurisdictional, and without their observance the court possesses no power to make any order in the proceedings. This is the rule as to process; if none is served the court has no jurisdiction. If notice is given, but

not such as is required by the statute, and the court proceeds, its action is at least erroneous, and will be reversed upon appeal, where there has been no waiver of the irregularity. Without notice as required by the statute, the court possesses no power to refer the matter to the commissioners of drainage, nor does it possess any power to make such reference until an affidavit that notice has been given as required by statute has been made. This is the express provision of the statute. In no other way can it appear that notice has been given, and in its absence it does not appear that notice was given. It will not do to say that the affidavit is mere proof that notice was given, and that if it were in fact given the reference is not erroneous, though the affidavit required by statute is not made. The statute requires it, and in order to fix a lien upon lands affected, against the owner's wishes, its provisions must be observed. This is especially true where it is sought to be done by constructive notice. In such case, all the requirements of the statute must be observed, in order to authorize the court to proceed and fix the lien. . . . In the absence of an affidavit, the court possesses no power to make the reference, as it does not and cannot otherwise appear that the notice required by statute has been given. An affidavit, however, was filed. This was not such as required by the statute. This the appellees concede, and after the judgment of confirmation they filed another, and now insist that this affidavit supplied the defect. We think otherwise. The requirement of the statute that an affidavit must be made that notice has been given is a condition precedent to the right to make the reference, and the reference cannot be made until this requirement of the statute has been observed. . . . Besides, the additional affidavit was defective in this, that it did not show that said notices had been posted for twenty days before the reference, and this fact was not shown by either affidavit. If, then, the additional affidavit may be regarded as supplying all other defects, both of them only show

defective service, which is, as has often been decided, good cause for reversal upon appeal. . . . In this case there was no waiver, as there was no appearance until after judgment of confirmation, and upon appearance an unsuccessful application was made to set aside the judgment for such irregularity. This motion, in our opinion, should have been sustained, and the reference set aside."

Where the statute provides for an appeal from an allotment to make repairs, an owner who delays and fails to avail himself of this remedy is estopped thereafter from objecting that the allotment was not legal and valid, on the ground of insufficiency of notice. *Cochran v. White* (1898) 151 Ind. 435, 51 N. E. 723. But if no notice is given, the surveyor has no jurisdiction to make an allotment, and the allotments, being void, may be attacked collaterally. *Beatty v. Pruden* (1895) 13 Ind. App. 507, 41 N. E. 961, wherein the court said: "It is averred in the complaint before us that the appellant was a resident landowner, and it is also shown that no copy of the notice of the allotment was ever served upon him. The allotment was therefore void as to the appellant, and subject to collateral attack. The surveyor could acquire jurisdiction over him and his lands only in the way pointed out, and that was by serving upon him a copy of the notice. Perhaps if some kind of personal notice had been served upon the appellant, and the surveyor had determined that it was sufficient, such determination might be conclusive upon the appellant as against a collateral attack. . . . In the present case it may as truthfully be said . . . that the proceedings which are claimed to conclude the appellant, and to estop him from asserting the invalidity of the allotments, were such as affected the private and property rights of the appellant personally, and distinct from any interest he had in common with other citizens and taxpayers. At all events he was entitled to notice by having a copy thereof served upon him, which was not done. Consequently, the surveyor, when he made the

allotment against the appellant, was without jurisdiction, and his proceedings in the premises were void."

4. *Performance of work.*

One who seeks to enjoin an assessment on the ground that a change was made by the surveyor in the depth of a ditch, but took no appeal from the order of the drain commissioner assessing the cost of the work on the property owners benefited, cannot, after the lapse of a year, apply for a writ of certiorari. *Horn v. Livingston County* (1904) 135 Mich. 553, 98 N. W. 256.

5. *Assessment.*

(a) *Excessiveness in general.*

Where an appeal is given by statute for the correction of all errors that may be committed by the commissioners in making drainage assessments, an objection to a third assessment, on the ground that the two first were adequate to meet the expenses of the improvement, is lost by the failure to take advantage of the remedy provided by law. *Morrell v. Union Drainage Dist.* (1886) 118 Ill. 139, 8 N. E. 675.

So, where the statute provides an adequate remedy by appeal, in case of an erroneous drainage assessment, that remedy must be held to be exclusive, and parties who have neglected to pursue it must be conclusively presumed to be content with the assessment. Under this rule, an objection that the assessment on railroad property is largely in excess of the benefits arising from a proposed system of drainage cannot be raised for the first time in an action to foreclose the lien of the assessment. *Wabash Eastern R. Co. v. East Lake Fork Special Drainage Dist.* (1890) 134 Ill. 384, 10 L.R.A. 285, 25 N. E. 781.

Likewise, though the method and manner of taking an appeal from an order confirming assessments is not provided for in the Drainage Act, the general statute providing for appeals must control, and an aggrieved owner, who has allowed the statutory time to elapse without action, cannot thereafter be heard upon the question of excessive assessments. *St. Louis, I. M.*

& S. R. Co. v. Maple Slough Drainage Dist. (1919) — Ark. —, 211 S. W. 168.

In like manner, where the commissioners of a drainage district have acquired jurisdiction as required by statute, and the property owners, after notice of a hearing on assessments, have had an opportunity to be heard on their objections thereto, they are estopped, in the absence of an appeal, to object that the assessments are greater than the benefits received, or are not in proportion to those levied on other property receiving corresponding benefits. *Davis v. Lincoln County* (1913) 45 Okla. 284, 137 Pac. 114.

The probable cost of proposed drainage work, which is the amount to be raised by an assessment, is fixed by the decree confirming the report of the commissioners, and when it is not appealed from within ten days, it is final and conclusive. Under this ruling, therefore, an objection that the commissioner assessed more than the cost of the construction of canals, as estimated by the engineers and by the commissioners, cannot be raised, if the appeal is not taken within the required time. *Wheeler & Silber v. Bogue Phalia Drainage Dist.* (1914) 106 Miss. 619, 64 So. 375; *Montgomery v. Krouch* (1919) — Okla. —, 186 Pac. 218.

In *Trimble v. McGee* (1887) 112 Ind. 307, 14 N. E. 83, it was said, with respect to a claim, that a drainage assessment was excessive: "We are of opinion that the informalities, irregularities, and alleged illegalities, even in the proceedings of the township trustee, of which they complain, cannot be made available by them in this suit to defeat the assessments against their lands. In the absence of any showing to the contrary, it may be assumed, we think, that appellants had full notice of the assessments made by the trustee on their lands, in ample time to have appealed therefrom to the circuit court of Tipton county, if they were aggrieved thereby. Upon such an appeal they could have obtained all the relief which the statute contemplates they should have in such a case; namely, the determination of

the cost of such repairs and work, and the assessment of the amount thereof on their respective tracts of land in accordance with equity, fair dealing, and good conscience." See to same effect, *Wisman v. McGee* (1887) 112 Ind. 600, 14 N. E. 375.

But a failure to appeal from an assessment will not estop a property owner from objecting to its validity, where it appears that the lands were twice assessed in the names of different persons. *Etchison Ditching Asso. v. Hillis* (1872) 40 Ind. 408, wherein the court said: "In our opinion, the right of appeal, as given by said section, and the failure to take such appeal, cannot render valid a double assessment. The appellee might have appealed, but his failure to do so cannot deprive him of the right to urge such objection to the complaint. The action is based upon the assessment, and, before the assessment can be enforced, the corporation must show a valid and legal assessment."

So, the fact that the report of the board of supervisors in favor of an extension of a drainage district contains a tentative estimate of the apportionment of the assessment does not require the property owners in the newly added territory to appeal from the adoption of that report, but they are entitled to wait until the assessment against them is made, before objecting thereto. *Loomis v. Board of Supervisors* (1919) — Iowa, —, 173 N. W. 615.

(b) Classification of lands.

Where a property owner, on notice, appears before the board and files objections to the classification of land for the purposes of a drainage assessment, but, having the right to appeal, fails to exercise it, this, under well-settled rules, forecloses further insistence that the district was made to include lands which should have been omitted. *Chicago & N. W. R. Co. v. Hamilton County* (1917) 182 Iowa, 60, 162 N. W. 868, 165 N. W. 390.

So, where a property owner fails to appeal from the decision of the board of county commissioners adverse to his contention that the lands assessed

for the construction of a drainage ditch are not used for agricultural purposes, but are covered with timber, brush, and weeds, and therefore are not liable to assessment, he is estopped to raise the same question in later proceedings. *Milne v. McKinnon* (1913) 32 S. D. 627, 144 N. W. 117, wherein the court said: "Certainly a tract of land need not be in use and cultivated for agricultural purposes in order for it to be agricultural land. The unbroken prairie, the timber-covered valleys and hillsides, are agricultural lands before they have been prepared for husbandry, as well as after they have been so prepared. It certainly does not appear that this tract of land is not agricultural land. If it was agricultural land, then concededly, when properly included in the drainage system, it was assessable for any benefits it may have received. Whether it did receive any benefits from the drainage system, and the extent of such benefits, were matters clearly within the jurisdiction of the board to determine, and its determination thereon, if honestly made, can only be reviewed upon appeal; and any allegations contained in the complaint setting forth that said lands were of little value as agricultural lands, and that, owing to their peculiar situation, they could not be and were not benefited by the drainage system, are improperly pleaded, and are not confessed by the demurrer, being matters that could be considered only upon an appeal from the assessment made."

Similarly, a property owner who fails to appeal from the order of the commissioner, designating the lands constituting a drainage district and apportioning the benefits, is bound by the apportionment, despite a failure to give proper notice of the hearing. *Hinkley v. Bishopp* (1908) 152 Mich. 256, 114 N. W. 676.

Where no objection to the boundary lines of a district is made at the time of its formation, and no appeal is taken from the order establishing it, within the time provided by the statute, it cannot later be raised. "The objection not having been made at the

proper time, nor the order appealed from, it must be considered waived." *Less Land Co. v. Fender* (1915) 119 Ark. 20, 173 S. W. 407.

Likewise, where a judgment of confirmation shows that an assessment was levied against a city for the benefit of its streets and alleys, clearly indicating all the streets and alleys of the city, if the evidence in the record does not support such a judgment, the error should be taken advantage of on appeal or writ of error, and the failure to describe them sufficiently is nothing more than a mere irregularity, which could easily have been cured by amendment, and cannot be raised for the first time in a collateral proceeding. *Kickapoo Drainage Dist. v. Mattoon* (1918) 284 Ill. 393, 120 N. E. 256.

In *Wofford v. Williams* (1916) 110 Miss. 637, 70 So. 823, in disposing of an objection to drainage proceedings on the ground that after the formation of the district certain lands were taken therefrom, the court said: "Being in court, it was the duty of the complainants in this case to come before the board of supervisors and object to such steps as they believed were unlawful; and if such proceedings were not regular, and orders were made by the board of supervisors in furtherance of the purposes of this drainage district which they believed to be irregular, the right of appeal to the circuit court from such order was granted them by statute. Before the bonds were actually issued and sold, it appears that every landowner was cited to appear to make objections to any and all irregularities that might have existed in any of the previous proceedings of the board, and in that notice all persons in the district were actually notified in compliance with all the provisions of the amended statute. It further appears that, at the regular time named in the notice, the board proposed to reissue the bonds in question. The majority of the complainants, if not all of them, appeared at this meeting and protested against the action of the board, and time was granted them within which to file a bill of exceptions and appeal to the

circuit court. This idea was abandoned, and an injunction was sought restraining the collection of taxes in lieu thereof. In our opinion, the action of the chancellor in sustaining the demurrer to complainant's bill for injunction was correct. At the most, the proceedings of the board of supervisors, after the passage of the amendatory Act of 1912, were irregular, and the complainants and all other persons owning property in the district were parties thereto, and, if they desired to challenge the correctness and regularity of the board of supervisors, they ought to have pursued the remedy provided for them by statute."

An objection that the order of the commissioners confirming the classification of lands included in a drainage district was lost or misplaced is not one which can be raised on application for judgment of sale, where the party interested has not appealed from the confirmation of the assessment, nor will the loss of the order serve as an excuse for failure to take an appeal. *Scott v. People* (1887) 120 Ill. 129, 11 N. E. 408, wherein the court said: "This objection clearly does not affect the justice or validity of the assessment, and consequently cannot prevail in an application of this kind. The appellants were bound, at their peril, to take notice of all orders made by the commissioners in the proceeding. The statute required them to adjourn from day to day, until all objections to the classifications of the lands were heard and disposed of. After the first notice, the statute declares that 'all persons shall take cognizance of all adjournments, without further notice.' Had appellants been present when the question of confirming the classification was finally disposed of, they would have been put in possession of all the facts necessary to the perfecting of an appeal."

But while the apportionment of cost and estimate of benefits in a drainage proceeding is the field over which discretion is especially given to the board of supervisors, subject only to an appeal to another special tribunal, and while it is true that a

landowner must suffer the result of any honest mistake or error of judgment committed by the supervisors, yet no statutory duty is more imperative than that they shall honestly exercise the judgment and discretion thus conferred upon them. Hence a landowner is not estopped to contest the validity of an assessment by the decision of the supervisors and failure to appeal therefrom, where it appears that they arbitrarily, and not in the exercise of judgment, omitted lands directly benefited, and in like manner assessed portions of the cost on lands not at all benefited. *Fraser v. Mulany* (1906) 129 Wis. 377, 109 N. W. 139.

(c) *Land not benefited.*

Where the statute provides a remedy by appeal for any person aggrieved by a drainage assessment, a failure so to appeal is an estoppel to raise the objection thereafter. *Moffit v. Medsker Draining Asso.* (1874) 48 Ind. 107, holding that, in a suit to recover an assessment, the defendant could not be heard to allege that the construction of a ditch did not benefit his land, but injured it.

Whether lands are benefited at all by a proposed drain is not open to question on an application for judgment of sale, but is conclusively settled at the time the classification of the lands is made, subject to review on the appeal of any landowner who might feel aggrieved. *People ex rel. Abt v. Soucy* (1913) 261 Ill. 108, 103 N. E. 570, where the court said: "If any landowner desires to show that his land is not benefited at all, or has been classified too high by the commissioners in proportion to other lands in the district, he has his remedy by appeal to the county court, where the matter can be finally determined by a jury."

So, where there is no appeal from the order of the board of supervisors establishing a drainage district, and including a railroad right of way therein, the railroad company is estopped from saying that its property has not been benefited to any extent. *Chicago G. W. R. Co. v. Dubuque County* (1916) 176 Iowa, 690, 158 N. W. 553.

Likewise, an objection that a highway assessed in drainage proceedings is not benefited by the construction of a drain cannot be raised in a proceeding to collect the assessment. The remedy is by appeal from the decision of the commissioners, and failure to take such appeal is a waiver of the right to object. *Highway Comrs. v. East Lake Fork Special Drainage Dist.* (1889) 127 Ill. 581, 21 N. E. 206.

Where the order of the county court organizing a subdistrict finds that the commissioners "have described all the lands which will be benefited" by the proposed improvement, and that all of such lands are within the boundaries of the district, a property owner who desires to question this finding should appeal from the order, and not having appealed, but acquiescing in the finding, he cannot thereafter object to the assessment on the ground that there are lands which were not included in the subdistrict, which would be benefited, and which were not assessed for benefits. *Hadley Creek Sub-Dist. v. Chicago, B. & Q. R. Co.* (1918) 284 Ill. 354, 120 N. E. 281.

Similarly, errors of the county board in making the apportionment of benefits may be corrected on appeal, and in a subsequent action to cancel the tax, objection to the form or letter of the findings or order of the county board in determining the apportionment of benefits which are not of a jurisdictional nature will not be considered. *White v. Papillion Drainage Dist.* (1914) 96 Neb. 241, 147 N. W. 218.

But where landowners not named in drainage proceedings are assessed for benefits, and file a remonstrance against the establishment of a drain, as proposed, on the ground that its construction will result in irreparable injury to their lands, but fail to appeal from the decision of the commissioners, they are not estopped thereby, and may enjoin the construction of the ditch. *Bilsborrow v. Pierce* (1907) 101 Minn. 271, 112 N. W. 274, wherein the court said: "The first question presented by the record is whether the plaintiffs lost whatever rights they

might have had by neglecting to appeal from the assessments of benefits and damages made by the drainage commissioners. We think they did not. It is elementary that the board of county commissioners could not have proceeded against lands until they had acquired jurisdiction, and they could then proceed against only such lands as had been brought within the power of the court by personal service of notice upon their owners, or by notice sufficient in ordinary proceedings in rem, in accordance with the statute. In the instant case, there had been no personal service on the owners. Their lands had not been named in the proceedings. Neither plaintiffs nor their property had been brought within the jurisdiction of the county commissioners. It may be that under such circumstances, if the plaintiffs had seen fit to do so, they might have appeared before the board of county commissioners and might have been entitled to be heard by them. . . . The plaintiffs in this case did not see fit so to do. Instead, they elected to bring an action to enjoin the township authorities. If they had the right to do this, they were clearly not estopped by failure to appeal. Nor did the fact that they filed a remonstrance make them parties to the proceedings."

V. Estoppel by acquiescence or acceptance of benefits.

a. Delay or acquiescence.

1. Generally.

While there are some cases which hold that jurisdictional defects in a drainage proceeding are not waived by the acquiescence of a landowner, the general rule seems to be that if the owner of property affected by a drainage project, with knowledge that the improvement is being made, stands by without objection until the work is completed and his property has received the benefit thereof, he is estopped to resist payment of the assessment because of defects in the proceedings. See the cases cited in the following subdivisions of this note, wherein the application of the

rule to particular defects is considered.

"The reasons for the rule so applied are obvious. It would result in a palpable wrong to permit those who are parties to and interested in such proceedings, particularly the petitioners, who have charge and control of the proceedings,—silently to permit them to proceed to completion, including the construction of the ditch, and be heard to complain, when called upon to pay the assessments made against them, that the proceedings were irregular, defective, and void. A rule which would sanction and approve of such a course by those who have control of the proceeding might encourage a failure of compliance with the statute in some respects essential to the jurisdiction of the board, for thereby those benefited by the final construction of the ditch could escape payment of the expense of improving their property, and cast it as a general county charge upon taxpayers who received no benefit at all." *State v. Lindberg* (1912) 120 Minn. 147, 139 N. W. 286.

"This rule is predicated on the fact that the party has slept upon his rights, and has, by neglecting to assert them and by allowing the authorities to go on with the improvement on his land, and presumably for his benefit, placed himself in a position where it would be inequitable to allow him an injunction to restrain the collection of his share of the work. It is essential to the application of this rule that the owner should know that the improvement is being made, and have the means of stopping it, or objecting to it, before the authorities have expended labor or money in its construction. Without such knowledge, he cannot be charged with neglect or with standing by and permitting the improvement. . . . This rule, that silence or acquiescence may amount to a waiver of the right to an injunction against the collection of the tax or assessment, does not apply where the improvement is not on the land of the party sought to be assessed. In such case he may have the injunction after the work is completed, unless he has requested it to be done

or promised to pay for it." *Teegarden v. Davis* (1881) 36 Ohio St. 601, wherein it was held that the owner, having no notice or knowledge of the work, was not estopped. See to the same effect, *Rice v. Wellman* (1891) 5 Ohio C. C. 334, 3 Ohio C. D. 165.

In dismissing a petition to enjoin the collection of an assessment for drainage because of laches, the court, in *Cotzhausen v. Dick* (1909) 138 Wis. 127, 119 N. W. 822, said: "He instigated the drainage proceeding by signing the original petition. He was chargeable with constructive notice of the decision of certain commissioners on appeal, directing that the drain be laid and requiring supervisors to proceed. This notice results from the statute requiring the filing of the decision of the commissioners in a public office. He was, too, chargeable with knowledge of the subsequent proceedings of the town supervisors in laying out and establishing the ditch, and in making apportionment of the cost thereof to the parties benefited. He is alleged to have had notice in fact thereof, and of the assessment upon his property, before the letting of the contract for the work, and, of course, before the doing of the work by the contractor. Besides which, it appears by the answer, and is therefore admitted, that plaintiff's lands are benefited to an amount at least equal to the assessment. He had a right to an appeal from that assessment, provided by statute, but did not exercise it. He knowingly permitted the contractor to do the work in reliance on the special assessment as unassailed. He makes no offer to pay any sum whatever. In such a situation a court of equity should not listen to the application of a property owner who has unprotestingly allowed others to expend money or labor upon an improvement which, under some circumstances, the authorities would have a right to make at his expense, and from which he receives benefit, to excuse him from the payment of the portion assessed against his premises."

In addition to the cases hereinafter more particularly stated, the rule has been enunciated in several cases

wherein the precise nature of the defect complained of was not stated.

Thus, in *Zeliff v. Bog & F. Meadow Co.* (1902) 68 N. J. L. 200, 56 Atl. 302, it was held that after a lapse of three years a property owner will not be heard to object to an assessment because of any mere irregularity in procedure.

So, in *Taylor v. Moseley Creek Drainage Dist.* (1918) 176 N. C. 217, 96 S. E. 1027, the court held that where the owners of land have notice of the establishment of a drainage ditch, actually or by publication, with full opportunity to be heard, they are estopped by a delay of six years, in coming forward and asking for a re-assessment, when, in addition to the publicity of the viewers going on the land, there was notice from the physical instalment of the drainage system and repeated publication of the notices.

Similarly, in *Bresler v. Ellis* (1881) 46 Mich. 335, 9 N. W. 439, in holding that where proceedings for the construction of a ditch are begun two years before, and finished eight months before, the application for a writ of certiorari to review the proceeding, the delay will constitute laches and estop the petitioners from seeking relief, the court said: "The only reason intimated as an explanation for the delay is a statement in the petition that the plaintiff was absent from the United States at the time he was first informed that the ditches were finished in July, 1880. There is nothing in this circumstance to excuse the continued failure for so many months to take steps. There will be danger of great injustice in allowing persons to lie by in cases of this class until all the benefit to arise from the work is secured, and nothing remains but the payment of their share of the expense, and then permit them to intervene by certiorari and procure the proceedings to be overthrown; and before permitting it the court should be satisfied that the delay has not been owing to any fault or neglect on the part of the applicant." Likewise, it was held in *Smith v. Carlow* (1897) 114 Mich. 67, 72 N. W. 22, that where

parties stand by and see drainage proceedings completed, and take no steps to impeach their validity, they are estopped to question their validity when called on to pay for them. In like manner, the court said in *Moore v. McIntyre* (1896) 110 Mich. 237, 68 N. W. 130, that a landowner who remains silent until a drain is partially constructed under statutory authority, knowing that the only method of compensating those who performed the labor is by an assessment for benefits, cannot, after the benefits have been accepted by him, maintain a bill in equity to set aside the proceedings for alleged irregularities.

Where a party stands by and sees the work of an improvement go on, with full knowledge that he is to be assessed therefor, and knowing that those who do the work can be compensated in no other way than by an assessment for benefits, he is estopped from objecting to irregularities. *Atwell v. Barnes* (1896) 109 Mich. 10, 66 N. W. 583. The court said that, whatever may be the rule at law, equity will not, under such circumstances, grant relief even from jurisdictional defects. See to the same effect, *GEIB v. MORRISON COUNTY* (reported herewith) ante, 839.

Acquiescence in one departure from the procedure prescribed in drainage proceedings does not estop a property owner from objecting to a subsequent irregularity. Thus, in *People ex rel. Cline v. Camp* (1909) 243 Ill. 154, 90 N. E. 215, attendance at one meeting held outside the district was held not to work an estoppel as to subsequent meetings so held. So, in *People ex rel. Heikes v. Jonkman* (1914) 266 Ill. 229, 107 N. E. 159, it was held that the payment of one drainage tax does not estop a landowner from objecting to subsequent distinct levies based on the same improvement. See to the same effect, *People ex rel. Lusk v. Garner* (1915) 267 Ill. 396, 108 N. E. 344.

A railroad company assessed for the construction of a drain which had actual knowledge of the construction thereof and was actually benefited thereby, and which has been guilty of

laches both before and after instituting an action extending over a period of six years, cannot maintain an equitable action to determine the validity of the drainage proceedings, especially where it has not offered any evidence of what its assessment equitably should have been and has not made any tender to the court to pay for the actual benefits it has received. *Northern P. R. Co. v. Sargent County* (1919) — N. D. —, 174 N. W. 811.

2. *Validity of statute.*

The view that one who stands by and sees his property benefited by the establishment of a drainage system is estopped to question the regularity of the proceedings was, in *Phillips v. Kankakee Reclamation Co.* (1912) 178 Ind. 31, 98 N. E. 804, Ann. Cas. 1915C, 56, carried to the length of holding that a property owner, after standing by, with knowledge of drainage proceedings, and making no protest against the construction until after the completion of the work, which benefited his land, is estopped, on collateral attack by injunction, from asserting the unconstitutionality of the statute under which the improvement was made.

So, in *Cass County v. Plotner* (1897) 149 Ind. 116, 48 N. E. 635, it appeared that a landowner had notice of drainage petitions, of the assessments, and of the various steps, as required by the act, relative to ditches in a single county, and knowledge of the issuance by the counties of bonds for large sums; that he lived on his lands, and saw the construction of the ditch thereupon, as the same progressed; that he made no objection to or complaint against the proceeding, or the construction of the ditch as it affected his lands; that during the progress of the work he joined in a petition to the board of commissioners, asking an extension of the time for the payment of the first instalment of the assessment, and, pursuant to said petition, a delay of one year in the enforcement of the assessments was allowed by the treasurer of said county. Under these circumstances, it was held that he was estopped to assert that the statute was invalid and ineffectual to create a

joint tribunal of two or more counties for the establishment and construction of drains over 5 miles in length, extending into two or more counties.

But to the contrary, it has been held that where the statute by which land "in the vicinity of the ditch" is made subject to assessment for a part of the cost of construction is void, because it fails to provide for any notice to the owners of such lands, equity will enjoin the collection of the assessment, notwithstanding the owner has an adequate remedy at law, and there is no estoppel by his failure to act more promptly. *Smith v. Peterson* (1904) 123 Iowa, 672, 99 N. W. 552, where the court said: "Where a tax is levied wholly without jurisdiction or authority, the rule relied upon by counsel does not apply."

3. *Conformity of proceedings to statute.*

(a) *Establishment of district or corporation generally.*

In *People ex rel. Kidd v. Crowley* (1911) 250 Ill. 282, 95 N. E. 192, a quo warranto proceeding, it was urged that the organization of a drainage district was void because one of the highway commissioners signed the petition for the organization of the district, and also made affidavit that the petition contained the required number of signers and thereafter found that the affidavit was made by a credible witness. The court, without passing on whether this would be a valid objection, if raised in apt time, held that it could not be raised at such a late hour, saying: "Many relations, both public and private, are so involved in a proceeding of this nature that each case must be largely decided on its own special and particular facts. Not every departure from the law in the organization and conduct of the proceedings of the district, or the use of its franchises, will justify such an order as was entered by the trial court in this case. While the public authorities will not be barred, either by laches or the acquiescence of individuals, where it does not appear that the information is filed exclusively for the benefit of private interests, still this court has frequently held that un-

reasonable delay or acquiescence on the part of the persons complaining, as well as considerations of public interest or convenience, will justify the refusal of the court to proceed to judgment, although no statute of limitations has intervened. . . . In a certiorari case, wherein the facts as to laches or estoppel were no stronger than here, the court held that it would be an abuse of its sound legal discretion, and of great public detriment, to quash the proceedings, as the errors, at the most, were technical and harmless, and were not shown to be such as would cause substantial injustice to anyone. . . . Such is the situation here. After the participation of all the relators in the preliminary organization, assessments were levied, liabilities incurred, and contracts to large amounts were entered into before any steps were taken to inquire into the legality of the organization of this district. If the facts are as set out in these pleas, the acquiescence of the relators in the proceedings bars them from raising the questions of which they now complain."

So, where a property owner has stood by for more than a year and allowed a ditch to be constructed at great expense and labor, it is too late to review the legality of the proceedings, and a writ of certiorari will be denied. *Haines v. Campion* (1840) 18 N. J. L. 49.

But a landowner is not estopped from enjoining the collection of an assessment for the construction of a drain, though he stood by without giving notice of any objection, and permitted the company to expend a large sum of money, by which his land was benefited, where, by reason of a fatal defect in the articles of association, such company was not legally incorporated, and therefore all the subsequent proceedings were invalid. *Newton County Drawing Co. v. Nofsinger* (1873) 43 Ind. 566.

(b) *Resolution or finding of necessity.*

In *Kellogg v. Ely* (1864) 15 Ohio St. 64, a suit to enjoin the collection of an assessment for the construction of a ditch, for the reason that the record of the proceedings did not affirmative-

ly show a finding that the ditch was "demanded by, or conducive to, the public health, convenience, or welfare," as required by statute, the court, in holding the landowner to be estopped, said: "It is evident enough that when the proceedings in the probate court, on inquiry of damages claimed by him, were ended, the plaintiff below might have proceeded on error to test their legality, and, if erroneous, to reverse them. And when the final order establishing the ditch was made by the county commissioners, he might have then proceeded, on error or by appeal, to question their power and jurisdiction, and to undo what may have been erroneously done. And these remedies, if they had been resorted to, would have had these important recommendations—that whatever had been done erroneously, or without authority of law, would have been set aside; officers would have been instructed as to their duties, and parties as to their rights; and proceedings, recommencing from the erroneous point of departure, would have been carried on in strict conformity to law, with all just interests respected and all rights conserved. But it does not appear that any resort was had to these remedies. Again, when the different sections of this ditch were let to the lowest bidder, and when the first spade had been thrust into the earth in the execution of the contract then made, before the contractors had expended any money, or the laborers any sweat, then, if ever, the remedy by injunction was open to the plaintiff below. But then he did not invoke it. It does not appear from the record that he ever warned the contractors or laborers that he intended, for himself, to resist the collection of the assessment which must follow to raise the money to pay them; but, remaining inactive and silent until his swamp lands were drained by a ditch of nearly a mile in length, he then, for the first time, asks the interposition of a court of equity. We think he comes too late."

(c) *Qualification of official.*

Where a landowner requested and assented to the making of a drainage

assessment, expressed himself satisfied, and stood by while the improvement was being made, he is estopped from objecting to it on the ground that the appraisers were not sworn to make the assessment as required by law. *Nevins & O. C. Twp. Draining Co. v. Alkire* (1871) 36 Ind. 189.

(d) *Acquiring right of way.*

Where a property owner made no attempt to prevent or stop the construction of a drain, it cannot escape its proportion of the cost, in an action to recover an assessment paid under protest, on the ground that the release of the right of way was not authorized by the board of directors of the owner. *Ranney Refrigerator Co. v. Smith* (1909) 157 Mich. 302, 122 N. W. 91, wherein the court said: "Were it some other person whose land had been irregularly appropriated, this plaintiff could not make such irregularity the basis of this action. The proceedings to acquire the right of way, and those to apportion benefits, are separate and distinct."

(e) *Notice.*

The failure to give a notice required in the course of drainage proceedings, and a defect in such a notice, have been distinguished in at least one case, with respect to estoppel by acquiescence to object to the assessment by reason thereof. *Prezinger v. Harness* (1888) 114 Ind. 491, 16 N. E. 495, wherein it was said: "There is a fundamental difference, however, between proceedings had without any notice, and those which follow a defective or insufficient notice—between no notice at all, or notice by a wrong, incomplete, or defective name; and equally radical is the distinction between an attempt to arrest proceedings that may be void as to some third person, before the work which the proceedings direct is completed, and which cannot be completed without the consent of such person, and an attempt to have them adjudged void after the work has been fully completed. Where the jurisdiction of a court, whether it be a court of limited or general jurisdiction, depends upon the sufficiency and validity of a certain no-

tice or process which it passes upon and holds sufficient, although the decision be entirely erroneous, the proceedings which follow are not on that account void, but are, when questioned collaterally, binding upon all those affected by the judgment finally rendered, to whom there was an apparent attempt made to give notice."

A like distinction has been held to be implied in a curative act, relative to notice of drainage allotments. See *Hille v. Neale* (1904) 32 Ind. App. 341, 69 N. E. 713.

So, it has been held that where a property owner has received no notice of proceedings for cleaning and widening a ditch, as required by law, he is not estopped from contesting an assessment therefor, on the ground that the ditch was on his land and sufficient for his needs, by the mere fact of being present on the premises with the appraisers when they were executing the order of the board. *Porter v. Durham* (1887) 98 N. C. 320, 3 S. E. 832.

Similarly, where the statute requires public notice of the letting of contracts, this is a condition precedent to the incurring of expense, and a property owner, by an explainable delay of one year, is not estopped from seeking relief in equity from an invalid assessment. *Burnett v. Scully* (1885) 56 Mich. 374, 23 N. W. 50.

Likewise, it has been held that where the return of service of notice is insufficient, a delay of two years, although the work has been done, taxes collected therefor and paid upon the contract some months previous thereto, will not estop an owner, where it appears "that the opening of this ditch has lowered a lake upon the waters of which his lands fronted, changing what was a thing of beauty, and afforded a safe and easy place for watering stock and other conveniences, into an unsightly and sickening mud-hole, unsafe and dangerous, and that during the progress of the work he was assured the opening of the ditch would have no such effect. Under such circumstances, he did not lose his rights by the delay." *Wright v.*

Rowley (1880) 44 Mich. 557, 7 N. W. 235.

On the other hand, it has been held that a landowner who stands by and sees the construction of a ditch without objection, until after its completion, is estopped from asserting that the statutory requirement as to the giving of notice or the letting of the contract was not complied with. *Muncey v. Joest* (1881) 74 Ind. 409, where the court said: "The second cause upon which appellant bases his right to an injunction would be a sufficient one, if urged by a person who had not estopped himself by his silence. If the appellant had made the proper resistance to the prosecution of the work, and made it without delay, he would have been entitled to relief. The statute does require that public notice shall be given of the time appointed for receiving bids for the construction of ditches. The evident intention of the statute is that notice shall be given in such a manner as that competitive bids may be invited and received. The provision is necessary for the protection of those who are compelled to bear the burden of the expense entailed upon them by the construction of the ditch. As the statute is silent as to the manner in which notice shall be given, it must be held that reasonable notice is required. We think that posting up one notice at the courthouse was not sufficient, but that notices should have been posted in the vicinity of the ditch. The provision of the statute as to the posting of other notices indicates very clearly that the legislature intended that a reasonable number of notices should be posted in the neighborhood through which the ditch runs. As the appellant made no objection until after the work had been fully completed, he is not now in a situation to complain of the insufficiency of the notice of the letting of the contract. Having received the full benefit of the work done by the contractor, he cannot now escape payment upon the ground that proper notice of the letting of the contract was not given. It is a well-settled rule of equity that, if a party is guilty of laches or unreasonable delay

in the enforcement of his rights, he thereby forfeits his claim to equitable relief. The rule is more especially applicable to cases where a party, being cognizant of his rights, does not take those steps to arrest them which are open to him, but lies by and suffers other parties to incur expenses and enter into engagements and contracts of a burdensome character."

So, an objection that no notice was given of the time of the making of an assessment to the owner of land, as required by law, is waived where the latter requests that the assessment be made, and the company expends a large sum of money in making the improvement on the faith of the assessment, the owner expressing himself as satisfied, and standing by while the work is going on. *Nevins & O. C. Twp. Draining Co. v. Alkire* (1871) 36 Ind. 189.

Likewise, in a case where it appeared that a landowner had acquired title subsequent to the preliminary proceedings for the construction of a ditch, and for the sole purpose of raising objections which were not open to his grantor, it was held that his knowledge of the proceedings estopped him to object on the ground that he had no notice, especially since it was shown that the commissioners did not know of the transfer of the land, and served notice on the grantor. *Hackett v. Brown* (1901) 128 Mich. 141, 87 N. W. 102.

To the same effect is the dictum in *State ex rel. Sheffer v. Fuller* (1909) 88 Neb. 784, 120 N. W. 495, wherein it appeared that notice of the establishment of a drainage district and election of directors was properly given, but before the day set the board of commissioners extended the boundaries of the proposed district, but made no change in the notice. It was said that any landowners who "did not have knowledge of the change, or participate in the election," might question the validity of the election by quo warranto.

With respect to notices in drainage proceedings which are merely defective, it seems that a landowner who stands by without objections until the

completion of the work thereby waives the defect.

Thus, in *Prezinger v. Harness* (1888) 114 Ind. 491, 16 N. E. 495, the court said: "The record in the present case shows that a notice therein set out was duly given, and it shows that the board of commissioners adjudged the notice to be sufficient. It cannot be, and is not, denied but that the appellee was duly notified. Indeed, it appears that one of the drains belonging to the system was established on his own petition, and some of the irregularities in respect to names are found in the proceedings which he instituted. It is not disputed but that the persons defectively named have fully constructed such portions of the work as were allotted to them, or that the drains have been fully completed according to the specifications; nor is there any dispute but that the amount which it cost to construct the work allotted to the appellee has been fully realized in benefits to his land. As no question is made in that regard, we assume the work has been fully completed. The appellee, therefore, so far as we can observe, occupies this position: After seeing the drains fully completed, and while enjoying whatever benefits have resulted therefrom, he seeks to escape paying for the share allotted to him, by asserting the invalidity of the proceedings. . . . The authorities fully justify the statement that, where an improvement is made under color of statutory proceedings, unless such proceedings are so totally and palpably void as that the person who made the improvement or performed the work must have proceeded with a degree of recklessness that amounted to bad faith, the property owner who stood by and received the benefits assessed against his property will be estopped to assert the invalidity of the proceedings, without first paying, or offering to pay, the benefits. . . . If he has stood by and acquiesced until the rights of others have intervened, he will be deemed to have made an effectual election to waive any and all irregularities that may have arisen during the progress of the proceedings

under which rights have been acquired."

So, in *Peters v. Griffie* (1886) 108 Ind. 121, 8 N. E. 727, it was held that where landowners stand by without objection until after the work is completed and a great part of the assessment collected, they are estopped from objecting to the sufficiency of the notice of the filing of the petition, especially if it appears that they had actual notice. The court said: "There was here notice, although a defective one, of the proceedings, and there was actual knowledge of the filing of the petition and of the proceedings under it, and also knowledge that money was expended on the faith that the proceedings were valid. We think that under these facts it must be held that appellees are not in a condition to defeat the proceedings on the ground that the notice was insufficient. If there had been no attempt at all to comply with the statute as to notice, the case might possibly be different, but here there was an attempt to comply with the statute, and some notice was given. The authorities sustain the doctrine that under such a state as that exhibited in the answer, acquiescence in the validity of the proceedings will be presumed. . . . This case is plainly distinguishable from *Vizzard v. Taylor* (1884) 97 Ind. 90, for there the landowner could not have had notice, for he was not a party to the proceeding."

Similarly, a property owner, having stood by while a ditch was constructed which benefited her land, with full knowledge of the proceedings and that the expense thereof would be assessed against the lands benefited, cannot, after a lapse of more than three years from completion of the enterprise, invoke equitable relief on the ground that the notice of hearing on the engineer's and viewers' reports was not posted for the requisite number of days before the hearing at the courthouse. See *GEIB v. MORRISON COUNTY* (reported herewith) ante, 839.

Likewise, where an owner has received notice of an allotment to make certain repairs to a ditch draining his lands, and has allowed the work to be

done, standing by and receiving the benefit, he is estopped from objecting to the assessment on the ground that the notice was given by the surveyor of an adjoining township, instead of by the surveyor of the township in which the lands were located. *Fletcher v. White* (1898) 151 Ind. 401, 51 N. E. 482.

(f) *Contract.*

The fact that a single contract was made, instead of separate contracts, for drainage work allotted to be done by a number of different persons, cannot be urged to defeat an assessment by one who, with knowledge of the facts, stood by until the completion of the work. *Montgomery v. Wasem* (1888) 116 Ind. 343, 15 N. E. 795, 19 N. E. 184.

In *Alstad v. Sim* (1906) 15 N. D. 629, 109 N. W. 66, it was claimed that the board of commissioners did not let the contract to the lowest bidder as to furnishing materials for a culvert, the objection being that the board furnished the materials by purchasing them from a local lumber company, upon prices to be submitted. It was held that, while this was irregular, and not in compliance with the statute, it could not be raised after the material had been furnished and the work completed, the court saying: "The plaintiff should have objected to that manner of supplying the materials, and not delayed until the materials were purchased, used, and paid for. There is no pretense that there was fraud or any overcharge in the purchase of the materials. There are other matters urged against the regularity of the board's proceedings after the drains were ordered established, after regular petitions had been filed. They refer entirely to irregularities, and not to anything done or omitted that pertained to the original jurisdiction of the board over the drain. They pertain to technical deviations from the provisions of the statute as to the duties of the board to file the lists of the assessment of benefits with the county auditor. It is too late to attack the proceedings for such irregularities after the work is completed. It is, therefore, immaterial whether

the lists filed were filed at the proper time and contained the proper date, or not."

A delay of eleven months will not estop an aggrieved owner from objecting to the validity of an assessment, on the ground that the contract was let for deepening and widening a ditch, while the petition was merely that it be "cleaned out." *Harbaugh v. Martin* (1874) 30 Mich. 234, where the court said: "To deepen and widen a ditch is quite a different thing from merely cleaning it out, which implies only a removal of sediment or other material that may have become deposited in it. What the commissioner undertook to do, therefore, was not asked for by the petition. . . . The plaintiff in error in this case did not, in any way, participate in the proceedings, nor does it appear that he had knowledge of them while they were in progress. His writ is sued out within ten months from the letting of the last contracts. If the proceedings had been according to law, he would have been bound by constructive notice of them; but there can be no constructive notice when there is no jurisdiction."

(g) *Issuance of bonds.*

An irregularity in the issuance of bonds to contractors to pay for the preliminary work on the construction of a proposed drainage ditch is not the subject of objection by property owners who, with knowledge of the facts, permitted the contractor to go on with the work and expend large sums of money in the building of machinery and the excavation of ditches, and made no tenable objections for more than a year. *Wood v. Hall* (1907) 138 Iowa, 308, 110 N. W. 270, wherein the court said: "That the doctrine of estoppel applies to cases involving works of public improvement is well settled by the authorities. See *Elliott, Roads & Streets*, 1st ed. 418-422 et seq., and cases cited; also *Harmon v. Omaha* (1897) 53 Neb. 164, 73 N. W. 673, and cases cited. To constitute such an estoppel it must be shown that the owner knew the improvements were being made. This appears in this case from the allega-

tions of plaintiffs' original petition that they knew the cost thereof was to be paid by a tax upon their property. This also appears from the allegations of the petition that they knew of the infirmity or defect under which the proceedings were had, which would render them invalid. This is sufficiently shown in the case now before us. And, lastly, that there is some special benefit to the owner's property distinct from that of the general public. Of course, if the proceedings are absolutely void or without jurisdiction, a taxpayer will not be estopped solely upon the ground of benefits received."

4. *Performance of work.*

An objection that the drainage commissioners have not properly carried out the drainage scheme, and that the work done has afforded no substantial benefits, due to a departure from the plans and specifications of the board of reviews, is waived where no objection is made to the assessment for a period of three years. *Griffin v. Moseley Creek Drainage Dist.* (1915) 169 N. C. 642, 86 S. E. 575, wherein the court said: "If it should be clearly made to appear that the commissioners of drainage, in carrying out the ministerial duties imposed upon them, should endeavor to collect of the landowners sums in excess of their own assessment, or that they had made out these rolls in utter disregard of the classification and ratio of assessment established by the report, or that they had made such changes in the plans and specifications of the final report as to exceed their powers in the premises, and work substantial wrong and hardship upon the individual members of the district, in either case, the complainant being free from laches or undue delay, the court would have the right to interfere, and stay the collection of the amounts until a proper assessment could be established. But when the commissioners, adhering substantially to the plans and specifications of the report, have made assessments contemplated and authorized by the law, then collection should not be stayed because the scheme has

not afforded to a landowner the drainage he has anticipated."

So, the collection of an assessment for the construction of a ditch, on the ground that the work was negligently done and wholly inadequate for the purpose of drainage, will not be enjoined where the parties have slept on their rights. In such a case, equity will not intervene after the completion of the work and payment to the contractors. *Putnam County v. Krauss* (1895) 53 Ohio St. 628, 42 N. E. 831. The court said: "On the bond given by the engineer, an action may be brought by any person aggrieved by his failure to do his duty, and a recovery had for his use and benefit (§ 4494, Rev. Stat.), and on the bond given by the contractor, a suit may be brought by anyone who has sustained damages in consequence of the contractor's failure to perform the work, and a recovery had for his damages (§ 4478, Rev. Stat.). There is no averment in the petition of any fact that did, or could, have prevented these parties from resorting to the remedy provided therein, on either or both of these bonds. They are not only adequate, but the only remedies they had, or have, for the grievances complained of. They do not aver want of knowledge of the matter as the work progressed. It is, no doubt, in accordance with the fact that they knew how the work was being done at the time. Here they might, and should, have complained to the engineer, and, if he continued derelict in his duty, could have caused him to be removed. It was in the power of the engineer to have had the work re-estimated and resold, for the neglect of the contractor to complete it. Without doing any of these things, or taking any steps to have the engineer removed, or payments or estimates enjoined, they remained inactive, so far as appears from the petition, until the collection of the assessments was about to be made. Under such circumstances, there is no principle of law or equity under which they can be permitted to shift the consequences of their own negligence to the people of the county. Such must be the re-

9 A.L.R.—57.

sult, if these assessments are enjoined, for, they say, the work has all been paid for. But the payment was made from the funds of the county, and the county cannot be reimbursed except by the collection of the assessments."

But, where the judgment of the court, declaring to be void the proceeding establishing a ditch which furnished an outlet for another, under which an assessment is made, if no benefit has resulted to the landowners, was not rendered until the time for filing an appeal from the decision of the surveyor had expired, an injunction will lie to restrain collection. *Millikan v. Wall* (1892) 133 Ind. 51, 32 N. E. 828, wherein the court said: "As an appeal lies from an assessment made by a surveyor, this action could not be maintained if it were not for the allegation that the nullification of the proceedings establishing the connecting ditch, which was the subject of controversy, was not known until it was too late to appeal. As the judgment declaring the proceedings establishing the connecting ditch was not rendered until the time of appealing had expired, the appellants could not know that the ditch repaired was rendered entirely valueless, and consequently they were not in fault in not pursuing the ordinary legal remedy. If they had known of the worthlessness of the ditch repaired, or were in law chargeable with knowledge of that fact, in time to appeal, this suit could not be maintained, but in the absence of a brief, and by force of the confessions of the demurrer, we assume that they had no such knowledge, and were not chargeable with it. If they had no such knowledge, and the ditch is of no benefit to them whatever, there is no foundation for an assessment, and, as there is shown an excuse for not resorting to the legal remedy, equity will award relief."

So, it has been held that, though an owner did not appeal from a drainage assessment, but stood by and saw the work done without objecting, the course of the ditch through his property was changed at his instance, \$100 was expended for his benefit in con-

structing the ditch through his land, and he did not question the legality of the assessment until after the work was completed, he was not estopped, in an action to collect the assessment, from questioning its legality because of defective description of the land. *Boatman v. Macy* (1882) 82 Ind. 490.

Similarly, where property owners are not shown to have been aware that work, in addition to that called for by a contract for drainage, was being done, and the contractors do not pretend to have been misled by their conduct or acquiescence, the owners are not estopped from objecting to an assessment on the ground that the cost was increased by the departure from the contract. "They had the right to assume, in the absence of knowledge to the contrary, that the work was being performed in compliance with the contract." *Monaghan v. Vanatta* (1909) 144 Iowa, 119, 122 N. W. 610.

Where there is no power in the commissioners to contract for work not described in their report and accompanying plans and proof, the property owners are not estopped from denying the validity of the contract, though they have made use of the improvement. *Badger v. Inlet Drainage Dist.* (1892) 141 Ill. 540, 31 N. E. 170, wherein the court said: "To entitle appellants to a judgment, it must appear that they have a legal claim, not merely as against the commissioners, but as against the real estate within the district benefited by the improvement; for, if judgment be rendered, it can only be satisfied by a special assessment upon that property. It cannot, therefore, be conclusive as to the right of appellants to recover, merely to show that the commissioners, as individuals, have done or said that which admits the right of appellants; for they cannot, by their acts and conduct, enlarge their powers over the property within the district, without the knowledge and consent, express or implied, of the owners of that property. . . . And therefore, although the property owners of the district are not parties to the suit, yet, because there can be no judgment unless it can be enforced against their property, it

must follow that unless they are estopped to deny appellants' right, the commissioners cannot, in suits like the present, be estopped to do so. The evidence in the record is insufficient to prove an estoppel as to the owners of real estate within the district benefited by the improvement."

In *Morrow v. Getting* (1894) — Ind. App. —, 37 N. E. 739, in holding that an owner was not estopped from objecting to repairs to a drain which was never completed, and no part of which was ever accepted by the court as completed, it was said: "If the surveyor had no jurisdiction either to determine the necessity for making the repairs, or to make an assessment therefor, he could not bind the appellees by any contract which he might make for the performance of the work, whether made with or without their knowledge. An assessment made by a county surveyor under this statute is in the nature of a judgment, and, if he has jurisdiction, the landowners will be estopped to contest the legality of the assessment if, with full knowledge, they make no objection to the proceedings, and lie silently by until the work is completed. . . . The rule of estoppel, however, does not apply when the surveyor has no jurisdiction, for his acts are void, not merely voidable."

Where property owners have no knowledge of the character of work being done, they are not thereby estopped from objecting to an assessment on the ground that the board of supervisors, under pretense of cleaning a ditch, were in reality deepening and widening it without the notice required by law. *Lade v. Hancock County* (1918) 183 Iowa, 1026, 166 N. W. 586, wherein the court said: "The naked fact that the landowners who now complain were advised that work was being done in the old ditch does not create an estoppel against them. There is no evidence that they knew that what was being done was not a cleaning and repairing of the ditch, but was, instead, a substantial lowering of its level, or a substantial widening. The board of supervisors itself did not apprehend that the latter was

to be done, nor know it was being done. The board certainly was as much under obligation to prevent unauthorized work as the landowner was to assume that such duty had not been performed. If it was the duty of the county authorities to see to it that the ditch should not be deepened and widened, it was not for these landowners to assume that the board would permit unauthorized work, and that the landowners must take steps to prevent it. The plaintiffs knew that widening and deepening could not lawfully be engaged in at their cost, unless they had been served with notice, and knew they had not been so served. Instead of assuming and anticipating and determining that the doing of the work which they saw was being done, because the board of supervisors contemplated the levy of an illegal assessment against them, it was their right to assume that the work being done was such as the law permitted."

5. Assessment.

Where landowners voluntarily drain their lands through the ditches dug by the authorities of a drainage district, by connecting with them, they are presumed to have applied to have them annexed to the district, and cannot be heard to say that the lands were not benefited thereby. *People ex rel. Caldwell v. Wild Cat Drainage Dist.* (1899) 181 Ill. 177, 54 N. E. 923.

"The right granted by the statute to another drainage district, to connect with the ditches of the district already made, is permissive, and of the same nature as that granted to private owners of land outside of the district, and in either case the connection is voluntary, and, when made, subjects the owner or district to the liability imposed by the statute. An implied promise to pay the amount described in the statute arises by the voluntary acceptance of the benefits offered thereby. . . . By making the connection, which it did, with the ditch of appellant district, appellee district will be treated as admitting that the lands of that district are benefited, . . . and the proportions and amounts of such benefits should be ascertained as provided by the statute.

In the case of the private owner who connects, the district to which the connection is made will make the assessment, and, in the case of another district, it will make the assessment upon the lands within its boundaries, benefited by the connection, the same as if it had laid out and executed the work itself." *Drainage Comrs. v. Drainage Comrs.* (1900) 91 Ill. App. 241.

So, in *Drainage Comrs. v. Drainage Comrs.* (1904) 113 Ill. App. 114, affirmed in (1904) 211 Ill. 328, 71 N. E. 1007, the court said: "By connecting with the outlet ditch of appellee district, appellant district is estopped from denying that some benefit accrued to the lands within its limits."

In like manner, where property owners have connected the drains and ditches on their land with the ditches of a district, they are estopped to deny the power of the commissioners to make an order including their lands within the district. This jurisdictional fact existing, the owners are, by the statute, deemed as having voluntarily applied to be included in the district, and the commissioners, in such case, are required to treat, classify, and tax their lands, as other lands of the district, to the proportion of the cost of drainage, irrespective of whether the lands lie within the township in which the district was originally organized, or in some other town or county of the state. Such landowners, having voluntarily applied to be admitted to the district, are not entitled to notice of the action of the commissioners, annexing the lands to the district. *People ex rel. Hardy v. Drainage Comrs.* (1892) 143 Ill. 417, 32 N. E. 688. See to same effect *Drainage Dist. v. People* (1893) 147 Ill. 404, 35 N. E. 238.

But, it has been held that the provisions of the Farm Drainage Act, that the owners of land outside a district, who connect their ditch with the drainage ditch, shall be deemed to have applied to be included within the district, and shall be classified and assessed accordingly, do not apply where a neighboring village connects its streets and alleys to a ditch. The village does not become part of the

drainage district, and has no power to classify the streets and alleys, or to levy an assessment. *Drainage Comrs. v. Cerro Gordo* (1905) 217 Ill. 488, 75 N. E. 516, wherein the court said: "It is urged by the plaintiffs in error that the village should not now be heard to urge any other objections than those interposed before the commissioners, and ought to be deemed estopped to make further defense because of its failure to avail itself of the right to prosecute an appeal to the county court from the decision of the commissioners. If we are correct in what has been said, the commissioners were wholly wanting in power or jurisdiction to enter the order attaching the streets and alleys of the village, or any part thereof, to the district, or to classify or assess any sum against the village, or the streets and alleys of the village, for benefits, or to notify the authorities of the village to appear before them to defend against any such proposed classification or assessment for benefits. That being true, the action taken by the commissioners in that respect was without any legal force, and void, and the village could lose no rights by presenting, or failing to present, objections at the meeting of the commissioners, or by failing to appeal from any action the commissioners might assume to take. The commissioners were wanting in jurisdiction over the subject-matter, and the appearance of the village, and the filing of objections by officials of the village, did not and could not confer jurisdiction on the commissioners over such subject-matter."

A railroad company will not be permitted to attack the validity of an assessment for repairs to a ditch, on the ground that it is constructed upon the right of way, when it appears that the location of the ditch has been acquiesced in for a number of years. *Davis v. Lake Shore & M. S. R. Co.* (1888) 114 Ind. 364, 16 N. E. 639, wherein the court said: "The ditch had been constructed, and we must presume rightfully constructed, so that the question is not as to the authority of the officer to enter upon

the appellee's right of way for the purpose of constructing a ditch, but the question is as to the authority of the surveyor to collect an assessment for the repair of a ditch rightfully constructed. The original proceedings are not assailed, and we must assume that what was done was rightful and legal. If the ditch was constructed under due authority of law, then the appellee, like any other landowner, must pay its proportion of the cost of maintaining the ditch. Whether the ditch could rightfully have been located upon the appellee's right of way was a question for the court in the original proceedings, and it cannot be successfully made in a collateral attack upon an assessment levied for the cost of repairing it. The adjudged cases, indeed, establish the rule that a collateral attack upon an original assessment will be unavailing, and surely it must be so here, where the assault is upon an independent proceeding which proceeds upon the theory that the ditch was lawfully established and constructed. We think it clear that, after this lapse of time, the appellee cannot be allowed to impeach the right of the officers to locate and construct the ditch upon its property. . . . It would be unjust to permit a property owner, whatever the nature of his property, to stand by without objection and allow the construction of a ditch, and subsequently either attack the validity of the proceedings, or refuse to bear the share of the cost of maintaining it which the law allots to him."

A landowner who makes a technical complaint, such as the failure of assessors to sign the assessment, cannot be heard, where he "has chosen to defer his attack until he has secured a benefit from the full or partial completion of the work for which he is assessed. His laches forbid equitable redress, and this rule does not depend upon his failure to avail himself of a statutory remedy." *Jones v. Gable* (1907) 150 Mich. 30, 113 N. W. 577.

A property holder is estopped from denying the validity of an assessment levied against his land for the construction of a drain, on the ground

that a previous assessment had been made, but set aside, where the first assessment was invalid, and a new one was made at his request and with his consent, and he expressed himself satisfied therewith, standing by and allowing the ditching company to expend money on the faith of his actions. *Nevins & O. C. Twp. Drainage Co. v. Alkire* (1871) 36 Ind. 189.

Where the petition for the establishment of a drainage district contained a stipulation that owners of certain lands on the lake location should not be assessed for maintenance more than 15 cents per acre, an objection to a greater assessment is waived by acquiescence in the final decree, establishing the district without incorporating such restriction. *Gibbs v. Drainage Comrs.* (1917) 175 N. C. 5, 94 S. E. 695.

But in a few instances the defects in an assessment for drainage have been held to be of so fundamental a nature that acquiescence will not work an estoppel to object thereto.

Thus, where commissioners have no authority to expend money and incur indebtedness prior to the levy of an assessment, a landowner who stands by without objecting to the inclusion of his property in a drainage district is not estopped, on the assumption that he has voluntarily connected his drain to the ditch, from contesting the proceedings, notwithstanding the commissioners have expended considerable money in repairing and cleaning out the ditch of the district in anticipation of taxes to be collected from his lands, where it appears that he has in fact made no connection, but that his lands are drained through the tiles of another owner, who has made connection. *People ex rel. Elbers v. Marquardt* (1919) 287 Ill. 132, 122 N. E. 125.

So, where an assessment is laid on an entire tract of land, part of which does not belong to the defendant, the latter is not estopped, in an action to foreclose the assessment, from objecting on this ground, by reason of the fact that he stood by without protest until the improvement was completed. *Hunt v. State* (1900) 26 Ind. App. 518,

58 N. E. 557, wherein the court said: "Concede that appellants stood by without objection until the improvement was completed, they are not now objecting to any assessment made against the land they actually owned. No such assessment was made. They are objecting to a proceeding which will lead to a decree directing a sale of their land to pay an assessment, part of which is clearly not upon their land."

In a ditch assessment, the land must "be described with such certainty that it may be definitely ascertained and located," and "a part" for a certain parcel of land is too indefinite to enable anyone to ascertain what was intended, and therefore such description renders the assessment void. A property owner whose land is thus inadequately described is not estopped from asserting the fact because he stood by and saw the work completed, money expended, and his property benefited, without objection. *Boatman v. Macy* (1882) 82 Ind. 490.

b. Accepting damages awarded.

Property owners who accept damages awarded to them for land taken for the ditches of a drainage district are estopped from questioning the validity of the order of court for the organization of the district. *Borah Drainage Dist. v. Ankenbrand* (1917) 277 Ill. 132, 115 N. E. 112.

So, where a landowner files a claim for damages caused by the location of a public drain on his land, he thereby waives any objections to the proposed ditch on the ground of irregularities in locating and establishing it. *Gutschow v. Washington County* (1905) 74 Neb. 794, 105 N. W. 548, 107 N. W. 127, wherein the court said: "When the board once acquired jurisdiction, all subsequent irregularities were waived by the filing of the plaintiff's claim for damages."

But a landowner is not estopped from objecting to irregularities in the assessment of a drain tax, because of his appearance before a jury and acceptance of an award of damages made to him for other land, and his entrance into a contract to construct a portion of the drain, when it does

not appear that he had notice or knowledge that the land owned by him, the assessment of which he complained, had been assessed for any portion of this drain until the assessment roll was completed, and it was too late for him to appeal from the action of the drain commissioner. *Tinsman v. Monroe County* (1892) 90 Mich. 382, 51 N. W. 460.

VI. Estoppel by payment of assessment.

Although a landowner cannot be required to accept payment of the just compensation for land taken, by way of a credit on the benefits assessed against his property, there is "no reason why the landowner may not willingly consent that the amount allowed him for compensation for the land taken shall be applied to the reduction of the benefits assessed against his land, and if he does so, and pays the balance or excess of benefits over the amount allowed him, he cannot complain that he was not paid in cash for the land taken." *Elgin, J. & E. R. Co. v. Hohenshell* (1901) 193 Ill. 159, 61 N. E. 1102.

So, property holders are estopped to question the right of commissioners to establish and maintain a ditch which has existed for a number of years, and which has been improved several times, where they have paid previous assessments without objection. *Mason v. Fulton County* (1907) 30 Ohio C. C. 49.

But one who pays an illegal drain tax under protest, to one who is about to levy on his property, is entitled to recover the amount, although the protest was not specific as to reasons of illegality. A specific protest is only required by statute in case of the payment of a tax in advance of the time the tax can be enforced. *Cox v. Welch* (1888) 68 Mich. 263, 13 Am. St. Rep. 339, 36 N. W. 69.

Assumpsit will not lie to recover drain taxes paid under protest, on the ground that the statute under which they were imposed is unconstitutional, where it is valid in part, and the unobjectionable provisions confer full power to assess the tax. *Mathias v. Cramer* (1888) 73 Mich. 5, 40 N. W. 926.

Where a property owner, pending an appeal, voluntarily pays his assessment, though he says he did so under protest, he is estopped from objecting to the sufficiency of notice. *Collins v. Pottawattamie County* (1912) 158 Iowa, 322, 138 N. W. 1095. And, where the record shows the service, posting, and publication of the notice of the time and place appointed by the commissioner for apportionment and review, the fact that proof thereof was not made at or previous to the review cannot be raised in an action to recover an assessment paid under protest. *Ranney Refrigerator Co. v. Smith* (1909) 157 Mich. 302, 122 N. W. 91. But where, after the beginning of a suit to cancel an assessment on the ground that the board of supervisors is, under pretense of repairs, deepening and widening a ditch without the notice required by law, some of the landowners deposit their part of the assessment with the county treasurer, with the express understanding that the money is to be held subject to the litigation and its termination and determination, they are not estopped, as such payment is not a voluntary one. *Lade v. Hancock County* (1918) 183 Iowa, 1026, 166 N. W. 586.

A property owner cannot recover the amount of an assessment voluntarily paid, on the ground that the assessment was not made by duly elected and qualified assessment commissioners. *Justice v. Robinson* (1904) 142 Cal. 199, 75 Pac. 776, wherein the court said: "The general rule in reference to the payment of taxes under protest, where not controlled by some statutory provision, is that, in the absence of acts amounting to duress or coercion, the payment is deemed to be voluntary, and a mere protest made at the time of such payment does not divest it of its voluntary character. Where there is no legal compulsion, the legal effect of the payment is not impaired by protest. . . . Therefore, according to the statement in the notice of protest, the plaintiff was under no legal compulsion whatever to pay said taxes, and the payment, in law, was made voluntarily upon his part, and

he has no right of action to recover the same."

The making of the apportionment before proof of service of notice is made, and the spreading of the tax before the filing of the papers in the proceeding with the county clerk, are at most mere irregularities, and cannot be raised in a suit to recover an assessment paid under protest. *Ranney Refrigerator Co. v. Smith* (1909) 157 Mich. 302, 122 N. W. 91.

So, the voluntary payment of an assessment precludes an aggrieved owner from asserting, in an action to recover back the money, that no certified assessment roll had ever been returned to the tax collector of any assessment in the district. *Justice v. Robinson* (Cal.) *supra*.

Similarly, a drainage tax will not be refunded to a landowner, although by statute his property is subsequently excluded from the drainage district, where it appears that, when the canals in process of construction are completed, his land will be drained. *New Orleans Canal & Bkg. Co. v. New Orleans* (1875) 27 La. Ann. 505.

Likewise, in an action to recover a drain tax paid under protest, the plaintiff is not permitted to show that his land was so remote that it was not benefited by the drain. *Smith v. Carlow* (1897) 114 Mich. 67, 72 N. W. 22.

But where a drainage assessment is erroneously spread and is paid under protest, an owner may recover the amount. *Murphy v. Dobben* (1904) 137 Mich. 565, 100 N. W. 891, wherein the court stated the rule in equity as follows: "The claim is made that the plaintiff should be estopped from asserting a claim to this money under the circumstances. It is the settled rule in equity cases, brought by the person taxed, that one will not be relieved from his share of the burdens in such cases, and were this an equity proceeding brought by this plaintiff, the rule should be applied to him."

So, the payment of an assessment for the original construction of a ditch does not estop a landowner from objecting to an assessment for later repairs, on the ground that it was based upon the proportion of the first as-

essment, without regard to benefits. *Parke County Coal Co. v. Campbell* (1894) 140 Ind. 28, 39 N. E. 149, wherein it appeared that the land assessed lay at the upper end of the drain, and was high, broken ground, and not in any way benefited by the repairs. The court said: "The submission to and payment of a legitimate assessment will not estop or bar a party from contesting another assessment, made under a different clause of the same act, if such clause contravenes the fundamental rights of the property owner; nor does it follow, because the original construction of an improvement is then beneficial to property to a certain extent, that the condition will continue so as to authorize future assessments upon the same ratio. Such a law implies that time and nature will continue the same status of property, when the fact is that relative values and benefits are continually changing, and the fallibility of the human intellect is not equal to the task of establishing a permanent basis of assessments. The inevitable result of an act so construed as to provide for future assessments based upon former assessments is as sure to work irreparable injury as the mutations of time are to change the relative values of property, and in the end might lead to the defeat of the entire enterprise. It would be unreasonable to hold the appellant bound by an assessment for repairs, of no benefit to it whatever, which by operation of law was estimated five or six years prior to the time supposed benefits accrued, and without any knowledge whatever of what the condition of the lands would be at so long a time in the future. If one tract can be assessed without benefit to it, so can all the lands affected by the original construction, and there would be no limit to the power of assessment for repairs, whether they would derive a benefit or not. There are many insuperable objections to the law governing repairs, as contended for by the appellee and as construed by the trial court, but placing upon it the more reasonable construction we have heretofore given it, that the assessment for repairs shall be made

upon the lands assessed for the construction, in proportion as they will be benefited by the repairs, it can be upheld and serve a useful purpose in the general plan for the drainage of wet lands."

And since, under the Illinois procedure, a landowner's first opportunity to question the excess even of a drainage assessment is on the application of the county collector for judgment against his land, it has been held that a landowner is not estopped to object that his land has been assessed more than it is benefited, because he paid the first four assessments. *People ex rel. O'Connell v. De Young* (1918) 284 Ill. 530, 120 N. E. 479.

A certain and definite description of land assessed is essential in order to identify it, and an assessment against 10 acres as benefited in each of two tracts of 40 and 80 acres, respectively, without further identification, is void, and payment under demand, even without formal protest, will not preclude a property owner from recovering the amount. *Atwell v. Zeluff* (1872) 26 Mich. 118.

And where the county court is without jurisdiction to reclassify lands of an objector, he is not estopped from attacking the proceedings by voluntarily paying two assessments under the void classification. *People ex rel. Heikes v. Jonkman* (1914) 266 Ill. 229, 107 N. E. 169, wherein the court said: "Under the Drainage Law the illegal classification as made, if not called in question, would stand until at some future time a reclassification might be made. Each assessment levied under

such classification is a new proceeding. The fact that appellants paid two of these assessments voluntarily, and without objection, furnishes no reason why they should not object to some subsequent assessment. Each assessment is a new tax, and the fact that a landowner had at different times paid taxes that were illegally assessed on his land would not preclude him from objecting to some separate or distinct tax or assessment in the future. . . . The classification under which these lands were assessed was void. All assessments levied under it were illegal. Appellants voluntarily paid two of them, and are simply in the position of those who have voluntarily paid an illegal tax which they cannot recover back."

See also *People ex rel. Lusk v. Garner* (1915) 267 Ill. 396, 108 N. E. 344, wherein, on the same theory that each levy of a tax to pay interest on the amount of a drainage tax was a new tax, the payment of a tax so levied was held not to estop the property owner from objecting that the assessment for the general drainage tax exceeded the benefits to his land. But it was held in an earlier case in the same jurisdiction that an objection to the original classification of lands included within a drainage district cannot be raised on an additional assessment, where the landowner for a period of twenty years has acquiesced in and paid his instalments without protest. *Hamilton v. Vermilion Special Drainage Dist.* (1908) 146 Ill. App. 84.

W. M. C.

DOLORES JUUL, by Guardian ad Litem, Appt.,
v.
SCHOOL DISTRICT of the City of Manitowoc, Respt.

Wisconsin Supreme Court — November 6, 1918.

(168 Wis. 111, 169 N. W. 309.)

Schools — liability for governmental duty.

1. The placing of a pail of hot water and chemicals in the passageway of a school building for use in scrubbing floors pertains to the govern-

mental act of the school district, for injury by which to a pupil the district is not liable.

[See note on this question beginning on page 911.]

— maintenance — liability for injury by scrubbing fluid.

2. The placing of a pail containing hot water and chemicals in a passageway of a school building for the purpose of scrubbing the floors is not an act of maintenance within the meaning

of a provision of a Workmen's Compensation Act, requiring owners of public buildings to construct, repair, and maintain them in a safe condition, so as to render the school district liable for injury to a pupil by falling into the water.

APPEAL by plaintiff from a judgment of the Circuit Court for Manitowoc County (Kirwan, J.) dismissing an action brought to recover damages for personal injuries alleged to have been caused by the negligence of defendant's servant. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Hougen & Brady and P. H. Martin, for appellant:

Defendant was liable as owner of the building for the injury sustained by plaintiff.

Besnys v. Herman Zohrlaut Leather Co. 157 Wis. 203, 147 N. W. 37, 5 N. C. C. A. 282; Kielar v. Fred Miller Brewing Co. 165 Wis. 237, 161 N. W. 739; Sullivan v. Chicago, N. & St. P. R. Co. 163 Wis. 583, 158 N. W. 321; Rosholt v. Worden-Allen Co. 155 Wis. 168, 144 N. W. 650; Toutloff v. Green Bay, 91 Wis. 490, 65 N. W. 168; Schweikert v. John R. Davis Lumber Co. 145 Wis. 632, 130 N. W. 508; Bonnell v. Chicago, St. P. M. & O. R. Co. 158 Wis. 153, 147 N. W. 1046; Riggles v. Priest, 163 Wis. 199, 157 N. W. 755; Klatt v. N. C. Foster Lumber Co. 97 Wis. 641, 73 N. W. 563; Redfield v. School Dist. 48 Wash. 85, 92 Pac. 770; Smith v. Martin [1911] 2 K. B. 775, 30 L. J. K. B. N. S. 1256, 105 L. T. N. S. 281, 27 Times L. R. 468, 55 Sol. Jo. 535, 2 N. C. C. A. 215, Ann. Cas. 1912A, 334; Ching v. Surrey County Council [1910] 1 K. B. 736, 79 L. J. K. B. N. S. 481, 74 J. P. 187, 102 L. T. N. S. 414, 26 Times L. R. 355, 54 Sol. Jo. 360, 8 L. G. R. 369, 2 N. C. C. A. 229; Morris v. Carnarvon County Council [1910] 1 K. B. 840, 79 L. J. K. B. N. S. 670, 102 L. T. N. S. 524, 74 J. P. 201, 26 Times L. R. 391, 54 Sol. Jo. 443, 8 L. G. R. 485, 2 N. C. C. A. 234; Shrimpton v. Hertfordshire County Council, 104 L. T. N. S. 145, 75 J. P. 201, 27 Times L. R. 251, 55 Sol. Jo. 270, 9 L. G. R. 397, 48 Scot. L. R. 737, 2 N. C. C. A. 238.

Municipal corporations are liable, as are individuals, for negligence in their corporate or proprietary capacity, and for the creation of a nuisance.

Bernstein v. Milwaukee, 158 Wis. 576, L.R.A.1915C, 435, 149 N. W. 382, 8 N. C. C. A. 624; Evans v. Sheboygan, 153 Wis. 287, 45 L.R.A.(N.S.) 98, 141 N. W. 265; Gilluly v. Madison, 63 Wis. 518, 53 Am. Rep. 299, 24 N. W. 137; Peck v. Baraboo, 141 Wis. 50, 122 N. W. 740; Schroeder v. Baraboo, 93 Wis. 95, 67 N. W. 27; Hughes v. Fond du Lac, 73 Wis. 381, 41 N. W. 407; Douglass v. State, 4 Wis. 387; Winchell v. Waukesha, 110 Wis. 101, 84 Am. St. Rep. 902, 85 N. W. 663; Little v. Madison, 42 Wis. 643, 24 Am. Rep. 435, s. c. 49 Wis. 605, 35 Am. Rep. 793, 6 N. W. 249.

Mr. E. L. Kelley, for respondent:

Defendant is not liable for injuries resulting from the acts or defaults of its agents, servants, or officers when it is engaged in the performance of a government function, that is, one of merely public service from which it derives no benefit in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the general welfare of the inhabitants of the community.

Hayes v. Oshkosh, 33 Wis. 314, 48 Am. Rep. 760; Wallace v. Menasha, 48 Wis. 79, 33 Am. Rep. 804, 4 N. W. 101; Schultz v. Milwaukee, 49 Wis. 254, 35 Am. Rep. 779, 5 N. W. 342; Little v. Madison, 49 Wis. 605, 35 Am. Rep. 793, 6 N. W. 249; Crandon v. Forest County, 91 Wis. 239, 64 N. W. 847; Kuehn v. Milwaukee, 92 Wis. 263, 65 N. W. 1030; Houston v. State, 98 Wis. 481, 42 L.R.A. 39, 74 N. W. 111; Daniels v. Racine, 98 Wis. 651, 74 N. W. 553; Kempster v. Milwaukee, 103 Wis. 421, 79 N. W. 411; Folk v. Milwaukee, 108 Wis. 859, 84 N. W. 420, 9 Am. Neg. Rep. 207; Lowe v. Conroy, 120 Wis. 151, 66 L.R.A. 907, 102 Am. St. Rep.

983, 97 N. W. 942, 1 Ann. Cas. 341; *Manske v. Milwaukee*, 123 Wis. 172, 101 N. W. 377, 17 Am. Neg. Rep. 388; *Liermann v. Milwaukee*, 132 Wis. 623, 13 L.R.A.(N.S.) 253, 113 N. W. 65; *Higgins v. Superior*, 134 Wis. 264, 13 L.R.A.(N.S.) 994, 114 N. W. 490; *Evans v. Sheboygan*, 153 Wis. 287, 45 L.R.A.(N.S.) 98, 141 N. W. 265; *Bruhnke v. La Crosse*, 155 Wis. 485, 50 L.R.A.(N.S.) 1147, 144 N. W. 1100; *Engel v. Milwaukee*, 158 Wis. 480, 149 N. W. 141; *Apfelbacher v. State*, 160 Wis. 565, 152 N. W. 144; *Bernstein v. Milwaukee*, 158 Wis. 576, L.R.A.1915C, 435, 149 N. W. 382, 8 N. C. A. 624; *Shearm. & Redf. Neg.* 5th ed. § 267; *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332; *Ernst v. West Covington*, 3 Ann. Cas. 883, and note, 116 Ky. 850, 63 L.R.A. 652, 105 Am. St. Rep. 241, 76 S. W. 1089; *Daniels v. Board of Education*, 191 Mich. 339, L.R.A.1916F, 468, 158 N. W. 23; *Bigelow v. Randolph*, 14 Gray, 541; *Sullivan v. Boston*, 126 Mass. 540; *Howard v. Worcester*, 153 Mass. 426, 12 L.R.A. 160, 25 Am. St. Rep. 651, 27 N. E. 11; *Wixon v. Newport*, 13 R. I. 454, 43 Am. Rep. 35; *McNeil v. Boston*, 178 Mass. 326, 59 N. E. 810; *Freel v. Crawfordsville*, 37 L.R.A. 301, note; *Wiest v. School Dist.* 68 Or. 474, 49 L.R.A.(N.S.) 1026, 137 Pac. 749; *Sommers v. Marshfield*, 90 Wis. 59, 62 N. W. 937; *Toutloff v. Green Bay*, 91 Wis. 490, 65 N. W. 168; *Selleck v. Tallman*, 93 Wis. 246, 67 N. W. 36; *Hay v. Baraboo*, 127 Wis. 1, 3 L.R.A.(N.S.) 84, 115 Am. St. Rep. 977, 105 N. W. 654; *Griswold v. Camp*, 149 Wis. 399, 135 N. W. 754; *Morrison v. Eau Claire*, 115 Wis. 538, 95 Am. St. Rep. 955, 92 N. W. 280; *Oliver v. Worcester*, 102 Mass. 499, 3 Am. Rep. 485.

Eschweiler, J., delivered the opinion of the court:

By the complaint herein it is alleged that the infant plaintiff, twelve years of age, was injured by falling into a pail containing hot water, caustic acid, and chemical compounds, in the passageway of one of the school buildings of the defendant, where plaintiff was attending as a pupil; that the pail, with its contents, had been so placed for the purpose of being used to scrub and clean the floor of one of the schoolrooms, in accordance with a custom, maintained for some time prior thereto, of at least once a week

so placing such pails with similar contents in the passageways of the school building, and before the pupils had left the building; that at the time of the injury plaintiff was passing from one schoolroom to another in the building, pursuant to directions given to her by her teacher.

It is a well-established principle in this state that a municipality, while performing the duty imposed upon it under the requirements of § 3 of article 10 of our Constitution, which provides for the establishment of district schools, which shall be free and without charge for tuition to all children between the ages of four and twenty years, shall not be liable for injuries to children attending such school occurring by reason of the negligence of servants necessarily employed by such municipality or school district in carrying out what have been designated as the governmental duties so imposed by law upon it. *Bernstein v. Milwaukee*, 158 Wis. 576, L.R.A. 1915C, 435, 149 N. W. 382, 8 N. C. A. 624; *Folk v. Milwaukee*, 108 Wis. 359, 84 N. W. 420, 9 Am. Neg. Rep. 207. The same principle is very generally recognized. *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332; 35 Cyc. 971; 19 R. C. L. 1124. Until changed by the legislature, we feel bound to follow it.

Appellant cites *Redfield v. School Dist.* 48 Wash. 85, 92 Pac. 770, which sustained a liability against a school district where a pupil was injured by being scalded by a pail of hot water; but there the court placed the liability upon a statute of that state permitting an action against a school district or other public corporation for an injury to the rights of a plaintiff arising from some act or omission of such public corporation, and expressly held that such statute was evidently intended to do away with the general and common-law doctrine of non-liability for that which occurs in the performance of governmental duties.

It is urged that by chapter 588

of the Laws of 1913, amending §§ 2394-48 and 2394-49, Wis. Stat., there is in effect a legislative declaration doing away with this doctrine of such nonliability. Before the enactment of that chapter these two statutes were, as they are now, found in chapter 110a, Wis. Stat., relating to "workmen's compensation and the Industrial Commission." As they stood before 1913, they in effect provided that every employer should furnish a safe place of employment for his employees. This chapter 588 added a provision, in substance, placing an obligation upon every owner of a public building, as well as on every employer, that each shall so construct, repair, or maintain such public building or place of employment as to render each of the same safe. From such legislative change it is claimed that it was intended to now make it a statutory duty of a school district, such as the defendant in this case, to construct and repair, and particularly, as applied to this case, to maintain its school building so as to render the same safe, and that upon a violation of such a statutory duty, and consequent injury to a pupil, an implied liability arises against such school district.

Unless, however, the act complained of here, such as the negligent placing within the school building of a pail with dangerous contents, to be used in cleaning the floors, can be reasonably construed to be within the meaning of the word "maintain" as found in said chapter, it is unnecessary to consider appellant's contentions any further. We are satisfied from a con-

sideration of this statute, its evident purpose, place, and history, that this word "maintain," particularly when found used with the words "construct or repair," must be held to relate to some act more closely related to the structure itself of a building than such an operation as is here involved of keeping the floors of a building clean.

Schools—
maintenance—
liability for
injury by
scrubbing fluid.

The conclusion thus arrived at makes it unnecessary to determine any other question with reference to the suggested applicability of such amended statutes to a school building or school district.

It follows, therefore, that the complaint upon its face shows that the act complained of was one done by the defendant school district in the performance of that which must still be recognized as one of its governmental duties towards the pupils, and of such a nature that for a consequent injury to a pupil there is no recognized liability against defendant, either at common law or by statute.

—liability for
governmental
duty.

The judgment of the Circuit Court is affirmed.

NOTE.

The liability of a school district, municipal corporation, or school board for injury to pupil is considered in the annotation following *STOVALL v. TOPPENISH SCHOOL DIST.* post, 911. The reported case (*JUUL v. SCHOOL DIST.* ante, 904), is cited in subdivisions I. a, and VII. of that note.

WILLIAM RALPH STOVALL by Guardian ad Litem, Respt.,
v.
TOPPENISH SCHOOL DISTRICT NO. 49, Yakima County, Impleaded,
etc., Appt.

Washington Supreme Court (Dept. No. 1) — March 1, 1920.

(— Wash. —, 188 Pac. 12.)

Schools' — liability for torts — construction of statute.

1. A statute providing that no action shall be maintained against a school district for noncontractual acts or omissions relating to any park, playground, or field house, athletic apparatus or appliance, or manual training equipment situated in or about any schoolhouse or elsewhere, owned, operated, or maintained by a school district, applies solely to accidents happening upon athletic apparatus or manual training equipment used in connection with a park, playground, or field house.

[See note on this question beginning on page 911.]

Proximate cause — pushing boy off from tank — negligence of school district.

2. A school district cannot escape liability to a pupil who is injured by being pushed by another boy off a discarded iron tank which the district negligently permits to remain on the school grounds, where it is used as a plaything by the pupils, on the theory that its negligence was not the proximate cause of the injury.

[See 22 R. C. L. 132 et seq.]

Nuisance — notice — sufficiency — liability of school district.

3. A school district which permits a discarded tank taken from the building to remain on the playground from Friday to Monday cannot avoid liability to a pupil injured while playing upon it, on the theory that it did not have sufficient notice of the nuisance.

APPEAL by the defendant school district from a judgment of the Superior Court for Yakima County (Taylor, J.) in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by the negligence of the defendant district. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. O. R. Schumann, J. Lenox Ward, and Dolph Barnett, for appellant:

A school district is immune from all liability in tort.

Redfield v. School Dist. 48 Wash. 85, 92 Pac. 770; McCalla v. Multnomah County, 3 Or. 424; Sheridan v. Salem, 14 Or. 328, 12 Pac. 925; Howard v. Tacoma School Dist. 88 Wash. 167, 152 Pac. 1004, Ann. Cas. 1917D, 792; Bruenn v. North Yakima School Dist. 101 Wash. 374, 172 Pac. 569; Kelley v. School Dist. 102 Wash. 343, 173 Pac. 333; Holt v. School Dist. 102 Wash. 442, 173 Pac. 335.

Before a party can be held liable in tort it must be established by the evidence that the alleged negligence of the defendant is the proximate and efficient cause of the injury.

Hellan v. Supply Laundry Co. 94 Wash. 683, 163 Pac. 9; 1 Shearm. & Redf. Neg. 6th ed. § 26, p. 94.

There being no evidence in the record to show that the school board had actual notice of the fact that the tank was left on the school grounds, the length of time that the tank was there was not sufficient to give constructive notice to the school board.

Clark v. Seattle, 102 Wash. 228, 172 Pac. 1155; Chase v. Seattle, 80 Wash. 61, 141 Pac. 180.

Messrs. Snively & Bounds for defendant Meyers.

Messrs. Roscoe Maddox and Grady & Shumate, for respondent:

School districts are liable for negligence, and pupils can recover for the negligence of officers or agents of such

(— Wash. —, 188 Pac. 12.)

districts in the use, operation, and maintenance of athletic apparatus.

Bruenn v. North Yakima School Dist. 101 Wash. 3/4, 172 Pac. 569; **Keiley v. School Dist.** 102 Wash. 343, 1/3 Pac. 333; **Holt v. School Dist.** 102 Wash. 442, 173 Pac. 335.

The intervention of a third person or of other and new direct causes does not preclude recovery if the injury was the natural or probable result of the original wrong.

Howe v. West Seattle Land & Improv. Co. 21 Wash. 594, 59 Pac. 495; **Eskildsen v. Seattle**, 29 Wash. 583, 70 Pac. 64, 12 Am. Rep. 366; **Akin v. Bradley Engineering & Macainery Co.** 48 Wash. 97, 14 L.R.A.(N.S.) 586, 92 Pac. 903; **Thoresen v. St. Paul & T. Lumber Co.** 73 Wash. 99, 131 Pac. 645, 132 Pac. 860.

Main, J., delivered the opinion of the court:

The plaintiff, being a minor, brought this action by his guardian ad litem for the purpose of recovering damages for personal injuries alleged to be due to the negligence of the defendant school district. The cause was tried to the court and jury, and resulted in a verdict and judgment sustaining a recovery. From this judgment the defendant appeals.

On November 19, 1917, respondent, a boy eight years old, was injured upon the playground of the Lincoln School in Toppenish, Yakima county. The accident occurred on a Monday. During the previous week there had been removed from the basement of the school building a steel tank about 20 feet in length and approximately 3½ feet in diameter. The tank had previously been used by the school in connection with its water system, but, being no longer necessary for that purpose, the officers of the district had given it to one W. B. Meyers, in consideration that he would remove the tank from the school premises and restore the building to its original condition; it being necessary to make an opening in the foundation of the building in order to remove the tank from the basement. Meyers employed one S. L. Ames to remove the tank and place it in the

street. The work of removing the tank was begun some time during the week prior to the accident. It consumed several days, the school being then in session, and on Friday afternoon was removed and placed near the side of the building, with concrete chunks sustaining it to prevent its being moved about. The tank was placed in this position before the close of school on that day. On the Saturday following, which was not a school day, boys had removed the concrete chunks and in play rolled the tank about the school playground. This occurred also on Sunday. On Monday, during the noon hour, the respondent and other boys were playing with the tank. Certain of the boys would roll the tank back and forth on the playground, while others would either stand or sit upon it; the purpose apparently being to see how long those upon the tank could remain there without falling off. While the tank was being rolled in this manner, the respondent and other boys upon it, the respondent either fell or was pushed from the tank by one of the other boys, and sustained a severe injury to his right leg by the tank rolling upon it.

It was for this injury that the action is brought. The principal question is the construction of chapter 92 of the Laws of 1917, which is as follows: "Section 1. No action shall be brought or maintained against any school district or its officers for any noncontractual acts or omissions of such district, its agents, officers or employees, relating to any park, playground, or field house, athletic apparatus or appliance, or manual training equipment, whether situated in or about any schoolhouse or elsewhere, owned, operated or maintained by such school district."

The appellant's position is that under this act the action cannot be maintained against the school district. Prior to the passage of this act under the previous statute, **Remington's Code**, § 951, it had been held, in **Redfield v. School Dist.** 48 Wash. 85, 92 Pac. 770, and **Howard**

v. Tacoma School Dist. 88 Wash. 167, 152 Pac. 1004, Ann. Cas. 1917D, 792, that school districts were liable in actions of this character, if the injury was proximately produced by the negligence of the district. When the Act of 1917 was passed by the legislature there was pending in this court three cases, *Bruenn v. North Yakima School Dist.* 101 Wash. 374, 172 Pac. 569; *Kelley v. School Dist. 102 Wash.* 343, 173 Pac. 333, and *Holt v. School Dist. 102 Wash.* 442, 173 Pac. 335, in which recovery was sought for injuries which occurred to school children upon playground apparatus. The Act of 1917 provides that "no action shall be . . . maintained against any school district . . . relating to any park, playground, or field house, athletic apparatus or appliance, or manual training equipment. . . ."

These words may be separated into two groups of three each, one including "park, playground, or field house," and the other "athletic apparatus or appliance or manual training equipment." The first three being descriptive of the place where the district shall be exonerated from liability, and the second three the things which may occasion the injury for which the district shall not be liable. The meaning of the statute will be rendered reasonably plain if two words should be dropped from each group, and the act read as though only the two remaining existed. It would then read: "No action shall be brought or maintained against any school district . . . relating to any . . . playground . . . athletic apparatus, . . . whether situated in or about any schoolhouse or elsewhere, owned, operated or maintained by such school district."

If the statute were in this form it would be plain that the meaning was that no liability would exist when the accident occurred upon a playground apparatus; the word "playground" being used to describe the place where the district would not be liable if the accident occurred upon athletic apparatus. Each one

of the three words in the first group bears the same relation to each and all of the words in the second group that one of the words in the first group bears to one in the second group. It will be observed that between the two groups there is no connecting word, either conjunctive or disjunctive. The clause in the act, "whether situated in or about any schoolhouse," supports this interpretation. That clause refers to what had previously been stated in the act. To give each one of the six words a separate and distinct meaning with the clause last quoted referring to each, it would appear, as applied to playground, that the district would not be liable "when it was situated in or about any schoolhouse." It certainly could not have been the intention of the legislature to use the language last quoted as referring to the words in the first group without any relation to the words in the second group. If further argument be necessary to sustain this interpretation, it will be found in the history of the legislation. As already pointed out under the laws that existed prior to 1917, the school districts were liable. The first bill introduced at the legislative session of 1917 provided for an amendment to § 951, *Remington's Code*, which quoted that statute as it then existed, and added a provision as follows: "Provided, however, that no action can be maintained against any school district, when the cause of action is based upon or arises out of any act or acts done or omitted by such school district in its governmental functions."

Had the act been passed in this form it would have exonerated a school district for permitting or maintaining a nuisance upon the playground. The bill in that form passed the senate. When it reached the house it was amended and passed that body in its present form. The bill, as passed by the house, was subsequently approved by the senate and the governor. Had the legislature intended to exonerate the school district from any and all actions not arising upon contract, it

doubtless would have approved the bill as first passed by the senate. It seems clear that the purpose of the legislature was to exonerate school districts from liability for an accident which occurs upon any athletic apparatus or appliance, or manual training equipment, which is used in connection with any park, playground, or field house owned or maintained by the district.

**Schools—
liability for
torts—construc-
tion of statute.**

The appellant makes two other contentions: One that the respondent was pushed off the tank by another boy, and that this circumstance would constitute an intervening cause, and that the negligence of the district was not the proximate cause; and the other, that the school district did not have sufficient notice. Neither of these contentions are meritorious. The injury complained of was a reasonable and probable result of the negligence of the district in permit-

ting the tank to remain upon the playground. The fact that the respondent may have been pushed off the tank, if it be a fact, would not constitute an intervening agency between the original wrong and the injury. The intervention of a third person does not preclude a recovery, if the injury was the natural and probable result of the original wrong. *Eskildsen v. Seattle*, 29 Wash. 583, 70 Pac. 64, 12 Am. Neg. Rep. 366.

**Proximate
cause—pushing
boy off from
tank—negli-
gence of school
district.**

The case of *Clark v. Seattle*, 102 Wash. 228, 172 Pac. 1155, does not sustain the appellant's contention as to lack of notice. The facts in that case are entirely different from the facts in this case.

**Nuisance—notice
—sufficiency—
liability of
school district.**

The judgment will be affirmed.

Holcomb, Ch. J., and Parker, Mackintosh, and Mitchell, JJ., concur.

ANNOTATION.

Liability of school district, municipal corporation, or school board for injury to pupil.

- I. In general, 911.
- II. Improper construction of buildings, 913.
- III. Failure to repair, 913.
- IV. Dangerous condition of grounds, 914.

- V. Unsuitable, defective, or dangerous appliances, 917.
- VI. Unsafe transportation of pupils, 918.
- VII. Negligence of officers, servants, or agents, 919.

Scope.

This note is confined to cases involving the liability of school authorities in their official capacity, and does not discuss the individual liability of the members of a board of education.

I. In general.

The general rule in this country is that a school district, municipal corporation, or school board is not, in the absence of a statute imposing it, subject to liability for injuries to pupils of public schools suffered in connection with their attendance thereat, since such district, corporation, or board, in maintaining schools, acts as

an agent of the state, and performs a purely public or governmental duty, imposed upon it by law for the benefit of the public, and for the performance of which it receives no profit or advantage.

Iowa.—*Lane v. Woodbury* (1882) 58 Iowa, 462, 12 N. W. 478.

Kentucky.—*Ernst v. West Covington* (1903) 116 Ky. 850, 63 L.R.A. 652, 105 Am. St. Rep. 241, 76 S. W. 1089, 3 Ann. Cas. 882; *Clark v. Nicholasville* (1905) 27 Ky. L. Rep. 974, 87 S. W. 300.

Maryland.—*State use of Weddle v. School Comrs.* (1902) 94 Md. 334, 51 Atl. 289.

Massachusetts.—*Bigelow v. Ran-*

dolph (1860) 14 Gray, 541; *Hill v. Boston* (1877) 122 Mass. 344, 23 Am. Rep. 332.

Michigan.—*Daniels v. Board of Education* (1916) 191 Mich. 339, L.R.A. 1916F, 468, 158 N. W. 23.

Minnesota.—*Bank v. Brainerd School Dist.* (1892) 49 Minn. 106, 51 N. W. 814.

New Hampshire.—*Harris v. Salem School Dist.* (1904) 72 N. H. 424, 57 Atl. 332, 16 Am. Neg. Rep. 119.

Ohio.—*Finch v. Board of Education* (1876) 30 Ohio St. 37, 27 Am. Rep. 414.

Pennsylvania.—*School Dist. v. Fuess* (1881) 98 Pa. 600, 42 Am. Rep. 627; *Ford v. Kendall School Dist.* (1888) 121 Pa. 543, 1 L.R.A. 607, 15 Atl. 812; *Rosenblit v. Philadelphia* (1905) 23 Pa. Super. Ct. 587.

Rhode Island.—*Wixon v. Newport* (1881) 13 R. I. 454, 43 Am. Rep. 35.

Washington.—See *Howard v. Tacoma School Dist.* (1915) 88 Wash. 167, 152 Pac. 1004, Ann. Cas. 1917D, 792. But see *infra*, V. as to effect of statute.

Wisconsin.—*Folk v. Milwaukee* (1900) 103 Wis. 379, 84 N. W. 420, 9 Am. Neg. Rep. 207; *JUUL v. SCHOOL DIST.* (reported herewith) ante, 904.

The New York cases, hereinafter set out in subdivision VII., are not in full accord with this rule. They uniformly hold, in accordance with the rule, that school authorities are not liable for injuries caused by the negligence or malfeasance of their officers, agents, or servants, the court, in the case of *Donovan v. Board of Education* (N. Y.) *infra*, concluding its opinion with the words, "For their [ward trustees charged with the care and repair of the school] acts or the acts of servants [causing the injury] employed by them, the board of education, which is a creation of the sovereign authority of the state, organized to exercise a purely public function and agency for the public good, having no treasury, and receiving no private corporate benefit from the functions and powers conferred, is not liable, either upon principle or authority." But whether the rule applies in case the injury is caused by the negligence of the board itself does not seem to have been definitely settled in New York. In *Wahr-*

man v. Board of Education (N. Y.) *infra*, the defendant board was held liable for an injury resulting from its negligence in failing to close a school in a dangerous state of disrepair, the court stating that while the board would not be liable for the negligent acts of its subordinate officers or servants, it was liable for its own negligence. The force of this case, however, is greatly weakened by the fact, as stated therein, that the question for review was limited to the point whether the board had been shown to have been negligent, counsel having practically conceded that the board was liable if negligent. On the other hand, in the case of *Reynolds v. Board of Education* (N. Y.) *infra*, the general rule hereinbefore set out was given as a reason for holding the defendant board not liable for its negligence in appointing an unfit and incompetent person as its truant officer, whose acts caused the injury complained of. This case was, however, decided partly upon other grounds.

Another ground for nonliability is that such educational agencies have no means to pay damages for such claims. are not given power to raise money therefor, and all funds placed under their control are appropriated by law to strictly school purposes, and cannot be diverted by them. *Ernst v. West Covington* (1903) 116 Ky. 850, 63 L.R.A. 652, 105 Am. St. Rep. 241, 76 S. W. 1089, 3 Ann. Cas. 882; *State use of Weddle v. School Comrs.* (1902) 94 Md. 334, 51 Atl. 289; *Finch v. Board of Education* (1876) 30 Ohio St. 37, 27 Am. Rep. 414.

But the rule in England seems to be to the contrary, the local educational authority being held liable when the injuries are shown to have resulted from its negligence, or that of its officers, agents, or servants. *Crisp v. Thomas* (1890) 63 L. T. N. S. (Eng.) 756, 55 J. P. 261; *Ching v. Surrey County Council* [1910] 1 K. B. (Eng.) 736, 102 L. T. N. S. 414, 26 Times L. R. 355, 79 L. J. K. B. N. S. 481, 74 J. P. 187, 54 Sol. Jo. 360, 8 L. G. R. 369, 2 N. C. C. A. 229; *Morris v. Carnarvon County Council* [1910] 1 K. B. (Eng.) 840, 79 L. J. K. B. N. S. 670, 102 L. T.

N. S. 524, 74 J. P. 201, 8 L. G. R. 485, 54 Sol. Jo. 443, 26 Times L. R. 391; 2 N. C. C. A. 234; *Smith v. Martin* [1911] 2 K. B. (Eng.) 775, 80 L. J. K. B. N. S. 1256, 105 L. T. N. S. 281, 9 L. G. R. 780, 75 J. P. 483, 55 Sol. Jo. 535, 27 Times L. R. 468, Ann. Cas. 1912A, 334, 2 N. C. C. A. 215; *Shrimpton v. Hertfordshire County Council* [1911] 104 L. T. N. S. (Eng.) 145, 75 J. P. 201, 27 Times L. R. 251, 55 Sol. Jo. 270, 9 L. G. R. 397, 48 Scot. L. R. 737, 2 N. C. C. A. 238; *Smerkinich v. Newport Corp.* (1912) 76 J. P. (Eng.) 454, 10 L. G. R. 959.

II. Improper construction of buildings.

A city or its board of education is not liable for injuries sustained by a pupil in falling over the banisters of a stairway to the floor below in a building owned by the city, in which the board of education conducted a public school; since the duty of providing public education at the public expense by building and maintaining schoolhouses and conducting public schools therein is purely a public or governmental duty, in the discharge of which school districts act as the representatives of the state, and are exempt from corporate liability for the improper construction of the houses, or want of proper repair, or for the wrongs of the servants employed. *Clark v. Nicholasville* (1905) 27 Ky. L. Rep. 974, 87 S. W. 300.

And it was held in *Hill v. Boston* (1877) 122 Mass. 344, 23 Am. Rep. 332, that a city is not liable for injuries to a pupil received in falling over the dangerously low railing of a winding staircase in one of the public schools which the city is bound by law to keep and maintain, upon the ground that it is well settled in Massachusetts that no private action, unless authorized by express statute, can be maintained against a city for the neglect of a public duty imposed upon it by law for the benefit of the public, and for the performance of which the corporation receives no profit or advantage.

A city board of education, or its individual members, are not liable for injury to a pupil in a school because of a defectively planned railing along

9 A.L.R.—58.

a stairway which, because too low, permits him to fall over it down the shaft in which the stairs are built; and it is immaterial that the board permits the building to be used for public gatherings with some incidental profit. The court said: "As applied to those states where liability is not expressly created by statute, the overwhelming weight of authority sustains the following concise statement of the general rule upon the question before us: 'The duty of providing means of education, at the public expense, by building and maintaining schoolhouses, employing teachers, etc., is a purely public duty, in the discharge of which the local body, as the state's representative, is exempt from corporate liability for the faulty construction or want of repair of its school buildings, or the torts of its servants employed therein.' *Shearm. & Redf. Neg.* § 267." The court overruled the contention in this case that the board of education was more than a purely governmental agency because it was organized under a local act vesting it with power to acquire and hold title to property and to sue and be sued, and the further contention that, considering the low railing to be a nuisance, the board was liable under the principle that a municipal corporation may not construct or maintain a nuisance upon its property to the damage of another lawfully thereupon, was disapproved by the court, upon the ground that it was impossible, by resort to the rules governing the law of nuisance, to change the well-settled general principle that school boards, in their quasi corporate capacity as governmental agencies, are exempt from corporate liability for faulty construction or want of repair of their school buildings. *Daniels v. Board of Education* (1916) 191 Mich. 339, L.R.A.1916F, 468, 158 N. W. 23.

III. Failure to repair.

A school district is not liable for personal injury sustained on account of the negligent construction of its schoolhouse, or negligence in failing to keep it in repair, since a school district is a public corporation, or quasi

corporation, created by statute for the purpose of executing the general laws and policy of the state, which require the education of all its youth, and is a branch of the state government, an instrument for the administration of the laws, and is, so far as the people are concerned, an involuntary organization. In this case a pupil was struck by lightning while in the schoolhouse, because of the alleged negligence of the school district in permitting the lightning rods upon the schoolhouse to become broken and out of repair, and in failing to provide protection from lightning for the schoolhouse. *Lane v. Woodbury* (1882) 58 Iowa, 462, 12 N. W. 478.

In *Rosenblit v. Philadelphia* (1905) 28 Pa. Super. Ct. 587, it was held that a city whose boundaries were identical with those of a school district was not liable for injuries to a pupil by the fall of a part of the plastering from the ceiling of the schoolroom, due to the negligence of the sectional school directors and the board of education of the district, who had exclusive control and management of the school building. It was further held in this case that the mere fact that legal title to the school building was in the city imposed upon it no liability for injuries resulting from the negligence of the school authorities to keep the building in proper repair. The court said that there could be no recovery from the school district in this case, because, as it is a mere agent of the state for purposes purely governmental, and the officers through whom it must act are chosen in a manner directed by the state, and their duties are defined by the sovereign power, and such officers perform a public service in which the district has no corporate interest and from which it derives no advantage in a corporate capacity, such officers cannot be regarded as servants of the school district for whose negligence in the discharge of their duties the school district can be held liable, in the absence of a statute imposing such liability; and the court further said that, even if the school district were liable under the circumstances, the city would not

be liable as a municipal corporation, since the city in its corporate capacity had no choice in the selection of the officers whose negligence resulted in the accident, could not remove them from office, nor supervise or control them in their management of the school property.

See in this connection also, *Wahrman v. Board of Education* (1907) 187 N. Y. 331, 116 Am. St. Rep. 609, 80 N. E. 192, 10 Ann. Cas. 405, *infra*, VII.

But it was held in *Ching v. Surrey County Council* [1910] 1 K. B. (Eng.) 736, 102 L. T. N. S. 414, 26 Times L. R. 355, 79 L. J. K. B. N. S. 481, 74 J. P. 187, 54 Sol. Jo. 360, 8 L. G. R. 369, 2 N. C. C. A. 229, that a county council, as the local education authority, was liable for injuries to a pupil from catching his foot in a hole in the pavement of the playground of the school, upon the ground that by the education act a statutory duty was imposed upon the council of keeping the school premises in repair.

And the preceding case was followed in *Morris v. Canarvon County Council* [1910] 1 K. B. (Eng.) 840, 79 L. J. K. B. N. S. 670, 102 L. T. N. S. 524, 74 J. P. 201, 8 L. G. R. 485, 54 Sol. Jo. 443, 26 Times L. R. 391, 2 N. C. C. A. 234, where a county council was likewise held liable under the same statute for injuries to a pupil from the closing upon her fingers of a heavy swing door with a powerful spring, dangerous and unsuitable for young children, which was in the building when purchased by the council for use as a school.

IV. *Dangerous condition of grounds.*

See also *Donovan v. Board of Education* (1881) 85 N. Y. 117; *Donovan v. McAlpin* (1881) 85 N. Y. 185, 39 Am. Rep. 649; and *Brown v. New York* (1900) 32 Misc. 571 66 N. Y. Supp. 382, *infra*, VII.

A school district, being a part of the public educational system of the state, is not liable, in the absence of statute, for injuries to a pupil from catching his foot between tree stumps negligently allowed to remain in the playground of the school, nor is a right of action for such injuries given by a statute providing that the trustees

may sue, in their official capacity, on contract, and also for damages for an injury to their official rights or property, and that an action may be brought against them upon a contract made with them in their official capacity, or for an injury to the rights of the plaintiff, arising from some act or omission of the officers, or of the district. The court in this connection said: "In making this provision for bringing suits against trustees in their official capacity, the legislature has not changed the character of the duties of such trustees, or created any new duties or liabilities on the part of the district, in the care of the public property. It is not, perhaps, entirely clear what was intended by the language, 'for an injury to the rights of the plaintiff,' but evidently it must refer to the breach of some duty owed to him as an individual, and not a mere public duty; and it would not operate, therefore, to change the rule. It may well be that the trustees would be liable in ejectment or trespass, as in the case of *Gould v. Eagle Creek School Dist.* (1862) 7 Minn. 203, Gil. 145, and for injuries to property or proprietary rights in the conduct of their official business. Questions relating to the title to property, party walls, boundaries, drains, etc., are of that character, and are subject to a different rule from that which applies in respect to duties purely public or administrative in their character. This distinction is recognized in *Peters v. Fergus Falls* (1886) 35 Minn. 549, 29 N. W. 586. We do not think, therefore, that the legislature has expressly changed, or intended to change, the prevailing rule in respect to the liability of officers of school districts; and we believe this accords with the practical construction which has been given to the statute during all these years." *Bank v. Brainerd School Dist.* (1892) 49 Minn. 106, 51 N. W. 814.

A town which has duly assumed the duties of the school district is not liable for injury sustained by a pupil from the caving in of an embankment upon the school grounds, under the rule that a private action cannot be

maintained against a town or other quasi corporation for a neglect of corporate duty, unless such action be given by statute. *Bigelow v. Randolph* (1860) 14 Gray (Mass.) 541.

A board of county school commissioners, being a quasi corporation or governmental agency, cannot be made liable to an individual in actions of tort, in the absence of statutory authority. A statute placing under the control of such a board the educational matters of the state affecting a county, and declaring the board to be a body corporate, and capable of suing and being sued, does not authorize an action against the board for personal injuries sustained by a pupil in running against a wire stretched across the grounds around a school and allowed to remain there in a position and in a condition likely to cause injury through the negligence of the board; and the court in this connection said: "Now it is obvious, we think, that the legislature intended by the use of the language, 'shall be capable to sue and be sued,' to restrict the liability of the boards of county school commissioners to such suits in respect to matters within the scope of their duties and to such things as the boards are empowered to do. We find nothing in the statutes that would justify a different conclusion, or would sustain the contention of the appellant in this case. There is no power given the board of school commissioners to raise money for the purpose of paying damages, nor are they supplied with means to pay a judgment against them. All of their funds are appropriated by law to specific purposes, and they cannot be diverted by them. The Constitution of the state, § 3, art. 8, provides that the school fund of the state shall be kept inviolate and appropriated only to the purposes of education. In *Perry v. House of Refuge*, 63 Md. 27, this court distinctly held, in adopting the English decisions on the subject, that damages could not be recovered from a fund held in trust for charitable purposes. In the language of Lord Campbell, the wrongdoer must pay from his own pocket."

State use of *Weddle v. School Comrs.* (1902) 94 Md. 334, 51 Atl. 289.

A city board of education which, as a quasi corporation, is a public agent employed in administering the common-school system of the state, is not liable, in the absence of a statute creating a liability, for injuries received by a pupil in falling into a basement window area, negligently left unprotected by the board, while playing in the school yard. The court said that they could find no provision in the school law, general or special, creating or implying the liability of defendant in this class of cases, and that no possible means appeared in the school laws by which defendant, if liable for a tort, could provide a fund out of which to satisfy a judgment against it. The defendant was by statute made a corporation to a qualified extent, capable of contracting and being contracted with, within the limits of the express grant of power given to it or arising to it by a necessary implication, capable of being sued and of suing, of being compelled by legal process to comply with all its legal obligations, but it was given no legal control or power over the school property, and while it could order an assessment within certain boundaries as one of the public agencies of the state for the maintenance of public schools within that limit, such assessment could not be lawfully directed to any other use. *Finch v. Board of Education* (1876) 30 Ohio St. 37, 27 Am. Rep. 414.

By furnishing a lot and building for the use of a school district within its limits, a municipal corporation does not become responsible to the public or patrons of the school for its safe condition, and no recovery can be had against it in case the school ground is on a different grade from that of the street, and is supported by a retaining wall, without barriers to prevent children from falling into the street, in consequence of which a pupil is jostled from the wall by other children at play and injured. The court, in giving the reason for this decision, said: "The state regards it as her duty to establish and maintain

a system of public education. When sums have been collected for that purpose, they cannot be diverted to any other use or purposes. If it could be done, the system would be injured and the public suffer incalculable injury. If someone is injured by the faulty construction of a public school building or the maintenance of the grounds, no action can be maintained against the district for such injury. The law provides no funds to meet such claims.

. . . Counsel for the appellant concedes the law to be as stated, but claims that the city was not required by law to furnish the building for common-school purposes; that the city had nothing to do with the maintaining of the public school; that it occupies the same position with reference to the house and lot as if the building had been used for other purposes. Although the city was not compelled to furnish the school trustees with the building for public-school purposes, still it did so, and made that contribution to the public to aid in the promotion of education. The use of the building accomplished the same purpose as it would have accomplished had it been owned by the common-school district. The building was not owned by the city for private or municipal uses, but for a public purpose." *Ernst v. West Covington* (1903) 116 Ky. 850, 63 L.R.A. 652, 105 Am. St. Rep. 241, 76 S. W. 1089, 3 Ann. Cas. 882.

In *Sullivan v. Boston* (1879) 126 Mass. 540, where, in an action for personal injuries to a pupil resulting from her catching her foot in lumps of ice on the open space in the school grounds adjoining a highway, the city was sought to be held liable upon the ground that the injuries were caused by a defect in the highway, but a recovery was denied upon the ground that the place where the plaintiff was injured was not within the limits of a highway, the court said: "As we have before said, the place where the injury happened was in the schoolhouse yard or lot, and, even if the city allowed this to be defective and dangerous, it is not liable therefor."

But in *Powers v. Philadelphia*

(1902) 18 Pa. Super. Ct. 621, a city was held liable for injuries to a school boy suffered by reason of negligence in the maintenance of a dangerous board walk running from the main school building to an annex on property owned by the city and devoted to the use of a public school, under the rule that municipal corporations are liable for the improper management and use of their property to the same extent and in the same manner as private corporations. But the court said in this case that where injury results from the act or negligence of the servant of a city in the performance of a public duty the maxim "respondeat superior" does not apply, and the city is not liable.

V. Unsuitable, defective, or dangerous appliances.

In the state of Washington, the courts recognize the general rule that a school district, when acting in a governmental capacity, is not liable for its negligence, in the absence of a statute creating such liability. And, therefore, it was held in *Howard v. Tacoma School Dist.* (1915) 88 Wash. 167, 152 Pac. 1004, Ann. Cas. 1917D, 792, that a school district was not liable at common law for injuries to a pupil from a fall from a ladder erected and maintained in the playground of a school for use by the pupils in exercises, since the district in the maintenance of such ladder was exercising a governmental function. But as shown in this case Washington had a statute making school districts liable for injuries arising from its acts or omissions, and the school district was held liable in this case under the statute.

It was held in *Redfield v. School Dist.* (1907) 48 Wash. 85, 92 Pac. 770, against the contention that such statute did not apply to governmental functions, that a school district was liable for the negligence of its officers or agents whereby a large metal bucket of scalding water kept upon a furnace register in the schoolroom was overturned and scalded a pupil. In this case the court, while approving the contention that the district was not liable for the negligence of its of-

ficers or agents upon the ground that the doctrine of respondeat superior did not apply, said that a discussion of this point was unprofitable for the reason that there was a statutory enactment on the subject in Washington.

It is stated in *Howard v. Tacoma School Dist.* (Wash.) supra, that although the statute reads that an action may be maintained against a county, incorporated town, school district, or other public corporation of like character for an injury to the rights of the plaintiff arising from some act or omission of such public corporation, the courts of Washington have uniformly held that an incorporated town or city is not liable where the injury occurs through negligent performance or omission of performance connected with its purely governmental functions, either ignoring or denying the statute, and have limited the application of the statute to school districts and counties.

In 1917 this statute, which had been in force since 1869, was amended so as to take away the liability of a school district, or its officers, for injuries or accidents in connection with any park, playground, or field house, athletic apparatus or appliance, or manual training equipment, whether situated in or about any schoolhouse or elsewhere, owned, operated, or maintained by a school district, but, as appears in the reported case (*STOVALL v. TOPPENISH SCHOOL DIST.* ante, 908), a school district is still liable for injury to pupils otherwise caused.

This amendment of 1917 was held in *Bailey v. School Dist.* (1919) — Wash. —, 185 Pac. 810, to be retroactive, and a perfect defense to an action against a school district for injury to a pupil upon playground apparatus, although the action was commenced before the amendment took effect.

And in *Foley v. Pierce County School Dist.* (1918) 102 Wash. 50, 172 Pac. 819, an appeal by plaintiff from a judgment for defendant was held to fall under the bar of the amendment, it being held that to prosecute an appeal was to maintain an action, although the judgment appealed from

was entered before the amendment went into effect.

But in *Bruenn v. North Yakima School Dist.* (1918) 101 Wash. 374, 172 Pac. 569 (struck by teeter board); *Kelley v. School Dist.* (1918) 102 Wash. 343, 173 Pac. 333 (injury from breaking of swing); and *Holt v. School Dist.* (1918) 102 Wash. 442, 173 Pac. 335 (fall from slide),—judgments for the plaintiffs, entered before the taking effect of the amendment, were sustained as against subsequent appeal by the defendant, upon the ground that resisting an appeal was not maintaining an action within the statute.

In the reported case (*STOVALL v. TOPPENISH SCHOOL DIST.* ante, 908) affirming a judgment for plaintiff, the amendment was held not applicable to an injury to a pupil while playing on a large steel tank temporarily left in the school yard by one removing it from the basement of the school, such tank not being a playground apparatus.

The fact that a city voluntarily assumes under and in pursuance of a general law of the state to maintain public schools does not render it liable for injuries to a pupil from being scalded and burned because of the defective condition of the heating apparatus of the school. The court, in giving the reasons therefor, stated as follows: "It is settled that a private action does not lie at common law against a municipal corporation for either the nonperformance or the negligent performance of any public duty which is imposed on it by general statute without its request, unless the corporation receives or is entitled to receive some privilege or profit, benefit or emolument, in consideration of the duty. . . . Of course, if the duty or service is not obligatory, no liability can arise from a mere omission to perform it, and the only question is whether a liability can arise from a negligent performance of it. We think it cannot arise any more when the duty is voluntarily assumed, if it is assumed under and in pursuance of a general law of the state, than when it is peremptorily imposed. If we understand the cases aright, the ground

of exemption from liability is not that the duty or service is compulsory, but that it is public, and that a municipal corporation, in performing it, is acting for the state or public in a matter in which it has no private or corporate interest; and that therefore, inasmuch as it can only act through its officers or servants, it is entitled to have them, while engaged in the performance of the duty or service, regarded as the officers or servants of the public, and to be exempt from any private responsibility for them." *Wixon v. Newport* (1881) 13 R. L. 454, 43 Am. Rep. 35.

In *Smerkinich v. Newport Corp.* (1912) 76 J. P. (Eng.) 454, 10 L. G. R. 959, a borough council, the local educational authority, was held, reversing the judgment of the lower court, not liable for injury sustained by a pupil at a technical institute while running an unprotected or unguarded circular saw, upon the ground that it was not negligent, because the saw was of a size not customarily guarded, and upon the further ground that the maxim "*volenti non fit injuria*" applied.

VI. *Unsafe transportation of pupils.*

A town school district which undertakes, at the public expense, to transport the pupils to and from school, is not liable for sickness contracted by a pupil because of exposure to inclement weather during such transportation, the court stating that assuming that it was the duty of the district to provide transportation, it was a public duty from which the district derived no benefit or advantage, and that it long had been the recognized law of the state that an action could not be maintained against the municipality for damages to an individual suffered by reason of the negligent performance of public duties. *Harris v. Salem School Dist.* (1904) 72 N. H. 424, 57 Atl. 332, 16 Am. Neg. Rep. 119.

But a county council, the educational authority of the county, which provides, pursuant to law, vehicles to transport to and from school children living beyond a certain distance therefrom, is liable for injuries to a pupil from falling out of the conveyance, although such pupil was not one of those

for whom the vehicle was provided, where he was conveyed in it with the consent of the council. *Shrimpton v. Hertfordshire County Council* [1911] 104 L. T. N. S. 145, 75 J. P. 201, 27 Times L. R. 251, 55 Sol. Jo. 270, 9 L. G. R. 397, 48 Scot. L. R. 737, 2 N. C. C. A. 238.

VII. Negligence of officers, servants, or agents.

See also *Rosenblit v. Philadelphia* (1905) 28 Pa. Super. Ct. 587, *supra*, III.

School districts in Pennsylvania are but agents of the commonwealth, and are made quasi corporations for the sole purpose of the administration of the commonwealth's system of public education, and are therefore not liable for the negligence of their officers, agents, or employees. In this case a pupil was injured by an explosion in the stove of the schoolroom, caused by the negligence of the janitor in throwing into the stove a dish of crude petroleum in kindling the fire, and the school board or board of directors, with knowledge of this method of kindling fires by its janitor, had negligently permitted its continuance. It was held in this case that the doctrine of respondeat superior did not apply to school districts. *Ford v. Kendall School Dist.* (1888) 121 Pa. 543, 1 L.R.A. 607, 15 Atl. 812.

It was held in *School Dist. v. Fuess* (1881) 98 Pa. 600, 42 Am. Rep. 627, that a school district was not liable for the negligence of a contractor employed by it to make repairs and improvements to a schoolhouse, in taking out the supports of the building during a school session, contrary to the contract, and thereby causing a column to fall upon and injure a pupil. The court in this case said: "School districts are corporations of lower grade and less power than a city, have less the characteristics of private corporations and more of a mere agent of the state. They are territorial divisions for the purpose of the common-school laws, and their officers have no powers except by express statutory grant and necessary implication; and these are for the establishment and maintenance of the public schools. The common-school system partakes

much of the nature of a public charity, extends over the whole state, is sustained by the public moneys, and the directors, who devote much time and labor for the public benefit, receive no compensation for their services. Unless exempted by the act of incorporation, or by law, a private corporation is liable for the wrongful acts and neglects of its officers done in the course and within the scope of their employment, the same as a natural person is for the acts and neglects of his servant or agent. A less stringent rule applies to public corporations, and least stringent of all should be applied to school districts, whose officers have limited and defined powers in a system exclusively for the free education of the children in the commonwealth."

And in *Wood v. Independent School Dist.* (1876) 44 Iowa, 27, a school district was held not liable for injuries received by a pupil while playing on a drilling machine left unlocked and unguarded by a firm employed by the district to drill a well in the school-house yard, upon the ground that the negligence was that of an independent contractor, and the court also decided against the claim that the district was liable on the ground of nuisance in suffering such machinery to remain upon its grounds in such dangerous condition.

It was held in *JUUL v. SCHOOL DIST.* (reported herewith) ante 904, that a city public-school district was not liable for injuries to a pupil from falling into a pail of hot water containing caustic acid and other chemicals, standing in the passageway of a school for use in scrubbing and cleaning the floor of the schoolroom, under the principle that a municipality, while performing the duty imposed upon it, under the Constitution, of maintaining schools, is not liable for injuries to children attending the school caused by reason of the negligence of servants necessarily employed by the municipality or school districts in carrying out the governmental duties so imposed by law on it. It was unsuccessfully contended in this case that this doctrine of nonliability was taken

away by a statute providing that every owner of a public building shall construct, repair, or maintain such public building so as to render it safe, the court holding that the negligent placing within the school of a pail with dangerous contents, to be used in treating the floors, could not reasonably be construed to be within the meaning of the word "maintain" as found in the statute.

In *Donovan v. Board of Education* (1881) 85 N. Y. 117, where, by statute, the board of education of a city was vested with a general control and care of the school buildings and property for the purposes of public education, but the special care and safe-keeping of school premises in the respective wards was committed to the ward trustees, who were authorized also to appoint janitors and make repairs of school buildings, it was held that the board of education could not be held liable within the rule of respondeat superior for injury sustained by a pupil falling into an excavation in the yard of a ward school, the grating over the excavation having been negligently left open either by the janitor or by masons employed by the ward trustees to make repairs to the building.

And in *Donovan v. McAlpin* (1881) 85 N. Y. 185, 39 Am. Rep. 649, an action brought against the ward trustees to recover for the same injury described in the preceding case, it was held that, assuming that they were not guilty of any personal negligence, they were not liable because they were acting as gratuitous agents of the public, within the scope of their authority, and necessarily employed to make needful repairs the workmen for whose negligence they were not liable, the doctrine of respondeat superior having no application.

But it was held in *Wahrman v. Board of Education* (1907) 187 N. Y. 331, 116 Am. St. Rep. 609, 80 N. E. 192, 10 Ann. Cas. 405, that the board of education was liable for injuries to a pupil from the fall of the ceiling of a schoolroom, because of the negligence of the board in allowing the school building to be occupied by pupils

while in such state of disrepair, as the power to close the school was vested wholly in the board. The only question presented for review, however, was whether the board was shown to have been negligent, since the case was submitted to the jury upon the charge that if the jury found that the board was guilty of negligence in permitting the room to be occupied by pupils, the plaintiff was entitled to recover, which charge, because of the absence of an exception thereto, had to be treated as the law of the case. It seems in this case that if the negligence alleged had been the failure to repair the school, the board would not have been liable, as the duty to repair rested upon subordinate officers or servants for whose acts the board would not be responsible, the doctrine of respondeat superior not being applicable.

The rule of respondeat superior does not apply to the relation existing between a board of education and an attendance officer appointed by it pursuant to the positive command of the state as expressed in a statute, and the board therefore is not liable for injuries inflicted upon a truant school-boy by such officer in arresting him. *Rhall v. Board of Education* (1899) 40 App. Div. 412, 57 N. Y. Supp. 977.

And it was held for the same reason in *Reynolds v. Board of Education* (1898) 33 App. Div. 88, 53 N. Y. Supp. 75, that a board of education was not liable for the death of a pupil from being run over by the cars in escaping from a wrongful arrest by its attendance officer. It was further held in this case that the board would not be liable, even if guilty of negligence in appointing as an attendance officer a person unfitted and incompetent for the position, upon the grounds that no private action, unless authorized by express statute, can be maintained for the neglect of a public duty imposed by law for the benefit of the public, and from the performance of which no profit or advantage is received, and that the officer, in doing the act complained of, was not acting within the scope of his employment, in

which view of the case his incompetency would be immaterial.

Where, although title to all school property and buildings is vested in a city, the board of education is by statute given full control and custody of the same, a pupil cannot recover from the city for damages from the breaking of the board floor of a playground, since the city is not liable for the malfeasance or misfeasance of the officials or subordinates of the board of education on the ground either of negligence or nuisance. *Brown v. New York* (1900) 32 Misc. 571, 66 N. Y. Supp. 382.

In *Diehm v. Cincinnati* (1874) 25 Ohio St. 305, a city was held not liable for injuries received by a pupil in passing through a temporary doorway in a schoolhouse undergoing repairs, where, by a special act, the management of the school and of the school property and the care and supervision thereof were given to a board of education, called the board of fund trustees and visitors of common schools, upon the ground that under such statute the board could not be regarded as the agent of the city and consequently the city was not liable for the board's negligence.

A city is not liable for the death of a pupil from sickness caused by the escape of sewer gas in the school. The court said that the city was performing a public duty in maintaining public schools, and that a municipal corporation is not liable for injuries resulting from the acts or defaults of its officers where it is engaged in the performance of a merely public service from which it derives no benefit in its corporate capacity, but which it is bound to see performed in pursuance of the duty imposed by the law for the general welfare of the inhabitants

or of the community. The court further said the city could not be held liable under the rule that a municipal corporation may not construct or maintain a nuisance upon its property, since this rule did not apply to the present case, because the city officers were acting in a purely governmental capacity so far as their relation to the pupil was concerned. *Folk v. Milwaukee* (1900) 108 Wis. 359, 84 N. W. 420, 9 Am. Neg Rep. 207.

In *Crisp v. Thomas* (1890) 63 L. T. N. S. (Eng.) 756, 55 J. P. 261, the vicar of the parish, ex officio a trustee of the school building and a member of the committee of management of a voluntary or denominational school, was held not liable for injuries to a pupil from the fall of a blackboard through the negligence of a pupil teacher appointed by the schoolmistress, upon the ground that neither the schoolmistress nor the pupil teacher was his servant.

But in *Smith v. Martin* [1911] 2 K. B. (Eng.) 775, 80 L. J. K. B. N. S. 1256, 105 L. T. N. S. 281, 9 L. G. R. 780, 75 J. P. 433, 55 Sol. Jo. 535, 27 Times L. R. 468, Ann. Cas. 1912A, 334, 2 N. C. C. A. 215, the defendant corporation, which was the local educational authority of the district, with full control and management of the public elementary school provided by them, was held liable for injuries to a pupil who was seriously burned in carrying out the order of the teacher to poke the fire and draw out the damper of the stove in the teacher's common room to enable the teacher to eat her lunch there, upon the ground that the relation of master and servant existed between the defendant corporation and the teacher, and that the act of the teacher was within the scope of her authority. G. V. I.

COMMONWEALTH OF PENNSYLVANIA et al., Appts.,
v.

THOMAS B. SMITH, Mayor, et al.

Pennsylvania Supreme Court — March 8, 1920.

(266 Pa. 511, 109 Atl. 786.)

Injunction — against violation of Sunday Law.

1. Injunction does not lie to restrain alleged violations of the Sunday Law.

[See note on this question beginning on page 925.]

— against nuisance — finding of non-existence of nuisance.

2. Equity has no jurisdiction to enjoin the maintenance of an alleged nuisance if the court finds that no nuisance in fact exists.

[See 20 R. C. L. 472-474.]

Appeal — absence of assignment of error — effect.

3. A finding of fact, although excepted to, will be regarded as conclusive on appeal if it is not assigned as error.

[See 2 R. C. L. 159, 160.]

Definition — crime.

4. A crime is an act committed or omitted in violation of a public law either forbidding or commanding it.

[See 8 R. C. L. 51, 52.]

Injunction — against commission of crime.

5. Injunction does not lie against the mere commission of a crime.

[See 14 R. C. L. 376.]

Appeal — ruling not excepted to.

6. A ruling not excepted to is not reviewable on appeal.

[See 2 R. C. L. 92.]

Evidence — hearsay — statements of gambling.

7. Evidence that boys said they had been gambling on Sunday ball games is not admissible in a suit to enjoin violation of the Sunday Law by licensing such games, because hearsay.

[See 10 R. C. L. 958 et seq.]

APPEAL by complainants from a decree of the Court of Common Pleas No. 5, for Philadelphia County, dismissing a bill filed to enjoin alleged violation of the Sunday Law. *Affirmed.*

The assignments referred to in the opinion are as follows:

The first assignment of error was to the exclusion of evidence of riotous conduct following a ball game.

The second assignment was to the exclusion of evidence that a number of boys, boarding a trolley car in which the witness was sitting, in referring to a ball game played that day, admitted that they had been gambling on the game, that one of them said he won \$60, and that later the witness asked some of the party the name of the one claiming to have won the \$60, and was given his nickname, but not his real name.

The fourth assignment was that the court erred "in dismissing complainants' exception."

Mr. Elton J. Buckley for appellants.
Mr. G. W. Pepper, for appellees:

The legislature has confided to the commissioners extraordinarily broad powers and wide discretion in the government and control of Fairmount park.

Philadelphia v. McManes, 175 Pa. 28, 34 Atl. 331; *Wakelin v. Philadelphia*, 21 Pa. Dist. R. 39.

If the act in question is a nuisance, equity will abate it for that reason. If it is not a nuisance and is merely made criminal by statute, a court of equity will not interfere, but will leave the commonwealth to pursue its statutory remedy.

Com. v. Rothrock, 2 North. Co. Rep. 249.

The interposition of equity is not justified merely because, in the particular case before the court, the legal remedy has failed.

Bispham, Eq. 7th ed. 56.

Brown, Ch. J., delivered the opinion of the court:

The bill filed by the complainants was for an injunction to restrain alleged violations of the Act of April 22, 1794 (3 Smith's Laws, p. 177), commonly known as the "Sunday Law." It averred that the respondents, commissioners of Fairmount park, at a meeting held May 14, 1919, passed a resolution "that the chief engineer be instructed to permit the orderly playing of all outdoor games in the park under the control of the commission on Sundays, under the same regulations as on other days;" that prior to the adoption of this resolution playing of outdoor games in the park was not licensed or permitted by the commissioners, but after its adoption the chief engineer was instructed to permit outdoor games on Sunday under no regulations except those obtaining on week days; that he has permitted the playing of games in the park on Sundays since the adoption of the resolution; that a large number of persons repair to the park on Sundays and spend the day playing outdoor games, notably lawn tennis and baseball; that the playing of said games and the licensing of same by the respondents constitute a violation of the Act of April 22, 1794, a violation of the common law of which Christianity is a part, a violation of the legal power and authority of the commissioners, a violation of the right and sanctity of the Sabbath day as adopted by the founders of the commonwealth, a violation of the right of the complainant churches to the opportunity to render religious instructions to the people, unmolested by the unlawful competition of public games officially licensed by a quasi municipal body; that the playing of the games is a public nuisance, inimical to the morals of the people, who, if the same is allowed to continue, will suffer irreparable injury. The prayer of the bill was for an injunction, commanding the respondents to rescind the resolution of May 14, 1919, and for

a decree prohibiting them from licensing or permitting any outdoor games to be played in Fairmount park on the Sabbath day. The answer of the respondents denied the maintenance of a public nuisance of violation of law, and averred control by them over the park, including authority to determine how it may most effectively be used as a great playground for such of the public as have not incapacitated themselves from enjoying play; that by the provision of § 5 of the Act of March 26, 1867 (P. L. 547), the respondents are charged with the care and management of Fairmount park; that under the terms of § 19 of the Act of April 14, 1868 (P. L. 1083) they have the power to manage the park; that the 21st section of the act vests in them authority to make rules and regulations for the government of the park, in addition to those prescribed in the act. The answer further averred that, for many years prior to the adoption of the resolution of May 14, 1919, the orderly playing of outdoor games in the park on Sundays and week days was permitted by the commissioners. The respondents denied that they had at any time licensed the playing of outdoor games in the park on any day, or that the chief engineer had licensed the playing of games on Sunday, or any other day. While admitting that a large number of persons, for years prior to the resolution of May 14, 1919, had played outdoor games in the park, under the control of the commission, on Sundays, and have continued such playing since the adoption of the resolution, the answer denied the averment in the bill that the playing of outdoor games in the park on Sundays, notably lawn tennis and baseball, constitutes a violation of the Act of April 22, 1794, or any other act, and it was denied that the respondents had licensed said games, or any of them, otherwise than by informal permission, prior to May 14, 1919, and by mere formal permission embodied in the resolution passed on that day; and

the answer still further denied that the permission constitutes a violation of the act of assembly, or that anything done by the respondents was in contravention of their legal power and authority, or violative of the sanctity of the Sabbath day. The case proceeded to final hearing on bill, answer, and proofs, and from the decree of the court dismissing the bill the complainants have appealed.

The learned court below was apparently of opinion that the bill ought to be dismissed, because, in view of changed social conditions and the general opinion of the public at the present time as to legitimate Sabbath occupations, the matters of which the appellants complain were not to be regarded as violations of the Act of 1794. It is not necessary for us to pass upon the correctness of this, as the bill was properly dismissed for the controlling reason that the case as presented by the complainants did not call for the exercise of equitable jurisdiction.

An averment in the bill was that the playing of lawn tennis and baseball in Fairmount park on Sundays

constituted a public nuisance, and therefore equity had jurisdiction of the complaint. The

**Injunction—
against nuisance—finding of
nonexistence of
nuisance.**

The conclusive answer to this is the distinct finding of the court below that "the evidence presented failed to prove that either the resolution passed by the commission, or games played in the park, constitute a public or private nuisance; or that either the commission or chief engineer had licensed the playing of games on Sunday." This finding, although excepted to below, has not

been assigned as error on this appeal, and is therefore to be accepted as a fact which the appellants cannot now question. Their case, as they present it to us, with this material and conclusive finding, consists of mere alleged

violations of the Act of 1794, and nothing more. That equity can interfere to restrain such violations is a proposition unsupported by reason or any known authority. For what was made an offense by that act it provides a penalty. If the playing of lawn tennis or baseball on Sunday is a violation of it, the players are punishable under it; if their playing does not violate it, they are not punishable, and they cannot be restrained from playing, unless their games become a nuisance. This proceeding is at the instance of the commonwealth. The remedy for that of which it complains is to be found in the act, if it has been violated. If the penalty therein provided is not a sufficient deterrent, it is for the legislature to provide another.

**Injunction—
against
violation of
Sunday Law.**

A crime is an act committed or omitted in violation of a public law either forbidding or

**Definition—
crime.**

commanding it, and it is well settled that a bill will not lie having for its sole purpose an injunction against the mere commission of a crime, as is the case here, under the unchal-

**Injunction—
against commis-
sion of crime.**

lenged sixth fact found by the learned chancellor. *Klein v. Livingston Club*, 177 Pa. 224, 34 L.R.A. 94, 55 Am. St. Rep. 717, 35 Atl. 606. In distinctly recognizing this rule, in *Sparhawk v. Union Pass. R. Co.* 54 Pa. 401, where the purpose of the bill was to restrain alleged violations of the Act of 1794, it was said by Mr. Justice Thompson, in speaking for the court: "If it be supposed that because an act is illegal merely, equity will interfere to restrain it, it is a misapprehension of equity jurisdiction. 'If an act be illegal,' said Vice Chancellor Kindersley, in *Solteu v. De Held*, 2 Sim. N. S. 153, 61 Eng. Reprint, 299, 'I am not to grant an injunction to restrain an illegal act merely because it is illegal. I could not grant an injunction to restrain a man from smuggling, which is an illegal act.' Nor could he for

any merely criminal or penal offense. Injunction is a civil remedy to arrest or prevent civil abuses, when granted at the instance of a private party. Because worldly employment on Sunday is interdicted by statute and an offense, it is not a reason, any more than in the case put by the vice chancellor, why we should interfere in equity to prevent it. The penal law that is violated is provided with the machinery for punishing it, and to it the violation must be referred. One reason why equity cannot interfere is that there is a remedy at law by statute, and we must presume it adequate, for it is what the law has provided and no more. If it could be restrained because a public nuisance, it would only be at the instance of someone authorized by the commonwealth."

A public nuisance is not involved in this proceeding, for the court below has so found, and, for the reasons stated, its finding is conclusive.

As appellants' statement of the questions involved does not include the matters complained of by the first and second assignments of error, we are not called upon to consider them (*Yeager v. Gately*, 262 Pa. 466, 106 Atl. 76; *Kress House Moving Co. v. George Hogg Co.* 263 Pa. 191, 106 Atl. 351), but both must be dismissed, the **Appeal—ruling not excepted to.** ruling of which it complains was not excepted to, and the second, because the offer was simply one of **Evidence—**hearsay—**statements of** say evidence. Nothing can be gathered from the fourth assignment, as it fails to disclose what the exception was which the court dismissed. The second and fifth are merely to the dismissal of the bill. All are overruled, and the decree is affirmed, at the costs of the appellants.

ANNOTATION.

Injunction to prevent violation of Sunday Law.

The present annotation does not cover the question as to what acts committed on Sunday may, apart from Sunday laws, amount to a nuisance entitling the person injured to the remedy of injunction. Nor does it purport to cover questions relating to the remedy by injunction to prevent the violation of Sunday laws which are common to the remedy by injunction for other purposes, but aims rather to deal with the question indicated in the above title from the viewpoint presented in the reported case (*Com. v. SMITH*, ante, 922), that is, as to the effect on the right to an injunction of the fact that the violation of the law constitutes a criminal offense. The rule, apparently well settled, that courts of equity will not interfere by injunction merely to prevent the commission of a crime, has been applied or approved in a number of cases involving alleged violation of Sunday laws, so that it is held, unless the acts complained of constitute a nuisance,

or some other ground exists for granting the injunction than that a violation of the law will result unless the writ is granted, injunction will not lie. *Lyric Theatre v. State* (*Carrell v. State*) (1911) 98 Ark. 437, 33 L.R.A. (N.S.) 325, 136 S. W. 174 (moving pictures); *Stevens v. Morenous* (1912) 169 Ill. App. 282 (theater); *State ex rel. Wood v. Schweickardt* (1892) 109 Mo. 496, 19 S. W. 47 (sale of intoxicants); *Gilbough v. West Side Amusement Co.* (1902) 64 N. J. Eq. 27, 53 Atl. 289 (baseball), approved in *Seastream v. New Jersey Exhibition Co.* (1904) 67 N. J. Eq. 178, 58 Atl. 532 (same); *McMillan v. Keuhnle* (1910) 78 N. J. Eq. 251, 78 Atl. 185 (same); *Green v. Piper* (1912) 80 N. J. Eq. 288, 84 Atl. 194 (amusement park); *Com. v. SMITH* (reported herewith) ante, 922; *Sparhawk v. Union Pass. R. Co.* (1867) 54 Pa. 401 (passenger cars on street railway); *York v. Ysaguirre* (1902) 31 Tex. Civ. App. 26, 71 S. W. 563 (barber shop); *Barry*

v. State (1919) — Tex. Civ. App. —, 212 S. W. 304 (moving pictures).

In connection with the above authorities, attention is called to *Atty. Gen. v. Niagara Falls, W. P. & C. Tramway Co.* (1891) 18 Ont. App. Rep. 453, and *Atty. Gen. v. Hamilton Street R. Co.* (1897) 24 Ont. App. Rep. 170, in which injunctions were denied to restrain the operation of street railways on Sunday, although the cases involved principally the questions whether the railway companies were authorized to operate the roads on Sunday, and whether the Sunday Law was violated.

The enforcement of Sunday laws is exclusively the function of other tribunals than courts of equity. *McMillan v. Keuhnle* (1910) 78 N. J. Eq. 251, 78 Atl. 185, *supra*.

Because worldly employment on Sunday is forbidden by statute, and made an offense, is not a reason, it was said in *Sparhawk v. Union Pass. R. Co.* (1867) 54 Pa. 401, *supra*, why a court of equity should interfere to prevent it; the penal law that is violated being provided with the machinery for punishment thereof; one reason why equity cannot interfere is that there is a remedy at law by statute, which must be presumed adequate, for it is the remedy provided by the law itself.

In refusing to enjoin the operation of a moving picture show on Sunday, alleged to be in violation of state laws, the court in *Barry v. State* (1919) — Tex. Civ. App. —, 212 S. W. 304, *supra*, said: "In the absence of some special statutory authority therefor, it is a familiar rule that an injunction will not issue to restrain the commission of an act constituting a misdemeanor punishable under the criminal statutes, where no property rights of the complainant are involved."

It was held also in *Barry v. State* (Tex.) *supra*, that the complaint did not contain sufficient allegations that the defendant was conducting a moving picture show on Sunday in violation of statute, it being alleged merely that he was charged in a certain pending criminal case with operating a moving picture show on Sunday, and

that he would continue to carry on the business in violation of the state law unless restrained. The court said: "By article 302 of the Penal Code of the state, it is made a misdemeanor punishable by fine for anyone to conduct on Sunday a place for public amusement where an admission fee is charged. But, while the petition contains the allegation that an information has been filed against Barry as a basis for criminal prosecution for the offense mentioned, there is no allegation that he has in fact been engaged in operating a moving picture show on Sunday and charging admission fees thereto. The allegation to the effect that Barry 'will continue to carry on said business in violation of the law of the state, unless restrained by your Honor,' is a mere conclusion of the pleader without stating the facts which would constitute such a violation of the criminal statute. The absence of any allegation of fact showing that Barry was conducting a moving picture show on Sunday in violation of the criminal statute would, of itself, render the petition for injunction wholly insufficient as a basis for the writ that was issued, even though it could be said that an injunction will lie to restrain a violation of that criminal statute."

It was held in *Lyric Theatre v. State* (*Carrell v. State*) (1911) 98 Ark. 437, 33 L.R.A. (N.S.) 325, 136 S. W. 174, *supra*, that equity would not enjoin the operation of a moving picture theater on Sunday on the ground that it was a public nuisance in that it was a violation of the Sunday laws, and tended to bring together a lawless and turbulent assemblage of people contrary to the criminal laws of the state, where neither the civil or property rights or privileges of the public, nor the public health, was affected. It will be observed that this case presents the question whether injunction will lie at the suit of the state against a public nuisance which is also a crime. This question is, of course, broader than the scope of the present note, arising in other cases than those involving Sunday laws, but attention is called to the fact that there are

numerous cases holding that injunction will lie, under certain circumstances, to prevent the commission of acts which are public nuisances, even though they may also constitute violation of the criminal laws.

In *Green v. Piper* (1912) 80 N. J. Eq. 288, 84 Atl. 194, supra, the court said: "Courts of equity, on proper occasion, interfere to protect property rights, and for this purpose sometimes interfere when the acts complained of are crimes; but they never exercise a jurisdiction based solely on the right of a suitor or citizen to prevent the commission of a crime or its continuance."

As is indicated in the quotation in the last case, the mere fact that the acts complained of may be of a criminal or quasi criminal nature, because in violation of Sunday laws, will not prevent relief by injunction on the ground of nuisance, where the right to such relief on the latter ground is clearly made out. *Gilbough v. West Side Amusement Co.* (1902) 64 N. J. Eq. 27, 53 Atl. 289 (baseball), approved in *Seastream v. New Jersey Exhibition Co.* (1904) 67 N. J. Eq. 178, 58 Atl. 532 (same); *Dunham v. Binghamton & L. Baseball Asso.* (1904) 44 Misc. 112, 89 N. Y. Supp. 762 (same).

It was said in *Gilbough v. West Side Amusement Co.* (N. J.) supra, that "whenever a private right is invaded and this court is called upon to protect it, and a proper case is made out, this court is bound to give the remedy, without regard to the criminal or quasi criminal character of the act complained of."

In *Dunham v. Binghamton & L. Baseball Asso.* (N. Y.) supra, the court said: "When a Sabbath entertainment works mischief, annoyance, or injury to a community, by being in such close proximity to residential parts of a city or village, if the individual sustains special damages, different from the damage to the whole public, he may maintain an action and have an injunction to restrain that entertainment." The question involved in this case was the right of residents and property owners in the vicinity of a baseball park to restrain the play-

ing of baseball therein on Sunday, on the ground that the plaintiffs would suffer from the noise, confusion, and public parade incident to the games, and that their property would be depreciated in value, by a violation of the statute against Sunday playing. The court denied a motion to dissolve a preliminary injunction, reserving decision on the merits until the trial, since no serious damage or inconvenience would be sustained by the defendants by the continuance of the injunction in the meantime.

But in *McMillan v. Kuehnle* (1910) 78 N. J. Eq. 251, 78 Atl. 185, it was held that an order directing the issue of a preliminary injunction to restrain the playing of Sunday baseball should be reversed, because the complainants, who sought relief on the ground that the noise of the crowds created a special nuisance to their dwellings, about two blocks from the baseball grounds, did not make out a case within the rule that the damage which it is legitimate to prevent during the pendency of a suit, by a preliminary injunction, must be of an irreparable character. The court stated that the rule that a preliminary injunction will not be allowed when the injury resulting from the invasion of the complainant's right is not irreparable is equally controlling where the writ is sought for the protection of one's dwelling house against nuisances which render it uncomfortable, as where it is sought for the protection of his other personal or property rights. The case distinguishes *Cronin v. Bloemcke* (1899) 58 N. J. Eq. 313, 43 Atl. 605, in which it was held that a prima facie case was made out sufficient to warrant the granting of a preliminary injunction to restrain the playing of Sunday baseball on premises adjoining those of the complainant, in such a manner as would be a nuisance to him, either by the dropping of balls on the complainant's premises or by the use of profane or indecent language on the baseball grounds.

The fact that noise from the playing of Sunday baseball may amount to a public nuisance does not prevent a court of equity from enjoining the

same at the suit of near-by residents specially injured thereby. *Gilbough v. West Side Amusement Co.* (1902) 64 N. J. Eq. 27, 53 Atl. 289. To a similar effect, see *Cronin v. Bloemecke* (N. J.) *supra*. And the rule is approved in *Seastream v. New Jersey Exhibition Co.* (1904) 67 N. J. Eq. 178, 58 Atl. 532.

It was held in *Seastream v. New Jersey Exhibition Co.* (N. J.) *supra*, that the evidence was sufficient to entitle near-by residents to a preliminary injunction restraining the playing of Sunday baseball, on the ground of a nuisance arising from the noise and unruly conduct of the crowds in attendance on and going to and from the games. And although there may be other cases on this point, which is broader than the scope of the present note, attention is called to the fact that it was held also in this case that the complainants were not estopped from obtaining the injunction to restrain the playing of baseball on Sunday, on the ground that for several years previous they had acquiesced in the playing of baseball on Sunday on the same ground, by sundry persons who, without charge, played the game for the amusement of any who might desire to observe; since there was no responsible person against whom the complainants could have proceeded, and, even if there had been an available remedy, the state of affairs was entirely changed when the defendant, a corporation, obtained exclusive possession and fenced in the grounds, erected seats and a grand stand, and invited baseball clubs to play for an admission fee.

A barber who closed his shop on Sunday, it was held in *York v. Ysa-guirre* (1902) 31 Tex. Civ. App. 26, 71 S. W. 563, could not enjoin a competitor from keeping his barber shop open on Sunday in violation of a Sunday law, on the ground that the complainant's customers would patronize the latter's shop and the complainant thus be deprived of his fair share of the public patronage. The court said: "There is in the petition no allegation that property rights of appel-

lant have been invaded, and it is apparent that the design is to restrain the violation of a penal statute because such infraction of law is supposed to give the violator some advantage over appellant in the occupation followed by each of them. It is an attempt to secure the aid of a court of equity to restrain a violation of a criminal law, not because the violator has invaded the property rights of complainant, but because such a violation will give the criminal an advantage over his competitor in business. We do not think a court of equity can lend its aid in any such case."

Attention is called to the fact, without attempting to cover the question as to what acts committed on Sunday may, apart from Sunday laws, amount to a nuisance, that it seems that noises which would not be declared to be nuisances on week days may be such on Sunday, so as to entitle the party injured to the remedy of injunction. *Gilbough v. West Side Amusement Co.* (N. J.) *supra*, holding, however, that the person injured is not entitled to an injunction because the Sunday laws have declared the making of such noises to be unlawful, but because they substantially interfere with his quiet enjoyment of the Sabbath as a day of rest; the fact that the noises do not tend to any useful purpose, but are in fact forbidden by the state laws, removes any excuse therefor, and, while in the class of cases of nuisances arising out of lawful trades, the question of degree of noise sufficient to warrant the granting of an injunction is of great importance, this question has little, if any, application, in the case of noises made on Sunday by such causes as a baseball game.

The scope of the note does not include cases on the question whether public officers can be enjoined from enforcement or attempted enforcement of Sunday laws. For example, see *Moore v. Owen* (1908) 58 Misc. 332, 109 N. Y. Supp. 585; *Eden Musec American Co. v. Bingham* (1908) 125 App. Div. 780, 110 N. Y. Supp. 210; *Shepard v. Bingham* (1908) 125 App. Div. 784, 110 N. Y. Supp. 217; *Suess-*

kind v. Bingham (1908) 125 App. Div. 793, 110 N. Y. Supp. 216, and 787, 110 N. Y. Supp. 213; Olympic Athletic Club v. Bingham (1908) 125 App. 32 N. Y. Supp. 1087. R. E. H.

JOHN R. KELLY, Appt.,
v.

FIRST STATE BANK of Rothsay, Minnesota, et al., Respts.

Minnesota Supreme Court — April 16, 1920.

(— Minn. —, 177 N. W. 347.)

Slander of title — what is.

1. The utterance of false and malicious statements, disparaging the title to property in which one has an interest, if the statements are untrue and cause damage, constitutes slander of title. Maliciously filing for record an instrument known to be inoperative is a false and malicious statement within the rule, but where a man does no more than file for record an instrument which he has a right to file, he commits no wrong.

[See note on this question beginning on page 931.]

— recording mortgage.

2. Defendant advanced \$1,500 to Jass on a second mortgage on land. The mortgage was fully executed by Jass and delivered to the bank. His wife was to call later and execute it. While it was held for that purpose, Jass and wife conveyed to plaintiff, by deed which was recorded. Jass told defendant that plaintiff was advised of defendant's mortgage. Defendant

thereupon recorded its mortgage and thereby, plaintiff claims, caused him damage. If defendant had lost its mortgage lien, then the question whether the recording of the mortgage was a wrong depended on the question whether the act was done in good faith. There is no evidence of bad faith. Defendant was within its rights in placing its second mortgage on record.

Headnotes by HALLAM, J.

APPEAL by plaintiff from a judgment of the District Court for Wilkin County (Flaherty, J.) in favor of defendants in an action brought to recover damages for alleged slander of title. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. George D. Smith and W. S. Lauder for appellant.

Mr. Lewis E. Jones, for respondents:

Plaintiff, to recover in an action for slander of title, must show the words were maliciously published.

Odgers, Libel & Slander, Eng. ed. 1887, § 142, p. 109; Butts v. Long, 106 Mo. App. 313, 80 S. W. 313; Steward v. Young, L. R. 5 C. P. 126, 39 L. J. C. P. N. S. 85, 22 L. T. N. S. 168, 18 Week. Rep. 492; Smith v. Spooner, 3 Taunt. 246, 128 Eng. Reprint, 98, 12 Revised Rep. 645, 9 Eng. Rul. Cas. 173; Hargrave v. Le Breton, 4 Burrow, 2,422, 98 Eng. Reprint, 269; Like v. McKinsstry, 41 Barb. 186.

9 A.L.R.—59.

A claim of title to property, asserted in good faith, will not constitute an actionable slander of title.

Walden v. Peters, 2 Rob. 331, 38 Am. Dec. 213; Bailey v. Dean, 5 Barb. 297; Harriss v. Sneed, 101 N. C. 273, 7 S. E. 801.

Good faith is the test, and not a belief such as a man of sense and knowledge would form.

Pitt v. Donovan, 1 Maule & S. 639, 105 Eng. Reprint, 238, 14 Revised Rep. 535.

As a matter of law an action for slander of title cannot be maintained for statements causing the breach by a third party of a valid contract to purchase plaintiff's property.

Burkett v. Griffith, 90 Cal. 532, 13 L.R.A. 707, 25 Am. St. Rep. 151, 27 Pac. 527; 2 L.R.A. Extra Ann. 707; Moore v. Rolin, 89 Va. 107, 16 L.R.A. 625, 15 S. E. 520.

Hallam, J., delivered the opinion of the court:

In November, 1917, Herman Jass owned a farm in Wilkin county subject to two mortgages. Jass borrowed \$1,500 from defendant bank to take up the second mortgage, and it was used for that purpose. To evidence the loan, he gave the bank his note for the amount, and to secure it signed and acknowledged a mortgage upon the land. Jass was married, but his wife was ill in Iowa. It was agreed that she would later call at the bank and execute the mortgage. In the meantime the mortgage was not recorded. In this situation Jass conveyed the land to plaintiff by warranty deed subject only to the "recorded mortgage thereon." This deed was recorded March 8th. On March 14th plaintiff notified defendant Peterson, president of the bank, by telephone, of the conveyance to him. Peterson at once called on both Jass and plaintiff. Jass told him he had told plaintiff about the bank's mortgage and that plaintiff was to take care of it. Plaintiff, on the other hand, insisted that he knew nothing of the mortgage until after he had paid the consideration for the land and recorded his deed. In this situation, Peterson sought the advice of a lawyer, and, on his advice, recorded the bank's mortgage without the signature of Mrs. Jass.

Shortly thereafter plaintiff negotiated a sale of the land at a profit. The purchaser learned of this mortgage, not from the record, but from plaintiff himself, and refused to close the sale.

Thereupon plaintiff brought this action to recover damages for slander of title. The trial court directed a verdict for defendant. Plaintiff appeals.

1. Utterance of false and malicious statements, disparaging the title to

property in which one has an estate or interest, if the statements are un-^{slander of title—}what is. true and cause damage, constitutes slander of title.

Burkett v. Griffith, 90 Cal. 532, 13 L.R.A. 707, 25 Am. St. Rep. 151, 27 Pac. 527; Moore v. Rolin, 89 Va. 107, 16 L.R.A. 625, 15 S. E. 520, 25 Cyc. 558, 559. See Wilson v. Dubois, 35 Minn. 471, 59 Am. Rep. 335, 29 N. W. 68. Filing for record an instrument known to be inoperative is a false statement within the rule, and if done maliciously it is regarded as slander of title. Collins v. Whitehead (C. C.) 34 Fed. 121; Coffman v. Henderson, 9 Ala. App. 553, 63 So. 808; Harriss v. Sneed, 101 N. C. 273, 7 S. E. 801; May v. Anderson, 14 Ind. App. 251, 42 N. E. 946. It is clear, however, that if a man does no more than file for record an instrument which he has a right to file, he commits no wrong. We think such is the case here.

2. We may assume that plaintiff's claim that he had no notice of defendant's mortgage is true, and that Jass's story that he had told plaintiff of it is false. The fact is, defendant bank had advanced \$1,500 on the strength of this mortgage. As far as concerned Herman Jass, the mortgage was complete. He had made delivery of it, received the money which it was given to secure. He could not have recalled it. We find no evidence that his wife's signature was to be a condition to its binding force upon him. It was a lien upon his interest, though not upon his wife's. Coles v. Yorks, 31 Minn. 213, 17 N. W. 341; Weitzner v. Thingstad, 55 Minn. 244, 56 N. W. 817. No wrong upon him would have been done had defendant recorded the instrument at any time after he had executed it.

Defendant, of course, wanted the signature of Mrs. Jass in order that her interest might be bound, and was trustfully holding it for that purpose. While so doing a palpable fraud was perpetrated upon defendant by someone. Its president knew

(— *Minn.* —, 177 N. W. 347.)

that either plaintiff or Jass had perpetrated the fraud. Each claimed the other to be guilty. It had a bona fide lien supported by a bona fide consideration, admittedly unpaid, and still of force unless defeated by the prior record of plaintiff's deed. It stood in danger of losing its security, if it had not already done so. If defendant had lost the lien of its mortgage, then the question whether the recording of it was a wrong depended on the question whether the act was done in good faith. *Odgers, Libel & Slander*, pp. 80, 84, 87; *Harriss v. Sneed*, 101 N. C. 273, 7 S. E. 801. We find no evidence of

bad faith. We think defendant was within its rights in acting on the assurance of Jass that plaintiff had notice of its mortgage. Good faith did not require that it determine the question of veracity between Jass and plaintiff or act at its peril. We think defendant's president acted as the average man of sound business morals would or might have acted under the same circumstances, and that his conduct did not render defendant liable.

Order affirmed.

Petition for rehearing denied.

ANNOTATION.

Recording of instrument purporting to affect title as slander of title.

The few cases in which the question has been considered are in accord with the reported case (*KELLY v. FIRST STATE BANK*, ante, 929), wherein it is held that the malicious filing for record an instrument known to be inoperative is a false statement constituting slander of title, but that if a person does no more than file for record an instrument which he has a right to file, he commits no wrong. *Collins v. Whitehead* (1888) 34 Fed. 121; *Coffman v. Henderson* (1913) 9 Ala. App. 553, 63 So. 808; *Atchafalaya Land Co. v. Brownell-Drews Lumber Co.* (1912) 130 La. 657, 58 So. 500, Ann. Cas. 1913C, 1358; *New Orleans Land Co. v. Slattery* (1919) 145 La. 256, 82 So. 215; *Chesebro v. Powers* (1889) 78 Mich. 472, 44 N. W. 290; *Smith v. Autry* (1917) — *Okla.* —, 169 Pac. 623.

Compare *Ontario Industrial Loan & Invest. Co. v. Lindsey* (1883) 3 Ont. Rep. 66.

In *Coffman v. Henderson* (1913) 9 Ala. App. 553, 63 So. 803, the alleged slander of title consisted of the filing by the defendant of a certain notice or declaration of lien, which he claimed for work and labor on a building on the plaintiff's property. A demurrer to the complaint was sustained because of the absence in the complaint of any allegation of malice, the court

saying: "Even though false, if the defendant had probable cause for believing his statement, there can in law be no malice; and, though the fact that there was a want of probable cause for believing the statement is evidence of malice, it is not conclusive of its existence, nor its legal equivalent."

In *Collins v. Whitehead* (1888) 34 Fed. 121, the plaintiff entered into negotiations with the defendants which resulted in a proposition to sell certain land to the defendants. A deed was sent to a bank, to be delivered to the defendants on payment of the purchase price. The defendants, claiming to have discovered a defect in the title, did not take the property within the time specified by the agreement, but applied to the plaintiff for an extension of time, which request was refused. Subsequently the defendants, wilfully and without cause, filed in the office of the recorder of deeds a paper which stated that they had "bargained for and bought" the property of the plaintiff, and that they claimed the right to enforce the contract. It was held that the plaintiff was entitled to recover as for defamation of title.

The plaintiff in *Atchafalaya Land Co. v. Brownell-Drews Lumber Co.* (1912) 130 La. 657, 58 So. 500, Ann.

Cas. 1913C, 1358, claimed that the defendant company had caused a certain title to property to be recorded in the office of the parish clerk, thereby slandering the plaintiff's title and causing damage to the extent of \$500. On appeal a judgment for the defendant was set aside and the registry of the title by the defendant canceled, but as the defendant acted without malice and in good faith, no damages were allowed.

In *Smith v. Autry* (1917) — Okla. —, 169 Pac. 623, the defendants in error, in order to secure a loan from the plaintiff in error, executed a mortgage on certain lots owned by them. It was later discovered that the plaintiff in error had filed of record in the office of the register of deeds a warranty deed purporting to have been executed by the defendants and purporting to be an absolute conveyance of said property. This was held to be sufficient to warrant a recovery for the damages sustained.

In *New Orleans Land Co. v. Slattery* (1919) 145 La. 256, 82 So. 214, the defendant Slattery was a stockholder in a certain development company which made an attempt to merge itself with the plaintiff corporation. The defendant brought suit and by injunction prevented the merger. The development company was then dissolved, and liquidating commissioners were appointed who sold its property to the plaintiff. The defendant thereupon brought suit to annul the dissolution and the sale. Notices of the pendency of both of the two suits mentioned were recorded in the mortgage office in the parish. The second suit was dismissed, and Slattery caused the notices of pendency to be canceled from the mortgage records. The plaintiff brought suit for slander of title, contending that its property had depreciated by reason of the filing of the notices of pendency. The court held, that in view of the fact that the defendant in the first suit acceded to Slattery's demand, and that in the second suit Slattery acted on the advice of highly respected attorneys, whose opinion of the justness of his demand was afterwards shared by two judges who heard and considered the

cause, it could not be said that he acted without probable or reasonable cause in starting the suits, and hence he was well within his rights in filing the notices of pendency.

In *Chesebro v. Powers* (1889) 78 Mich. 472, 44 N. W. 290, which was an action for the slander of the plaintiff's title to certain property, the defamatory words were contained in a recital in a deed which the defendants had caused to be executed and recorded. The action was grounded on the statements contained in the deed and the claims made from time to time that the statements were true. A decree in chancery had previously removed the cloud from the plaintiff's title, and the latter claimed damages for the time and expense to which he was put in preparing his case and obtaining the chancery decree. A judgment in favor of the defendants was reversed, the court saying: "The court was also in error in rejecting the testimony offered on the question of damages. The taxable costs in the chancery case may have fallen far short of compensating the plaintiff for all the costs and expenses he was necessarily put to in that proceeding. The rules as to taxable costs limit the amount to be recovered by the prevailing party, and may in many instances fall far short of full and complete recompense for an injury done from bad motives. Whether the defendants were actuated by malice, and wrongfully and wilfully asserted the claim without just cause or excuse, is a question of fact for the jury. But the court excluded the plaintiff's testimony upon this question. If, upon the proofs, the jury found that the defendants acted maliciously, and under a claim which they knew to be false, for the purpose of vexing and harassing the plaintiff, and thereby compel him to a settlement of a claim which they knew to be wrongful, then the plaintiff would not be limited to his taxable costs, and any other reasonable outlay by him in removing the cloud from his title would be damages for which he could recover."

In *Ontario Industrial Loan & Invest.*

Co. v. Lindsey (1888) 8 Ont. Rep. 66, it appeared that the defendants, Shaw and Caston, prepared a claim to certain lands and filed the same with the defendant Lindsey, registrar of the city of Toronto. The registry laws

did not permit the recording of such a document, and the court held that an action would lie to remove the cloud from the title, but as there was an absence of malice, only nominal damages could be recovered. R. G. R.

L. B. FARLEY

v.

CRYSTAL COAL & COKE COMPANY et al., Plffs. in Err.

West Virginia Supreme Court of Appeals—February 17, 1920.

(— W. Va. —, 102 S. E. 265.)

Joint debtors — tort-feasors acting independently.

1. Two or more tort-feasors acting independently, without concert, collusion, or pursuit of a common design, in the perpetration of like wrongful acts at the same time, working like injury to the same subject, are not jointly liable for injury subsequently resulting to any person from combination of the consequences of such wrongful acts by the operation of natural causes.

[See note on this question beginning on page 939.]

— joint liability.

2. In the case of wholly independent action of tort-feasors, there is no joint liability, nor liability of one of them for entire damages, except in those instances in which the injury results immediately or directly from the coincident and contemporaneous wrongful acts.

[See 26 R. C. L. 763.]

— pollution of stream.

3. Two or more persons who, acting separately and independently, have wrongfully cast in a stream coal, cinder, and other materials and polluted and defiled it, in consequence of which the property of a riparian owner has been injured and damaged, are not jointly liable for the damages so wrought, nor is any one of them liable for such damages in their entirety.

[See 26 R. C. L. 764.]

Decision overruled.

4. In so far as the decision in *Day v. Louisville Coal & Coke Co.* 60 W. Va. 27, conflicts with the propositions above stated, it is disapproved and overruled.

Pleading — failure to show joint liability.

5. Failure of a declaration against several tort-feasors, joined in one ac-

tion, to show any ground of joint liability, is good cause of demurrer thereto for misjoinder of parties.

[See 21 R. C. L. 525.]

Appeal — insufficiency of declaration — reversal.

6. If on such a declaration there has been a verdict and judgment for the plaintiff, the appellate court, on writ of error, will reverse the judgment, set aside the verdict, and remand the case, with leave to the plaintiff to amend his declaration so as to show a joint right of action, if he desires to do so, or to prosecute his action against one of the defendants and dismiss it as to the others.

[See 2 R. C. L. 286.]

Trial — motion to set aside verdict.

7. If, in an action against two or more tort-feasors, the proof shows they acted separately and independently, in the perpetration of the wrongful acts alleged and proved against them, and the injury the plaintiff has suffered from such acts is a merely consequential result of the coincident and contemporaneous torts, and not a direct and immediate one, a motion to set aside a verdict for the plaintiff therein, as being contrary to the law and the evidence, should be sustained.

ERROR to the Circuit Court for Mercer County to review a judgment in favor of plaintiff in an action brought to recover damages alleged to have been caused by the wrongful pollution of the waters of a river resulting in injury to his lands. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. John R. Pendleton and Reynolds & Reynolds, for plaintiffs in error:

There was a misjoinder of defendants, who are separate corporations, operating independently of each other and engaged in lawful occupation.

Pulaski Anthracite Coal Co. v. Gibboney Sand Bar Co. 110 Va. 444, 24 L.R.A.(N.S.) 1185, 66 S. E. 73; Mansfield v. Bristol, 76 Ohio St. 270, 10 L.R.A.(N.S.) 806, 118 Am. St. Rep. 852, 81 N. E. 631, 10 Ann. Cas. 767; Miller v. Highland Ditch Co. 87 Cal. 430, 22 Am. St. Rep. 254, 25 Pac. 550; Chicago & N. W. R. Co. v. Hoag, 90 Ill. 339; Babbitt v. Safety Fund Nat. Bank, 169 Mass. 361, 47 N. E. 1018; Sloggy v. Dilworth, 38 Minn. 179, 8 Am. St. Rep. 656, 36 N. W. 451; Martinowsky v. Hannibal, 35 Mo. App. 70; Watson v. Colusa-Parrot Min. & Smelting Co. 31 Mont. 513, 79 Pac. 14; Chipman v. Palmer, 77 N. Y. 52, 33 Am. Rep. 566; Tennessee Coal, I. & R. Co. v. Hamilton, 100 Ala. 252, 46 Am. St. Rep. 48, 14 So. 167; Loughran v. Des Moines, 72 Iowa, 382, 34 N. W. 172; Blaisdell v. Stephens, 14 Nev. 17, 33 Am. Rep. 523, 7 Mor. Min. Rep. 599; Upson*Coal & Min. Co. v. Williams, 75 Ohio St. 644, 80 N. E. 1134; Seely v. Alden, 61 Pa. 306, 100 Am. Dec. 642.

The river has become a common sewer by prescription.

Cleveland v. Standard Bag & Paper Co. 72 Ohio St. 324, 106 Am. St. Rep. 613, 74 N. E. 206, 3 Ann. Cas. 21; Wooldridge v. Coughlin, 46 W. Va. 345, 33 S. E. 233; Eells v. Chesapeake & O. R. Co. 49 W. Va. 65, 87 Am. St. Rep. 787, 38 S. E. 479; Boyd v. Woolwine, 40 W. Va. 282, 21 S. E. 1020; Rogerson v. Shepherd, 33 W. Va. 307, 10 S. E. 632; Lucas v. Smithfield, C. & H. T. Turnp. Co. 36 W. Va. 427, 15 S. E. 182.

Messrs. John M. McGrath and Hugh G. Woods, for defendant in error:

Where the negligence of two or more persons, acting independently, concurrently results in the injury to a third, the latter may maintain his action for the entire loss against any one or all of the negligent parties.

21 Am. & Eng. Enc. Law, 2d ed. 496; 15 Am. & Eng. Enc. Law, 557; Whar-

ton, Neg. § 144; Shearm. & Redf. Neg. 4th ed. § 122; Cooley, Torts, p. 79; Grand Trunk R. Co. v. Cummings, 106 U. S. 700, 27 L. ed. 266, 1 Sup. Ct. Rep. 493; Slater v. Mersereau, 64 N. Y. 138; Boyd v. Watt, 27 Ohio St. 259; Johnson v. Chapman, 43 W. Va. 639, 28 S. E. 744; Day v. Louisville Coal & Coke Co. 60 W. Va. 27, 10 L.R.A.(N.S.) 167, 53 S. E. 776.

The sewage of the city of Bluefield and the sewage from other cities and towns may have been cast upon Bluestone river for many years prior to the institution of this suit, without any objection on the part of the plaintiff, but that fact does not constitute said river a common sewer by prescription at the point where said river passes through his lands.

Eells v. Chesapeake & O. R. Co. 49 W. Va. 65, 87 Am. St. Rep. 787, 38 S. E. 479; Day v. Louisville Coal & Coke Co. 60 W. Va. 27, 10 L.R.A.(N.S.) 167, 53 S. E. 776.

Private property cannot be taken or damaged, even for public purposes, without just compensation.

Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 665, 22 L. ed. 461.

Poffenbarger, J., delivered the opinion of the court:

The judgment complained of, amounting to \$1,650, stands upon a declaration in an action against six different coal mining corporations, whose mines and works are located at different places on tributaries of the Bluestone river, charging them with having polluted and defiled said river, by casting into it directly and indirectly cinder, coal, slag, and other materials from their mines and coke ovens, and fetid and putrid matter from their tenant houses and privies, and so altered its condition by means of such deposits as to cause more frequent and disastrous overflows of the bottom lands along its course, the filling up of its bed, narrowing of its channel, and deposits on its shores, and with having injured and damaged the plaintiff's farm by such means. A demurrer

to the declaration was overruled and is relied upon in the assignments of error. If it was well taken and should result in a reversal, it will be unnecessary to consider all of the other numerous assignments of error.

The coal works of three of the defendants are located on Crane creek, those of one of them on Flipping creek, and those of the other two on Widemouth creek. All of these streams flow into the Bluestone river at distances above the location of the plaintiff's farm not stated in the declaration. The deposits of the river, according to the allegations in the declaration, have filled up practically all of the holes in the stream, narrowed its channel, cast great quantities of cinder, coal, and sand over portions of its bottom lands, made heavy deposits along its shores, destroyed the plaintiff's fords of the river, by means of which he went from one part of his farm to another, caused mucky deposits along the shores of the stream, preventing cattle from going to it with safety for water, and on the edges of the bottom lands of plaintiff's farm increased the frequency and volume of overflows of the bottom lands, turned the waters black and so polluted them that they are unfit for use, and otherwise injured and damaged the plaintiff's farm. There is no allegation that the defendants acted in concert, collusion, or pursuit of a common design in the performance of the acts which are alleged to have injured and defiled the stream and damaged the plaintiff's land. It simply alleges that they did the specified wrongful acts, and that the injury and damage to the plaintiff's land resulted therefrom.

For legal justification of joinder of these defendants in one action and right to recover upon a declaration so framed, the plaintiff relies upon the decision of this court rendered in *Day v. Louisville Coal & Coke Co.* reported in 60 W. Va. at page 27, 10 L.R.A. (N.S.) 167, 53 S. E. 776. That action was prosecuted against a

single coal mining corporation, one of the defendants in this action, by the owner of another farm situated on the same stream, for injury and damage thereto by reason of acts of the same kind as those alleged in this declaration. But joint and several liability of all persons and corporations guilty of the wrongful acts charged in the declaration was asserted and adjudicated in that action in the determination of the extent of the liability of the defendant therein. It was held to be liable for the entire damages to his farm, wrought by the consequences of the acts of the defendant and all other persons and corporations whose wrongful acts of like kind had combined with those of the defendant in the infliction thereof. The substance of the court's conclusion respecting that phase of the case is embodied in point 2 of the syllabus, reading as follows: "When the negligent acts of two or more persons, though acting independently of each other, concurrently result in injury to the property of another, they are liable either jointly or separately."

In this case the soundness of that decision is questioned by the demurrer to the declaration, and also by the motion to set aside the verdict. The lack of concert, collusion, common design, or any other element of connection among the defendants is clearly revealed by the evidence. They are wholly independent concerns operating at different points on the tributaries of the river.

A careful examination of the opinion delivered in the case above referred to (*Day v. Louisville Coal & Coke Co.*) readily discloses failure on the part of the court to observe and apply a well-defined and firmly grounded exception to the general rule of liability of joint tort-feasors given in the opinion, or, stated more accurately, a limitation of the rule of joint liability and liability for entire damages. This exception or limitation is that there is no joint liability nor liability for entire damages when the tort-feasors act inde-

pendently, without concert, collusion, or common design, and the injury to the plaintiff is consequential only, or remotely resulting, as contradistinguished from direct and immediate. The rule as quoted in the opinion from Shearman & Redfield on Negligence puts in this element of directness, saying: "Persons who co-operate in an act directly causing injury are jointly liable for its consequences."

Nor does Cooley on Torts, 3d ed. vol. 1, p. 119, in the quotation from it, omit this element. It says: "If the damage has resulted directly from concurrent wrongful acts or neglects of two persons, each of these acts may be counted on as the wrongful cause, and the parties held responsible, either jointly or severally, for the injury."

The same quotation from Shearman & Redfield is found in *Boyd v. Watt*, 27 Ohio St. 259, and the opinion filed in that case puts in the element of directness, saying: "Where separate and independent acts of negligence of two parties are the direct causes of a single injury to a third person, and it is impossible to determine in what proportion each contributed to the injury, either is responsible for the whole injury." [*Slater v. Mersereau*, 64 N. Y. 138].

The decisions cited and relied upon in the opinion in *Day v. Louisville Coal & Coke Co.* all involved cases of direct injury by the wrongful acts complained of. In *Boyd v. Watt*, the action was founded upon a statute giving right of action against any person who had caused intoxication of another person, to the injury and damage of the plaintiff. The defendant undertook to limit his liability on the ground of contribution to the result by other persons, without his knowledge or consent. In its disposition of the case the court said: "If the defendant was using the means calculated to produce the injury, the law presumes he intended to produce it. If others, with or without concert, were concurrently

co-operating with him, using like means, they were acting with the same common design, and if the injury resulted, each is liable, though each was acting without the knowledge of what the other was doing."

It is to be observed that the unlawful act was done directly and immediately to the subject of the injury, the person to whom the liquor was unlawfully sold. The intoxication constituting the groundwork of the action was the immediate and direct consequence of the result of the unlawful act. In the opinion of the court it was not a case of direct injury to one subject resulting in consequential injury to another. In *Johnson v. Chapman*, 43 W. Va. 639, 28 S. E. 744, the injury was the direct and immediate result of the wrongful act. Two contiguous buildings had fallen upon a third because of the coexistent and concurring negligence of the separate owners to keep their separate walls in repair. They caused or permitted their buildings to fall upon that of the plaintiff and inflict immediate and direct injury upon it. In *Grand Trunk R. Co. v. Cummings*, 106 U. S. 700, 27 L. ed. 266, 1 Sup. Ct. Rep. 493, the injury was inflicted by a collision of railway trains, wherefore it was necessarily immediate and direct.

Viewed from a merely practical standpoint, this distinction may not be important. Whether inflicted directly or immediately by the joint, coincident, or contemporaneous action of the wrongdoers, or effected by combination of the consequences arising from the wrongful acts, the injury is equally serious, and the difficulty of apportioning the responsibility among the wrongdoers equally great. Nevertheless the courts and text-writers, looking at it from a legal point of view, all regard it as important. It is marked in the edition of Shearman & Redfield on Negligence published in 1898. In § 123 of that edition it said that persons who act separately, each causing a separate injury, cannot be made jointly liable, even though the in-

Joint debtors—
tort-feasors
acting
independently.

juries thus committed are all inflicted at one time and are precisely similar in character, and in the note appended to that section cases of several different classes, sustaining the proposition and decided by the courts of various states, are cited. Among them are cases of the class of this one, injury by pollution and defilement of streams. In each of them the subject of the injury was different from that upon which the wrongful acts were directly inflicted. Another class involves cases of infliction of injury by animals of different owners, though occurring at the same time and as part of a single transaction. The cases cited for this proposition in that work and others are to be found in the note to *Day v. Louisville Coal & Coke Co.* in 10 L.R.A.(N.S.) 167, 169, among them being *Partenhimer v. Van Order*, 20 Barb. 479; *Westgate v. Carr*, 43 Ill. 450; *Cogswell v. Murphy*, 46 Iowa, 44. Another class of cases asserting the same doctrine and put under the same exception to the rule are those involving actions for injuries inflicted by dogs owned by different persons, at the same time and as a single transaction. *Van Steenburgh v. Tobias*, 17 Wend. 562, 31 Am. Dec. 310; *Russell v. Tomlinson*, 2 Conn. 206; *Adams v. Hall*, 2 Vt. 9, 19 Am. Dec. 690; *Auchmuty v. Ham*, 1 Denio, 495; *Buddington v. Shearer*, 20 Pick. 477; *Dyer v. Hutchins*, 87 Tenn. 198, 10 S. W. 194; *State, Nierenberg, Prosecutor, v. Wood*, 59 N. J. L. 112, 35 Atl. 654. It is to be observed that in all these cases the negligent act was not directed to the subject of the injury. It was the wrongful act of permitting the stock to go at large or of maintenance of the sheep-killing dog. In point of law there was no immediate or direct connection between the wrongful act and the injury; the latter being merely a remote consequence of the wrongful act. In the actual infliction of the injury there was no joint action of the parties. There was nothing more than a combination,

effected by natural causes, of the consequences or results of the wrongful acts, in which the parties did not act. This, of course, does not absolve them from liability, but it does away with the ground or basis of joint liability and liability for entire damages. Each is liable only for the consequences of his own wrong and must be sued alone for the damages.

The distinction between actions at law for recovery of damages and suits in equity for injunctive relief in such cases is well defined. *Draper v. Brown*, 115 Wis. 361, 91 N. W. 1001; *Lockwood Co. v. Lawrence*, 77 Me. 297, 52 Am. Rep. 763; *People v. Gold Run Ditch & Min. Co.* 66 Cal. 138, 56 Am. Rep. 80, 4 Pac. 1152; *West Arlington Improv. Co. v. Mt. Hope Retreat*, 97 Md. 191, 54 Atl. 982; *Strobel v. Kerr Salt Co.* 164 N. Y. 303, 51 L.R.A. 687, 79 Am. St. Rep. 643, 58 N. E. 142, 21 Mor. Min. Rep. 38; *Evans v. Wilmington & W. R. Co.* 96 N. C. 45, 1 S. E. 529. Precedents in cases of the latter class are inapplicable and need not be considered. A damming of the waters of a stream so as to cast them back upon the lands of an upper riparian owner by two or more persons may be a case of direct injury. *Wright v. Cooper*, 1 Tyler (Vt.) 425. If the waters are depleted or absorbed by an upper owner to the detriment of a lower, the injury may be direct. In the one case the immediate effect is to cover the injured owner's land with water, and in the other to take away what belongs to the lower owner.

An overwhelming weight of authority now stands against the decision in *Day v. Louisville Coal & Coke Co.* in so far as it authorizes a joinder of defendants upon the facts stated in the declaration in this case, and imposes liability of one of the parties for entire resultant damages, whatever it may have been at the date of rendition thereof. *Pulaski Anthracite Coal Co. v. Gibboney Sand Bar Co.* 110 Va. 444, 24 L.R.A. (N.S.) 1185, 66 S. E. 73; *Swain v.*

Tennessee Copper Co. 111 Tenn. 430, 78 S. W. 93; Miller v. Highland Ditch Co. 87 Cal. 430, 22 Am. St. Rep. 254, 25 Pac. 550; West Muncie Strawboard Co. v. Slack, 164 Ind. 21, 72 N. E. 879; Bowman v. Humphrey, 124 Iowa, 744, 100 N. W. 854; Loughran v. Des Moines, 72 Iowa, 382, 34 N. W. 172; Blaisdell v. Stephens, 14 Nev. 17, 33 Am. Rep. 523, 7 Mor. Min. Rep. 599; Chipman v. Palmer, 77 N. Y. 51, 33 Am. Rep. 566; Mansfield v. Bristol, 76 Ohio St. 270, 10 L.R.A. (N.S.) 806, 118 Am. St. Rep. 852, 81 N. E. 631, 10 Ann. Cas. 767; Little Schuylkill Nav. R. & Coal Co. v. Richards, 57 Pa. 142, 98 Am. Dec. 209; Seely v. Alden, 61 Pa. 302, 100 Am. Dec. 642; Norton v. Colusa Parrot Min. & Smelting Co. (C. C.) 167 Fed. 202. It is equally clear that a well-defined legal principle, or exception to a general principle or rule, which this court overlooked or misapprehended in the decision of that case, stands against it. In this state the development of natural resources and location of mills and factories along its numerous streams has only fairly commenced; wherefore it is highly important that the rights of riparian owners and persons conducting divers kinds of business along the watercourses, and their remedies for wrongful acts respecting them and the adjacent lands, be correctly defined. Being clearly of the opinion that the decision in the Day Case is unsound in principle and contrary to the great weight of judicial opinion, we disapprove and overrule it, in so far as it imposes liability for entire damages upon one of several wrongdoers and authorizes a joinder of defendants, in an action for damages, under the circumstances here shown.

Decision overruled.

—pollution of stream.

Reversal of the judgment and annulment of the verdict necessarily result from the conclusion just stated and the character of the evidence hereinbefore indicated.

A demurrer always lies for any substantial defect disclosed on the face of the declaration, and this is true as to parties. "If too many persons be made defendants, and the objection appear on the pleadings, either of the defendants may demur." 1 Chitty, Pl. 44.

This quotation applies only to declarations in actions ex contractu. The rule at common law in cases of delicto may not have been quite so liberal. Whether it was or not, according to Chitty, depends upon the interpretation of his language. At page 85 he says: "If several persons be made defendants jointly, where the tort could not in point of law be joint, they may demur." **Pleading—failure to show joint liability.**

There are some instances in which two or more persons can never be jointly liable for a tort, on account of its nature. This may be the class of cases to which the text just quoted applies, and it has been judicially applied to that class of cases. *Orin v. Bank of United States*, 1 Ohio, 36 13 Am. Dec. 588; *Russell v. Temlinson*, 2 Conn. 206; *McKeown v. Johnson*, 12 S. C. L. (1 McCord) 578, 16 Am. Dec. 698; but a more liberal interpretation is put upon it in *Franklin F. Ins. Co. v. Jenkins*, 2 Wend. 130, in which the defendants might have been made jointly liable upon proper allegations. These decisions are not inconsistent; the former class of cases being clearly within the text and the latter possibly so. It is to be observed that the text makes no necessary reference to the inherent character of the tort. "Where the tort could not in point of law be joint" may mean where the tort as alleged in the declaration could not in point of law be joint. This is the more reasonable interpretation, because it reconciles the terms with a basic and fundamental rule of pleading, namely, that the declaration must state a case with reasonable certainty. Here an allegation of joint or concerted action by the defendants is an essential ele-

ment of the right of recovery as claimed by the declaration. Being required in the proof, such action should be charged in the declaration. The argument of convenience also supports this conclusion. It is highly burdensome to impose upon a citizen defense against a charge not stated in the declaration, because it cannot be made good by proof. Our conclusion is that the declaration is defective, and that the defect is cognizable on demurrer.

But, inasmuch as the defendants may be severally liable in all such cases, the plaintiff should have his election to proceed against one of them in this action and dismiss it

as to the others, if he cannot truthfully charge joint action in the perpetration of the wrongs complained of. There is no good reason for requiring him to dismiss as to all of them and bring an entirely new action. It was said in *Orr v. Bank of United States*, cited, that entry of a *nolle prosequi* as to the bank would have saved the declaration on demurrer.

Appeal—
insufficiency of
declaration—
reversal.

Upon these principles and conclusions, the judgment will be reversed, the verdict set aside, the demurrer sustained, and the case remanded.

Trial—motion
to set aside
verdict.

ANNOTATION.

May acts of independent tort-feasors, each of which alone causes or tends to produce some damage, be combined to create a joint liability?

I. Introductory:

- a. In general, 939.
- b. Border line cases, 940.

II. General rule, 942.

III. Cases favoring joint liability, 944.

IV. Illustrations:

- a. Trespass for wrongful attachment or arrest, 944.
- b. Trespassing animals:
 1. Generally, 945.

1. Introductory.

a. In general.

We are without any satisfactory general rule as to when various persons acting independently may be joined in an action for damages for a tort. Probably most authorities agree that if but a single injury is the result of the independent action of various tort-feasors, all may be joined in an action for damages therefor. It has been wisely suggested as the basis of this rule that the acts or omissions of the several tort-feasors are vital causes of the injury, which cannot be apportioned. This rule, however, is not entirely satisfactory, as it is not always possible to say whether the injury is single or separable.

Our difficulties would seem to be increased, and not diminished, by the doctrine discussed in the reported case (*FARLEY v. CRYSTAL COAL & COKE CO.* ante, 933) that the test of joint liability

IV. b—continued.

2. Dogs, 946.

c. Waters:

1. Generally, 947.
2. Cases favoring joint liability, 950.

d. Emission of gases, 952.

V. Suits in equity, 952.

VI. Miscellaneous, 954.

ity is whether the injury is direct and immediate as distinguished from merely consequential; for who shall say what is direct and what consequential.

It may be that the possibility of contribution in negligence is the reason for the doctrine which is asserted in some of the cases, that independent tort-feasors are not jointly liable in cases of a wilful tort, although the act of each would by itself have been harmless to the plaintiff, which doctrine distinguishes in this respect wilful torts from negligence. See *Schafer v. Ostmann* (1910) 148 Mo. App. 644, 129 S. W. 63 (assault and battery); *Barton v. Barton* (1906) 119 Mo. App. 507, 94 S. W. 574 (alienation of spouse's affections, followed in *Heisler v. Heisler* (1911) 151 Iowa, 503, 131 N. W. 676, also a suit for alienation of spouse's affections). But the possibility of contribution in negligence is hardly a sufficient reason

for greater tenderness towards the wilful wrongdoer than towards the merely negligent.

By the weight of authority and speaking of actions at law as distinguished from equity, independent tortfeasors, the act of each of whom alone would have caused some damage, are not liable jointly, but each is liable severally only for the damage caused by him.

The doctrine which has been asserted, that the rule is otherwise in case the wrong amounts to a public nuisance, does not seem satisfactory where the injury is not single.

In this annotation the question of the joint liability of successive owners of property for nuisance maintained thereon is not included. No effort has been made to include cases against one tort-feasor which hold that he is not liable for the wrongs done by another tort-feasor, but a few of these cases are cited in illustration.

Cases under the Civil Damage Acts are excluded. Some of these acts are drawn to provide for holding the person who causes or contributes to the intoxication liable for all the damages, and for a joint action against such of the contributors as the plaintiff elects.

b. Border line cases.

As a preface to the consideration of the subject of this annotation it is advisable, if not necessary, to refer to some of what may be called border line cases.

In *Boston & A. R. Co. v. Shanly* (1871) 107 Mass. 568, where, on orders of a certain third party, each of two independent manufacturers, each ignorant of the acts of the other, sent to a common carrier for transportation a different explosive, without notice of its character, which two explosives, while to some extent dangerous in themselves, were, it seems, particularly so in combination, and an explosion of them occurred, the manufacturers were held jointly liable to the carrier therefor.

In *Wright v. Cooper* (1802) 1 Tyler (Vt.) 425, it was held that the plaintiff properly sued in trespass, for overflowing his land, the several owners of two dams, one running from the

easterly bank of a stream to an island and the other from the island to the westerly bank, where one dam alone would not have caused the injury. (But the jury found against only one of the defendants, and their verdict was sustained.)

But in *Lull v. Fox & W. Improv. Co.* (1865) 19 Wis. 101, where one defendant had dammed one channel of a river and the other defendant the other channel whereby the plaintiff's land was overflowed, it was held that a joint action against the defendants for damages could not be maintained.

In *Hill v. Smith* (1867) 32 Cal. 166, where the jury found a verdict for the defendant, the court, while refusing to set it aside, said: "Where there is a large number of persons mining on a small stream, if each should deteriorate the water a little, although the injury from the act of one might be small, the combined result of the acts of all might render the water utterly unfit for further use; and if each could successfully defend an action on the ground that his act alone did not materially affect the water, the prior appropriator might be deprived of its use, and at the same time be without a remedy."

In an action for damages and injunction against an upper riparian proprietor for pollution of the ice in the plaintiff's mill pond, the court said: "It may well have been that the quantity of pomace in the pond was insignificant and harmless until the defendant made his contribution to it. The fact that others put refuse into the brook which combined with the defendant's refuse to produce the injury would not relieve him from liability. If different persons by several acts foul the same stream, each is responsible for the results of his own wrong, and may be restrained from doing the acts for which he is chargeable." *Lawton v. Herrick* (1910) 83 Conn. 417, 76 Atl. 986.

"Each one of several, acting independently, who wrongfully permits water to waste on to the land of another, is liable for his proportionate share of the injury caused thereby, even though the water allowed to run down

by each would do no harm if not combined with that of the others, and the injury is actually caused by the combined flow wherein the waters from all sources are mixed and indistinguishable. If injury follows as the combined result of the wrongful acts of several, acting independently, recovery may be had severally against each of such independent tort-feasors, in proportion to the contribution of each to the injury." *Woodland v. Portneuf-Marsh Valley Irrig. Co.* (1915) 26 Idaho, 789, 146 Pac. 1106.

Where the acts of a number of persons in polluting a stream do not render the water unfit for the use of live stock, one who subsequently renders the water unfit for such purpose by casting substances into it which create noxious gases will be liable for the injury thus caused. *Ferguson v. Firmenich Mfg. Co.* (1889) 77 Iowa, 576, 14 Am. St. Rep. 319, 42 N. W. 448.

In an action for an injunction and damages for polluting a stream the court said: "Doubtless the defendant is not to be held for damages resulting merely from the independent acts of third persons. But it chose to discharge noxious substances into the stream and thereby so to pollute the water as to cause loss to the plaintiff. The water, as has been found, was already somewhat contaminated from other causes, so that it was not fit for drinking or domestic use. But this degree of pollution did not of itself harm the plaintiff. The fact that under other circumstances, if, for example, the water as it came to the defendant had been pure, the pollution caused by the defendant might have been less injurious to the plaintiff, is not material. In this respect, the case is like that presented when an injury has been done by a defendant, either purposely or negligently, to a plaintiff, which would not appreciably have harmed a well and normally strong man, but has more seriously affected the plaintiff by reason of some bodily weakness or infirmity peculiar to himself, as in *Coleman v. New York & N. H. R. Co.* (1870) 106 Mass. 178, 8 Am. Neg. Cas. 375. The wrongdoer takes the risk of the consequences

that may result from his injurious act. . . . Doubtless the defendant and the third party who also contaminated the stream were not joint wrongdoers." *Parker v. American Woolen Co.* (1913) 215 Mass. 176, 102 N. E. 360.

In *Blair v. Deakin* (1887) 57 L. T. N. S. (Eng.) 522, in granting an injunction against a manufacturer for polluting a stream, the court considered that it was shown that the defendant's acts alone were polluting the water, but discussed the question whether the action would lie if the pollution caused by the defendant was by itself not material, and said as to cases where the act of each alone was harmless; "I have no hesitation in saying that, in my opinion, a man so injured has distinctly a right to take the several persons who injure him in detail and to say, 'I am suffering from the combined acts of all of you; if I can prove that each one of you contributes to that result which is damaging me, I have a right to sue, and a right to ask the court to prevent each of you from sending in his contribution to that which in the aggregate does me damage.'"

In an action for a nuisance in the throwing out of clouds of smoke, soot, and gases, from a brick works, it was held error to instruct the jury that "to constitute the operation of defendant's work a nuisance, it must appear that the smoke, soot, and gas given off or emitted therefrom are such as, by themselves, considered alone, constitute a nuisance. Though it may appear that the smoke, soot, or gas given off from the defendant's works, when combined with that given off from other works or industries, did, so taken together, constitute a nuisance, yet the existence, if proven, of such a nuisance, so created, will not warrant a condemnation of the defendant's works in an action brought against it alone; the rule of law being that when one establishes works lawful in themselves, and not being in themselves a nuisance, they cannot be made a nuisance by proof that the operation thereof, combined with causes arising from the operation of other works in the vicinity, togeth-

er constitute a nuisance." The court said: "It is well settled that each person who acts in maintaining a nuisance is liable for the resulting damage. If he act independently, and not in concert with others, he is liable for the damages which result from his own act only. . . . And the fact that it is difficult to measure accurately the damage which was caused by the wrongful act of each contributor to the aggregate result does not affect the rule, nor make anyone liable for the acts of others." *Harley v. Merrill Brick Co.* (1891) 83 Iowa, 73, 48 N. W. 1000.

II. General rule.

It is a general rule that acts of independent tort-feasors, each of which causes some damage, may not be combined to create a joint liability at law for damages.

Alabama. — *Sparkman v. Swift* (1886) 81 Ala. 231, 8 So. 160.

Arkansas. — *LeLaurin v. Murray* (1905) 75 Ark. 232, 87 S. W. 131.

Colorado. — *Livesay v. First Nat. Bank* (1906) 36 Colo. 526, 6 L.R.A. (N.S.) 598, 118 Am. St. Rep. 120, 86 Pac. 102.

Florida. — *Symmes v. Prairie Pebble Phosphate Co.* (1913) 66 Fla. 27, 63 So. 1; *Standard Phosphate Co. v. Lunn* (1913) 66 Fla. 220, 63 So. 429.

Georgia. — *Howe v. Bradstreet Co.* (1911) 135 Ga. 564, 69 S. E. 1082, Ann. Cas. 1912A, 214; *Key v. Armour Fertilizer Works* (1916) 18 Ga. App. 472, 89 S. E. 593.

Illinois. — *Willard v. Red Bank Oil Co.* (1909) 151 Ill. App. 433.

Iowa. — *Wm. Tackaberry Co. v. Sioux City Service Co.* (1911) 154 Iowa, 358, 40 L.R.A. (N.S.) 102, 132 N. W. 945, 134 N. W. 1064, Ann. Cas. 1914A, 1276.

Kentucky. — *Kentucky Lumber Co. v. Hinkle* (1891) 13 Ky. L. Rep. 173; *Bonte v. Postel* (1900) 109 Ky. 64, 51 L.R.A. 187, 58 S. W. 536; *Polk v. Illinois C. R. Co.* (1917) 175 Ky. 762, 195 S. W. 129.

Massachusetts. — *Harriott v. Plimpton* (1886) 166 Mass. 585, 44 N. E. 992.

Montana. — *Howell v. Bent* (1913) 48 Mont. 268, 137 Pac. 49.

Nevada. — *Blaisdell v. Stephens*

(1879) 14 Nev. 17, 33 Am. Rep. 523, 7 Mor. Min. Rep. 599.

New York. — *Williams v. Sheldon* (1833) 10 Wend. 654.

Ohio. — *Mansfield v. Bristor* (1907) 76 Ohio St. 270, 10 L.R.A. (N.S.) 806, 118 Am. St. Rep. 852, 81 N. E. 631, 10 Ann. Cas. 767; *Columbus v. Rohr* (1907) 30 Ohio C. C. 155 (stating the rule).

Pennsylvania. — *Bard v. Yohn* (1856) 26 Pa. 482; *Little-Schuylkill Nav. R. & Coal Co. v. Richards* (1868) 57 Pa. 142, 98 Am. Dec. 209, 10 Mor. Min. Rep. 661 (stating the rule); *Eckman v. Lehigh & W. Coal Co.* (1912) 50 Pa. Super. Ct. 427 (stating the rule); *Magee v. Pennsylvania Schuylkill Valley R. Co.* (1900) 13 Pa. Super. Ct. 187.

Tennessee. — *Swain v. Tennessee Copper Co.* (1903) 111 Tenn. 430, 78 S. W. 93.

Texas. — *Sun Co. v. Wyatt* (1908) 48 Tex. Civ. App. 349, 107 S. W. 934.

West Virginia. — *FARLEY v. CRYSTAL COAL & COKE Co.* (reported herewith) ante, 933.

Wisconsin. — *Lull v. Fox & W. Improv. Co.* (1865) 19 Wis. 101.

England. — *Sadler v. Great Western R. Co.* [1896] A. C. 450, 65 L. J. Q. B. N. S. 462, 74 L. T. N. S. 561, 45 Week. Rep. 51; *Thompson v. London County Council* [1899] 1 Q. B. 840, 68 L. J. Q. B. N. S. 625, 47 Week. Rep. 433, 80 L. T. N. S. 512.

Canada. — *Austin v. Snyder* (1861) 21 U. C. Q. B. 299; *Hinds v. Barrie* (1903) 6 Ont. L. Rep. 656.

A joint action will not lie against two independent railway companies for separate acts causing the obstruction of the highway in front of the plaintiff's premises with carts and vans. *Sadler v. Great Western R. Co.* [1896] A. C. (Eng.) 450, 65 L. J. Q. B. N. S. 462, 74 L. T. N. S. 561, 45 Week. Rep. 51.

"If there are two distinct publications of the same libel, and there is no concert of action between the first and second publishers, a joint action against them will not lie." *Howe v. Bradstreet Co.* (1911) 135 Ga. 564, 69 S. E. 1082, Ann. Cas. 1912A, 214.

In *LeLaurin v. Murray* (1905) 75

Ark. 232, 87 S. W. 131, an action against two defendants for assault and battery, it was held that the court properly instructed the jury that if the defendant Murray for a reason given assaulted the plaintiff and afterwards, "without the knowledge of Murray or previous design or understanding what he should do, Peterson joined in the assault, and beat and damaged the plaintiff, then defendant Murray would not be responsible for such damage inflicted by Peterson."

In *Millard v. Miller* (1907) 39 Colo. 103, 88 Pac. 845, where a landlord, having leased premises to the plaintiff, sold one part of the premises to one purchaser and another part to another, it seems to be held that the tenant could not join the two purchasers for depriving him severally of the pasturage on the lands severally bought by them. The suit was against one purchaser and another person, probably the agent of the other purchaser, though the report is obscure on this point.

In *Thompson v. London County Council* [1899] 1 Q. B. (Eng.) 840, the lessees and occupiers of premises alleged that the defendants, in excavating the earth of the street adjoining the premises and pumping water out of the excavation, negligently abstracted subsoil water and subsoil supporting the premises, which thereby were damaged; the defendants denied the alleged negligence, and that the injuries to the premises were caused by the matters complained of; their statement of defense alleged, among other things, that the defendants would, if necessary, contend that the injuries were caused wholly or in part by the Central London Railway, which was excavating a large shaft for one of its stations close to the premises, and by the negligence or default of the New River Company in leaving its water main, at a point in front of the premises, unstopped, or insufficiently and improperly stopped. The court, in reversing an order permitting the plaintiff to join the New River Company as an additional defendant, said: "To allow that to be done would be to allow the joinder of

a separate cause of action. It is all very well to say that whatever we do the plaintiffs get the same damages. That is not the question; the question is, Who is the tort-feasor?"

An action for causing a breach of an engagement to marry will not lie against various defendants jointly when there was no conspiracy and no joint act. *Harriott v. Plimpton* (1886) 166 Mass. 585, 44 N. E. 992.

In an action for alienation of a husband's affections, it was held that "where the torts are intentional and independent of each other, though their combined influence may result in an injury," there is no joint liability. *Barton v. Barton* (1906) 119 Mo. App. 507, 94 S. W. 574. Similarly, in an action by a wife against her husband's parents for alienation of his affections, the court said: "Where the concurrent negligence of two or more persons contributes to the harm, the tort-feasors may be jointly sued, but where the torts are intentional and independent of each other, though their combined influence may result in injury, it seems that the liability is not joint." *Heisler v. Heisler* (1911) 151 Iowa, 503, 131 N. W. 676. And in *Schafer v. Ostmann* (1910) 148 Mo. App. 644, 129 S. W. 63, it was held in an action for assault and battery that "intentional torts committed independently by different tort-feasors impose no joint liability, even though their combined influence may result in an injury to the plaintiff."

The subject is not clarified by the decision in *Bard v. Yohn* (1856) 26 Pa. 482, where the plaintiff, while riding down the street, was kicked by a horse wrongfully tied on one side of the street, breaking his leg and throwing him against a carriage wrongfully placed on the other side of the street by a third party, striking his hip causing lameness; and it was held that a joint action would not lie against the placer of the horse and the placer of the carriage. The court said: "No one can be made to answer for the torts of those with whom he had no connection, and over whom he had no control. It follows from these principles that if Bard com-

mitted an unlawful act, by reason whereof Yohn was injured, Bard is responsible for the damages sustained in consequence of his act. Or, if the injury was sustained by reason, in part, of the unlawful act of Bard, and in part on account of the unlawful conduct of young Wenrich, each is liable for the entire injury. But the liability in either case is a separate, and not a joint, one. A recovery and satisfaction as to one would be a satisfaction as to both."

III. Cases favoring joint liability.

There are a number of decisions holding that in the particular case independent tort-feasors might be joined as defendants, although the act of each caused some damage.

Indiana.—Brady v. Ball (1860) 14 Ind. 317 (*infra*, IV. b, 1); West Muncie Strawboard Co. v. Slack (1904) 164 Ind. 21, 72 N. E. 879 (*infra*, IV. c, 2); South Bend Mfg. Co. v. Liphart (1894) 12 Ind. App. 185, 39 N. E. 908 (*infra*, IV. c, 2).

Kansas.—McDaniel v. Cherryvale (1913) 91 Kan. 40, 50 L.R.A. (N.S.) 388, 136 Pac. 899 (*infra*, IV. c, 2).

Kentucky.—Campbell Turnp. Road Co. v. Maxfield (1906) 28 Ky. L. Rep. 1198, 91 S. W. 1135 (stating a rule, *infra*, IV. c, 2).

Maine.—Allison v. Hobbs (1901) 96 Me. 26, 51 Atl. 245 (*infra*, IV. a).

Massachusetts.—Stone v. Dickinson (1862) 5 Allen, 29, 81 Am. Dec. 727 (*infra*, IV. a).

West Virginia.—Day v. Louisville Coal & Coke Co. (1906) 60 W. Va. 27, 10 L.R.A. (N.S.) 167, 53 S. E. 776 (*infra*, IV. c, 2), now overruled in the reported case (FARLEY v. CRYSTAL COAL & COKE Co. *ante*, 933).

Canada.—Booth v. Ratté (1892) 21 Can. S. C. 637 (*infra*, IV. c, 2).

It will be seen that some of these cases are put upon the ground that the wrong was a public nuisance. West Muncie Strawboard Co. v. Slack (1904) 164 Ind. 21, 72 N. E. 879; Booth v. Ratté (1892) 21 Can. S. C. 637.

The attachment and arrest cases seem to stand on the ground of a special arbitrary rule, and not as opposed to the general rule against joint liability.

IV. Illustrations.

a. Trespass for wrongful attachment or arrest.

Only cases where the various writs were executed simultaneously are included.

It seems that where several independent writs are executed simultaneously by the same officer that a rule has been developed of holding the several plaintiffs jointly liable for trespass. This rule would seem to be highly artificial, and not in accord with the general rule as to independent tort-feasors.

Thus in *Ellis v. Howard* (1845) 17 Vt. 330, it was held that, where attachments are levied at the same time by the same officer and upon the same property, there is *prima facie* a joint trespass.

And in *Vose v. Woods* (1882) 26 Hun (N. Y.) 486, it was held that, where property was seized under color of several attachments, which were illegal and void, by one officer at the same time, all the attachment plaintiffs might be held liable for damages for the wrongful detention of the property.

And where different creditors, acting separately and without concert, and without knowing that they were employing a common agent, wrongfully caused their debtor to be arrested upon their individual writs, by the same officer, who served them all at the same time, and by virtue thereof committed the debtor to jail, it was held, in *Stone v. Dickinson* (1862) 5 Allen (Mass.) 29, 81 Am. Dec. 727, that they were to be regarded as joint trespassers, and each liable in a separate suit; but that full satisfaction received by the debtor for one of them would be a bar to an action upon his part against the other. Approved in *Sparkman v. Swift* (1886) 81 Ala. 231, 8 So. 160.

Where the plaintiff was arrested upon two warrants, both served at the same time, for failure to pay respectively the taxes of 1897 and 1898, and sued the assessors of the tax of 1898, it was held that the court properly charged the jury "that if this man was arrested at the same time for the

[non] payment of both taxes, upon both warrants, and the damages arising from one and the other are so intermixed that they cannot be separated, that these defendants are liable for the whole amount of damages and suffering which this plaintiff underwent, except the \$3 for the tax of 1897." The court said: "It would be a strange doctrine, if an injury caused by a defendant's tort is in no way increased by the independent but concurrent wrongful act of a third person, that the extent of the defendant's liability in damages should thereby be lessened. Moreover, these defendants and the assessors for the year of 1897, provided the plaintiff was also illegally arrested upon their warrant by the same officer and at the same time, were joint trespassers, although each board of assessors acted independently of each other, and neither had knowledge that the plaintiff was to be arrested upon the warrant of the other. . . . While it is true that persons who act separately and independently, each causing a separate and distinct injury, cannot be sued jointly, even though the injuries may have been precisely similar in character and inflicted at the same moment, yet if such persons, acting independently, by their several acts, directly contribute to produce a single injury, each being sufficient to have caused the whole, and it is impossible to distinguish the portions of injury caused by each, they are then joint tort-feasors within the rule, and may be sued either jointly or severally at the election of the plaintiff, and in such an action against one or more the whole damage may be recovered." *Allison v. Hobbs* (1901) 96 Me. 26, 51 Atl. 245.

But in *Miller v. Beck* (1897) — Iowa, —, 72 N. W. 558, and *Miller v. Beck* (1899) 108 Iowa, 575, 79 N. W. 344, it was held that, where attachments were simultaneously sued out by different creditors acting through the same attorney and levied by the same officer on the same property at the same time, but so that one constituted a prior lien on the personalty and the other a prior lien upon the realty attached, the creditors were not

9 A.L.R.—60.

joint wrongdoers, since neither was interested in the success of the other, and their actions, although simultaneous, were not for a common purpose.

b. Trespassing animals.

1. Generally.

The several independent owners of trespassing animals are not jointly liable for the entire trespass. *Westgate v. Carr* (1867) 43 Ill. 450; *Yeazel v. Alexander* (1871) 58 Ill. 263; *Cogswell v. Murphy* (1877) 46 Iowa, 44. *Contra, Brady v. Bell* (1860) 14 Ind. 317.

When the cattle of several owners communicate disease to other cattle, the owners of the guilty cattle are not jointly liable for the damage. *Yeazel v. Alexander* (1871) 58 Ill. 263.

Each owner is liable only for the trespass caused by his own animals. *Pacific Livestock Co. v. Murray* (1904) 45 Or. 103, 76 Pac. 1079. It is error, in an action against a man for damages done by his cow to the plaintiff's garden, to include in the recovery damage done by the cows of other owners at the same time. *Partenheimer v. Van Order* (1855) 20 Barb. (N. Y.) 479.

Where the sheep of several trespass on the plaintiff's land, sheep of one owner are not to be sold under the statute to pay for the damage done by the sheep of others, over which he has no control and to the trespass of which he had not consented. *Dooley v. 17,500 Head of Sheep* (1894) 4 Cal. Unrep. 479, 35 Pac. 1011.

If under the practice a joint action is permissible, judgment against each defendant can only be entered for the damage done by his own cattle. *Shultz v. Quinn* (1896) 2 Lack. Legal News (Pa.) 141.

In *Harrison v. McClellan* (1910) 137 App. Div. 508, 121 N. Y. Supp. 822, where cattle on a farm were partly owned by the landlords and partly by the tenant, and owing to the negligence of the tenant they damaged the plaintiff's corn, a judgment against both landlords and tenant for the damage was reversed on the ground that the stock were in control of the tenant. The court said: "If liability were established against the landlords it could

only be for the amount of damage actually committed by their cattle, it being fairly assumed that all the cows trespassing did about an equal amount of damage."

But in *Brady v. Ball* (1860) 14 Ind. 317, in an action for damages for an injury done by trespassing animals, it was held that the plaintiff might elect to sue all, or only a part, of the owners.

It may be noted that the general rule does not apply where the animals of the several defendants are kept in a common herd under their joint control. *Ozburn v. Adams* (1873) 70 Ill. 291.

In an action for trespass on lands by the defendant's cattle, where the facts are not reported so that the exact nature of the situation can appear, the court said: "The defendants were in the joint, or at least common, occupation of an adjoining cattle range, and each of them owned animals going to make up a herd that pastured the range and that committed the trespass and inflicted the damage complained of, and for which the recovery was had." It was held that the defendants were jointly liable. *Wilson v. White* (1906) 77 Neb. 351, 124 Am. St. Rep. 852, 109 N. W. 367.

And where three persons together turned their three horses into a lot and one of the horses kicked the plaintiff's horse, which was there, the court said: "This case does not depend upon the ownership of the horses, nor as to whether they were known to be vicious. The rule that each person is liable only for damages done by his own animal does not apply. If the injury to the plaintiff's horse was one fairly to have been anticipated from the wrongful act of turning the three horses into the lot, then all persons participating in the wrong were joint wrongdoers. In such an action recovery may be had against one or all of the participants." *Martin v. Farrell* (1901) 66 App. Div. 177, 72 N. Y. Supp. 934.

2. Dogs.

When dogs of several independent owners kill sheep they cannot be held jointly liable, as each is liable only

for the act of his own dog. *Russell v. Tomlinson* (1817) 2 Conn. 206; *Denny v. Correll* (1857) 9 Ind. 72, 1 Am. Neg. Cas. 99; *Nohre v. Wright* (1906) 98 Minn. 477, 108 N. W. 865, 8 Ann. Cas. 1071; *Vansteenburgh v. Tobias* (1837) 17 Wend. (N. Y.) 562, 31 Am. Dec. 310; *Carroll v. Weiler* (1874) 4 Thomp. & C. (N. Y.) 131 (stating the rule).

Each is liable only for the damage done by his own dog. *Buddington v. Shearer* (1838) 20 Pick. (Mass.) 477; *Miller v. Prough* (1920) — Mo. App. —, 221 S. W. 159; *Auchmucky v. Ham* (1845) 1 Denio (N. Y.) 495. "The dogs were joint wrongdoers if they acted in concert in killing or injuring plaintiff's sheep, but the owners thereof were not. In the absence of statute, the owners of the respective dogs are simply liable for the damages done by their dogs, and not for that done by dogs belonging to others." *Anderson v. Halverson* (1904) 126 Iowa, 125, 101 N. W. 781.

So, where dogs of two owners destroy garden plants, the owners are not jointly liable. *State, Nierenberg, Prosecutor, v. Wood* (1896) 59 N. J. L. 112, 35 Atl. 654.

But while a joint action on the case will not lie at common law against the owners of several dogs who kill sheep, it was held in *Dole v. Hardinger* (1917) 204 Ill. App. 640, that the law was otherwise under a statute providing that "the owner of any dog or dogs shall be liable in an action on the case for all damages that may accrue to any person or persons in this state, by reason of such dog or dogs killing, wounding, or chasing any sheep or other domestic animal belonging to such other person or persons," as otherwise there was no reason for the statute except the abrogation of the necessity of proving scienter.

So, the owner of one dog is liable for all the damages done by several dogs killing sheep where the statute provides that "every owner or keeper of a dog engaged in doing damage to sheep, lambs, or other domestic animals, shall be liable in an action of tort to the county for all damages so done which the county commissioners

thereof have ordered to be paid, as provided in this chapter." *Worcester County v. Ashworth* (1893) 160 Mass. 186, 35 N. E. 773.

It was so held where the statute provided: "Where any dog or dogs shall kill, or in any manner damage, any sheep in this state, the owner of such dog shall be liable, upon an action for damages, to the owner of such sheep for the worth of such sheep, if killed, or for the amount of injury or damage committed upon the same by such dog." *Dyer v. Hutchins* (1889) 87 Tenn. 198, 10 S. W. 194.

So, where the statute provided that "the owner or keeper of such dog or dogs shall pay to the owner or owners of such sheep, so worried, wounded, or killed, just damages, to be recovered by action of trespass." *Adams v. Hall* (1829) 2 Vt. 9, 19 Am. Dec. 690.

But in *Miller v. Prough* (1920) — Mo. App. —, 221 S. W. 159, it was held that a statute providing that, "in every case where sheep or other domestic animals are killed or maimed by dogs, the owner of such animals may recover against the owner or keeper of such dog or dogs the full amount of damages," etc., "changes the common-law rule of liability only in so far as it relieves the plaintiff of the necessity of showing scienter."

Where an original statute providing "that if any dog or dogs shall kill or injure any sheep or lamb, the owner or harbinger of such dog or dogs shall be holden liable for all damages which may be inflicted thereby, to be recovered at the suit of the party injured, before any justice or court having cognizance" had been superseded by an act providing "that if any dog or dogs shall kill or injure any sheep, the owner or harbinger of such dog or dogs, or any of them, shall be liable for all damages that may be sustained thereby, to be recovered by the party injured, before any court having competent jurisdiction," it was held that the several owners of dogs might be joined in one action. *Sawyer v. Jewett* (1859) 2 Ohio Dec. Reprint, 34. And the owner of one of the dogs is liable for all the damage. *Baldwin v. Skil-*

lington (1859) 2 Ohio Dec. Reprint, 104.

In *Kerr v. O'Connor* (1869) 63 Pa. 341, 1 Am. Neg. Cas. 242, where the statute provided that "the owner or owners of any dog or dogs shall be liable for all damages done or caused to be done by any and every such dog or dogs," the court expressed the obiter opinion that such owner would be jointly liable for the whole damages.

Sometimes the statute permits the several owners of dogs to be joined. *Rowe v. Bird* (1876) 48 Vt. 578; *Fairchild v. Rich* (1895) 68 Vt. 202, 34 Atl. 692. In which case the owner of one of the dogs may be sued alone for the whole damage. *Remele v. Donahue* (1882) 54 Vt. 555, 1 Am. Neg. Cas. 247.

Sometimes the statute expressly creates joint and several liability in such case. *McAdams v. Sutton* (1873) 24 Ohio St. 333.

Where the statute provided that "every owner or keeper of a dog shall forfeit to any person injured by it double the amount of the damage sustained by him," one who obtained an uncollectable judgment against the owner of the dog for the same injuries was precluded thereby from recovering against the defendant as keeper. *Galvin v. Parker* (1891) 154 Mass. 346, 28 N. E. 244.

c. *Waters.*

1. *Generally.*

The general rule has illustration in case of the pollution, diversion, obstruction, or flooding of a stream by various independent proprietors; these in general not being jointly liable.

Florida.—*Symmes v. Prairie Pebble Phosphate Co.* (1913) 66 Fla. 27, 63 So. 1 (mud and refuse injuring oyster beds); *Standard Phosphate Co. v. Lunn* (1913) 66 Fla. 220, 63 So. 429 (pollution).

Illinois.—*Willard v. Red Bank Oil Co.* (1909) 151 Ill. App. 433 (pollution).

Iowa.—*Wm. Tackaberry Co. v. Sioux City Service Co.* (1911) 154 Iowa, 358, 40 L.R.A. (N.S.) 102, 132 N. W. 945, 134 N. W. 1064, Ann. Cas. 1914A, 1276 (blocking).

Montana.—*Howell v. Bent* (1913) 48 Mont. 263, 137 Pac. 49 (diversion).

Nevada.—*Blaisdell v. Stephens* (1879) 14 Nev. 17, 33 Am. Rep. 523, 7 Mor. Min. Rep. 599 (flooding).

Ohio.—*Columbus v. Rohr* (1907) 30 Ohio C. C. 155 (pollution, stating the rule).

Pennsylvania.—*Little Schuylkill Nav. R. & Coal Co. v. Richards* (1868) 57 Pa. 142, 98 Am. Dec. 209, 10 Mor. Min. Rep. 661 (stating the rule, filling basin of a dam with coal dust); *Eckman v. Lehigh & W. Coal Co.* (1912) 50 Pa. Super. Ct. 427 (stating the rule, deposit of culm).

West Virginia.—*FARLEY v. CRYSTAL COAL & COKE CO.* (reported herewith) ante, 933.

Canada.—*Austin v. Snyder* (1861) 21 U. C. Q. B. 299 (stating the rule, obstruction); *Hinds v. Barrie* (1903) 6 Ont. L. Rep. 656 (stating the rule, obstruction).

An action for damages will not lie against upper riparian owners jointly for polluting a stream where, though "the matter put into the stream by the defendants, each at its separate plant, may have united or intermingled in increasing the injurious consequences to the plaintiff, and the damages done by each may be difficult of ascertainment, yet such union or intermingling of consequences did not cause the injury by intermingling or contact." *Standard Phosphate Co. v. Lunn* (1913) 66 Fla. 220, 63 So. 429.

In an action for damages to the plaintiff's oyster beds, it was held that a joint tort was not shown by allegations that "the defendants, and each of them, in the conduct of their respective businesses along or near the shore of" a navigable river, "wrongfully and injuriously from day to day caused great quantities of mud and other refuse to be deposited and flow into said river above the point where" plaintiff's property was situated, and by reason thereof the plaintiff's property has been injured as specifically stated. *Symmes v. Prairie Pebble Phosphate Co.* (1913) 66 Fla. 27, 63 So. 1.

In an action by the owner of a mill and milldam to recover of defendants,

two lumber companies, damages for injuries to his mill and dam alleged to have been caused by defendants floating their logs down the river above his dam and negligently permitting them to lodge on his dam and against his mill house, and to remain there for long periods of time, it was held that a verdict for the plaintiff was not sustained by the evidence where there was no evidence that defendants acted jointly in floating the logs. *Kentucky Lumber Co. v. Hinkle* (1891) 13 Ky. L. Rep. 173.

Several riparian owners are not jointly liable for injury to upper riparian property by water backed upon it because of structures which, acting independently, they erect along and across the stream so as to diminish its capacity and cause the water to set back, to the injury of the upper proprietor. *Wm. Tackaberry Co. v. Sioux City Service Co.* (1911) 154 Iowa, 358, 40 L.R.A.(N.S.) 102, 132 N. W. 945, 134 N. W. 1064, Ann. Cas. 1914A, 1276.

In *Willard v. Red Bank Oil Co.* (1909) 151 Ill. App. 483, the plaintiff sued thirteen defendants, who had oil lands and oil wells from 1 to 4 miles from his property and on higher lands, alleging that when the rains came, oil which had escaped and flowed upon their lands was brought down into a creek, and from the creek, by the overflow of it, upon the plaintiff's lands, and injured them greatly. The court, in holding that a verdict was properly directed for the defendants, said: "A person polluting a watercourse is liable in damages only for his own act, and not for that of any others who may contribute to the injury. If others have contributed, his deposit must be separated by means of the best proof the nature of the case affords, and his liability ascertained accordingly." 2 Farnham, Waters, 1716; *Seely v. Alden* (1869) 61 Pa. 302, 100 Am. Dec. 642; *Chipman v. Palmer* (1879) 77 N. Y. 51, 33 Am. Rep. 566. We are of opinion that the act of each of the defendants in allowing the escape of oil upon its own premises was separate and independent, and without any connection with the acts of others, and, being a several act

when committed, it cannot be made joint because of the consequences which followed in connection with others who had done similar acts; and while it is true it is difficult or impracticable to separate the injury, that is no reason why one of the defendants should be liable as a joint tort-feasor (among whom there is no contribution), because of the consequences which followed the acts of others who have not acted in concert with it."

In *Sun Co. v. Wyatt* (1908) 48 Tex. Civ. App. 349, 107 S. W. 934, the plaintiff claimed that the defendants, each acting for itself, laid their pipe lines in the ditch alongside a city street, on which plaintiff had his residence, and immediately in front of his premises; that the combined result of these acts obstructed the flow of the surface water through the ditch; that by reason of leakage, oil which was being conveyed through the pipe lines ran into the ditch, and after a rainfall, by the overflow of this water caused by the obstruction aforesaid, was carried by the water and deposited upon plaintiff's premises, causing him the damages claimed. The court, in holding that the petition was demurrable, said: "In the present and similar actions where the parties act separately and independently, with no concert of action and no common purpose, it would be manifestly unjust to make each liable for the entire injury, without regard to the extent to which its acts contributed to the general result."

In *Equitable Powder Mfg. Co. v. Cleveland, C. C. & St. L. R. Co.* (1910) 155 Ill. App. 265 (affirmed in (1910) 246 Ill. 582, 92 N. E. 979, without passing upon the question), the plaintiff sued several railroads, each of which had one or more embankments or structures on which they crossed a stream near his premises, some of them more than once, and he claimed that these embankments impeded the flow of the stream, whereby his lands were flooded and damaged. The court said: "It is argued this is a case where 'appellant's loss flowed not from the combined result of each appellee's act, but was the result of the combined

acts of appellees.' We cannot agree to this conclusion. The evidence shows that each of the appellees, in performing the acts complained of, acted separately for itself and independently of the others and without concert of action. There could be no loss result to appellant except as a result, not from the combined acts, but from the separate and independent acts of appellees, which caused the loss claimed by appellant;" stating further in substance that most if not all the cases where tort-feasors have been held liable have been cases where no part of the injury would have resulted but for the act of the several defendants held to be liable.

In *Magee v. Pennsylvania Schuylkill Valley R. Co.* (1900) 13 Pa. Super. Ct. 187, it was held that where two upper proprietors, by combined action, increase the drainage of water across the plaintiff's land, they are not jointly liable for the pollution of the water caused by one of them.

Each tort-feasor is liable for his own contribution only. The following are cited as examples of the numerous cases on waters to this effect:

Alabama.—*Jones v. Tennessee Coal, I. & R. Co.* (1918) 202 Ala. 381, 80 So. 463.

California.—*Miller v. Highland Ditch Co.* (1891) 87 Cal. 430, 22 Am. St. Rep. 254, 25 Pac. 550.

Illinois.—*Hoffman v. Chicago & N. W. R. Co.* (1917) 205 Ill. App. 197.

Iowa.—*Loughran v. Des Moines* (1887) 72 Iowa, 382, 34 N. W. 172; *Bowman v. Humphrey* (1904) 124 Iowa, 744, 100 N. W. 854.

Kentucky.—*Polk v. Illinois C. R. Co.* (1917) 175 Ky. 762, 195 S. W. 129.

Missouri.—*Martinowsky v. Hannibal* (1889) 35 Mo. App. 70.

Montana.—*Watson v. Colusa-Parrot Min. & Smelting Co.* (1904) 31 Mont. 518, 79 Pac. 14.

New York.—*Chipman v. Palmer* (1879) 77 N. Y. 51, 33 Am. Rep. 566.

Ohio.—*Mansfield v. Bristor* (1907) 76 Ohio St. 270, 10 L.R.A.(N.S.) 806, 118 Am. St. Rep. 852, 81 N. E. 631, 10 Ann. Cas. 767.

Pennsylvania.—*Gallagher v. Kem-*

merer (1891) 144 Pa. 509, 27 Am. St. Rep. 673, 22 Atl. 970.

Virginia.—Pulaski Anthracite Coal Co. v. Gibboney Sand Bar Co. (1909) 110 Va. 444, 24 L.R.A.(N.S.) 1185, 66 S. E. 73.

In an overflow case where the defendant was sued alone, in affirming a judgment for it, the court said: "If the separate wrongful acts of two or more persons acting independently, without concert, plan, or agreement, unite to cause injury to another, such persons are not joint wrongdoers within the meaning of the law, and each is liable to the injured party for only so much of the injury as is chargeable to his own separate individual act." Polk v. Illinois C. R. Co. (1917) 175 Ky. 762, 195 S. W. 129.

In reversing an action against a city for pollution of a stream on the ground that the city had been held liable for all the pollution, it was held that where different parties discharge sewerage and filth into a stream, which intermingles and causes an actionable nuisance, they are not jointly liable for damages when there is no common design or concert of action, but each is liable only for his proportion of the damages. Mansfield v. Bristol (1907) 76 Ohio St. 270, 10 L.R.A.(N.S.) 806, 118 Am. St. Rep. 852, 81 N. E. 631, 10 Ann. Cas. 767.

An action is properly brought for damages against one person for causing the overflowing of the plaintiff's land, though others may have contributed thereto. Learned v. Castle (1889) 78 Cal. 454, 21 Pac. 11, where the court said: "A wrongdoer who contributes to a damage cannot escape entirely because his proportional contribution to the result cannot be accurately measured."

In Pulaski Anthracite Coal Co. v. Gibboney Sand Bar Co. (1909) 110 Va. 444, 24 L.R.A.(N.S.) 1185, 66 S. E. 73, it was held that one whose negligent or wrongful acts contribute with others, acting independently, to the casting of foreign material into a stream, to the injury of a lower riparian owner, cannot be held liable for the entire injury, on the theory that he is a joint tort-feasor.

In an action for damages from the overflow of a brook obstructed by the defendant, it was held that he was not liable for any increase in flow caused by the city wrongfully using the brook as a sewer. Sellick v. Hall (1879) 47 Conn. 260.

A railroad company sued for overflowing land owing to diversion by its ditch is not liable for the acts of strangers in turning water into its ditch without its sanction or approval. Chicago & A. R. Co. v. Glenney (1886) 118 Ill. 487, 9 N. E. 208.

As individual blockers of a stream could not be made jointly liable, there is no reason why one of them should not be held individually liable for such wrong as he has done. Austin v. Snyder (1861) 21 U. C. Q. B. 299.

It may be noted that in Timms v. Vancouver (1910) 15 B. C. 336, where the plaintiff sued the defendant corporations—one being a city, the other a railway company—for damages to his land, whereby a watercourse on his land was obstructed or its capacity diminished by the city by its arrangement of its drains, etc., and by the railroad by the erection of a building, the court, in declining to direct the plaintiff to elect which of the defendants he should proceed against, said: "If there was joint action by the two defendants in the laying out of a drainage system, and that system should prove to have been negligently devised or carried out (with, of course, resultant damage to riparian owners), the defendants would, in my opinion, be joint tort-feasors, in which case they would be properly joined in one action. That being a possible construction of this statement of claim, this motion must be dismissed."

2. Cases favoring joint liability.

In West Muncie Strawboard Co. v. Slack (1904) 164 Ind. 21, 72 N. E. 879, it was held that various proprietors who pollute a stream are jointly and severally liable when their acts constitute a public nuisance.

In Valparaiso v. Moffitt (1894) 12 Ind. App. 250, 54 Am. St. Rep. 522, 39 N. E. 909, an action against a city for polluting a stream with a sewer, the court said that there was a "class of

cases in which the defendants are jointly and severally liable, although they are not joint tort-feasors. If their acts are separate and distinct as to place and time, but culminate in producing a public nuisance which injures the person or property of another they are jointly and severally liable."

In *Booth v. Ratté* (1892) 21 Can. S. C. 637, the plaintiff recovered in one action damages assessed by the master, of \$1,000 each, against several upper proprietors for severally throwing sawdust into a stream, thus polluting the river and destroying access to his property, the court holding that as the wrong was a public nuisance the defendants were properly treated as joint tort-feasors, and that "the master was not, strictly speaking, called upon to apportion the damages so as to restrict the liability of each defendant to the proportion in which he may have contributed to the nuisance."

In *South Bend Mfg. Co. v. Liphart* (1894) 12 Ind. App. 185, 39 N. E. 908, individual owners of water rights were held both jointly and severally liable for injuries to a lower riparian owner, caused by water escaping from their respective dams, negligently allowed by them to become out of repair; and the fact that the plaintiff instituted his suit against one tort-feasor only would not avail the defendant in defeating a recovery. The language used in this case, however, seems to imply that, had the injury been such as could have been apportioned between the respective tort-feasors, each would be responsible for only the damage actually caused by his own misfeasance.

See also *Wright v. Cooper* (1802) 1 Tyler (Vt.) 425, *supra*, II.

Where the plaintiff sued the defendant for damages for unlawful appropriation of water from a reservoir, it was held that the irregular use of some of the parties "makes it very difficult, and it might be said impossible, to determine just what proportion of the water each used; and under such circumstances, although the acts of each may have been separate and independent, yet it cannot be said that

they together were not the direct cause of the single injury of which appellee complains, and, this being true, either is responsible for such injury." *Elkhart Paper Co. v. Fulkerson* (1905) 36 Ind. App. 219, 75 N. E. 288.

Where an oil company and a city by their concurrent action pollute a stream, to the injury of another through whose land the stream flows, they are jointly and severally liable for the wrongdoing; and the injured party may, at his option, institute an action, and recover against one or all of those contributing to his injury. *McDaniel v. Cherryvale* (1913) 91 Kan. 40, 50 L.R.A. (N.S.) 388, 136 Pac. 899, where judgment went for the defendants on another ground.

In *Kansas City v. Slangstrom* (1894) 53 Kan. 431, 36 Pac. 706, it was held that a municipal corporation and land company which, by their concurrent wrongdoings in the construction by the former of an insufficient culvert and drain through an embankment placed across a creek in the grading of a street, and the continuance of such drain by the latter across its land, and permitting that portion to become broken down, cause injury to a third person by the backing of water on his premises, are jointly and severally liable; and the injured person may maintain an action against either or both of them for the entire damage done. The court said: "As the acts of either one would have occasioned injury, and as both contributed in obstructing the stream, a joint liability arises against them."

In an action against a turnpike company for flooding, the court, in ruling that evidence was properly excluded that the county authorities had caused the flood by negligence on their own road, said: "The appellees were suing for the wrongful casting upon their lot surface water diverted from its natural flow and drainage by the ditches and culvert of appellant. If it was not guilty of this act it was not liable at all. If, in addition to the wrong alleged to have been done by appellant, the county authorities wrongfully dammed the water on the far side of the lot, this only made

these two wrongdoers joint tort-feasors, and they were both liable, and the appellees had the right to sue them jointly or severally, as they might elect." *Campbell Turnp. Road Co. v. Maxfield* (1906) 28 Ky. L. Rep. 1198, 91 S. W. 1135.

Day v. Louisville Coal & C. Co. (1906) 60 W. Va. 27, 10 L.R.A.(N.S.) 167, 53 S. E. 776, is sufficiently dealt with in the reported case (*FARLEY v. CRYSTAL COAL & COKE Co.* ante, 933).

In this connection reference may be made to the opinion in *Pickerill v. Louisville* (1907) 125 Ky. 213, 100 S. W. 873, where it was alleged that the defendant city by its manner of drainage, and that the two defendant railroad companies by their constructions, threw water and filth upon the plaintiff's lot, causing him injury by the joint and several negligence of the defendants; that the two railroad companies were jointly interested in certain of these constructions, and that their wrongful acts were committed and done with the knowledge and approval of the defendant city. The court said: "There was no misjoinder of parties or of actions. According to the allegations of the petition, and much of appellant's testimony, all the appellees were wrongdoers, as by their joint and several acts and conduct appellant's property was injured. If the averments of the petition are true, and appellant's testimony can be relied on, all contributed in some material measure to the injuries complained of. The injuries resulted from the diversion of the water from its natural course, and the accumulation of an unusual quantity of it upon appellant's lot. If this was caused in part by the acts of each of the appellees, and the entire volume of water produced by their joint and concurring negligence inflicted the injury, unquestionably it was inflicted by the combined or joint action of all three of them; therefore they are jointly, as well as severally, liable."

d. Emission of gases.

An action will not lie against independent mining companies jointly for a nuisance in emitting gases. *Swain*

v. Tennessee Copper Co. (1903) 111 Tenn. 430, 78 S. W. 93.

Where two "separate and distinct corporations in proximity to each other operate their respective and separate plants for manufacturing fertilizers, and, from each plant, noxious and poisonous gases are discharged into the atmosphere and invade the premises of a near-by resident, and so poison and befoul the air therein as to cause sickness and death in his family, and otherwise to injure him, and to create an actionable nuisance, but where there is no common ownership or operation of the plants, no community of interest, and no common design, purpose, concert, or joint action, a suit by the adjacent resident against the two corporations jointly, for damage caused by their respective acts thus separately committed, cannot be maintained." *Key v. Armour Fertilizer Works* (1916) 18 Ga. App. 472, 89 S. E. 593.

F. Suits in equity.

It is a general rule that several independent tort-feasors may be joined in an action in equity for an injunction.

United States.—*Woodruff v. North Bloomfield Gravel Min. Co.* (1883) 8 Sawy. 628, 16 Fed. 25.

Maine.—*Lockwood Co. v. Lawrence* (1885) 77 Me. 297, 52 Am. Rep. 763.

Missouri.—*State ex rel. Federal Lead Co. v. Dearing* (1912) 244 Mo. 25, 148 S. W. 618 (holding that a non-resident corporation could not remove such a case into the Federal court, as it was not a separable controversy).

New York.—*Warren v. Parkhurst* (1906) 186 N. Y. 45, 6 L.R.A.(N.S.) 1149, 78 N. E. 579, 9 Ann. Cas. 512.

Tennessee.—*Madison v. Ducktown Sulphur, Copper & I. Co.* (1904) 113 Tenn. 331, 83 S. W. 658.

Vermont.—*Ames v. Dorset Marble Co.* (1891) 64 Vt. 10, 23 Atl. 857.

England.—*Cowan v. Buccleuch* (1876) L. R. 2 App. Cas. 344.

"It is an established rule of equity that where several persons are alleged to have contributed, and are continuing to contribute, to the same general nuisance, on account of which com-

plainants suffer, all such contributing persons may be joined as defendants." *Norton v. Colusa Parrot Min. & Smelting Co.* (1908) 167 Fed. 202 (where, however, the court held the bill demurrable so far as it called for damages, as there was an adequate remedy at law).

Thus a riparian proprietor may maintain an action in equity against several upper riparian mine owners to restrain them from throwing earth and mining débris into the streams. *Woodruff v. North Bloomfield Gravel Min. Co.* (1883) 8 Sawy. 628, 16 Fed. 25.

So, a riparian owner may maintain a bill in equity against several upper riparian owners, the aggregate of whose several and individual acts in depositing filth in the stream results in a nuisance to his property, to enjoin such acts, although injury from the act of each, considered by itself, would be nominal. *Warren v. Parkhurst.* (1906) 186 N. Y. 45, 6 L.R.A. (N.S.) 1149, 78 N. E. 579, 9 Ann. Cas. 512.

So, an action to enjoin independent companies from the nuisance of emitting gases may be brought against them jointly. *Madison v. Ducktown Sulphur, Copper & I. Co.* (1904) 113 Tenn. 331, 83 S. W. 658.

In sustaining an injunction against several obstructors of a stream causing overflow of the plaintiff's meadow, the court said: "Each defendant is liable in damages in proportion only as its wrongful acts have contributed to obstructing the flow of the water, and to setting it back upon the orator's meadow. The defendants are not joint wrongdoers, in the sense that they join in doing the same wrongful act, but only in the sense that their several wrongful acts combine in causing damage to the orator's meadow. This does not make them joint tortfeasors, in the sense that each is liable for all damages occasioned to the orator's meadow. There must, therefore, be a further reference to the master to ascertain the total amount of damages sustained by the orator, and the amount thereof which the wrongful acts of each defendant has contributed thereto." *Ames v. Dor-*

set Marble Co. (1891) 64 Vt. 10, 23 Atl. 857.

In *Draper v. Brown* (1902) 115 Wis. 361, 91 N. W. 1001, where the consequences of several acts performed by different persons acting independently combined to injure plaintiff, and he sought to restrain such action, it was held that one action could best determine the rights of the parties, and one judgment protect their interests.

But the inhabitants of a city who invoke its power to construct, and who, after its completion, use, a local improvement—a main sewer—which the city had the right to construct, are improperly joined with the city in a bill by a lower riparian owner for an injunction and damages on account of the effects of its negligence in constructing and operating the sewer, as they had no control over the construction. *Carmichael v. Texarkana* (1902) 58 L.R.A. 911, 54 C. C. A. 179, 116 Fed. 845.

California cases.

In *Keyes v. Little York Gold Washing & Water Co.* (1879) 53 Cal. 724, 14 Mor. Min. Rep. 95, an action in equity asking for an injunction, it was held that, where individual miners dumped tailings into a stream, and the combined consequences of these dumpings injured a lower riparian owner, their tortious acts were not joint, and a complaint joining them in a common action would be dismissed. The court further observed that in such a case an action of law for damages would not lie against the parties jointly.

In *Hillman v. Newington* (1880) 57 Cal. 56, where the plaintiff had a right to 400 inches of water in a stream, it was held that he properly sued eight defendants together for diversion, asking an injunction and damages. The court said: "He is only entitled to a certain specific amount of it, and if it is only by the joint action of the defendants that he is deprived of that amount, it seems to us that the wrong is committed by them jointly, because no one of them alone is guilty of any wrong. Each of them diverts some of the water. And the aggregate reduces the volume below the amount to which the plaintiff is entitled, although the

amount diverted by any one would not. It is quite evident, therefore, that without unity or concert of action, no wrong could be committed; and we think that in such a case all who act must be held to act jointly."

In *Miller v. Highland Ditch Co.* (1891) 87 Cal. 430, 22 Am. St. Rep. 254, 25 Pac. 550, it was held that several independent tort-feasors might be joined in an action for an injunction, but that in such cases there could be no judgment for damages. The court considered the language of the *Hillman Case* as referring only to the equitable remedy.

But in *People v. Oakland Water Front Co.* (1897) 118 Cal. 234, 50 Pac. 305, it was held that the state might not enjoin in one action to abate nuisances the independent erectors of structures obstructing the navigation of a bay, although each might be liable in a separate action.

VI. Miscellaneous.

In *Sherman Gas & E. Co. v. Belden* (1909) 103 Tex. 59, 27 L.R.A. (N.S.) 237, 123 S. W. 119, an action against an electric light plant, it was held that in case the value of property is diminished by the operation of several business enterprises near it, no one of them can be held liable for more of the injury than is caused by it.

In *McClellan v. St. Paul, M. & M. R. Co.* (1894) 58 Minn. 104, 59 N. W. 978, an action against one tort-feasor, it was held that "if two fires have been set, the origin of one or both of which can be traced to the negligence of a party or parties, either or both of these parties can be held responsible for resulting damages in case the fires mingle and concurrently destroy property."

In *Seckerson v. Sinclair* (1913) 24 N. D. 625, 140 N. W. 239, it was held that there was no error in refusing to instruct the jury in effect that there could be no recovery if the fire which caused the injury originated on the property of a third person, even though it joined the fire originating on the property of the defendant, as such an instruction absolutely ignored the legal fact that when the wrong of two

persons jointly contributes to the injury, both such persons are liable.

If several act in concert in cutting and carrying away timber they are jointly liable in an action of trespass, and "it would not be material, if they had unequal interests in the avails of the trespass; for that those who confederated to do an unlawful act are deemed guilty of the whole, although their share in the profits may be small. But if any of the defendants were not guilty at all, or if any of them, though guilty, were acting separately and for themselves alone, without any concert with the others, they ought to be acquitted, and those only found guilty who were acting jointly." *Williams v. Sheldon* (1833) 10 Wend. (N. Y.) 654.

An action will not lie against two persons jointly for slander. *Chamberlain v. White* (1622) Cro. Jac. 647, 79 Eng. Reprint, 558; *Pope v. Hawtrey* (1901) 85 L. T. N. S. (Eng.) 263, 17 Times L. R. 717; *Webb v. Cecil* (1848) 9 B. Mon. (Ky.) 198, 48 Am. Dec. 423 (slander of title); *Blake v. Smith* (1896) 19 R. I. 476, 34 Atl. 995; *Carrier v. Garrant* (1878) 23 U. C. C. P. 276. The reason given in case of a conspiracy is that the action should be for conspiracy to defame. But in *Green v. Davies* (1905) 182 N. Y. 499, 75 N. E. 536, 3 Ann. Cas. 310, the court, in holding that an action for slander could be maintained against more than one person, said: "As to the second objection to the complaint, that an action for slander can be maintained against one person only, we are of opinion that it is not well founded. There is no decision in this state on the point, and though dicta are to be found in the old text-books and in some of the English cases which support the appellants' contention, the opinion of modern writers is against it. *Odgers, Libel & Slander*, p. 370. It is difficult to see on principle why there should be any such rule. The reason given by the old authorities, that a slander can be the utterance of but a single tongue, is not conclusive. Granting that only one person can speak the slander, still other persons may hire or procure him to utter it. In the case of other torts such persons

and the actual perpetrator of the act are joint tort-feasors. Thus, a principal and agent may be jointly sued for the negligence of the latter. *Phelps v. Wait* (1864) 30 N. Y. 78. There is no reason for any different rule in a slander case. We do not mean to suggest that the repetition by one person of a slander uttered by another is any part of the original slander. On the contrary, they give rise to two distinct causes of action. But if the two slanders were uttered in pursuance of a common agreement between the parties that such slanders should be uttered, then each is jointly liable with the other for their utterance, and separate causes of action for slander may be joined in the same complaint under § 484 of the Code."

It seems probable that the court took the view that there was a distinction between wilful torts and negligence in *Goldstein v. Tunick* (1908) 59 Misc. 516, 110 N. Y. Supp. 905, where the court below gave judgment for the defendant in an action by a man

against his next-door neighbor for flooding the alley between them by water from his roof, whence the water came into his basement, and where it was claimed by the defendant that the plaintiff's landlord was also guilty of negligence which caused part of the damage. The court seemed to be of the opinion that the defendant might be sued for the entire damage, although the plaintiff's landlord had contributed to it, and quoted from the opinion in *Slater v. Mersereau* (1876) 64 N. Y. 138, this proposition: "Where separate acts of negligence of two parties are the direct causes of a single injury to a third person, and it is impossible to determine in what proportion each contributed to the injury, either is responsible for the whole injury; and this although, without fault on his part, the damages would have resulted from the act of the other." But this, it seems, was not necessary to the reversal of the judgment.

B. B. B.

JOE JACKSON et al., Appts.,
v.
COMMONWEALTH OF KENTUCKY.

Kentucky Court of Appeals—April 27, 1920.

(— Ky. —, 220 S. W. 1045.)

Criminal law — credit for time served.

1. Persons erroneously sentenced to the house of reform instead of the penitentiary for commission of crime are entitled to credit for the time served there when the sentence is corrected.

[See note on this question beginning on page 958.]

— error in place of commitment — correction.

2. An error in the place of commitment in a sentence for crime may be

corrected at a subsequent term of court.

[See 8 R. C. L. 245.]

APPEAL by defendants from a judgment of the Circuit Court for Grant County, resentencing them to the penitentiary after their discharge from the house of reform to which they had been committed upon pleading guilty to the crime of grand larceny. *Reversed with directions.*

The facts are stated in the opinion of the court.

Messrs. J. J. Blackburn and L. M. Ackman, for appellants:

When defendants were placed in the Greendale House of Reform under the judgment of the Grant circuit court, a writ of habeas corpus was the proper remedy, and on said writ they should have been finally discharged, and if so discharged such former trial would have constituted a former jeopardy.

Ex parte Parks, 93 U. S. 18, 23 L. ed. 787; Re Snow, 120 U. S. 274, 30 L. ed. 658, 7 Sup. Ct. Rep. 556; Re Nielsen, 131 U. S. 176, 33 L. ed. 118, 9 Sup. Ct. Rep. 672; Re Mills, 135 U. S. 263, 34 L. ed. 107, 10 Sup. Ct. Rep. 762.

Messrs. Charles I. Dawson, Attorney General, and John J. Howe, for the Commonwealth:

Where a defendant duly convicted of a crime obtains his discharge from imprisonment on habeas corpus, on the ground that his sentence was illegal, the court has jurisdiction to impose a corrected sentence, although the term at which he was convicted and sentenced has passed.

Bryant v. United States, 130 C. C. A. 491, 214 Fed. 51.

Changes in the sentence, however, which do not alter the punishment, but only change the time or place of its infliction, may be made at a subsequent term.

People v. Finucan, 151 App. Div. 92, 135 N. Y. Supp. 936; State v. Cardwell, 95 N. C. 643; Kingen v. Kelley, 3 Wyo. 566, 15 L.R.A. 177, 28 Pac. 36; Combs v. Com. 160 Ky. 386, 169 S. W. 879.

Sampson, J., delivered the opinion of the court:

Two young men, Jackson and Sims, were jointly indicted in the Grant circuit court for the crime of grand larceny, to which charge they pleaded guilty. A trial being had, the jury returned a verdict reading: "We, the jury, find the defendants guilty, and fix their punishment at eighteen months in the penitentiary."

Jackson was only nineteen and Sims eighteen years of age, and, these facts having been made known to the court, the defendants were sentenced to the house of reform, at Greendale, instead of the penitentiary, at Frankfort. From the orders of the circuit court we learn that this was done at the instance of the

defendants and by the consent of the attorney for the commonwealth. The defendants were carried to the reform school and there confined under its rules for ten days. In the meantime they applied to the judge of the Fayette circuit court for a writ of habeas corpus, which was granted, and upon hearing they were discharged from the institution because of their age, and remanded to the Grant county jail. When this was done, the judge of the Grant circuit court called a special term, and the commonwealth's attorney gave notice to the defendants that he would on a day named move the court to correct that part of the original judgment whereby the defendants were sentenced to the house of reform, instead of the penitentiary. On a hearing before the court on the day named in the notice, the defendants objected to the motion of the commonwealth's attorney, and filed a plea of former jeopardy and former conviction, to which the commonwealth demurred, and the demurrer was sustained, the objection of the defendants overruled, and the motion to correct the sentence and again sentence the defendants was sustained. The court then pronounced sentence upon the defendants in accordance with the verdict, sentencing them to the penitentiary for eighteen months each, and directed the sheriff of the county to transport them to the state penitentiary, "there to be confined at hard labor for a period of eighteen months." To all this proceeding the defendants objected, and, their objection being overruled, they excepted, and prayed and are now prosecuting an appeal to this court.

Appellants contend: (1) That the Grant circuit court lost jurisdiction of this case after it adjourned its trial term, and had no power to enter any order in the case at the special or any subsequent term. (2) They having served time in the house of reform under the first judgment, the trial court is barred from entering a second judgment which would operate as a second jeopardy

in violation of defendants' constitutional rights.

After the verdict of the jury, the court immediately pronounced sentence upon them, and they were soon thereafter carried to the house of reform, the orders were signed, and court closed in due course. Appellants insist that the court did not thereafter have jurisdiction to enter any order in the case. This is ordinarily true, but in a criminal case of this nature the rule is different. Most courts are averse to discharging criminals who have been duly convicted, when the application for their release is by petition for habeas corpus, based on some error, omission, or mistake in the sentence, which might have been cured or corrected by appeal, and this rule is more in consonance with reason and justice than that which recognizes the right of the defendant to be discharged for some technical error committed by the trial court. This question was before this court in the case of *Combs v. Com.* 160 Ky. 396, 169 S. W. 883, and in passing upon it, we said: "Appellant also complains of the action of the trial court in setting aside so much of the judgment entered at the trial term as sentenced him to the house of reform until he should be twenty-one years of age. At the trial term, February, 1914, appellant, on his own motion, was sentenced to the house of reform until he should arrive at the age of twenty-one years; and at the June term, 1914, the commonwealth attorney gave notice and entered a motion for a correction of that part of the original judgment. The court granted the motion, and reformed the judgment in so far as it ordered his confinement in the house of reform until he should arrive at the age of twenty-one years. Appellant contends that this action of the court was prejudicial; but we think not. It would not have been lawful to have sent appellant to the house of reform, and the prison commissioners would have transferred him to the reformatory. *Thompson v. Com.* 159 Ky.

8, 166 S. W. 623. And the order having been made on appellant's own motion, he will not be heard to complain thereof."

The general rule, as laid down by text-writers and courts, is much as stated in the *Combs* Case: "Changes in the sentence, however, which do not alter the punishment, but only change the time or place of its infliction, may be made at a subsequent term." 16 C. J. 1316.

Criminal law—
error in place
of commitment—
correction.

Supporting this text cases from New York, North Carolina, Wyoming, and Kentucky are cited.

The rule in this jurisdiction is well stated in the *Combs* Case above cited, and we do not incline to the rule of discharging defendants for errors made by the trial court in the sentence pronounced. The trial and verdict in this case were regular, and no complaint is made of either by appellants. Only that part of the judgment which sentenced the prisoners to the house of reform, instead of to the penitentiary, was erroneous, and the judgment went so far as to properly provide in case the defendants, or either of them, arrived at the age of twenty-one years before they had served the full eighteen month's sentence imposed by the verdict, the keeper of the house of reform should deliver defendants to the state penitentiary, "there to be confined at hard labor for the balance of said eighteen months' confinement imposed by the jury in said case."

Looking to the substance, rather than to form, and to the merits, rather than to useless rules of procedure, this court has adhered to the doctrine of allowing the trial court at a subsequent term to correct an erroneous sentence to conform to the law and thus meet the ends of justice, rather than cling to a form or rule which obstructs justice and gives the criminal the advantage on some technical error. The only substantial error the trial court made at the special term, in entering the

judgment sentencing appellants to the penitentiary, was in failing to allow them credit for the time served in the house of reform. It would be an injustice, as well as flagrant invasion of their legal rights, to require them to serve their terms, or any part thereof, twice. Since they served ten days in the house of reform, they were entitled to ten days' credit on their eighteen months' sentence in the penitentiary,

—credit for
time served.

and the court should have adjudged their terms of eighteen months to begin with the date of their entering into the house of reform at Greendale. On a return of the case the court will enter a judgment sentencing the appellants to the penitentiary for a term of eighteen months, to begin as of the date of their confinement in the house of reform. In all other respects the judgment is affirmed.

Judgment reversed.

ANNOTATION.

Right to credit for time served under void sentence.

As to power to change time for commencement of sentence, see annotation following *Bernstein v. United States*, 3 A.L.R. 1569.

It is generally conceded that where an original sentence is merely erroneous, credit may be had for the time served thereunder. But in some of the cases a distinction has been made between sentences which are merely erroneous and those which are regarded as absolutely null and void, and in the latter instance credit for the time served thereunder is refused, —a result seemingly more consistent with dry logic than natural justice. The distinction has not been made in all of the cases. For instance, in the reported case (*JACKSON v. COM.* ante, 955), the court, without reference to the question whether or not the original judgment was void or merely erroneous, held that in resentencing the defendants they should be allowed credit for the time served under the erroneous sentence. It will be remembered that the theory of the court was that it would be both an injustice and a "flagrant invasion of their legal rights" to require them to serve their terms or any part thereof twice.

And in the California case of *Re Silva* (1918) 38 Cal. App. 98, 175 Pac. 481, it was held that since the sentence under consideration was not absolutely void, but rather merely erroneous in that it did not provide a definite term of incarceration as it should have done, the sentence upon

correction by amendment should run from the date of the irregular judgment so as to give the defendant the benefit of the time served thereunder.

And it has been said that where the time served under a void sentence equals or exceeds the period for which the accused could have been legally sentenced, he should be discharged. *Ex parte Bulger* (1882) 60 Cal. 438 (defendant sentenced to house of correction for three years, and after serving six months obtained his discharge on the ground that the crime was punishable by "imprisonment in the county jail not exceeding six months").

But in *Ex parte Gunter* (1915) 193 Ala. 486, 69 So. 442, where defendant was sentenced to the penitentiary for six months at hard labor, but the statutes only permitted a sentence to hard labor for the county, it was held that the sentence was absolutely void, and that a discharge from the void sentence was merely from custody under that sentence, and not from the penalty attached by law to the offense of which the prisoner had been legally convicted, so that the trial court had power to resentence without consideration of the period of unlawful confinement in the penitentiary, the continuity of the prosecution having been preserved by appeal. The court expressly distinguished the case from those where the sentence was merely erroneous and the time served was such as might have been lawfully imposed. And in *McCormick v. State*

(1904) 71 Neb. 505, 99 N. W. 237, where defendant was confined for a time under a sentence which was null and void because of the fact that the trial judge had failed to inform him of the verdict of the jury and to ask him if he had anything to say why judgment should not be pronounced against him, it was held that the time served was in no sense a part of the execution of a valid sentence and could not be credited upon a subsequent sentence. It does appear in this case, however, that the defendant could have obtained a suspension of the void sentence pending the determination of the validity of the first sentence, so that in a sense his incarceration thereunder was due to his own failure or neglect. In reaching this conclusion the court distinguished the case from those wherein the first sentence was either legal in whole or in part, saying: "It will be observed that in the case at bar we held that the first sentence imposed upon the plaintiff was void for the reason that the court, in pronouncing it, had not proceeded in the manner provided by statute. In this case the trial court did not set aside a former legal sentence and judgment, but this court set aside the sentence because it was null and void. Upon remanding the case to the district court, it stood there on the verdict of conviction, and upon which the trial court was required by law and the order of this court to pronounce a valid sentence and judgment. The difference between the cases cited by the plaintiff in support of his contention and the one at bar is a radical one. If the sentence and judgment of the trial court in the first instance had been legal in whole or in part, and if any portion of the same had been executed, it would seem that the plaintiff should be discharged. But such is not the case. The plaintiff prosecuted error because, as he claimed, the sentence and judgment were illegal and void, and his contention was sustained. He was therefore granted the right to have a valid and legal sentence pronounced against him. This

was one of the things that he contended for, and his confinement in the penitentiary for want of a suspension of this void sentence during the pendency of his error proceedings was no part of the execution of a valid sentence, and the judgment complained of does not amount to a second punishment for the same offense." And in *Ogle v. State* (1901) 43 Tex. Crim. Rep. 219, 96 Am. St. Rep. 860, 63 S. W. 1009, 15 Am. Crim. Rep. 321, where defendant was convicted under a void indictment and served a part of the sentence, it was held that the time so served could not be credited upon the term of imprisonment imposed upon a subsequent conviction under a valid indictment.

In some jurisdictions statutes have been enacted which, in some instances at least, have a bearing upon the question under consideration. For instance, in Iowa it is provided that if a defendant imprisoned during appeal is granted a new trial and is again convicted, the period of his former imprisonment shall be deducted from the period of imprisonment to be fixed on the last verdict of conviction. See *State v. Hopkins* (1885) 67 Iowa, 285, 25 N. W. 244 (holding that where the record is silent, the presumption is that the court made the proper deductions); *Travis v. State* (1899) 109 Iowa, 602, 80 N. W. 680 (holding same as preceding case); *State ex rel. Bone v. Barr* (1907) 133 Iowa, 132, 110 N. W. 280 (holding that upon resentence the defendant is entitled to have the "good time" earned under his former sentence considered in determining the amount of further punishment that should be imposed); *State v. Butler* (1912) 155 Iowa, 204, 135 N. W. 628 (holding that failure of the court to deduct the time served under a prior sentence constituted error); *State v. Rogers* (1912) 156 Iowa, 570, 137 N. W. 819 (holding that where a sentence to the penitentiary for an indefinite period is reduced to a jail sentence of eight or nine months, credit must be given on the latter for the time served under the former). G. J. C.

GUST JOHNSON, Respt.,

v.

FIRST STATE BANK OF ROLLINGSTONE et al., Appts.

Minnesota Supreme Court — January 3, 1920.

(— Minn. —, 175 N. W. 612.)

Bank — what is payment of check — taking drafts.

Where a check is presented for payment to the drawee having funds of the drawer to meet it, and the payee, for his own convenience, receives part in cash and part in drafts or cashier's checks of the drawee, the transaction constitutes in law a payment of the checks so far as the drawer and drawee are concerned, so that the drawee cannot set up as defense, when sued on the drafts, that the drawer of the check for good cause stopped payment thereon after the drafts were issued and delivered to the payee of the check, nor can the drawer of the check intervene and assert any right in the drafts or claim any relief against the drawee.

[See note on this question beginning on page 963.]

Headnote by HOLT, J.

APPEAL by defendant and intervener from orders of the District Court for Winona County (Callaghan, J.) sustaining demurrers to defendant's answer and to intervener's pleading, in an action brought to recover the amount of two drafts or cashier's checks drawn by defendant on another bank in favor of plaintiff. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Henry M. Lamberton and Brown, Abbott, & Somsen, for appellants:

Nothing short of a written acceptance or certification of a check will work an assignment.

Hunt v. Security State Bank, 91 Or. 362, 179 Pac. 248.

The drawer of a check may stop payment at any time before payment, acceptance, or certification.

Raesser v. National Exch. Bank, 112 Wis. 591, 56 L.R.A. 174, 88 Am. St. Rep. 979, 88 N. W. 618; Taylor v. First Nat. Bank, 119 Minn. 525, 138 N. W. 783, Ann. Cas. 1914A, 1302; Morse, Banks & Bkg. §§ 397-400.

A check is payment only where there is a specific agreement to that effect.

National Bank v. Chicago, B. & N. R. Co. 44 Minn. 224, 9 L.R.A. 263, 20 Am. St. Rep. 566, 46 N. W. 342, 560; First Nat. Bank v. McConnell, 103 Minn. 340, 14 L.R.A.(N.S.) 616, 123 Am. St. Rep. 336, 114 N. W. 1129, 14 Ann. Cas. 396.

Mr. Leo F. Murphy also for appellants.

Messrs. Otto A. Poirier and Tawney, Smith, & Tawney, for respondent:

As between the bank and intervener, the transaction has been closed and cannot be reopened in an action of this character; the bank and the intervener are estopped and barred from setting up any transaction growing out of the issuance of the check by the intervener to the plaintiff, the bank having accepted said check and paid the same.

Vanstrum v. Liljengren, 37 Minn. 192, 33 N. W. 555; Anderson v. Reardon, 46 Minn. 186, 48 N. W. 777; Northern Trust Co. v. Rogers, 60 Minn. 208, 51 Am. St. Rep. 526, 62 N. W. 273; Wasgatt v. First Nat. Bank, 117 Minn. 9, 43 L.R.A.(N.S.) 109, 134 N. W. 224, Ann. Cas. 1913D, 416; Taylor v. First Nat. Bank, 119 Minn. 525, 138 N. W. 783, Ann. Cas. 1914A, 1302; First Nat. Bank v. Currie, 147 Mich. 72, 9 L.R.A.(N.S.) 698, 118 Am. St. Rep. 537, 110 N. W. 501, 11 Ann. Cas. 241.

Holt, J., delivered the opinion of the court:

This action was brought to recover \$4,000, the amount of two drafts

or cashier's checks drawn by defendant on the Merchants' Bank of Winona in favor of plaintiff, and upon which defendant had afterwards stopped payment.

Defendant answered, alleging that plaintiff had entered into an agreement to sell Jerome Speltz certain shares of stock in a land company at \$61 per share and \$224 besides; that Speltz gave to plaintiff his check for \$4,250 on defendant in payment; that through mistake Speltz believed plaintiff owned and was selling him sixty-six shares of stock, and computed the amount due him on that basis; that in fact plaintiff owned but thirty-nine shares; that plaintiff knew of Speltz's mistake and knew that there was due him but \$2,603, and that he took the check with intent to cheat and defraud Speltz; that plaintiff presented Speltz's check to defendant for payment, and received \$250 in cash and the drafts or cashier's checks above mentioned; that thereafter, but before the drafts were presented for payment at the Winona Bank, Speltz notified defendant to stop payment on the check he gave plaintiff, and thereupon defendant stopped payment on the drafts or cashier's checks it had issued to plaintiff. It is conceded that Speltz had ample funds on deposit with defendant to meet his check when it was there presented by plaintiff, and that defendant had ample funds in the Winona Bank to meet its drafts. Plaintiff demurred to this answer as insufficient to constitute a defense, and the court sustained the demurrer. Defendant appeals.

Speltz, alleging the same state of facts, intervened, and asked that his check be canceled and returned to him, and that he have judgment against defendant for \$4,000. Plaintiff demurred to the pleading on the ground that it does not state a cause of action in intervention. This demurrer was also sustained, and intervenor appeals.

Defendant is a state bank in which intervenor had a checking account at the time of the transaction stated

in the pleadings. When plaintiff accepted intervenor's check the law did not regard the transaction as payment absolute for the shares of stock in the absence of an express or implied agreement that it should be so considered. *First Nat. Bank v. McConnell*, 103 Minn. 340, 14 L.R.A. (N.S.) 616, 123 Am. St. Rep. 336, 114 N. W. 1129, 14 Ann. Cas. 396. The drawer of such an instrument may revoke the authority of the drawee to pay, accept, or certify it at any time before it is paid, accepted, or certified. Appellants contend that the same holds true in respect to the drafts issued by defendant. It is also claimed that since the enactment of the Uniform Negotiable Instruments Act (Laws 1913, chap. 272 [Gen. Stat. 1913, §§ 5813-6009]) the giving of a check or draft cannot be regarded as an assignment, equitable or otherwise, of any part of the funds of the drawer in the hands of the drawee; therefore the drawer has the right to revoke the authority to pay at any time before there has been a written acceptance, or certification, or actual payment of the check or draft. In this case the Speltz check when presented was neither certified nor accepted in conformity with the act mentioned. Was it paid?

When plaintiff presented the check at the banking house of defendant, the drawer, Speltz, had money on deposit to fully meet it. It was presented for payment. Plaintiff received \$250, and, for his own convenience, requested the two drafts or cashier's checks for the balance. No doubt, defendant charged Speltz's account with the whole amount. Clearly both plaintiff and defendant considered the transaction as a payment of Speltz's check; for the former parted with the check and the latter with the cash and the drafts which it knew to be good. When this was done no contract obligation remained in respect to the check either as between plaintiff and Speltz or as between defendant and Speltz. The check had served its purpose; and could there-

after be used only as evidence of a past transaction. Had defendant become insolvent before the drafts were paid, or had plaintiff for any other reason failed to get the money therein called for, he could have had no recourse against Speltz on the check, nor could he have sued him for the debt or claim the check was given to settle or pay. "When a debtor gives his creditor an order on his bank to pay an indebtedness, having money at the bank to pay it on presentation, and the creditor waives the right to demand cash and accepts bills of exchange from the bank in payment, the debt is satisfied, though the exchange proves worthless." *Loth v. Mothner*, 53 Ark. 116, 13 S. W. 594.

Whether defendant paid the check in cash or with its own drafts or cashier's checks was no concern of Speltz. That was a matter wholly between plaintiff and defendant. Plaintiff requested the drafts instead of the cash, and cannot well be heard to say that they were not accepted in payment of the check he surrendered. And when plaintiff is content to rest on the obligations created by the drafts issued by defendant in the usual course of business, it ought not to lie in the mouth of the latter to say that the check was not paid by the transaction. Plaintiff owed defendant nothing when he presented the check, and the drafts were not given as provisional payment of any debt or obligation then existing between defendant and plaintiff. They were given and taken instead of money. Bank drafts or bank cashier's checks pass current as money in everyday business transactions. When large sums are involved, business men prefer to receive payment in such paper rather than in the coin of the realm. In *First Nat. Bank v. Maxfield*, 83 Me. 576, 22 Atl. 479, the court uses this language in respect to a draft that was surrendered upon the receipt of a check from the acceptor: "The draft in question, in the eye of the law, was paid at maturity, and became dead to the commercial world."

See also *Equitable Nat. Bank v. Griffin & S. Co.* 113 Cal. 692, 45 Pac. 985, where a bill of exchange drawn on defendant was presented for payment, and defendant on the same day gave its check for the amount to plaintiff, and directed that the bill of exchange be returned to it by mail because the clerk who had the bill in his charge was temporarily absent from the office of plaintiff's agent when the check was there delivered. The bill was so returned, marked paid. It was held that the transaction constituted a payment of the bill of exchange, and defendant could not stop payment of the check. *Briggs v. Central Nat. Bank*, 89 N. Y. 182, 42 Am. Rep. 285, also bears out our conclusions that defendant here cannot set up the defense attempted.

Appellants rely on *Hunt v. Security State Bank*, 91 Or. 362, 179 Pac. 248. There the drawer of the check notified the drawee not to pay after the latter had received the check, properly indorsed, by mail from a bank at a distant city with instructions to remit the amount of the check, and other checks inclosed, "in Portland exchange." When so notified, the drawee had already marked the check paid and had placed it on a spindle with the intention to, later in the day, charge it against the drawer's account and remit the "exchange." The drawee did not remit until after payment was stopped. The court said: "When Hunt [the drawer] ordered the defendant not to pay the check, the bank had done nothing more than to satisfy itself that the check was genuine, and that there were sufficient funds to pay it, and to stamp it 'Paid,' and to place it upon the spindle. All this was merely preparing to pay; it was simply a step towards payment; it was not payment. No entry was made on the books. The drawer was not charged; the holder was not credited. It may be assumed that the bank intended to make appropriate entries on its books and to remit; but we are confronted with a situa-

tion where the bank had not yet executed its intention. An intention to pay is not payment. What the bank did was done in contemplation of payment; but payment was not completed."

It is quite clear that the language used in that decision strongly suggests that here, where the payee presented and surrendered the check to the drawee, upon receiving part in cash and the balance, at his own request, in these drafts, there was in law a payment of the check before the drawee undertook to stop payment. We think the answer shows no defense.

Reaching that conclusion in respect to defendant's answer, it follows that the intervener's complaint states no cause for intervention. Speltz did not attempt to stop payment of the check until after defend-

ant had fulfilled all the duties it owed him with reference thereto, namely, to honor it when presented for payment. Speltz could have no claim for the \$250 defendant paid plaintiff, nor could he claim the drafts or the funds on which the drafts were drawn. It is not a case like *Hoidale v. Cooley*, 143 Minn. 430, 174 N. W. 413, where the intervener claimed the notes in suit as its property because its agent had wrongfully appropriated the same. Without intimating that Speltz could successfully urge as a ground of intervention in this action that he would otherwise be unable to obtain redress from plaintiff, we may note that there is no allegation that plaintiff is insolvent or that he cannot be made to respond in damages for any wrong committed in the stock transaction.

The orders are affirmed.

ANNOTATION.

Fraud or other defense to check as available against paper issued by drawee bank in payment of check.

An extensive search has failed to disclose any other case passing upon the right of a bank which has issued its paper in payment of a check drawn upon it, to defend an action upon the paper issued by it on the ground that there was fraud or other defense to the check. That the bank cannot make such a defense is held in the reported case (*JOHNSON v. FIRST STATE*

BANK, ante, 960). This decision is based upon the theory that where the payee of the check presented and surrendered it to the drawee bank, upon receiving part in cash and the balance in a draft there was in law a payment of the check, and the drawee thereafter could not stop payment upon it; hence, the bank had no defense to the paper issued by it. W. A. E.

EX PARTE THOMAS TAYLOR.

Texas Supreme Court — March 24, 1920.

(— Tex. —, 220 S. W. 74.)

Courts — power to honor letters rogatory.

1. A proper court has inherent power to honor the request of a court of an independent jurisdiction expressed by letters rogatory for the use of its process in aid of obtaining the deposition of a witness whose testimony is material in a case pending in the requesting court.

[See note on this question beginning on page 966.]

Witness — duty of person to testify.

2. Men generally owe the duty of giving their testimony to courts of justice in all inquiries where it may be material.

Deposition — duty of court to assist in obtaining.

3. Courts of justice of different countries or states are, in aid of justice, under a mutual obligation to assist each other in obtaining testimony upon which the right of a case may depend.

[See 8 R. C. L. 1145, 1146.]

—discretion with respect to honoring letters rogatory.

4. Whether or not a court shall honor letters rogatory from the courts of another state is a matter of discretion.

—protection of witness.

5. A court honoring letters rogatory from the courts of another state will see that the witness is not compelled to give privileged testimony, although the question of the relevancy and materiality of the testimony is one for the court sending the letters.

[See 8 R. C. L. 1145.]

APPLICATION for a writ of habeas corpus to secure petitioner's release from custody to which he had been committed for refusal to give his oral deposition in obedience to an order of the court. *Denied.*

The facts are stated in the opinion of the court.

Messrs. Pope & Young for relator.
Messrs. Crane & Crane opposed.

Phillips, Ch. J., delivered the opinion of the court:

The circuit court of Cook county, Illinois, in a suit there pending of Nancy J. Wicks v. The Tribune Company, issued, on November 20, 1919, a commission to Jack A. Schley, a notary public of Dallas county, Texas, for the taking of the oral deposition of the relator, Thomas Taylor. The notary caused Taylor to be served with a subpoena for the purpose of obtaining his appearance, but Taylor refused to appear before him. Thereafter, on January 17, 1920, the circuit court of Cook county, Illinois, in the form of a letter rogatory, made request of the district court of Dallas county that, by appropriate process, it cause the witness Taylor to appear before the notary, or someone authorized by it, and give his oral deposition for use in the cause pending in the former court. The letter rogatory recited that Taylor's testimony was material in the cause, and justice could not be completely done between the parties without it, as given by oral deposition; the issuance of the previous commission at the instance of the defendant after due notice to the plaintiff; Taylor's refusal to appear before the notary; and, in substance, that the formalities of the

Illinois laws had been complied with in respect to the giving of notice for the taking of the deposition.

The district court of Dallas county, Honorable E. B. Muse presiding, on January 19, 1920, honored the request so made of it, and issued its writ commanding the witness to appear before the notary Schley on January 30, and give his deposition on oral interrogatories as might be propounded by the attorneys for the respective parties in the Illinois suit. Taylor refused to obey this writ. Thereupon, the Tribune Company, defendant in the Illinois suit, filed an ancillary proceeding in the Dallas county district court against Taylor to have him adjudged in contempt. He was cited to appear, and on examination announced to the court that he would refuse to give his oral deposition in obedience to its order. The court adjudged him in contempt and remanded him to the custody of the sheriff to be confined until such time as he would consent to obey its order.

The question presented is one of jurisdiction,—whether it was within the power of the district court of Dallas county, under the proceedings recited, to order the relator to appear before the notary and give his oral deposition. If the court had the authority to make the order, it was within its authority to enforce it,

and to hold the relator in contempt for its disobedience.

The power of a proper court to honor the request of a court in an independent jurisdiction expressed by letters rogatory, for the use of its process in aid of obtaining the deposition of a witness whose testimony is material in a cause pending in the

Courts—power to honor letters rogatory.

latter, while perhaps not frequently called into exercise, is inherent, and does not depend upon statutes. It exists to prevent a failure of justice. It is related to the administration of justice in its best sense. Men, generally, owe the duty of giving their

Witness—duty of person to testify.

testimony to courts of justice in all inquiries where it may be material.

Courts of justice of different countries or states, therefore, are, in aid of justice, under a mutual obligation to assist each other in obtaining testimony upon which the right of a cause may depend. There must be the judicial power somewhere to prevent what may amount to the defeat of justice through the recalcitrant conduct of a material witness.

Deposition—duty of court to assist in obtaining.

This obligation of courts of independent jurisdiction grows out of necessity,—the necessity that the administration of justice be untrammelled and unobstructed. It rests upon the comity of states, and may be said to proceed from the law of nations. The issuance of letters rogatory for the purpose is derived from the civil law. The power is one which has always obtained in courts of chancery.

The court to which the letter rogatory, or request, is addressed, is under no compulsion to respect it. It is within its discretion to refuse to honor it. It is a matter, as has been said, resting upon comity. But if it be a court of appropriate jurisdiction, there is no question as to its power

—discretion with respect to honoring letters rogatory.

to honor it and by its process execute it.

In the execution of the request, it is the duty of the court to see that the witness is protected in all of his legal rights. In general, the relevancy and materiality of the testimony adduced is for the determination of the court having jurisdiction of the cause; but the court executing the request will see, for instance, that the witness is not compelled to give evidence which is privileged.

Under the general jurisdiction possessed under the Constitution by the district courts, it was within the power of the district court of Dallas county to honor the request of the Illinois court and to order the witness to appear before the notary and give his oral deposition, a method for taking the testimony of witnesses having the express sanction of the laws of this state.

The following authorities may be consulted upon the general question, and sustain the ruling here made: Greenl. Ev. § 320; 4 Jones, Ev. § 400; Weeks, Depositions, § 128; State v. Bourne, 21 Or. 218, 27 Pac. 1048; Keller v. B. F. Goodrich Co. 117 Ind. 556, 10 Am. St. Rep. 88, 19 N. E. 196; Re Whitlock, 51 Hun, 351, 3 N. Y. Supp. 855; Anonymous, 59 N. Y. 313; Re Martinelli, 219 Mass. 58, 106 N. E. 557; Dowagiac Mfg. Co. v. Lochren, 74 C. C. A. 341, 143 Fed. 211, 6 Ann. Cas. 573.

The case of Marshall v. Irwin, 280 Ill. 90, 117 N. E. 483, cited by the relator,—the further citation from 18 C. J. 682 being founded upon its holding,—is not an opposing authority. There, the commissioner, attempting to obtain the deposition of a witness in Illinois upon a commission issued by the court of another state, filed a proceeding in the Illinois court to have the witness adjudged in contempt for refusing to testify, and he was so adjudged by the court. It was held that the commissioner had no authority under the Illinois statutes to procure such

The case of Marshall v. Irwin, 280 Ill. 90, 117 N. E. 483, cited by the relator,—the further citation from 18 C. J. 682 being founded upon its holding,—is not an opposing authority. There, the commissioner, attempting to obtain the deposition of a witness in Illinois upon a commission issued by the court of another state, filed a proceeding in the Illinois court to have the witness adjudged in contempt for refusing to testify, and he was so adjudged by the court. It was held that the commissioner had no authority under the Illinois statutes to procure such

Digitized by Google

an order. The case did not, in any way, involve the power of the court to respect the request of another court to aid it in obtaining the deposition of a witness within its jurisdiction. The court's assistance there had not been invoked by the

court of the other state, and it was not attempting to enforce any order made in virtue of such application to it.

The relator is remanded to the custody of the sheriff of Dallas county.

ANNOTATION.

Power of court to issue or to honor letters rogatory.

- I. Introduction, 966.
- II. Power to issue, 967.
- III. Power to honor, 969.

I. Introduction.

The reported case (*EX PARTE TAYLOR*, ante, 963) turns on the question of the inherent power of the court to honor letters rogatory. There seems to be no question under the authorities cited in the present annotation but that courts have this inherent power, although the practice of examination on oral interrogatories, as was ordered in the *TAYLOR CASE*, seems to be unusual. The present annotation does not purport to cover questions of practice regarding the granting or honoring of letters rogatory, but is intended rather to treat the question of the power of the courts in this regard. Since, however, the courts very generally assume that the power exists, the annotation includes a sufficient number of authorities on questions of practice to show that the general power both to issue and to honor letters rogatory is well established, as inherent in the courts.

It is the custom, it appears, to issue letters rogatory, where the government of the country in which the witnesses reside refuses to permit the execution of a commission appointed by the court of another country to take testimony. This custom arises out of the mutual obligation of the courts of the different countries, under the law of nations, to assist one another in the furtherance of justice. By these letters the court abroad is requested to take the testimony of certain witnesses named for use in a cause pending in the court issuing the request, with an offer on the part of

the latter court to do the like for the other court in a similar case. And the request, it appears, is usually accompanied by interrogatories. Such letters of request appear not uncommon under the English practice. See 13 *Laws of England* (Halsbury) pp. 611, 614.

There is a very broad distinction, it was said in *Kuehling v. Leberman* (1873) 9 Phila. (Pa.) 160, between the execution of a commission and the procuring of testimony by the instrumentality of letters rogatory or letters requisitory, as they are sometimes called; in the former case the rules of procedure are established by the court issuing the commission, and are entirely under its control; in the latter, the methods of procedure must, from the nature of the case, be altogether under the control of the foreign tribunal which is appealed to for assistance in the administration of justice.

Letters rogatory were unknown to the common law, and came from the civil law through the admiralty courts. *Ibid.*

It will be observed, as above indicated, that the court in the *TAYLOR CASE* ordered the examination on oral interrogatories. While this feature does not apparently affect the power of the court, written interrogatories, it seems, generally accompany the letters rogatory, and their absence may, apparently, affect the question whether the court in its discretion will honor the letters.

In *De Villeneuve v. Morning Journal Asso.* (1913) 206 Fed. 70, the court, in granting a motion for letters rogatory, stated that the case was one in which a number of the witnesses were

likely to be unwilling, so that the examinations should be oral, although that was a most unusual method, and not upon written interrogatories.

But it was held in *Doubt v. Pittsburgh & L. E. R. Co.* (1897) 6 Pa. Dist. R. 238, that the application for the taking of testimony under letters rogatory should be refused because no interrogatories were attached to the letters, and the court could not prevent the abuse of process by the asking of irrelevant and incompetent questions.

II. Power to issue.

The proposition that courts have inherent power to issue letters rogatory seems well established. *Gross v. Palmer* (1900) 105 Fed. 833; *De Ville-neuve v. Morning Journal Asso.* (1913) 206 Fed. 70; *Re Martinelli* (1914) 219 Mass. 58, 106 N. E. 557; *Anonymous* (1874) 59 N. Y. 313; *De Cauville Auto Co. v. Metropolitan Bank* (1908) 124 App. Div. 478, 108 N. Y. Supp. 1027; *Bowen v. Havana Electric R. Co.* (1911) 146 App. Div. 672, 131 N. Y. Supp. 536; *Robb's Petition* (1892) 11 Pa. Co. Ct. 298; *Hite v. Keene* (1909) 137 Wis. 625, 119 N. W. 303. See also other cases cited in the annotation in which the power is assumed.

The inherent power of courts to issue letters rogatory was held in *De Ville-neuve v. Morning Journal Asso.* (1913) 206 Fed. 70, supra, not restricted by the provision of the Federal statute treating of the method of execution and return of letters rogatory issued in cases in which the United States is a party or has an interest. The court said: "Letters rogatory have very rarely issued in this circuit. The statutes of the United States confer no general power upon the courts to issue them. Section 875, U. S. Rev. Stat. (Comp. Stat. § 1486, 3 Fed. Stat. Anno. 2d ed. p. 196) does treat of letters issued in cases in which the United States is a party or has an interest, and this has been thought evidence of an intention upon the part of Congress to restrict the inherent power of the court. However, as we execute letters rogatory coming from foreign countries, and as this method of getting testimony is most necessary in countries which refuse to compel the

attendance of witnesses under commissions, I think we ought not to suppose that Congress intended to limit the power of the court."

The power of courts to issue letters rogatory is not dependent on statute, but rests upon the international good will toward each other by which courts of civilized countries are actuated. *Re Martinelli* (1914) 219 Mass. 58, 106 N. E. 557, supra.

It was said in *Anonymous* (1874) 59 N. Y. 313, supra, that although a commission rogatory was not the mode authorized by statute for the taking of testimony of witnesses residing out of the state, the power to issue the same would seem to be proper, if not necessary, in cases where the evidence can be produced in no other way, on account of the laws of the country where the witness resides. But, conceding the power, the court held that whether it was proper to exercise it in a given case, and whether the circumstances justified or demanded it, were questions calling for the exercise of the discretion of the court to which the application was made, and could not be reviewed by the court of appeals.

And in *Robb's Petition* (1892) 11 Pa. Co. Ct. 298, supra, the court said that letters rogatory are not the creation of a statute, but existed prior to any statute on the subject, and arose from the principle of comity between friendly nations, since one nation could not compel the attendance of witnesses from another nation, and justice would often fail unless there was some mode of obtaining their testimony; that this was accomplished by letters rogatory, for which there was an additional reason in the case of foreign nations, in that each was jealous of its own territory and would not permit a foreign jurisdiction to interfere with its citizens except under the sanction of its own courts.

It is within the discretion of the trial court to order the issuance of letters rogatory for the taking of testimony in a foreign country. *Hite v. Keene* (Wis.) supra.

But although courts have inherent power to issue letters rogatory, where

the testimony sought cannot otherwise be obtained, yet the remedy is only resorted to in cases of necessity, owing to the fact that the law of the foreign jurisdiction then governs with respect to the taking of testimony. *De Cauville Auto Co. v. Metropolitan Bank* (1908) 124 App. Div. 478, 108 N. Y. Supp. 1027, *supra*. It was said also that the courts now had express statutory power under the Code.

Although holding that letters rogatory should issue where the desired testimony could not otherwise be obtained, the court in *Gross v. Palmer* (1900) 105 Fed. 833, *supra*, denied the application for the issuance of such letters for the reason that the showing was insufficient that the testimony could not be obtained by a commission. The court said: "A commission is, as a rule, the more expeditious, comprehensive, and satisfactory means of procuring evidence outside the jurisdiction of the court, and this means of taking such testimony is favored by the courts where it is adequate. Complainant seeks to establish the fact that this means is not adequate in this instance by his affidavit made upon information and belief only. This showing I do not deem sufficient. I am of the opinion that the impossibility of obtaining the testimony sought by ordinary procedure under a commission should be established with certainty; the most satisfactory method being the issuance of such commission, and its return showing the impossibility, after proper efforts made, of obtaining the desired testimony thereunder."

Letters rogatory are never issued when the testimony can be obtained on a commission, which is a much more simple and speedy method of obtaining testimony, and is now generally adopted in the states of the Union. *Robb's Petition* (Pa.) *supra*.

That courts have inherent power to issue letters rogatory for the examination of a witness in a foreign country seems assumed, and the practice of so doing is expressly recognized in *Romero v. Calaf* (1915) 7 Porto Rico Fed. Rep. 505.

And that a court has inherent pow-

er to issue letters rogatory if the testimony cannot otherwise be obtained seems assumed in *Stengel v. Stengel* (1915) 85 N. J. Eq. 277, 96 Atl. 358, although the court in this case denied the request for the issuance of such letters, as it was not shown that a commission could not be executed.

The doctrine that it is discretionary with the court to issue letters rogatory appears supported by the case of *Ferrie v. Public Administrator* (1855) 3 Bradf. (N. Y.) 249, although the court in this case issued a commission in the ordinary form for the taking of testimony in France, instead of letters rogatory, as requested, stating that the letters rogatory presented no advantages and was exposed to the objection that it removed the investigation from the control of the court, and from the operation of those rules of evidence prevailing in American tribunals.

It is the constant practice of the courts, it was said in *Re Smith* (1913) 79 Misc. 77, 139 N. Y. Supp. 523, to issue letters rogatory to officials of the German Empire, as ordinary commissions to take depositions of witnesses in Germany are not *ex comitate* executed freely there, and no provision seems there to be made for such commissions.

Letters rogatory were issued in *Nelson v. United States* (1816) Pet. C. C. 235, Fed. Cas. No. 10,116, where the policy of the government of the country in which the witnesses were to be examined was not to permit a commission to be executed.

The power inherent in a court to issue letters rogatory can be exercised only in aid of a cause actually pending in the court which issues the letters. *Re Martinelli* (1914) 219 Mass. 58, 106 N. E. 557. It was said that this was apparent when the nature of the proceeding was considered, it being in form a request to a court of a foreign jurisdiction asking that court, as a matter of comity, to take the testimony of a witness or witnesses within its jurisdiction and transmit the same to the court making the request, for its aid in the doing of justice in a cause before it. It was held accord-

ingly in this case that it was not within the power of the superior court to issue letters rogatory for the taking of testimony to be used in proceedings pending before the Industrial Accident Board for the recovery of payments provided by the Workmen's Compensation Act.

It is not within the power of a court, even of general jurisdiction, to issue letters rogatory to obtain testimony to be used before a tribunal over whose procedure and trials it is given no authority until the case itself is brought before it for review. *Ibid.*

And power on the part of the superior court to issue letters rogatory under the above circumstances was held not conferred by a statute providing that the Industrial Accident Board should have power to subpoena witnesses, administer oaths, and examine books and records, and that the superior court should have power to enforce by proper proceedings the provisions of the act relating to the attendance and testimony of witnesses. *Ibid.*

In *United States v. Dennison* (1867) 2 Ch. Chamb. Rep. (U. C.) 176, letters rogatory were issued at the request of the United States government for the examination of a witness in the United States, although the Canadian court stated that it could not reciprocate the courtesy, but that a clause would be added explaining the omission of the usual offer to reciprocate on the ground that the laws of Upper Canada did not permit the court to render the same service. Whether the court regarded its inability to reciprocate as due to the lack of a statute in Canada similar to the United States statute to which it refers does not appear.

The practice of the Canadian courts to issue letters rogatory for the examination of witnesses in other countries is shown in the following cases, the courts being held to have a discretion as to whether the letters shall be issued: *Armstrong v. Gillies* (1903) 5 Quebec Pr. Rep. 423; *Bernard v. Carboneau* (1904) 6 Quebec Pr. Rep. 350; *Deslandes v. St. Jacques* (1908) 9 Quebec Pr. Rep. 213; *Edwards v. Le*

Petit Seminaire de Sainte Marie de Monnoir, Rap. Jud. Québec 45 C. S. 178.

III. Power to honor.

The majority view seems to be that courts have inherent power to honor and to execute letters rogatory from another state or country, although, as in the case of the issuing of such letters, they have a discretion in the matter, not, however, to be exercised arbitrarily, and are not bound under all circumstances to honor the request. *EX PARTE TAYLOR* (reported herewith) ante, 963; *State v. Bourne* (1891) 21 Or. 218, 27 Pac. 1048; *McKenzie's Case* (1843) 2 Pars. Sel. Eq. Cas. (Pa.) 227, 1 Clark, 356; *Robb's Petition* (1892) 11 Pa. Co. Ct. 298; *Doubt v. Pittsburgh & L. E. R. Co.* (1897) 6 Pa. Dist. R. 238. See also other authorities elsewhere cited in the annotation implying the existence of the power.

But the court in *Re Romero* (1907) 56 Misc. 319, 107 N. Y. Supp. 621, in refusing to direct service on a resident of New York, at the request of a Mexican court, to answer a suit in Mexico where it had no property, appears to be of a different opinion as regards inherent power to honor letters rogatory, it being said: "By statute our courts will assist in the execution of foreign letters rogatory for the examination of witnesses within our jurisdiction; but even as to such process there is no inherent or implied power in the court. The authority must be found in the statute." As supporting this view the court cited *Re Canter* (1903) 82 App. Div. 103, 81 N. Y. Supp. 416, in which it is said: "There is no inherent authority in the supreme court to issue a subpoena to compel the attendance of a witness to give testimony in this state to be used without the state, and such authority, if it exists at all, must be found in some statute enacted for the purpose of carrying into effect the comity existing and that should exist between this state and other states or countries with reference to facilitating the administration of justice."

It is especially proper for the court to honor letters rogatory issued by the court of a sister state. *McKenzie's*

Case (1843) 2 Pars. Sel. Eq. Cas. (Pa.) 227, 1 Clark, 356, *supra*. It was held also in this case that the court would not inquire into the relevancy of the testimony which it was sought to elicit under the letters rogatory, and would leave to the court granting them the question whether they were lawfully issued.

It was held in *State v. Bourne* (1891) 21 Or. 218, 27 Pac. 1048, *supra*, that the circuit courts of the state had power, independent of statute, to require the attendance of a witness under letters rogatory from another state. The court said that a duty was created which no state could refuse to fulfil without forfeiting its standing among the civilized states of the world; that the matter appertained to the administration of justice in its best sense, and the exercise of the power was now common and unquestioned among civilized nations.

The inherent power of courts to honor letters rogatory issued in foreign countries is recognized (*obiter*) in *Re Pacific R. Commission* (1887) 32 Fed. 241, where the court distinguished between proceedings to obtain testimony by this method and a proceeding by an investigating commission appointed under act of Congress. The court said: "There are certain powers inherent in all courts. The power to preserve order in their proceedings, and to punish for contempt of their authority, are instances of this kind. And by jurists and text-writers the power of the courts of record of one country, as a matter of comity, to furnish assistance, so far as is consistent with their own jurisdiction, to the courts of another country, by taking the testimony of witnesses to be used in the foreign country, or by ordering it to be taken before a magistrate or commissioner, has also been classed among the inherent powers."

And the rule that it is discretionary with the court, on application, to enforce obedience to a subpoena issuing by virtue of a commission or letters rogatory, is approved in *Simpler's Petition* (1901) 10 Pa. Dist. R. 141, and *Bliss v. Milholland* (1901) 10 Pa. Dist. R. 201, although these cases in-

volved the taking of testimony under a commission rather than letters rogatory.

The superior court of Delaware, in *Shannon Mfg. Co. v. McCaulley* (1902) — Del. —, 56 Atl. 367, granted an application under letters rogatory from Pennsylvania for the appointment of a commissioner to take testimony in Delaware for use in a suit in Pennsylvania, where the letters stated that without the testimony justice could not completely be done between the parties.

The discretion which a court has, when application is made to it by letters rogatory from another state for the taking of testimony, to comply with the request, it was held in *Doubt v. Pittsburgh & L. E. R. Co.* (1897) 6 Pa. Dist. R. 238, was not affected by a statute which prescribed the mode or form of procedure in such cases. Without setting out the statute, the court said: "The Act of 1833 merely recognizes a form which always existed in judicial tribunals, and prescribes the mode by which it may be made effective. This power rests upon comity, which, in itself, implies the right to exercise judicial discretion. The words of the act do not deprive the courts of this discretion, and surely it never could have been intended to make the courts of this state the unquestioning and perhaps unwilling agents of a court of another state, whether that court was right or wrong. It may be admitted that the comity of nations in this matter has the force of law, but it still leaves to the court whose power is invoked the right to determine as to the legality and rightfulness of its exercise. Every presumption must be in favor of the legality and regularity of the demand made by a foreign court, but it is not conclusive. It is not enough to call papers 'letters rogatory;' they must be such in fact. If the objection is that they do not conform to the general law which governs all courts, that may be determined by the court to which they are addressed. If the objection is that they are not in accordance with the laws or practice of the courts of the state from which they

come, they must be determined by the courts of that state."

It was held also in *Doubt v. Pittsburgh & L. E. R. Co.* (Pa.) *supra*, that the application should be refused for the reason that comity did not require the Pennsylvania court to permit the plaintiff, who was a resident of Pennsylvania and had brought a suit in Ohio against a corporation of both states for a cause of injury arising in Pennsylvania, to examine witnesses in the latter state, under letters rogatory from Ohio, the plaintiff having instituted the suit in that state for the purpose of avoiding defenses which might be set up under the laws of Pennsylvania. The court said: "It is one of the first principles of the exercise of comity that it will not be given at the expense of injustice to the citizen of the state to which the appeal is made. . . . We are not bound to assist in enforcing claims in violation of our own laws in favor of a citizen who voluntarily and without necessity goes outside our jurisdiction to avoid them. And it does not matter whether the rights of the parties depend upon statute, or on the common law as interpreted by our courts."

But under the Pennsylvania Statute of 1833, providing for the method of procedure when letters rogatory are received from another state, it was held in *Zimmel's Case* (1893) 13 Pa. Co. Ct. 460, that the courts of the state could not execute letters rogatory from another country issued for the purpose of securing testimony to be used in a criminal prosecution. The court said: "It seems, therefore, that the Statute of 1833, to which reference has been made, is extended to the case of letters rogatory from a foreign tribunal, and that in such cases the courts of common pleas in Pennsylvania will receive them in civil cases, and enforce them according to their own prescribed methods of procedure and by their proper and usual processes. It nowhere appears, however, that this statute contemplated the taking of evidence in this way for criminal cases, nor under the direction and by the process of our courts of quarter sessions and oyer and terminer, organized

for criminal prosecution. The taking of testimony by deposition for criminal cases is unknown to our system of jurisprudence, and § 9 of art. 1 of the Declaration of Rights in our Constitution provides that in all criminal prosecutions the accused hath the right to meet the witnesses face to face. I am therefore of the opinion that the courts of this commonwealth are not competent to receive these letters rogatory, and to enforce the testimony of this witness by deposition or answers to interrogatories, to be used in a criminal cause."

It was held in *Re Letters Rogatory* (1888) 36 Fed. 306, that an order for the attendance of witnesses, based on letters rogatory from a district judge of Vera Cruz, should be set aside, because it did not appear that the proceedings, which related to an investigation as to smuggling, amounted to a suit for the recovery of money or property, within the provision of the Revised Statutes that the testimony of any witness resident in the United States may under certain circumstances be obtained by letters rogatory to be used in a suit for the recovery of money or property depending in a court in a foreign country.

And where request was made by a judge in Mexico that a New York court summon a resident of that state to answer a suit brought against him in Mexico on a contract which was made and was to be performed there, and apparently under the laws of Mexico a personal judgment might be rendered by default, it was held in *Re Letters Rogatory* (1919) 261 Fed. 652, that an order for service of summons should be vacated, both because the judicial aid invoked was without precedent, letters rogatory being in practice used only for examination of witnesses, and because the result would be contrary to the system of American jurisprudence which treated the legal jurisdiction of the court as limited to persons and property within its territorial jurisdiction. The same result was reached on similar facts in *Re Romero* (1907) 56 Misc. 319, 107 N. Y. Supp. 621.

R. E. H.

NELS KVALE, Respt.,
v.
DANIEL KEANE, Appt.

North Dakota Supreme Court—May 23, 1918.

(39 N. D. 560, 168 N. W. 74.)

Evidence — answer to letter — sending of letter.

1. Where it is sought to introduce in evidence an answer to a letter which it is claimed was previously sent, before the letter, which is claimed to be the answer, can be received in evidence, it must first be proved that the letter previously sent was properly addressed to the addressee at his post-office address with sufficient postage thereon, and that thereafter such letter was deposited in the postoffice or some branch of the postal service authorized to receive and collect mail for transmission, and until such proof is made concerning the previous letter, there is no foundation laid for the admission in evidence of the purported answer thereto, and the same is inadmissible.

[See note on this question beginning on page 984.]

— sufficiency.

2. Evidence examined, and held not sufficient to establish the making of a contract by correspondence.

— incapacity.

3. Evidence examined, and held to establish the incapacity of the defendant to make a contract by reason of his mental and physical disability coupled with his very advanced age.

— presumption that letter was received.

4. Before there arises any presumption in law that a letter claimed to be sent by one party to another, the addressee, has been received by the addressee, it must first be proved that the letter so sent was properly addressed to the addressee at his post-office address, and was properly stamped with sufficient postage thereon and deposited in some postoffice or some subdivision of the postal department, where mail may properly and le-

gally be deposited for collection and transmission such as mail boxes on the rural routes.

[See 21 R. C. L. 764 et seq.]

Contract — by letter — binding effect.

5. Where one by letter makes an offer to sell property for a specified price and upon specific terms, and there is an unqualified and unconditional acceptance of the offer, the mutual letters make and constitute a contract in writing.

[See 6 R. C. L. 610.]

— necessity of unconditional acceptance.

6. To constitute a contract to sell land by exchange of letters, there must be no deviation from the terms of the offer in the letter of acceptance, nor must the letter contain a new or different proposition which would change the terms of the offer.

[See 6 R. C. L. 608.]

Headnotes 1-4 by GRACE, J.

APPEAL by defendant from a judgment of the District Court for Renville County (Leighton, J.) in favor of plaintiff in an action brought to enforce specific performance of an alleged contract to sell certain land. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. James R. Hickey and Lee Combs for appellant.

Messrs. Ryerson & Rodsater for respondent.

Grace, J., delivered the opinion of the court:

This action is one of specific performance, wherein the plaintiff

seeks to have the defendant perform a certain alleged contract claimed by the plaintiff to have been made between defendant and plaintiff with reference to the N. E. $\frac{1}{4}$ of section 21, township 162, range 86, Renville county, North Dakota. Plaintiff claims that he is entitled to conveyance of said premises from the defendant to the plaintiff upon the payment by the plaintiff to the defendant of the purchase money according to the terms of the contract. The facts in the case are as follows: On the 7th day of April, 1916, the defendant was the owner of a certain tract of land above described. The defendant is a resident of the city of St. Paul, Minnesota. It is claimed by the plaintiff that on the 7th day of April, 1916, the defendant made an offer, in writing, to sell the land in question to the plaintiff for \$3,200, the terms of such sale to be as follows: \$250 when the deal is closed, \$250 per year, after the year 1916, payable January 1st of each year, and the balance, at the end of five years, to then become due and payable; interest on deferred payments to be at the rate of 6 per cent per annum, payable semiannually, the first interest payments to be made October, 1, 1916, and every six months thereafter. Plaintiff claims that on the 14th day of April, 1916, and before said offer to sell was withdrawn by the defendant, the defendant's offer to sell such land to the plaintiff was accepted, which acceptance in writing was communicated to the defendant and received by him about the 17th day of April, 1916. After acceptance by the plaintiff of defendant's offer was communicated to and received by the defendant, the defendant notified the plaintiff, in writing, that he would not perform his part of the contract. The plaintiff asserts he is ready, able, and willing to perform his part of the contract. Defendant refuses to make any conveyance of said land. The contract, if any, is in the form of letters ex-

changed between the plaintiff and defendant.

The action is maintained upon the theory, and the complaint is framed in pursuance of the theory, that the defendant made an offer, in writing, to sell the real estate in question for a specific price and upon specific terms, and that the plaintiff made an unconditional acceptance, in writing, of such offer, claiming thereby to have made a binding contract for the purchase of said land.

It is a principle of law, well established and understood, in the law of contracts, that where one, by letter, makes an offer to sell property for a specified price and upon specific terms, and there is an unqualified and unconditional acceptance of the offer, the mutual letters thus written make and constitute a contract in writing. It is also a well-settled principle of law that in thus construing such letters to constitute a contract there must be no deviation from the terms of the offer in the letter accepting the terms of the offer. The letter of acceptance must contain no new or different proposition, which would, to any degree, change the terms of the offer. When an offer is made as above stated, the acceptance must contain no conditions which add to the terms of the offer. By this rule the transaction in question must be measured. However, the terms of the contract or the terms of the offer and the acceptance thereof must be distinguished from matters which relate not to the terms of the contract, but to the execution and performance of the contract. This distinction is of importance where contracts are made as a result of correspondence. After setting forth the correspondence which is the basis of the contract in question, we will endeavor to point out the distinction as it applies to this case.

The entire correspondence is as follows: Kvale testifies he had some correspondence with Daniel Keane;

Contract—
by letter—
binding effect.

—necessity of
unconditional
acceptance.

that he wrote a letter to him on March 17, 1915. He testified that he had no copy of the letter nor the original, but that he wrote and asked him if he would sell the land. To the letter, written March 17th, Kvale testifies he received a reply, which is exhibit 2, which came inclosed in exhibit 1, the envelop. The envelop is postmarked at St. Paul, Minnesota, March 24, 1916. In the upper left-hand corner is the conceded address of the defendant: "642 Iglehart Avenue, St. Paul, Minnesota." The address on the envelop is: "Mr. Nels Kvale, R. F. D. No. 2, Tolley, North Dakota."

Exhibit 2 reads as follows:

St. Paul, Minnesota. 3/23/16.

Mr. Nels Kvale, R. F. D. No. 2,
Tolley, North Dakota.

Dear Sir:—

I received your letter of March 17, 1915, but did not answer at that time as I had a cash offer at that time. Will you let me know whether you still desire the place and what you would be willing to pay at once? I also wish you would let me know what basis of crop payment you would be willing to make.

Hoping to hear from you soon, I am

Yours truly,

Daniel Keane.

642 Iglehart Avenue, St. Paul,
Minnesota.

The plaintiff testifies that he wrote an answer to exhibit 2, addressed to Daniel Keane, at 642 Iglehart Avenue, St. Paul, Minnesota, and deposited the same in the mail; that he received a letter, marked "exhibit 4," which came in the envelop, marked "exhibit 3." Envelop is postmarked St. Paul, Minnesota, April 10, 1916. In the upper left-hand corner, it contains the following words: "642 Iglehart Avenue, St. Paul, Minnesota." The envelop is addressed to "Mr. Nels Kvale, Tolley, North Dakota." The plaintiff testifies that the letter, exhibit 4, was contained in the envelop, exhibit 3, and was received by the plaintiff in the United States

mail. The letter, exhibit 4, reads as follows:

St. Paul, Minnesota. 4/7/16.

Mr. Nels Kvale,

Tolley, North Dakota.

Dear Sir:—

Received your letter of March 31st,—16. I would accept thirty-two hundred (\$3,200) dollars, based on the following payments: Two hundred fifty (\$250) dollars when the deal is closed, \$250 per year after 1916, first payment to be made on or before January first of each year, the interest to be paid semi-annually on or before the first of October, 1916, and payment every six months, the rate of interest to be 6 per cent. I will give you a mortgage running for five years and if you desire, you can renew mortgage at that time if the total amount of same is not paid. The taxes are paid for 1915 and you will pay all taxes from that year.

Will you kindly let me hear from you at your earliest possible convenience?

Yours truly,

Daniel Keane.

642 Iglehart Avenue, St. Paul,
Minnesota.

P. S. I do not understand what crop payments mean. If the proposition above agrees, kindly answer.

The plaintiff testified that he wrote Mr. Keane the letter which is exhibit 5, in answer to exhibit 4, and addressed it to Daniel Keane, 642 Iglehart Avenue, St. Paul, Minnesota:

Tolley, North Dakota. April 14, 1916.

Mr. Daniel Keane, 642 Iglehart Avenue, St. Paul, Minnesota.

Dear Sir:—

I have received yours of the 7th inst. in regard to sale of N. E. $\frac{1}{4}$ of Sec. 21, Twp. 162 Rge. 86, which you offer for a price of \$3,200 with a cash payment of \$250 at the time when the deal is made and balance at 6 per cent semiannually. I hereby agree to pay you the said price as per your terms stated in your letter and inclose my check for \$10 in advance as part payment of

the \$250 to be paid when the deal is closed, and I would therefore ask you to have the contract executed and sent to me in duplicate form and I will sign same and return copy to you with \$240 still due you on the first payment. I will appreciate your prompt attention to this as the spring work soon commences and I will have to make proper arrangements to work this land.

Yours very truly,
Nels Kvale.

In reply to this letter plaintiff testifies he received the following letter, exhibit 6:

St. Paul, Minnesota. April 17, 1916.

Mr. Nels Kvale,
Tolley, North Dakota.

Dear Sir:—

Your letter was received by me this morning inclosing a check for \$10 which I herewith return to you as I have already sold my property and will say that you were too slow in answering my letter. If you had answered it about five days ago the sale would have been made. Therefore, having sold the property, I return your check.

Yours very truly,
Daniel Keane.

It must be conceded that the terms of the contract are: The price of the land; the amount of the initial payment, and the subsequent payments to be made yearly; the time when the payments should be made; the rate of interest; the taxes; and the proposition to take a mortgage, which was evidently what the defendant meant in his reference to a mortgage in his letter of April 7th. These terms are definite and certain. There is no room for doubt as to what they mean. The plaintiff in his reply letter accepts all of such terms. Attention is called to his language in this letter, "I hereby agree to pay you the said price as per your terms stated in your letter." Then follows the balance of the letter. It will be seen there are no new terms suggested, no change in the terms demanded, but an absolute acceptance of the terms as

stated by the defendant. The other matters referred to in plaintiff's reply as to the making out of the contracts in duplicate which he asked the defendant to make out and send to him, and which he would sign and return a copy, together with the balance of the first payment of \$240,—all related to the execution and performance of the contract, and did not relate to the making of the contract or the terms thereof. The making of the contract and execution and performance must be distinguished. The making of the contract, if it were made, was completed between the plaintiff and defendant when the defendant had quoted his price and terms in the manner in which he did, which price and terms were unreservedly accepted by the plaintiff. After this would come the execution of the contract which had been made. While the letters of themselves constitute the contract so far as to be binding between the parties and are effective for the purpose of showing an actual meeting of the minds of the parties in the contract, and are sufficient to take the matter without Statute of Frauds, the plaintiff had the right to assume that the defendant would desire to have the contract executed in a more durable form and in accord with the ordinary custom of having the same put in the form of contract for deed. When the defendant made the price and terms in the manner in which he did, he necessarily impliedly obligated himself to complete the sale of the land by reducing the terms to the form of the ordinary contract, or, in other words, to place such words in a permanent form so as to protect both himself and the buyer.

That part of the plaintiff's letter which refers to the payment of the \$10 and the payment of the \$240 after plaintiff had signed and returned a copy of the contract related to the performance of the contract and in no manner changed the terms stated by the defendant. As it appears to us, if the defendant

made the contract, it is his duty to enter into a contract or execute a conveyance which would contain the terms enumerated by him. It might not be the duty of the defendant to make such contract any more than that of the plaintiff, but it certainly constitutes no change in the terms of the contract for the plaintiff to request the defendant to draw such contract in duplicate.

We are of the opinion that the correspondence, taken as a whole, is insufficient to constitute a contract whereby the defendant sold the land in question to the plaintiff upon

**Evidence—
sufficiency.**

the terms stated in the letters of the defendant, and insufficient to show that the plaintiff purchased such land upon such terms provided; the correspondence, as introduced in the case, was incompetent evidence, and, further, there was no contract, for the reason that the defendant had insuffi-

—incompetency.

cient capacity to enter into the contract. As to the question whether the letters were properly admitted in evidence and as to whether there was a sufficient foundation laid for the introduction of the letters in evidence, we are of the opinion that no proper foundation was laid for the introduction in evidence of such letters, and that they were improperly admitted as evidence. The general rule applicable in this case is that laid down in § 2153, vol. 3, Wigmore on Evidence, and reads as follows:

"When a letter is received by due course of mail, purporting to come in answer from the person to whom a prior letter has been sent, there are furnished thereby, under and above mere contents showing knowledge of facts in general, three circumstances evidencing the letter's genuineness: First, the tenor of the letter as a reply to the first indicates a knowledge of the tenor of the first; secondly, the habitual accuracy of the mail in delivering a letter to the person addressed and to no other person indicates that no other person was likely to have re-

ceived the first letter and to have known its contents; thirdly, the time of the arrival, in due course, lessens the possibility that the letter, having been received by the right person, but left unanswered, came subsequently into a different person's hands and was answered by him. To this may be added the empirical argument that in usual experience the answer to a letter is found in fact to come from the person originally addressed. There seems to be here adequate grounds for a special rule declaring these facts, namely, the arrival, by mail, of a reply, purported to be from the addressee of a prior letter duly addressed and mailed, are sufficient evidence of the reply's genuineness to go to the jury."

The author uses this further language in commenting upon this principle:

"Such a rule—varying slightly in the phraseology of different judges—seems now to be universally accepted."

In the case at bar, there was no jury, but the rule applies with equal effect. A material question to be first answered is: When is a letter proved to have been sent or mailed, so that such proof of sending or mailing will be a foundation authorizing the admission in evidence of a reply letter thereto? We are of the opinion that it is the general rule that where a letter is offered in evidence, which letter is claimed to be an answer to a previous letter, before such letter which is the answer can be received in evidence, there must be proof that the

**—presumption
that letter was
received.**

previous letter was written or mailed. *National Acci. Soc. v. Spiro*, 24 C. C. A. 334, 47 U. S. App. 293, 78 Fed. 774. If it is shown that the previous letter is written and mailed in the usual and regular manner, with sufficient postage prepaid, the reply received in due course of the mail may be treated as *prima facie* genuine. The statement in a letter offered that it is in answer to a letter previously received does not of itself

make the letter admissible. To so hold would dispense with the necessity of proof of the writing and mailing of the previous letter, and will also make the letter the proof of its own genuineness. This would not be the proper method of proof, and is not permissible. *Smith v. Shoemaker*, 17 Wall. 630, 21 L. ed. 717; *Butterworth & Lowe v. Cathcart*, 168 Ala. 262, 52 So. 896. This is one rule by which the genuineness of correspondence may be proved, but when proof is sought to be made under this rule, strict compliance with the requirements of the rule is necessary.

Another method of proof in such cases is to prove the genuineness of the letters, or, in other words, to properly authenticate them; for instance, if a letter has been written, direct proof that the letter was received by the person to whom it was addressed, and, if a reply is received to such letter, the genuineness thereof proved by showing that the signature to such letter is the genuine signature of the person who wrote it.

The plaintiffs have sought to establish their claim by the first method, and in order to permit proof based upon the correspondence entirely, he must bring himself strictly within this first rule. It is certain that the rule should not be extended. To do so would afford too great an opportunity for fabrication and undue advantage. We are of the opinion that where a person undertakes to show that he sent another a letter by mail, no presumption will arise that the letter so sent was received by the person to whom it was addressed, unless it is shown that it was deposited in the postoffice or some department thereof, as, for instance, in a mail box on a rural route, and that such letter was properly addressed and stamped with sufficient postage. *Trezevant v. Powell*, 61 Tex. Civ. App. 449, 130 S. W. 234. It is conceivable that a person could write a letter to another and deposit it in the postoffice without stamping it and without placing sufficient post-

9 A.L.R.—62.

age thereon, and truthfully claim that he had addressed the letter to the party at his proper address and deposited it in the United States mail. In order for a reply to a letter written to have a proper foundation for its admissibility laid, it must first appear that the letter written was properly addressed to the party at his ^{—answer to letter—accompanying of letter.} known or usual address, and properly stamped with the requisite amount of postage thereon, and deposited in the postoffice or in some department thereof authorized to receive letters for the purpose of forwarding them to the parties to whom they are addressed. Has the plaintiff brought himself within this rule?

We think it advisable to quote some of the testimony in this regard:

Q. Mr. Kvale, did you have some correspondence with Daniel Keane?

A. Yes.

Q. State whether or not you wrote him a letter on March 17, 1915.

A. Yes.

Q. Have you a copy of that letter?

A. No.

Q. Have you the original letter?

A. No.

Q. Do you remember what you wrote about?

A. Yes.

Q. What did you write about?

A. I wrote and asked him if he would sell the land.

Q. What land?

A. If he would sell the quarter of land, 160—21, about how much he would take for that. (The township and range named in this answer are evidently erroneous.)

Q. Do you remember whether that had reference to the N. E. 1 21—162—86?

A. Yes, sir.

It will be observed that this is the initial letter of the alleged transaction. It must also be observed that the plaintiff does not testify that such letter was addressed to the defendant at his known or usual ad-

dress, or that such letter was deposited in the United States mail or in the postoffice or any department thereof authorized to receive such letters, or that the postage was paid or the letter properly stamped, in accordance with the rules of the United States postal laws and regulations. It appears to us the proof must be thus first made before there is any proper foundation laid for the introduction of a reply of such letter. The proof explicitly showing that no such foundation was laid, the alleged reply to such letter was entirely inadmissible, though the reply may have been received in the customary way through the United States mail.

Further testimony of the plaintiff is as follows:

Q. Did you write a letter in answer to this and exhibit 2?

A. Yes.

Q. Addressed to Daniel Keane, at 642 Iglehart avenue, St. Paul?

A. Yes.

Q. Did you deposit it in the mails?

A. Yes.

Q. After that did you receive any further letters from Daniel Keane?

A. Yes.

Q. I show you exhibit 3, and ask you whether you received that envelop in the mail?

A. Yes.

Q. Along about the 10th to the 15th of April?

A. Yes.

Q. I show you exhibit 4, and ask you whether or not that is the letter contained in the envelop marked exhibit 3?

A. Yes.

Q. And you received this letter in the United States mail?

A. Yes, sir.

It will be observed that the plaintiff, in the letter which he testifies he wrote in answer to exhibit 2, does not show that such letter was stamped with sufficient postage; hence there is no presumption that the same was delivered to the addressee. The plaintiff having not shown that such letter was stamped

with the proper amount of postage, for aught that appears in the testimony, the plaintiff might have written the letter and deposited it in the United States postoffice without the proper stamps or postage thereon, and, if so, the letter would not be delivered, and at all events it is certain there could arise no presumption of its delivery, and there is no foundation laid which would admit in evidence a reply to such letter. Further, in reference to the letter claimed to be written in answer to exhibit 2, the letter itself is not in evidence, neither is there any copy thereof in evidence, and there is no testimony as to what the contents of that letter were.

We think it must conclusively appear there is no foundation for the admission in evidence of exhibits 3 and 4. The tenor of the letter claimed to be written in answer to exhibit 2 is not in evidence, and there is no way to know whether the tenor of exhibit 3 is in answer to the tenor of the letter claimed to be written in answer to exhibit 2. It clearly appears that exhibit 4 was not properly received in evidence; there being no foundation for its reception.

With all the letters we have referred to, being concededly inadmissible in evidence, the letter exhibit 5, claimed to be written by the plaintiff in reply to exhibit 4, cannot be supported by exhibit 4 or any other preceding letters, and, standing alone, even if it were admissible, all that could be said of it would be that it is an offer by the plaintiff to purchase the land, which was declined by the defendant, if it is assumed that exhibit 6 is a letter signed by the defendant or under his authority, but exhibit 5 is subject to the same fatal error as exhibits 4 and 2. The testimony with reference to this letter, exhibit 5, does not show that it was deposited in the postoffice or the United States mail or any postage paid.

Testimony with reference to this letter is as follows:

Q. After receiving the letter of

April 4th, did you write any letters to Daniel Keane?

A. Yes.

Q. Have you got the original letter?

A. Yes.

Q. You haven't got the letter you mailed to him, have you?

A. No.

Q. I will show you exhibit 5, and ask you if that is a copy of the letter you sent to Daniel Keane on April 14, 1916?

A. Yes.

Q. Did you inclose the original letter in an envelop?

A. Yes.

Q. And addressed it to Daniel Keane at 642 Iglehart avenue, St. Paul?

A. Yes.

Q. After sending that letter, did you receive any further letters from Daniel Keane?

A. Yes.

Q. I will ask you whether you received exhibit 7 in the mail?

A. Yes.

Q. About the 17th or 18th of April?

A. Yes.

Q. About that time?

A. Yes.

Q. And is exhibit 6 the letter that was contained in that envelop?

A. Yes.

It is apparent that there was no foundation laid for the introduction of exhibit 5, for the reasons we have above stated. This being true, exhibit 6, the reply, was certainly not admissible in evidence. Exhibit 8 was the check for \$10 which was returned with exhibit 6.

Measured by the rule which we have set forth which governs the admission of correspondence and letters, the plaintiff has wholly failed to bring himself within said rule. It is also plainly evident that the rule is one with which it is not difficult to comply. It is also evident that it will not be wise to extend the rule further than it is and permit letters and writings to be introduced in such a loose manner as to open wide the door for much evil,

which might easily result from any further expansion of the rule enunciated.

The only writing offered in evidence to which there is a genuine signature of the defendant is exhibit 9, which is an affidavit verifying the answer. The plaintiff put on the stand three competent witnesses, who testified to this, in effect, that the signature of the defendant to exhibits 9 and 6 were the same. This testimony can avail the plaintiff nothing, for, as we have seen, exhibit 6 was inadmissible, and therefore cannot be considered as part of the testimony; and, even if it were admissible, exhibits 6 and 9, standing alone, would not prove any contract between plaintiff and defendant.

We are of the opinion that all the letters and correspondence, for the reasons we have stated, should have been excluded. Being thus excluded the plaintiff must necessarily fail in his proof of the contract alleged in the complaint. Having this view of the case, it is really unnecessary to pass upon the mental competency of the defendant to enter into the contract in question, but to entirely dispose of the case we will do so.

There is testimony on behalf of the plaintiff that the defendant was, at the time in question, about seventy-seven years of age. During the months of March, April, and May, 1916, he was very sick, afflicted with heart trouble; he had two operations. There was testimony that he could not carry on a connected conversation; that he was ordered by the doctor not to speak; that his mind was not right; that he would talk on one subject, and the next time he would forget all about it. This testimony was given by his wife. We think the testimony in this regard, standing alone and undisputed, is sufficient to establish a want of capacity to execute a contract as important as the one under consideration, however, or, in fact, to execute any contract. Especially is this true when the great age of the defendant is taken into consideration,

coupled with the undisputed afflictions with which he was suffering at the time in question. We are convinced that the mind of the defendant was so incapacitated as to be unable to comprehend the import and consequence of business transactions of the nature of the one under consideration, and he was not in such mental and physical condition, according to the testimony, to have capacity to enter into the contract under consideration.

It appears to us, for the reasons hereinbefore stated, that the plaintiff can never recover upon his alleged contract, if for no other reason than the incapacity of the defendant. This being true, a new trial could serve no useful purpose.

Judgment is reversed, and the District Court is instructed to enter a dismissal of the action, with costs in favor of the defendant.

Robinson, J., concurring.

This is an appeal from a judgment for the specific performance of an alleged contract to sell and convey to the plaintiff a quarter section of land in Renville county. There is no just claim that any payment, or tender of payment, has ever been made to the defendant. The alleged agreement is all in letters which fail to show a completed contract by a letter dated, St. Paul, March 23, 1916. Defendant invited plaintiff to make an offer for the land. By letter of April 7th, defendant offers to accept \$3,200, payable \$250 when the deal is closed and \$250 a year after 1916, with interest at 6 per cent. By letter of April 14th, plaintiff writes defendant: "I have your letter of the 7th inst., and agree to pay you said price as per terms stated in your letter and inclose you check \$10 in part payment. I ask you to have the contract executed and sent to me in duplicate form. I will sign same and return copy to you with \$250 due on first payment."

The writing of this letter did not complete a contract or tender performance of the same. It was mere-

ly a modified offer to complete a contract on the terms stated in the letter. In answer by letter of April 17th defendant returned the check and called off the deal. The defendant had not offered to make and sign contracts for the sale of the land and to send them in duplicate to plaintiff and to receive his check in payment of \$10, or any sum. The offer of defendant was in legal effect to sign contracts for the sale of the land on cash payment of \$250 at St. Paul. Defendant would have acted the part of a mere simpleton had he made contracts and sent them to Renville county without first receiving the cash payment.

The letters show merely an attempt to bargain for the sale of the land. There is no showing of any completed contract. There is no showing of facts or circumstances which appeal to the conscience of the court or give the plaintiff any equity. The statute is that specific performance cannot be enforced against a party to a contract in cases following: (1) If he has not received an adequate consideration for the contract; (2) if it is not as to him just and reasonable; (3) if his assent was obtained by any unfairness; (4) if his assent was given under the influence of mistake, misapprehension, or surprise. In equity there is no property right more sacred than that of a man's title to land. Hence, on a bald or naked contract, when no payment has been made and no possession given, no man should be forced to sell or part with his title to land only on proof showing a just, equitable, and considerate contract. There is no such proof in this case. There is some proof that at the time of writing the letters defendant was advancing in the seventies and that he was in feeble health, and that his letters were written inadvisedly. It needs no evidence to show the folly and imprudence of an aged man selling a quarter section of good North Dakota land for \$3,200 on cash payment of \$250 and annual pay-

ments of \$250. The purchaser, having once obtained possession of the land, might use it for years and never make a second payment, and the cost of regaining the land might exceed the first payment. Such bald and improvident contracts do not appeal to equity, but in this case the proof failed to show the making of any contract.

Judgment reversed, and action dismissed.

NOTE.

The general question of proof of authenticity or genuineness of a letter, other than by proof of handwriting or typewriting, is treated in the annotation following *MAYNARD v. BAILEY*, post, 984. The cases involving reply letters, of which the reported case (*KVALE v. KEANE*, ante, 972) affords an apt illustration, are treated in subdivision III. of that annotation.

K. A. MAYNARD

v.

E. L. BAILEY, Plff. in Err.

West Virginia Supreme Court of Appeals — March 2, 1920.

(— W. Va. —, 102 S. E. 480.)

Evidence — authenticity of letter.

1. Though genuineness of a letter, a fact essential to its admission in evidence, is ordinarily proved by testimony to the handwriting of its author, circumstantial evidence is admissible for the purpose.

[See note on this question beginning on page 984.]

— interference with trial.

2. Evidence of misconduct of a party to an action, having for its motive or purpose prevention of a fair trial, by intimidation or corruption of a witness or otherwise, is admissible against him, on the ground of its tendency to prove the falsity or fraudulent nature of his claim or defense.

— letter attempting to keep witness away.

3. A letter written to a witness, by a party to an action, imploring him not to testify in the case, denying his knowledge of any material fact, offering to pay him money, if needed, after a trial unattended by him, and admonishing him of danger of arrest on a criminal charge if he should come into the state, is admissible evidence against the writer.

— typewritten letter — how proved.

4. The authenticity or origin of a typewritten letter, signed in typewriting, may be established or shown by the character of the paper and envelop used, the place and circumstances of its mailing, the postmarks, the direction for its return in case of nondelivery, and manifest probability that the subject-matter of its contents was known only to the apparent writer and the person to whom it was written and mailed.

[See 10 R. C. L. 1151.]

— attempt to suborn witness — admissibility.

5. Subornation of a witness by a party to a suit, or his attempt to do so, is evidence of an admission of the falsity or fraudulent nature of his claim.

[See 1 R. C. L. 478.]

Headnotes 1-4 by **POFFENBARGER, J.**

ERROR to the Circuit Court for Mingo County to review a judgment in favor of plaintiff in an action brought to recover the purchase price of a concrete mixer sold and delivered by plaintiff to defendant. *Reversed.*

The facts are stated in the opinion of the court.

Mr. S. D. Stokes for plaintiff in error.

Messrs. Whitt & Shannon, for defendant in error:

No foundation was laid for the introduction in evidence of the letter written by plaintiff to a third person. 3 Jones, Ev. § 583, pp. 764, 766.

Poffenbarger, J., delivered the opinion of the court:

Plaintiff sold and delivered to the defendant a concrete mixer. Upon failure of the defendant to pay for it, this suit was instituted to recover the purchase price. The latter insists that the mixer was sold to him, under a guaranty that it would mix 50 cubic yards of concrete per day; that after a thorough and fair trial it was found that it would not mix nearly that quantity; that he thereupon notified the plaintiff he would not accept it, and advised him that he would make such disposition of it as plaintiff desired. Declining to have anything to do with it, the plaintiff brought this suit to recover the purchase money. The sole issue in the case is whether there was such a guaranty.

Plaintiff's theory is that the defendant desired to purchase the machine, which was a secondhand one; that he went with him to its location; that after having examined it, they agreed upon the price; and that he then shipped it to the defendant, in accordance with their agreement. On the other hand, the defendant says that, at the time of the purchase, he asked the plaintiff about the capacity of the machine, explaining to him that he wanted one that would mix a considerable amount of concrete, as he had a large job on which he intended to use it; that the plaintiff informed him it was a machine of 50 cubic yards' capacity per day; that he thereupon advised the plaintiff that if he would guarantee it to mix that much concrete per day he would take it; and that the plaintiff did so guarantee it and ship it. A witness by the name of Blackburn was introduced, who testified that he was present during at least a part of the negotiations between the parties,

and in his testimony he fully corroborated the defendant. With his evidence there was offered a letter, purporting to have been written by the plaintiff to the witness while the litigation was pending, which the court refused to admit, and this action of the court is the basis of the only assignment of error.

This witness swore the letter was received by him in the ordinary course of mail, a few days after its date, in an envelop addressed to him at his postoffice and postmarked at Williamson, West Virginia, the postoffice of the plaintiff, with a notation in the upper left hand corner, directing its return after five days to the plaintiff contractor and builder, at Williamson, West Virginia. The letter itself was written upon a letterhead purporting to be that of the plaintiff, bearing his postoffice box number, and designating the business in which he was engaged. The entire letter, including the signature, was written with a typewriter. It exhorted the witness to lead a better life, and advised him that the writer was not at all mad at him, but had forgiven him for all past offenses. It also reminded him that he had promised the writer not to appear against him as a witness in this case, and informed him that, as he lived out of the state, he could not be compelled to testify. It told him that Bailey, the defendant, had caused his discharge, and expressed willingness to pay the witness \$10, after the trial, if he did not appear in the case and needed the money; but he was advised to tell the truth if he should appear. It further reminded him that he knew nothing about the case, he not having heard the contract between the parties, and, in the concluding paragraph, it suggested the witness's continued absence from the state, on account of a reputed indictment against him in the Federal court at Huntington. While it does not in words say the witness would be adverse to the plaintiff, in case he should testify, its plain purpose was to prevent his attendance.

The attempt to justify the action of the court in its rejection of the letter is based upon two grounds: (1) Lack of any statement or admission therein, material to the issue involved, if it was written by the plaintiff; and (2) insufficiency of the evidence of its genuineness to justify its admission.

If this document is a product of the plaintiff, its materiality and

Evidence—
interference
with trial.

relevancy are obvious. It is for the jury to determine

whether it was written and mailed for immunity from damaging testimony, spiritual and civic edification and betterment of the witness, or protection of the administration of justice from impurity and contamination. If the jury should find the motive was such immunity, the plaintiff's conduct was a circumstance in the nature of an admission, because it was an effort to prevent a fair trial of a vital issue, by improper, reprehensible, and perhaps criminal means. It imports knowledge on his part of disinterested evidence condemnatory of his own testimony and corroborative of that of his adversary. If written by him, the letter reflects upon his credibility, and might have resolved the sharp conflict in the evidence against him.

—letter attempt-
ing to keep
witness away.

Subornation of a witness by a party to a suit, or his attempt to do so, is evidence of an admission of the falsity or fraudulent nature of his claim. Egan v. Bowker, 5 Allen, 449; McHugh v. McHugh, 186 Pa. 197, 41 L.R.A. 805, 65 Am. St. Rep. 849, 40 Atl. 410; United States Brewing Co. v. Ruddy, 203 Ill. 306, 67 N. E. 799. Fabrication or suppression of evidence, by a party to an action, is admissible in evidence against him, on the same principle. State v. Hogan, 67 Conn. 581, 35 Atl. 508; People v. Chin Hane, 108 Cal. 597, 41 Pac. 697. For both propositions, see Jones, Ev. § 287, citing many cases illustrating the principle.

—attempt to
suborn witness
—admissibility.

Subornation of a witness by a party to a suit, or his attempt to do so, is evidence of an admission of the falsity or fraudulent nature of his claim. Egan v. Bowker, 5 Allen, 449; McHugh v. McHugh, 186 Pa. 197, 41 L.R.A. 805, 65 Am. St. Rep. 849, 40 Atl. 410; United States Brewing Co. v. Ruddy, 203 Ill. 306, 67 N. E. 799. Fabrication or suppression of evidence, by a party to an action, is admissible in evidence against him, on the same principle. State v. Hogan, 67 Conn. 581, 35 Atl. 508; People v. Chin Hane, 108 Cal. 597, 41 Pac. 697. For both propositions, see Jones, Ev. § 287, citing many cases illustrating the principle.

Of course, authentication of a letter is always a prerequisite to its admission over a sufficient objection, but its genuineness may be shown —authenticity of letter. in more than one way. Ordinarily, it is done by proof of the handwriting, but, when neither the letter nor the signature is in the handwriting of the author, it may be shown in other ways. If this were not true, there might be a failure of justice in every instance in which a controlling document has not been written or signed by the author thereof in his own handwriting, and in every instance in which it is impossible to produce a witness to the handwriting. Men might escape their obligations by mere disguises of their handwriting. Like any other material fact, the authenticity or genuineness of a letter may be established by circumstantial evidence. If its tenor, subject-matter, and the parties between whom it purports to have passed, make it fairly fit into an admitted or proved course of correspondence, and constitute an evident connecting link or part thereof, these circumstances justify its admission. Loverin & B. Co. v. Bumgarner, 59 W. Va. 46, 52 S. E. 1000; Capital City Supply Co. v. Beury, 69 W. Va. 612, 72 S. E. 657; Fayette Liquor Co. v. Jones, 75 W. Va. 119, 83 S. E. 726; Ramsey v. Reid, 83 W. Va. 197, 98 S. E. 155; Jones, Ev. § 583.

If the signature of a letter is typewritten or stamped, the evidence afforded by its contents justifies its admission. Wigmore, Ev. § 2149. A letter written for an illiterate person by another is admissible; if it appears, from its contents, to have been written by one having knowledge reasonably attributable only to the parties between whom it passed, or at his dictation. Singleton v. Bremer, 16 S. C. L. (Harp.) 201; 10 R. C. L. title Ev. § 353. Proof of the habit or custom of one from whom a letter, bearing a rubber stamp signature, purports to have come, to dictate his correspondence to an amanuensis,

and have her affix his name to his letters by means of such a stamp, justifies its admission. *Deep River Nat. Bank's Appeal*, 73 Conn. 341, 47 Atl. 675. A letter written upon a letterhead of the party from whom it purports to have emanated, and bearing the same signature as that found upon other letters received from him, is sufficiently authenticated to go to the jury; the circumstances affording prima facie evidence of its genuineness. *International Harvester Co. v. Campbell*, 43 Tex. Civ. App. 421, 96 S. W. 93.

The character of the letter in question, as shown in the statement of the case, leaves no doubt of the sufficiency of the ^{—typewritten letter—how} paper on which it was written, its direction, the places of its deposit in the mail and receipt therefrom, its purported authorship, and its contents, to carry the questions of its emanation and actual authorship to the jury for determination.

For the error in its rejection, the judgment will be reversed, the verdict set aside, and the case remanded for a new trial.

ANNOTATION.

Proof of authenticity or genuineness of letter other than by proof of handwriting or typewriting.

- I. Introduction, 984.
- II. Original letters:
 - a. General rule, 984.
 - b. Circumstances warranting admission, 985.
 - c. Facts insufficient to warrant admission, 987.
- III. Reply letters, 989.

I. Introduction.

The term "original letter," as used herein, means any letter other than one written in reply or answer to a previous letter. The meaning of the term "reply letter" is, of course, obvious.

II. Original letters.

a. General rule.

The authorities generally concede that under proper facts and circumstances the authenticity or genuineness of a letter may be established by indirect or circumstantial evidence, without resort to proof of handwriting or typewriting. See the following cases:

Alabama.—*Union Cent. L. Ins. Co. v. Washburn* (1909) 158 Ala. 169, 48 So. 475.

California.—*Re Kennedy* (1894) 4 Cal. Unrep. 671, 36 Pac. 1030.

Connecticut.—*Deep River Nat. Bank's Appeal* (1900) 73 Conn. 341, 47 Atl. 675.

Florida.—*Nickles v. State* (1904) 48 Fla. 46, 37 So. 312.

Georgia.—*Walls v. Atlanta Newspaper Union* (1914) 141 Ga. 594, 81 S. E. 866; *Hollister Bros. v. Bluthenthal* (1911) 9 Ga. App. 176, 70 S. E. 970.

Maine.—*Abbott v. McAloon* (1879) 70 Me. 98.

Michigan.—*People v. Adams* (1910) 162 Mich. 371, 127 N. W. 854.

New Hampshire.—*Glauber Mfg. Co. v. Voter* (1900) 70 N. H. 332, 47 Atl. 612.

Oklahoma.—*Williamson v. Davis* (1917) — Okla. —, 177 Pac. 567.

Pennsylvania.—*Com. v. Drum* (1910) 42 Pa. Super. Ct. 156.

South Carolina.—*Singleton v. Bremer* (1824) 16 S. C. L. (Harp.) 201; *Spellman v. Richmond & D. R. Co.* (1890) 35 S. C. 475, 28 Am. St. Rep. 858, 14 S. E. 947.

Texas.—*Sun Mfg. Co. v. Egbert* (1904) 37 Tex. Civ. App. 512, 84 S. W. 667; *Bishop v. State* (1912) 68 Tex. Crim. Rep. 559, 151 S. W. 821; *James v. State* (1913) 72 Tex. Crim. Rep. 155, 161 S. W. 472.

Virginia.—*Ashlock v. Com.* (1908) 108 Va. 877, 61 S. E. 752.

West Virginia.—*Fayette Liquor Co. v. Jones* (1914) 75 W. Va. 119, 83 S. E. 726; *MAYNARD v. BAILEY* (reported herewith) ante, 981.

Canada.—See *Scott v. Crerar* (1886) 11 Ont. Rep. 541.

b. Circumstances warranting admission.

In a number of cases where necessity demanded proof other than proof of handwriting, it has been held that the authenticity or genuineness of a letter may be established by circumstantial evidence. Thus, in *Singleton v. Bremar* (1824) 16 S. C. L. (Harp.) 201, it was held that a letter purporting to have come through the mail from a person who could not write was rendered admissible in evidence by a showing that it stated facts which could only be known to, or relate to, such person. And upon the theory that necessity justifies a resort to circumstantial evidence to prove the authenticity of a letter, it has been held that an unsigned typewritten letter may be admitted in evidence so that the jury may pass upon the identity of the writer, where it appears that it was postmarked at the place where the purported writer carried on its business, that both the letterhead and the envelop bore its name and address, and that the subject of the letter was one peculiarly within the knowledge of the officer who is claimed to have written it. *Com. v. Drum* (1910) 42 Pa. Super. Ct. 156. So, in *MAYNARD v. BAILEY* (reported herewith) ante, 981, it was held that the authenticity of a letter written and signed by typewriter might be shown by the character of the paper and envelop used, the place and circumstances of mailing, the postmarks, the direction on the envelop for return in case of nondelivery, and manifest probability that the subject-matter of its contents was known only to the alleged writer and the sendee. And again in *Fayette Liquor Co. v. Jones* (1914) 75 W. Va. 119, 83 S. E. 726, it was held that letters received in a continuous course, not in the handwriting of the alleged illiterate sender, but relating to the matters in suit and so consistent with truthful relation thereto as to make it most improbable that anyone could have forged them, may be admitted in evidence so that the jury may, from their contents, determine their genuineness. And see *Ashlock v. Com.*

(1908) 108 Va. 877, 61 S. E. 752, wherein it was said that an unsigned letter may be admitted where the contents are such that no one but the alleged writer could have written the same.

In the majority of the cases, however, which have held the facts sufficient to render an original letter admissible without proof of handwriting or typewriting, stress has not been placed upon the necessity for resorting to other proof.

Thus, in *Nickles v. State* (1904) 48 Fla. 46, 37 So. 312, where a witness admitted having written and mailed at a certain postoffice a letter to a certain person purporting to have been signed by himself, and also admitted having written in such letter material parts of its contents which were quoted to him verbatim, and the sendee testified that he received a letter purporting to have been written by the witness, which was postmarked at the postoffice named by the witness, it was held that the letter was sufficiently identified to render it admissible in evidence, although it was not exhibited to the witness.

And in *Walls v. Atlanta Newspaper Union* (1914) 141 Ga. 594, 81 S. E. 866, where defendant testified that he conducted the correspondence of a partnership in the firm name, it was held that a letter purporting to have been written in the tradename of the partnership, and which related to the subject in suit and had been received by the sendee by due course of mail, was admissible in evidence.

So, in *Spellman v. Richmond & D. R. Co.* (1891) 35 S. C. 475, 28 Am. St. Rep. 858, 14 S. E. 947, it was held sufficient to render a letter admissible that its contents referred to the controversy in suit, and that it had been acted upon by the writer's agent.

• And in *Williamson v. Davis* (1917) — Okla. —, 177 Pac. 567, it was held that the fact that the contents of a letter were of such a nature that it could not have passed between any parties save the purported writer and the sendee was sufficient to render it admissible under the rule that the authenticity of an original letter must

be established, either by proof of the handwriting, or by other proof establishing its genuineness. And the court in *Ashlock v. Com.* (1908) 108 Va. 877, 61 S. E. 752, approved the proposition that a letter may be admitted in evidence where it appears that no person other than the purported writer could have known the facts and circumstances related so as to have written it. And see *Scott v. Crerar* (1886) 11 Ont. Rep. 541.

And in *Hollister Bros. v. Bluthenthal* (1911) 9 Ga. App. 176, 70 S. E. 970, where a letter was received by due course of mail and the purported writer produced under notice an exact copy, it was held that the genuineness of the letter was sufficiently established.

In *Union Cent. L. Ins. Co. v. Washburn* (1909) 158 Ala. 169, 48 So. 475, it was held that letters purporting to have been written by a state agent of an insurance company, with no marks or other thing to indicate that they were not genuine, were admissible in evidence to show a waiver of forfeiture of an insurance policy though signed only with a rubber stamp, it also being shown that it was the custom of such agent to affix his signature by that method.

In *Deep River Nat. Bank's Appeal* (1900) 73 Conn. 341, 47 Atl. 675, it was held that letters stamped with the signature of an officer of a corporation were admissible in evidence, it being proved that it was the custom and habit of the purported writer to dictate his letters to a stenographer who typewrote the same and affixed his signature by means of a rubber stamp, that the letter was on the business paper of the corporation, and that it related to the business under consideration in the action.

And upon the theory that identity of name and address is identity of person, it was held in *Re Kennedy* (1894) 4 Cal. Unrep. 671, 36 Pac. 1030, that a letter which was received in Buffalo, New York, by an alleged illegitimate daughter of the purported writer, and which contained a railroad ticket to California and \$5, was admissible as sufficiently authenticated, it appearing

that such writer, the alleged mother, lived at 1616½ N street, San Francisco, that at about that time she borrowed \$5 to send, as she said, to Buffalo, and that the registered letter book of the San Francisco postoffice showed the receipt of a letter from a person of the same name as the mother, and living at 1616½ N street, addressed to a person of the same name as the daughter, Buffalo, N. Y.

And the uncontroverted statement of a witness that a certain letter was from the person whose letter it purported to be has been held to render it admissible in evidence. *Glauber Mfg. Co. v. Voter* (1900) 70 N. H. 332, 47 Atl. 612. This was upon the theory that where nothing appears to the contrary it will be presumed that what a witness states is within his knowledge, the court saying that if the opponents thought the witness was stating matter of opinion merely, or that his knowledge was not derived from such sources as would legally entitle him to testify to the authorship of the letter, it was in their power to make the fact clear. It does not appear that the witness based his conclusion upon the handwriting of the signer of the letter. But to the contrary, see *Miller v. State* (1912) 65 Tex. Crim. Rep. 302, 144 S. W. 239, as set out *infra*, c.

It has also been held that a letter purporting to have been sent in accordance with a previous verbal agreement may be admitted in evidence without proof of handwriting. Thus, in *People v. Adams* (1910) 162 Mich. 371, 127 N. W. 354, it was held that letters purporting to come from one accused of seduction, and which had been mailed at a place where he stated that he would be in accordance with a previous agreement with the mother of the prosecutrix, were admissible in evidence without identifying the handwriting, it also appearing that the letter contained references to matters previously discussed by the mother and the purported writer. And in *Sun Mfg. Co. v. Egbert* (1904) 37 Tex. Civ. App. 512, 84 S. W. 667, a letter accepting a previous verbal proposition was held admissible in evidence,

without proof of the handwriting of the purported signer. And a similar conclusion was reached in *Abbott v. McAloon* (1879) 70 Me. 98, where an order for goods was sent by post as promised orally. And see *Bishop v. State* (1912) 68 Tex. Crim. Rep. 559, 151 S. W. 821, and *James v. State* (1918) 72 Tex. Crim. Rep. 155, 161 S. W. 472. However, in *Charles H. Scholes Co. v. Oppenheim* (1912) 136 N. Y. Supp. 37, the court refused to extend the rule as to reply letters to a letter following an oral communication. The court said: "There is no doubt but that, where a letter is received by due course of mail, purporting to be in answer from the person to whom a prior letter has been sent, the reply letter is admissible in evidence. In such case, the courts have held that the circumstances present prima facie proof of the genuineness of the letter. No case has, however, been cited to us, and I know of no authority in this state, that this rule should be extended to cases where the letter follows an oral communication. The only argument for extending the rule under such circumstances is that where an oral communication is made to a sole person, and a communication is received purporting to come from that person, and the contents show knowledge of the matter communicated, it is a fair inference that the letter is written by the person to whom alone the oral communication was made. Nevertheless, the courts seem unwilling to accept this inference, at least in any case where actual proof of handwriting may be had."

In Texas, by virtue of a statutory provision to the effect that when a written instrument is made the basis of an action it shall be received in evidence "without the necessity of proving its execution," unless the execution be denied under oath, it has been held that a letter acknowledging an indebtedness is admissible in evidence in a suit based thereon, without proving its execution, where the purported writer has not denied its execution by plea under oath. *Close v. Judson* (1870) 34 Tex. 289. In this case the alleged writer merely denied

the execution of the letter in an unsworn answer.

c. Facts insufficient to warrant admission.

The generally accepted rule is to the effect that the mere fact that a letter (other than a reply letter) purports to have been written and signed by the person in question is insufficient to establish its authenticity and genuineness.

United States.—*Sprinkle v. United States* (1906) 82 C. C. A. 1, 150 Fed. 56; *Consolidated Grocery Co. v. Hammond* (1910) 99 C. C. A. 195, 175 Fed. 641; *McGowan v. Armour* (1918) 160 C. C. A. 576, 248 Fed. 676; *Re Laude Tate Mfg. Co.* (1905) 135 Fed. 910.

Alabama.—*Stetson v. Lyons* (1859) 34 Ala. 140; *O'Connor Min. & Mfg. Co. v. Dickson* (1895) 112 Ala. 304, 20 So. 413; *Louisville & N. R. Co. v. Britton* (1907) 149 Ala. 552, 43 So. 108; *Rike v. McHugh* (1914) 188 Ala. 237, 66 So. 452.

Arkansas.—*Carrens v. State* (1905) 77 Ark. 16, 91 S. W. 30; *Rogers v. State* (1911) 101 Ark. 45, 49 L.R.A. (N.S.) 1198, 141 S. W. 491.

California.—*Sinclair v. Wood* (1853) 3 Cal. 98; *Richmond Dredging Co. v. Atchison, T. & S. F. R. Co.* (1916) 31 Cal. App. 399, 160 Pac. 862.

Colorado.—*Burnham v. Grant* (1913) 24 Colo. App. 131, 134 Pac. 254.

Connecticut.—*Bridgeport Hardware Mfg. Corp. v. Bouniol* (1915) 89 Conn. 254, 93 Atl. 674.

Georgia.—*Campbell v. State* (1905) 123 Ga. 533, 51 S. E. 644; *Ginn v. Ginn* (1914) 142 Ga. 420, 83 S. E. 118; *Covington v. State* (1914) 15 Ga. App. 513, 83 S. E. 867 (signed by initials only); *Lumpkin v. Provident Loan Soc.* (1914) 15 Ga. App. 816, 84 S. E. 216.

Illinois.—*Kreamer v. Hewitt* (1914) 189 Ill. App. 27; *Lewis v. New Amsterdam Casualty Co.* (1916) 200 Ill. App. 553.

Indiana.—*Baltimore & O. R. Co. v. McWhinney* (1871) 36 Ind. 436; *Lingg v. State* (1901) 28 Ind. App. 248, 61 N. E. 696. And see *Leslie v. Ebner* (1918) — Ind. App. —, 118 N. E. 829.

Iowa.—*State v. Waite* (1897) 101 Iowa, 377, 70 N. W. 596.

Kansas.—Clark v. Ford (1898) 7 Kan. App. 332, 51 Pac. 938.

Kentucky.—Donnelly v. Donnelly (1904) 25 Ky. L. Rep. 1543, 78 S. W. 182; Lane v. Com. (1909) 134 Ky. 519, 121 S. W. 486; Frasure v. Com. (1916) 169 Ky. 620, 185 S. W. 146; Bennett v. Com. (1916) 171 Ky. 63, 186 S. W. 933.

Michigan.—Kovacs v. Mayoras (1913) 175 Mich. 582, 141 N. W. 662.

Missouri.—Brown v. Massey (1897) 138 Mo. 519, 38 S. W. 939; Fowle v. Adams Exp. Co. (1881) 9 Mo. App. 572.

Montana.—Buhler v. Loftus (1917) 53 Mont. 546, 165 Pac. 601.

Nebraska.—Gartrell v. Stafford (1882) 12 Neb. 545, 41 Am. Rep. 767, 11 N. W. 732.

New York.—Nichols v. Kingdom Iron Ore Co. (1874) 56 N. Y. 618; Material Men's Mercantile Asso. v. Material Men's Credit Agency (1920) 191 App. Div. 73, 180 N. Y. Supp. 801; Rothchild v. Schwarz (1899) 28 Misc. 521, 59 N. Y. Supp. 527; Madden v. Stern (1919) 173 N. Y. Supp. 373. And see Charles H. Scholes Co. v. Oppenheim (1912) 136 N. Y. Supp. 37, which quotes 3 Wigmore, Ev. § 2148, with seeming approval.

North Carolina.—Beard v. Southern R. Co. (1906) 143 N. C. 136, 55 S. E. 505; Arndt v. Jefferson Standard L. Ins. Co. (1918) 176 N. C. 652, 97 S. E. 631.

Oklahoma.—Comanche Mercantile Co. v. McCall Co. (1915) 52 Okla. 782, 153 Pac. 675; Fidelity Mut. L. Ins. Co. v. Dean (1916) 57 Okla. 84, 156 Pac. 304; Burke v. Smith (1916) 57 Okla. 196, 157 Pac. 51; National Surety Co. v. Oklahoma Nat. L. Ins. Co. (1917) — Okla. —, 165 Pac. 161.

Pennsylvania.—Sweeney v. Ten Mile Oil & Gas Co. (1889) 130 Pa. 193, 18 Atl. 612.

Porto Rico.—See Siaca v. Brunet (1907) 13 P. R. R. 153.

Texas.—Ex parte Denning (1907) 50 Tex. Crim. Rep. 629, 100 S. W. 401; Henry v. Vaughan (1907) 46 Tex. Civ. App. 531, 103 S. W. 192; Miller v. State (1912) 65 Tex. Crim. Rep. 302, 144 S. W. 239; Newman v. Norris Implement Co. (1912) — Tex. Civ. App. —, 147 S. W. 725; Quannah, A. & P. R. Co. v. Drummond (1912) — Tex. Civ. App.

—, 147 S. W. 728; Anderson v. State (1914) 74 Tex. Crim. Rep. 621, 170 S. W. 142; Sarli v. State (1916) 80 Tex. Crim. Rep. 161, 189 S. W. 149.

Utah.—See Murdock v. Farrell (1917) 49 Utah, 314, 163 Pac. 1102.

Vermont.—Johnson v. Bolton (1871) 43 Vt. 303.

Virginia.—Ashlock v. Com. (1908) 108 Va. 877, 61 S. E. 752.

This rule is especially applicable where the letter is typewritten or printed and the signature is attached by a rubber stamp or stencil, or is typewritten or printed (Sprinkle v. United States (1906) 82 C. C. A. 1, 150 Fed. 56; Kent v. Wadley Southern R. Co. (1911) 136 Ga. 857, 72 S. E. 413; St. Louis Loan & Invest. Co. v. Yantis (1898) 173 Ill. 321, 50 N. E. 807); or was signed by a third person whose authority is not shown (Southern Loan & T. Co. v. Benbow (1904) 135 N. C. 307, 47 S. E. 435); or where the genuineness of the letter is denied by the purported signer (Lingg v. State (1901) 28 Ind. App. 248, 61 N. E. 696; Lane v. Com. (1909) 134 Ky. 519, 121 S. W. 486; Brown v. Massey (1897) 138 Mo. 519, 38 S. W. 939; Beard v. Southern R. Co. (1906) 143 N. C. 136, 55 S. E. 505); or it does not appear that it was addressed to or received by the alleged recipient (Donnelly v. Donnelly (1904) 25 Ky. L. Rep. 1543, 78 S. W. 182; Brown v. Massey (1897) 138 Mo. 519, 38 S. W. 939, supra); or that it was received by or ever was in the possession of such person (Bennett v. Com. (1916) 171 Ky. 63, 186 S. W. 933).

In fact it has been said that proof of the genuineness of a letter cannot be supplied solely by what appears on the face of the letter itself, namely, the letterhead, the contents, etc. Freeman v. Brewster (1892) 93 Ga. 648, 21 S. E. 165; Ginn v. Ginn (1914) 142 Ga. 420, 83 S. E. 118.

Nor does the mere fact that a letter is received through the mail in itself establish it to be the letter of the person purporting to have written it.

United States.—Re Laude Tate Mfg. Co. (1905) 135 Fed. 910.

Alabama.—O'Connor Min. & Mfg.

Co. v. Dickson (1895) 112 Ala. 304, 20 So. 413.

California.—Richmond Dredging Co. v. Atchison, T. & S. F. R. Co. (1916) 31 Cal. App. 399, 160 Pac. 862.

Georgia.—Kent v. Wadley Southern R. Co. (1911) 136 Ga. 857, 72 S. E. 413; Hollister Bros. v. Bluthenthal (1911) 9 Ga. App. 176, 70 S. E. 970; Lumpkin v. Provident Loan Soc. (1915) 15 Ga. App. 816, 84 S. E. 216; First Nat. Bank v. Barrett (1917) 20 Ga. App. 493, 93 S. E. 107.

North Carolina.—Beard v. Southern R. Co. (1906) 143 N. C. 136, 55 S. E. 505.

Pennsylvania.—Sweeney v. Ten Mile Oil & Gas Co. (1889) 130 Pa. 193, 18 Atl. 612.

Texas.—Newman v. Norris Implement Co. (1912) — Tex. Civ. App. —, 147 S. W. 725.

And this notwithstanding the letter came from a postoffice where the purported writer was supposed to have been at the time (Campbell v. State (1905) 123 Ga. 533, 51 S. E. 644; Nichols v. Kingdom Iron Ore Co. (1874) 56 N. Y. 618), and was upon paper stamped with the letterhead of the party purporting to have signed it (Kent v. Wadley Southern R. Co. (1911) 136 Ga. 857, 72 S. E. 413; Ginn v. Ginn (1914) 142 Ga. 420, 83 S. E. 118; Comanche Mercantile Co. v. McCall Co. (1915) 52 Okla. 782, 153 Pac. 675; Com. v. Drum (1910) 42 Pa. Super. Ct. 156), and also referred to the subject-matter in issue between the parties (Comanche Mercantile Co. v. McCall Co. (1915) 52 Okla. 782, 153 Pac. 675, *supra*). In *O'Connor Min. & Mfg. Co. v. Dickson* (1895) 112 Ala. 304, 20 So. 413, the court said that "there is no presumption that a person whose name is signed to a letter is its author, merely because it was carried by the post."

And it has been held that the mere statement of a witness that a letter was signed by the one whose signature it purports to bear is not sufficient to establish the genuineness of the letter (Miller v. State (1912) 65 Tex. Crim. Rep. 302, 144 S. W. 239), but the contrary has also been held (see *Glauber Mfg. Co. v. Voter* (1900) 70 N. H. 332,

47 Atl. 612, as set out *supra*, II. b; Bishop v. State (1912) 68 Tex. Crim. Rep. 559, 151 S. W. 821, and James v. State (1913) 72 Tex. Crim. Rep. 155, 161 S. W. 472).

And it has been held that the authorship of unsigned threatening letters is not sufficiently established to render them admissible in evidence where the alleged author merely stated to the wife of the party who was threatened that "your husband was well warned, we have written to him," and the accused denied all knowledge of the letter, it not appearing that the husband had not received other letters about the same time. *People v. Pisano* (1911) 142 App. Div. 524, 127 N. Y. Supp. 204.

III. Reply letters.

The universally accepted rule is to the effect that a *prima facie* case of authenticity is made by showing that the offered letter purports to be from the addressee of a prior letter and to be in reply thereto, and that it was received through the mail in due course, there being indulged in such a case a presumption of fact of the genuineness of the signature to the reply letter sufficient in itself to render it admissible in evidence without further authentication. The following cases support this rule:

United States.—Scofield v. Parlin & O. Co. (1894) 10 C. C. A. 83, 18 U. S. App. 692, 61 Fed. 804; Consolidated Grocery Co. v. Hammond (1910) 99 C. C. A. 195, 175 Fed. 641.

Alabama.—Campbell v. Woodstock Iron Co. (1887) 83 Ala. 351, 3 So. 369; White v. Tolliver (1895) 110 Ala. 300, 20 So. 97; Louisville & N. R. Co. v. Britton (1907) 149 Ala. 552, 43 So. 108; Central R. Co. v. Malone (1910) 165 Ala. 432, 51 So. 730; Rike v. McHugh (1914) 188 Ala. 237, 66 So. 452; American Workmen v. James (1915) 14 Ala. App. 477, 70 So. 976; White Trunk & Bag Co. v. Brantley (1917) — Ala. App. —, 75 So. 182.

Arkansas.—Barham v. Bank of Delight (1910) 94 Ark. 158, 27 L.R.A. (N.S.) 439, 126 S. W. 394.

California.—Fielding v. Iler (1919) — Cal. App. —, 179 Pac. 519.

Colorado.—Atlantic Ins. Co. v. Man-

ning (1877) 3 Colo. 224; *Chicago, B. & Q. R. Co. v. Roberts* (1897) 10 Colo. App. 87, 49 Pac. 428.

District of Columbia.—*Jones v. Cooke* (1905) 25 App. D. C. 524.

Florida.—*Boykin v. State* (1898) 40 Fla. 484, 24 So. 141.

Georgia.—*Ragan v. Smith* (1897) 103 Ga. 556, 29 S. E. 759.

Illinois.—*Illinois C. R. Co. v. Messnard* (1884) 15 Ill. App. 213; *Consolidated Perfume Co. v. National Bank* (1900) 86 Ill. App. 642; *Grayville Waterworks v. Burdick* (1903) 109 Ill. App. 520.

Iowa.—*Lyon v. Railway Pass. Assur. Co.* (1877) 46 Iowa, 631; *Davis's Sons v. Robinson* (1885) 67 Iowa, 355, 25 N. W. 280; *Bloom v. State Ins. Co.* (1895) 94 Iowa, 359, 62 N. W. 810; *Nichols Shepard Co. v. Ringler* (1907) 135 Iowa, 181, 112 N. W. 548; *City Nat. Bank v. Jordan* (1908) 139 Iowa, 499, 117 N. W. 758; *Fisher v. Carter* (1916) 178 Iowa, 636, 160 N. W. 15.

Kansas.—*Norwegian Plow Co. v. Munger* (1893) 52 Kan. 371, 35 Pac. 11; *Huber Mfg. Co. v. Claudel* (1905) 71 Kan. 441, 80 Pac. 960. And see *Clark v. Ford* (1898) 7 Kan. App. 332, 51 Pac. 988.

Kentucky.—*Louisville & N. R. Co. v. E. J. O'Brien & Co.* (1916) 168 Ky. 403, 182 S. W. 227, Ann. Cas. 1917D, 922.

Maine.—*Lancaster v. Ames* (1907) 103 Me. 87, 17 L.R.A. (N.S.) 229, 125 Am. St. Rep. 286, 68 Atl. 533. And see *Abbott v. McAloon* (1879) 70 Me. 98.

Maryland.—*American Bonding Co. v. Ensey* (1907) 105 Md. 211, 65 Atl. 921, 11 Ann. Cas. 883.

Massachusetts.—*Connecticut v. Bradish* (1817) 14 Mass. 296.

Minnesota.—*Melby v. D. M. Osborne & Co.* (1885) 33 Minn. 492, 24 N. W. 253; *Hoxsie v. Empire Lumber Co.* (1889) 41 Minn. 548, 43 N. W. 476.

Missouri.—*Russell v. State Ins. Co.* (1874) 55 Mo. 585; *Kloes v. Wurmser* (1889) 34 Mo. App. 458 (reply to post card); *J. H. Sanders Pub. Co. v. Emerson* (1896) 64 Mo. App. 662; *Hays v. General Assembly American Benev. Asso.* (1907) 127 Mo. App. 193, 104 S. W. 1141; *Hicks v. National Surety Co.* (1913) 169 Mo. App. 479, 155 S.

W. 71; *Citizens' State Bank v. Ferson* (1919) — Mo. App. —, 208 S. W. 136.

Nebraska.—*Gartrell v. Stafford* (1882) 12 Neb. 545, 41 Am. Rep. 767, 11 N. W. 732; *People's Nat. Bank v. Geisthardt* (1898) 55 Neb. 232, 75 N. W. 582; *Peycke v. Shinn* (1906) 76 Neb. 364, 107 N. W. 386, on former appeal in (1903) 68 Neb. 343, 94 N. W. 135; *Helwig v. Aulabaugh* (1909) 83 Neb. 542, 120 N. W. 162.

New York.—*Bush v. Miller* (1852) 13 Barb. 481; *Thayer v. Schley* (1910) 137 App. Div. 166, 121 N. Y. Supp. 1064; *Charles H. Scholes Co. v. Oppenheim* (1912) 136 N. Y. Supp. 37; *Todd Protectograph Co. v. Wells, F. & Co. Exp.* (1920) 111 Misc. 282, 181 N. Y. Supp. 128.

North Carolina.—*Edwards Bros. v. Erwin* (1908) 148 N. C. 429, 62 S. E. 545, 16 Ann. Cas. 393 (dictum); *State ex rel. Echerd v. Viele* (1913) 164 N. C. 122, 80 S. E. 408.

North Dakota.—See *KVALE v. KEANE* (reported herewith) ante, 972.

Oklahoma.—*Comanche Mercantile Co. v. McCall Co.* (1915) 52 Okla. 782, 153 Pac. 675 (exception recognized); *Williamson v. Davis* (1917) — Okla. —, 177 Pac. 567.

Pennsylvania.—*Eichenhofer v. Philadelphia* (1915) 248 Pa. 365, 93 Atl. 1065; *Comeror v. Patrons' Mut. F. Ins. Co.* (1913) 53 Pa. Super. Ct. 516.

South Carolina.—*Leesville Mfg. Co. v. Morgan Wood & Iron Works* (1906) 75 S. C. 342, 55 S. E. 768.

South Dakota.—*Armstrong v. Advance Thresher Co.* (1894) 5 S. D. 12, 57 N. W. 1131; *Tilden v. Smith* (1910) 24 S. D. 576, 124 N. W. 841.

Texas.—*Ullman v. Babcock* (1885) 63 Tex. 68; *Lewis v. Alexander* (1895) — Tex. Civ. App. —, 31 S. W. 414; *Dix v. Jackman* (1896) — Tex. Civ. App. —, 37 S. W. 344; *McDonald v. Hanks* (1908) 52 Tex. Civ. App. 140, 113 S. W. 604; *Messner v. State* (1916) 78 Tex. Crim. Rep. 632, 182 S. W. 329.

West Virginia.—*Loverin & B. Co. v. Bumgarner* (1906) 59 W. Va. 46, 52 S. E. 1000; *Capital City Supply Co. v. Beury* (1911) 69 W. Va. 612, 72 S. E. 617; *Ramsey v. Reid* (1919) 83 W. Va. 197, 98 S. E. 155.

England.—*Carey v. Pitt* (1797)

Peake, N. P. Add. Cas. 130, 4 Revised Rep. 895; *Harrington v. Fry* (1824) 1 Car. & P. 289, 9 J. B. Moore, 344, 1 Ryan & M. 90, 2 Bing. 179, 130 Eng. Reprint, 274, 3 L. J. C. P. 244; *Ovens-ton v. Wilson* (1845) 2 Car. & K. 1.

Canada.—See *McDonald v. Gilbert* (1889) 16 Can. S. C. 700.

It has been said, in connection with this relaxation of the general rule as to proving documentary evidence, that "the rule is founded on presumptions arising from the ordinary course of business," and that "by a like rule the identity of the correspondent may be inferred." *Atlantic Ins. Co. v. Manning* (1877) 3 Colo. 224. Again, in *Clark v. Ford* (1898) 7 Kan. App. 332, 51 Pac. 938, the court said: "We can easily suppose that a principal reason for the rule is the general inviolability of the government mails, and the presumption that a certain letter put into the mails would be delivered only to the party addressed, and that a letter received by the writer of the first letter, appearing to be an answer, could safely be assumed to be genuine. The letters referred to do not come within this rule, and the admission of the second letter is clearly erroneous, for the reason that no showing is made as to how the letters were exchanged." So, in *J. H. Sanders Pub. Co. v. Emerson* (1896) 64 Mo. App. 662, the court said: "A well-recognized exception to the general rule requiring proof of handwriting is that of letters received in reply to others proved to have been sent to the party at his usual place of business or residence. . . . This rests upon the presumption that letters are delivered to the person to whom addressed, and that the reply was written by him or by his authority." And it has been said that it certainly cannot be presumed that some stranger, surreptitiously or otherwise, got possession of the original letter and answered it. *Chicago, B. & Q. R. Co. v. Roberts* (1897) 10 Colo. App. 87, 49 Pac. 428.

A fortiori, a reply letter is admissible without proof of handwriting where it appears that it was inclosed with a paper which had been sent in the original letter, that the postmark

on the envelop containing the reply bore the postmark of the place to which the original letter was addressed, and that the letter itself referred to the contents of the original letter (*White v. Tolliver* (1895) 110 Ala. 300, 20 So. 97); that the reply expressly referred to the subject-matter discussed in the original letter and that it was inclosed in an envelop with the address of the purported writer printed thereon (*Barham v. Bank of Delight* (1910) 94 Ark. 158, 27 L.R.A. (N.S.) 439, 126 S. W. 394; *Hays v. General Assembly American Benev. Asso.* (1907) 127 Mo. App. 195, 104 S. S. 1141); that the reply related to the subject-matter under consideration, that it was written upon a letterhead of the purported writer, and that it was dated at his place of residence (*Messner v. State* (1916) 78 Tex. Crim. Rep. 632, 182 S. W. 329); that the content of the letter shows it to be an answer to a prior one written by the sendee (*Lancaster v. Ames* (1907) 103 Mo. 87, 17 L.R.A. (N.S.) 229, 125 Am. St. Rep. 286, 68 Atl. 533; *J. H. Sanders Pub. Co. v. Emerson* (1896) 64 Mo. App. 662; *Ullman v. Babcock* (1885) 63 Tex. 68); that the reply was written upon a letterhead of the purported signer (*Ragan v. Smith* (1897) 103 Ga. 506, 29 S. E. 759; *Consolidated Perfume Co. v. National Bank* (1900) 86 Ill. App. 642; *Bloom v. State Ins. Co.* (1895) 94 Iowa, 359, 62 N. W. 810; *Louisville & N. R. Co. v. E. J. O'Brien & Co.* (1916) 168 Ky. 403, 182 S. W. 227, Ann. Cas. 1917D, 922; *American Bonding Co. v. Ensey* (1907) 105 Md. 211, 65 Atl. 921, 11 Ann. Cas. 883; *Leesville Mfg. Co. v. Morgan Wood & Iron Co.* (1906) 75 S. C. 342, 55 S. E. 768; *Lewis v. Alexander* (1895) — Tex. Civ. App. —, 31 S. W. 414); and that the letters were acted upon by both the writer and the addressee (*Jones v. Cooke* (1905) 25 App. D. C. 524; *Ramsey v. Reid* (1919) 83 W. Va. 197, 98 S. E. 155).

And the rule as to the prima facie authenticity of reply letters has been held to apply to letters typewritten as to the body and signature. *Barham v. Bank of Delight* (1910) 94 Ark. 158, 27 L.R.A. (N.S.) 439, 126 S. W. 394; Con-

solidated Perfume Co. v. National Bank (1900) 86 Ill. App. 642; Davis's Sons v. Robinson (1885) 67 Iowa, 355, 25 N. W. 280; Norwegian Plow Co. v. Munger (1893) 52 Kan. 371, 35 Pac. 11; Lancaster v. Ames (1907) 103 Me. 87, 17 L.R.A. (N.S.) 229, 125 Am. St. Rep. 286, 68 Atl. 533. And this even where the signature was affixed by a rubber stamp, it also appearing that the reply letter was written on the letterhead of the corporation to which the original letter was addressed, that the stamped signature was that of an officer of the corporation whose name appeared on the letterhead, and that the letter itself referred to the subject-matter of the original letter. National Acci. Soc. v. Sprio (1897) 24 C. C. A. 334, 47 U. S. App. 293, 78 Fed. 774. In Lancaster v. Ames (Me.) supra, the court discussed the effect of a typewritten signature as follows: "It is true as a general rule that documentary evidence, to be admissible, must be authenticated, and in case of a letter this is ordinarily done by proof of the genuineness of the signature of the writer. When the signature is typewritten this method of authentication may be difficult, if not impossible. At any rate it was not tried in this case. But there is a relaxation of this rule in the case of what are called reply letters. The rule does not apply to a letter which is received by due course of mail, purporting to come in answer from the person to whom a prior letter has been duly addressed and mailed. Proof of these facts is sufficient evidence of the genuineness of the reply to go to the jury, without specific proof of the genuineness of the signature. The genuineness is assumed, at least, until the contrary is shown."

And it has been held that the production of the letter, in response to which the letter offered in evidence was written, is not essential to the admission of the latter, the presumption being that the original letter is in the possession of the one to whom it was written. Dix v. Jackman (1896) — Tex. Civ. App. —, 37 S. W. 344.

But to render a reply letter prima facie evidence of its authenticity and

genuineness, the preliminary proof must actually show that a letter was written and mailed, to which the letter offered purports to be an answer. Consolidated Grocery Co. v. Hammond (1910) 99 C. C. A. 195, 175 Fed. 641 (holding that the statement in a letter offered in evidence that it is in answer to a letter previously received cannot, of itself, make the letter admissible, since to so hold would make the statement prove the writing and posting of the previous letter and also prove its own genuineness); Clark v. Ford (1898) 7 Kan. App. 332, 51 Pac. 938 (holding that the manner of exchange must be shown); Linn v. New York L. Ins. Co. (1899) 78 Mo. App. 192 (holding that the existence of the prior letter must first be shown); KVALE v. KEANE (reported herewith) ante, 972 (holding that before a reply letter can be introduced in evidence it must first be proved that the letter previously sent was properly addressed to the addressee at his post-office address, with sufficient postage thereon, and that such letter was properly deposited in the mails). And see Cook v. Augustus (1916) 201 Ill. App. 195.

And where the rule which requires preliminary proof of the mailing, etc., of the original letter is enforced, and strict compliance required, it has been held that the statement in a letter offered in evidence that it is in reply to a letter previously received does not of itself render the letter admissible. KVALE v. KEANE (reported herewith) 972. This was upon the theory that to hold otherwise would dispense with the necessity of proof of the writing and mailing of the previous letter and would also make the letter proof of its own genuineness. And strict compliance with the rule cannot be excused by showing that the alleged reply was received in the customary way through the United States mail. Ibid.

And the fact that a letter is in reply to a prior one mailed by the recipient does not necessarily bring it within the exception to the general rule, at least where the same is signed by

another than the sendee of the original. For example in *Butler v. Price* (1874) 115 Mass. 578, where the reply was signed by the wife of the man to whom the original had been sent, it

was held that such facts did not create a prima facie case of genuineness or authority. And see *Thayer v. Schley* (1910) 137 App. Div. 166, 121 N. Y. Supp. 1064. G. J. C.

E. W. NEWELL, Respt.,

v.

E. B. & A. L. STONE COMPANY, Appt.

California Supreme Court (In Banc) — October 8, 1919.

(— Cal. —, 184 Pac. 659.)

Vendor and purchaser — time of essence — waiver of provision.

1. Accepting payment on a land purchase contract after the time specified in the contract for making such payment waives a provision that time is of the essence of the contract, and notice that a strict performance as to future payment is necessary must be given to warrant declaration of a forfeiture of rights under the contract and payments made.

[See note on this question beginning on page 996.]

—error in notice — election to rescind.

2. The mere fact that a vendor is in error in giving notice that rights under the contract and payments made are forfeited unless payment of the balance due is made at once does not convert the notice into one of election to rescind.

—placing vendor in default — necessity of tender.

3. A vendee in default on a contract for purchase of real estate cannot place the vendor in default, so as to be entitled to recover payments made, by merely remaining quiet, without tender of amount due, upon receiving notice that the balance due must be paid at once, or the payments made will be forfeited.

APPEAL by defendant from a judgment of the Superior Court for the City and County of San Francisco (Deasy, J.) in favor of plaintiff in an action brought for the recovery of payments made by him under a contract for the purchase of real estate. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. W. F. Williamson and Ernest L. Brune, for appellant:

Plaintiff, while in default himself, could not rescind the contract and demand back the money he had paid.

Bradford v. Parkhurst, 96 Cal. 102, 31 Am. St. Rep. 189, 30 Pac. 1106; *Glock v. Howard & W. Colony Co.* 123 Cal. 1, 43 L.R.A. 199, 69 Am. St. Rep. 17, 55 Pac. 713; *Joyce v. Shafer*, 97 Cal. 335, 32 Pac. 820; *Odd Fellows' Sav. Bank v. Brander*, 124 Cal. 255, 56 Pac. 1109; *Cross v. Mayo*, 167 Cal. 594, 140 Pac. 283; *Aikman v. Sanborn*, 5 Cal. Unrep. 961, 52 Pac. 729; *Boone v. Templeman*, 158 Cal. 290, 139 Am. St. Rep. 126, 110 Pac. 947; *Sausalito Bay Land Co.*

9 A.L.R.—63.

v. Sausalito Improv. Co. 166 Cal. 302, 136 Pac. 57; *Hansbrough v. Peck*, 5 Wall. 497, 18 L. ed. 520; *Pearson v. Brown*, 27 Cal. App. 125, 148 Pac. 956.

The letter written by defendant was well within his rights, and was not a repudiation or a rescission or a consent to the abandonment of the contract.

Glock v. Howard & W. Colony Co. 123 Cal. 1, 43 L.R.A. 199, 69 Am. St. Rep. 17, 55 Pac. 713; *Oursler v. Thacher*, 152 Cal. 739, 93 Pac. 1007; *Empire Invest. Co. v. Mort*, 171 Cal. 339, 153 Pac. 236; *Odd Fellows' Sav. Bank v. Brander*, 124 Cal. 255, 56 Pac. 1109; *List v. Moore*, 20 Cal. App. 616, 129

Pac. 962; *Skookum Oil Co. v. Thomas*, 162 Cal. 539, 123 Pac. 363; *Schwerin Estate Realty Co. v. Slye*, 173 Cal. 170, 159 Pac. 420.

Messrs. Sloss, Ackerman, & Bradley also for appellant.

Messrs. Harding & Monroe for respondent.

Melvin, J., delivered the opinion of the court:

The plaintiff, E. W. Newell, and the defendant corporation, entered into a written contract on April 7, 1913, whereby the former agreed to purchase and the latter to sell certain real property for \$9,200. Of this amount the sum of \$500 was paid at the date of the agreement. The sum of \$1,500 was due August 1, 1913, and the balance was to be paid in monthly instalments of at least \$200. There was a provision for the monthly payment of interest, time was expressly made of the essence of the agreement, and it was further provided that upon default in the payment of any of the instalments the vendor, E. B. & A. L. Stone Company, might at its option, without notice to the vendee, declare the entire principal and interest immediately due.

The vendee failed to pay the first instalment of \$1,500, due August 1, 1913, but on December 13, 1913, a payment, on account, of something more than \$500, was accepted, and thereafter other sums were paid, at various times not specified in the contract, until \$2,694.83 had been received by the vendor. On April 28, 1915, the vendor (defendant in this action) served upon plaintiff a notice reciting the terms of the agreement. The notice contains the following statement by way of recital: "At all times the undersigned [E. B. & A. L. Stone Company] has stood ready, willing, and able to comply with the terms of said contract, and that it is not the intention of the undersigned in any manner to rescind or abandon said contract, and nothing herein shall be construed to be a consent in any way

to a rescission or abandonment of said contract."

Then follow recitals that time is of the essence of the contract, and that default has been made by the vendee, in consequence of which he has abandoned the contract, and the vendor notifies the vendee that, in order to determine that it is the latter's "express intention as purchaser to abandon said contract," a deed to the land is ready and is thereby tendered to the vendee upon payment of the balance of the purchase price, with interest as specified in the agreement, provided the entire balance should be paid immediately upon receipt of the notice. The closing words of the notice are as follows: "Unless said entire balance shall be paid immediately, as aforesaid, the undersigned, in accordance with the terms of said contract, hereby declares that it shall be relieved from all obligations in law or equity to convey the property hereinbefore described, or any part thereof, and that you shall forfeit all right thereto under this contract, and all rights to any and all moneys paid thereon, which shall be deemed payments for the right to have the option to purchase said property, and none of the same shall be returned, and the undersigned hereby further notifies you that it will thereupon, in accordance with its rights, immediately, or at its convenience thereafter, enter upon said lands and premises, and take possession thereof, together with the improvements constructed thereon, and the appurtenances thereunto belonging."

On August 4, 1916 (more than a year after the service of notice), the vendee demanded return of the moneys paid under the contract, and, this demand being refused, instituted the present action.

The court found that defendant, although it had accepted payments from plaintiff while he was in default, by the writing of April 28, 1915, "notified plaintiff . . . that

it exercised its option under said contract to cancel the same, and notified plaintiff that all his rights under said contract had terminated; that the moneys paid to defendant were forfeited, and that defendant would retake possession of said real property, and defendant did re-enter and take possession of said real property in said contract described; that no notice was ever given to plaintiff of any intention on the part of defendant to insist upon its right to forfeit said contract, and no notice whatever was served upon plaintiff, except the notice of cancelation and claim of forfeiture above referred to."

This finding is attacked by appellant as being without justification, and appellant also insists that the further finding that "plaintiff accepted said notice of forfeiture as a rescission on the part of defendant of said contract" is not sustainable.

The question to be determined by this court is whether or not the giving of the notice and the conduct thereafter of the parties to the contract amounted to a rescission by their mutual consent. We are of the opinion that it did not. In the first place, there was an express declaration by the vendor that it was not seeking to rescind. This, of course, would amount to nothing if the other parts of the notice were in contradiction of the vendor's declared intention. But we do not so interpret them.

Under the authorities the vendor, by accepting payments after the times specified in the agreement,

Vendor and purchaser—
time of essence—
waiver of
provision.

waived the provision with reference to time being of the essence of the contract as to those payments, and could not thereafter effectually declare a forfeiture of vendee's right to purchase, and of the payments already made, without notice that in the future a strict performance would be required. That is the doctrine of such cases as *Boone v. Templeman*, 158 Cal. 290,

139 Am. St. Rep. 126, 110 Pac. 947; *Stevinson v. Joy*, 164 Cal. 279, 128 Pac. 751; *Butte Creek Consol. Dredging Co. v. Olney*, 173 Cal. 697, 161 Pac. 260, and *Pearson v. Brown*, 27 Cal. App. 125, 148 Pac. 956. The vendee was in default over twenty months at the time the notice was served; that is to say, more than \$4,000 in monthly instalments had not been paid when due. If, within a reasonable time after receipt of the notice, the purchaser had tendered payment of the amounts due under the terms of the contract, perhaps the seller would have been bound to accept such tender. But this is not a case in which a vendee, having offered to perform, seeks to compel performance of the contract by the vendor. By its notice the vendor was not seeking to rescind the contract, but to declare the vendee's rights forfeited and itself entitled to the moneys previously paid by Newell because of the latter's supposed breach of the agreement. The mere fact that the vendor may have been in error in supposing and declaring that, unless immediate payment were made of the entire balance of the purchase price, it could consider the rights of the vendee foreclosed, does not convert the notice into a declaration that the vendor elected to rescind. On the contrary, defendant sought to stand upon the contract and to enforce its terms. The corporation had done no act of abandonment of the agreement. On the contrary, it had extended to Mr. Newell the favor of accepting payments long past due. The plaintiff could not take advantage of his own default. *Glock v. Howard & W. Colony Co.* 123 Cal. 1-19, 43 L.R.A. 199, 69 Am. St. Rep. 17, 55 Pac. 713. Plaintiff was in default when the notice was received by him. True, his prior defaults had been condoned, and he could have reinstated himself by making prompt payments of the balance due under the terms of the contract; but he could not, by merely saying nothing, gain the right to

—error in
notice—election
to rescind.

demand repayment of the instalments of the purchase price previously made. He could not place defendant in default unless he at least tendered to defendant all that was due under the agreement up to the

—placing vendor in default—necessity of tender.

date of his offer. He made no such tender. Therefore he should not prevail in this suit.

Judgment reversed.

We concur: Angellotti, Ch. J.; Shaw, J.; Lennon, J.; Wilbur, J.; Olney, J.; Lawlor, J.

ANNOTATION.

Vendor's acceptance of payment tendered after time specified as waiver of provision making time of essence of contract.

- I. Waiver of prior default:**
 a. General rule, 996.
 b. Illustrations, 998.

I. Waiver of prior default.

a. General rule.

The vendor in a contract for the sale of real estate, by accepting a payment on the purchase price after the time specified in the agreement, waives as to that payment a provision that time is of the essence of the contract, and cannot thereafter declare a forfeiture of the vendee's rights under the contract because of the failure to make it on time.

United States.—Coughran v. Bigelow (1896) 164 U. S. 301, 41 L. ed. 442, 17 Sup. Ct. Rep. 117.

Alabama.—Stewart v. Cross (1880) 66 Ala. 22; Hurst v. Thompson (1882) 73 Ala. 158; Davis v. Robert (1889) 89 Ala. 402, 18 Am. St. Rep. 126, 8 So. 114; Sewell v. Peavey (1914) 187 Ala. 322, 65 So. 803; Jones v. Hert (1915) 192 Ala. 111, 68 So. 259; Dinsmoor v. Thomas (1917) 198 Ala. 481, 73 So. 820.

Arkansas.—Braddock v. England (1908) 87 Ark. 393, 112 S. W. 883; Friar v. Baldridge (1909) 91 Ark. 133, 120 S. W. 939.

California.—Boone v. Templeman (1910) 158 Cal. 290, 139 Am. St. Rep. 126, 110 Pac. 947; Hayt v. Bentel (1913) 164 Cal. 680, 130 Pac. 432; Sausalito Bay Land Co. v. Sausalito Improv. Co. (1913) 166 Cal. 302, 136 Pac. 57; Butte Creek Consol. Dredging Co. v. Olney (1916) 173 Cal. 697, 161 Pac. 260; Pearson v. Brown (1915) 27 Cal. App. 125, 148 Pac. 956; Hermosa Beach Land & Water Co. v. Law Credit

- II. Waiver of subsequent default:**
 a. General rule, 1001.
 b. Qualification of rule, 1002.

Co. (1917) 175 Cal. 493, 166 Pac. 22; Burmester v. Horn (1917) 35 Cal. App. 549, 170 Pac. 674; La Chance v. Brown (1919) — Cal. App. —, 183 Pac. 216; Debairos v. Barlin (1920) — Cal. —, 190 Pac. 188. And see the reported case (NEWELL v. E. B. & A. L. STONE Co. ante, 993).

Connecticut.—Avery v. Kellogg (1836) 11 Conn. 562; Grippo v. Davis (1918) 92 Conn. 693, 104 Atl. 165.

Florida.—Shouse v. Doane (1897) 39 Fla. 95, 21 So. 807.

Georgia.—Hudson v. Duke (1857) 21 Ga. 403.

Illinois.—Stow v. Russell (1864) 36 Ill. 18; Smith v. Smith (1870) 55 Ill. 204; Allen v. Woodruff (1880) 96 Ill. 11; Watson v. White (1894) 152 Ill. 364, 38 N. E. 902; Eaton v. Schneider (1900) 185 Ill. 508, 57 N. E. 421; Hill v. Alber (1913) 261 Ill. 124, 103 N. E. 612; Fitzgerald v. Turner (1906) 223 Ill. 322, 79 N. E. 76.

Iowa.—Zunkel v. Colson (1899) 109 Iowa, 695, 81 N. W. 175.

Maine.—Manning v. Brown (1833) 10 Me. 49; Linscott v. Buck (1852) 33 Me. 530.

Minnesota.—Sylvester v. Holasek (1901) 83 Minn. 362, 86 N. W. 336.

Missouri.—O'Fallon v. Kennerly (1869) 45 Mo. 124; Randolph v. Ellis (1912) 240 Mo. 216, 144 S. W. 483; Robberson v. Clark (1913) 173 Mo. App. 301, 158 S. W. 854.

Nebraska.—Lent v. Burlington & M. R. Co. (1881) 11 Neb. 201, 8 N. W. 431; Paulman v. Cheney (1885) 18 Neb.

392, 25 N. W. 495; *Merriam v. Goodlett* (1893) 36 Neb. 384, 54 N. W. 686; *White v. Atlas Lumber Co.* (1896) 49 Neb. 82, 68 N. W. 359.

New Jersey.—*Grigg v. Landis* (1870) 21 N. J. Eq. 494.

New York.—*McCarty v. Myers* (1875) 5 Hun. 83; *Murray v. Harbor & S. Bldg. & Sav. Asso.* (1904) 91 App. Div. 397, 86 N. Y. Supp. 799, affirmed in (1906) 184 N. Y. 596, 77 N. E. 1191; *Pettit v. Brooklyn Development Co.* (1912) 152 App. Div. 462, 137 N. Y. Supp. 301; *Church v. Bourne* (1913) 79 Misc. 629, 141 N. Y. Supp. 333; *Re Ashback* (1918) 103 Misc. 147, 169 N. Y. Supp. 1058.

North Dakota.—*Plummer v. Kelly* (1897) 7 N. D. 88, 73 N. W. 70.

Oregon.—*Maffet v. Oregon & C. R. Co.* (1905) 46 Or. 443, 80 Pac. 489; *Miller v. Beck* (1914) 72 Or. 140, 142 Pac. 603.

Pennsylvania.—*Hatton v. Johnson* (1876) 83 Pa. 219; *Kuhn v. Skelley* (1904) 25 Pa. Super. Ct. 185; *Shilanski v. Farrell* (1914) 57 Pa. Super. Ct. 137.

South Carolina.—*Cooper v. Rutland* (1914) 99 S. C. 83, 82 S. E. 994.

Texas.—*McCord v. Hames* (1905) 38 Tex. Civ. App. 239, 85 S. W. 504.

Utah.—*Kohler v. Lundberg* (1919)

—*Utah*, —, 180 Pac. 590.

Washington.—*Whiting v. Doughton* (1903) 31 Wash. 327, 71 Pac. 1026; *Cash v. Meisenheimer* (1909) 53 Wash. 576, 102 Pac. 429; *Douglas v. Hanbury* (1909) 56 Wash. 63, 134 Am. St. Rep. 1096, 104 Pac. 1110; *Shorett v. Knudsen* (1913) 74 Wash. 448, 133 Pac. 1029; *Reidt v. Smith* (1913) 75 Wash. 365, 134 Pac. 1057.

England.—*Hunter v. Daniel* (1845) 4 Hare, 432, 67 Eng. Reprint, 717, 14 L. J. Ch. N. S. 194, 9 Jur. 526.

Canada.—*Barber v. Allen* (1856) 6 U. C. C. P. 329.

In an early English case, the vice chancellor, in discussing the question, said: "The next point is on the question of time. Nothing can be more express upon the agreement, nor more reasonable under the circumstances, than that time should be of the essence of the contract. But the question is whether that stipulation is not waived

by the parties in this case. . . . I agree with the defendants that each breach on the part of the plaintiff, in the nonpayment of money, was a new breach of the agreement; and that, time being of the essence of the contract, each breach gave the defendants a right to rescind the contract; but that right should have been asserted the moment the breach occurred. The defendants were not at liberty to treat the agreement as still subsisting, and to take the benefit of it at the expense of the plaintiff, if they meant to insist that it was at an end. They were at liberty to rescind it, but were not imperatively bound to do so. There is no stronger reason for holding that the forfeiture of a lease is waived by the acceptance of rent subsequently accruing, than there is in this case for holding that the acceptance of an instalment of purchase money (which was not due unless the agreement was to be continued) is a waiver of the right to rescind the agreement. The defendants had no right to accept the money, but upon the principle that the agreement was still subsisting." *Hunter v. Daniel* (Eng.) *supra*.

"The acceptance of payments of instalments on the price by Templeman, without objection, long after they had become due, was a waiver of all breaches which had occurred at or prior to the time such payments were actually made, and he could not afterwards insist upon a forfeiture on account thereof." *Boone v. Templeman* (1910) 158 Cal. 290, 139 Am. St. Rep. 126, 110 Pac. 947.

In *Sausalito Bay Land Co. v. Sausalito Improv. Co.* (1913) 166 Cal. 302, 136 Pac. 57, an action to quiet title to two parcels of land, the court said: "Where the vendor allows all the payments to become past due, and thereafter accepts partial payments, the forfeiture is waived; the payment of the balance and the execution of a deed thereupon become dependent and concurrent conditions. . . . So far as plaintiff is concerned, in the absence of such tender and refusal, it having accepted part of the price after maturity of the whole, the contract

would still stand, and it could not have a decree declaring that it is the owner in fee, and that defendant has no interest, unless the conduct of the defendant in the matter has waived a tender, or amounts to a refusal to perform in any event, or an abandonment of the contract."

b. Illustrations.

In the leading case of *Boone v. Templeman* (1910) 158 Cal. 290, 139 Am. St. Rep. 126, 110 Pac. 947, the facts were that an agreement was entered into by which the seller agreed to convey land to the buyer on payment of the purchase price, which payment was to be made in instalments at specified times. If any instalment of principal and interest was not paid within sixty days after it became due, the whole of the unpaid portion of the price would, at the election of the seller, forthwith become due, in which event the seller was given power to sell the land in order to realize the amount unpaid, and all previous payments were thereupon to become forfeited. Time was declared to be of the essence of the contract. The buyer made the initial cash payment and several monthly payments on account, but only one of these payments was made when due, the others being made after the time fixed by the contract. The buyer finally stopped making payments, and the seller, without any previous demand for performance, gave the buyer a written statement purporting to rescind the contract. The buyer thereupon tendered in full the balance due, on condition that the seller should perform on his part by executing the necessary deed. On the seller's failure so to do the buyer filed a bill for specific performance. It was held that the seller's conduct in accepting and retaining the payments made amounted to a waiver of the condition that time should be of the essence of the contract, and of the right to declare a forfeiture for nonpayment.

The contract under consideration in *Hurst v. Thompson* (1882) 73 Ala. 158, provided that, on the failure of the purchaser to pay an instalment of the purchase money at the time it became due, the contract should cease to be

one of sale, and become a lease for a stated period, and the instalment then falling due should be considered as rent. The purchaser paid only a part of an instalment at the time it became due, but soon thereafter paid the balance, which was received by the vendor without objection. It was held that the vendor, by receiving such balance, waived his right to claim a forfeiture for the vendee's failure to pay the instalment when it became due.

See to the same effect, *Stewart v. Cross* (1880) 66 Ala. 22; *Davis v. Robert* (1889) 89 Ala. 402, 18 Am. St. Rep. 126, 8 So. 114; *Jones v. Hert* (1915) 192 Ala. 111, 68 So. 259; *Friar v. Baldridge* (1909) 91 Ark. 133, 120 S. W. 989; *Pearson v. Brown* (1915) 27 Cal. App. 125, 148 Pac. 956.

So it was shown in *Braddock v. England* (1908) 87 Ark. 393, 112 S. W. 883, that a vendor continuously accepted payments on the purchase price after the date specified, and failed to declare a forfeiture until after the property had been levied on by a creditor of the vendee. It was held that the vendee could not, under these circumstances, declare a forfeiture as against the purchaser at the execution sale, the court saying: "Braddock's course of conduct in habitually permitting payments to be made after default amounted in equity to a waiver of the forfeiture which he had theretofore been entitled to have demanded, and this waiver continued until after England had acquired rights in the property by levy of execution thereon. There could be no nunc pro tunc forfeiture."

Similarly it appeared in *Hermosa Beach Land & Water Co. v. Law Credit Co.* (1917) 175 Cal. 493, 166 Pac. 22, that a contract for the sale of land provided for payments of the purchase price in instalments at specified times. It was held that the acceptance by the vendor of payments on account of interest on the unpaid balance long after the last instalment became due constituted a waiver of the vendor's right to declare a forfeiture for failure to make payments on time.

In *Hayt v. Bentel* (1913) 164 Cal. 680, 130 Pac. 432, it appeared that the

plaintiff and the defendant, some time previous to the institution of the action, had entered into a contract for the sale of real estate, which contract was rescinded for defect in title. The plaintiff thereupon brought suit to recover the purchase money paid under the contract. The claim was made that the plaintiff was in default in payments under the contract, and this was advanced as a defense to the action. It was held that there was no merit in this claim, since the evidence showed that the payments, although made after the expiration of the time specified in the contract, were accepted without question by the vendor.

Likewise, in *Avery v. Kellogg* (1836) 11 Conn. 562, it was shown that the defendant agreed to convey a farm to the plaintiff on payment of the purchase price, which was to be paid in stipulated amounts at definite times. The plaintiff did not pay the first instalment when due, but subsequently made a payment of part of the instalment, which the defendant accepted and retained. Before the last instalment became due the plaintiff tendered to the defendant the entire amount of the purchase price, demanding a deed. The defendant refused to accept the money or execute a conveyance, and the plaintiff thereupon filed a bill for a decree of redemption or specific performance. Holding that the acceptance of the payment after the time specified constituted a waiver, the court said: "The defendant, then, having received this money on account of the payment due on the 1st of April, must be considered as having waived any advantage from the omission of the plaintiff to make the first payment at the day."

In *Shouse v. Doane* (1897) 39 Fla. 95, 21 So. 807, it appeared that the first two notes on the purchase price of certain property were not paid promptly; that the vendor collected them with great difficulty and trouble, in fractional amounts, at irregular times, and that the notes were not fully paid until long after maturity. In reversing the lower court, which denied a decree for specific performance to the vendee, the court held that although time was made of the essence of the contract,

and the right was given to declare a forfeiture for default in payment, the vendor, by accepting payments past due, waived the condition as to all defaults then existing.

In *Hudson v. Duke* (1857) 21 Ga. 403, a bill in equity was filed to compel the defendant to perform specifically an agreement for the sale and conveyance of a parcel of land. It appeared that the defendant executed a bond for title, agreeing to give title to the land in question on payment of the purchase price, which was to be paid by an initial cash payment and two deferred payments on specified dates. The first cash payment was made as agreed, but the second payment was not made at the time specified, the complainant's assignor paying \$50 on account of this note about two months after it became due. The defendant accepted and retained this payment. The bond was thereafter assigned to the complainant, who immediately tendered to the defendant the balance of the purchase money, exhibited the bond, with the transfer thereon, and demanded title for the land, which the defendant refused to execute. It was held that, notwithstanding time was of the essence of the contract, the action of the defendant in accepting and retaining a partial payment long after the note fell due was a waiver of the failure to pay the note punctually.

In *Watson v. White* (1894) 152 Ill. 364, 38 N. E. 902, wherein it appeared that the vendor in an instalment contract for the sale of real estate in which time was distinctly declared to be essential, accepted a payment on the purchase price which was not for the amount or at the time specified, the court said: "But an agreement that time shall be of the essence of a contract may be waived or set aside, and more especially so in the contemplation of a court of chancery, either by the mutual consent or conduct of the parties, or by the consent or conduct of the party in whose favor and for whose benefit such stipulation is made."

In *Stow v. Russell* (1864) 36 Ill. 18, the court, in holding that a waiver of the time stipulation was effected by

the vendor's acceptance of overdue payments, said: "The first payment was made as stipulated. Other payments were made, not punctually, but as they were accepted; that was a waiver of the want of punctuality as to the particular day, up to the 1st day of September, 1854."

See to the same effect, *Smith v. Smith* (1870) 55 Ill. 204; *Eaton v. Schneider* (1900) 185 Ill. 508, 57 N. E. 421.

It appeared in *Robberson v. Clark* (1913) 173 Mo. App. 301, 158 S. W. 854, that a contract for the sale of land provided for the payment of the purchase price in monthly instalments, the vendor agreeing to deliver a warranty deed to the property on completion of the payments, and time being made of the essence of the agreement. The vendee being in default in payments, the vendor accepted a payment for the current month, giving the vendee a memorandum to present at the bank which was making the collections, directing it to allow the vendee to continue his monthly payments. It was held that the vendor waived the right to declare a forfeiture for past default in making payments.

So, in *Randolph v. Ellis* (1912) 240 Mo. 216, 144 S. W. 483, an action to quiet title, the defendant admitted title in the plaintiff, but claimed under a contract with the plaintiff's grantor, by which it was agreed that she should occupy the premises as a tenant for eighty-five and one third months, paying \$7.50 per month rent. The contract provided that at the end of that time, and on payment in full of the rent, the plaintiff's grantor was to convey to her, and that a failure to pay \$7.50 each month should render the contract void. Various and numerous payments were made at irregular times in small amounts, averaging about \$5 or \$6 at a time. The court said: "Here, by the long-continued conduct of both parties, the provision for the payment of \$7.50 each month was disregarded, and payments were repeatedly made at irregular intervals and of different amounts. The forfeiture was waived and cannot be insisted on here."

In *Merriam v. Goodlett* (1893) 36 Neb. 384, 54 N. W. 686, wherein it appeared that a vendor accepted interest after the date on which the purchase money was to be paid, it was said: "There is no circumstance, therefore, that would make time the essence of the contract, and thus rob the purchaser of his estate. But even if time was the essence of the contract, it has been waived by the acceptance of the interest while the Goodletts were in default. They are, therefore, entitled, upon payment of the purchase price, to specific performance of the contract."

In *Paulman v. Cheney* (1885) 18 Neb. 392, 25 N. W. 495, the action was brought to enforce specific performance of an instalment contract for the sale of land. Under the contract time was made of the essence, and provision was made for a forfeiture on failure to make payments at the time specified. The vendor accepted two overdue payments, and thereafter, no further default having been made by the vendee, returned all notes to the vendee and declared the contract forfeited. The vendee thereupon tendered the full amount of the purchase price and demanded a deed, which the vendor refused to deliver. It was held that the vendor's acceptance of overdue payments was a waiver of the conditions as to all defaults then existing, and the vendor could not, by the mere return of the notes to the purchaser, where there had been no subsequent default, terminate the contract.

In *Shilanski v. Farrell* (1914) 57 Pa. Super. Ct. 137, an action of assumpsit brought by a vendee to recover purchase money paid under an instalment contract for the sale of real estate, it appeared that by the terms of the contract \$10 was to be paid on the 7th day of each month, time being expressly declared essential. Payments were accepted by the vendor at irregular intervals, the last payment of \$30 being tendered and accepted when the vendee was in default over one year. "Certainly," the court said, "the acceptance of the last payment of \$30, in the absence of any qualifying fact

or circumstance, raised the conclusive inference that the defendants intentionally abandoned and relinquished the right to enforce a forfeiture for previous failures to pay on the day."

In *Kohler v. Lundberg* (1919) — Utah, —, 180 Pac. 590, the court had under consideration an instalment contract for the sale of real estate in which time was declared to be of the essence, and containing a stipulation providing for a forfeiture in case payments on the principal and of the interest were not punctually made. It was held that the vendors, by accepting interest at a later day than provided for in the contract, and by failing to inform or advise the purchaser of their intention to declare or insist on a forfeiture, had waived the right to a forfeiture.

II. Waiver of subsequent default.

a. General rule.

A vendor in a contract for the sale of real estate, in which time is an essential element, by accepting one or more payments subsequent to the time specified in the agreement, does not necessarily waive the vendee's delinquency as to future payments, or the right to insist on strict performance in the future; and on the vendee's default in subsequent payments the vendor may declare a forfeiture.

United States. — *Eastern Oregon Land Co. v. Moody* (1912) 119 C. C. A. 135, 198 Fed. 7, reversing (1910) 180 Fed. 532.

Alabama. — *Nelson v. Sanders* (1898) 123 Ala. 615, 26 So. 518; *Davis v. Folmer* (1919) — Ala. —, 83 So. 60.

California. — *De Bairos v. Barlin* (1920) — Cal. —, 190 Pac. 188; *Boone v. Templeman* (1910) 158 Cal. 290, 139 Am. St. Rep. 126, 110 Pac. 947; *McAdams v. Felkner* (1903) 140 Cal. 354, 73 Pac. 1064.

Idaho. — *Bowers v. Bennett* (1917) 30 Idaho, 188, 164 Pac. 93.

Illinois. — *Stow v. Russell* (1864) 36 Ill. 18; *Phelps v. Illinois C. R. Co.* (1872) 63 Ill. 468; *Fox v. Grange* (1913) 261 Ill. 116, 103 N. E. 576.

Iowa. — *Mahoney v. McCrea* (1898) 104 Iowa, 735, 74 N. W. 699.

Kansas. — *Kliesen v. Equity Exch.*

Mercantile Asso. (1917) 101 Kan. 138, 165 Pac. 650.

Kentucky. — *Baker v. Smith* (1901) 22 Ky. L. Rep. 1878, 61 S. W. 1014.

Massachusetts. — *Keefe v. Fairfield* (1904) 184 Mass. 334, 68 N. E. 342.

Minnesota. — *True v. Northern P. R. Co.* (1914) 126 Minn. 72, 147 N. W. 948.

Nebraska. — *Reynolds v. Burlington & M. R. R. Co.* (1881) 11 Neb. 186, 7 N. W. 737; *Lent v. Burlington & M. R. R. Co.* (1881) 11 Neb. 201, 8 N. W. 431.

Oregon. — *Maffet v. Oregon & C. R. Co.* (1905) 46 Or. 443, 80 Pac. 489; *Gray v. Pelton* (1913) 67 Or. 239, 135 Pac. 755.

Pennsylvania. — *Shilanski v. Farrell* (1914) 57 Pa. Super. Ct. 137.

Washington. — *Cash v. Meisenheimer* (1909) 53 Wash. 576, 102 Pac. 429; *Rose v. Rundall* (1915) 86 Wash. 422, 150 Pac. 614; *White Invest. Co. v. Demarco* (1915) 89 Wash. 34, 153 Pac. 1060.

"The simple act of receiving a payment after the day when the payee was bound to accept it, without more, is no excuse for laches as to future payments. The effect of the acceptance is exhausted upon the payment made, and as to those following, the provisions of the contract are left to operate with unimpaired force." *Lent v. Burlington & M. R. R. Co.* (Neb.) *supra*.

"In his brief appellant insists that because, on April 24, 1908, respondent accepted interest due April 5th, he waived time as being of the essence of the contract. We hold, however, that he waived it in regard only to this payment, but not as to future payments." *Bowers v. Bennett* (Idaho) *supra*.

"We find [no decision] that goes so far as to hold that the mere acceptance of one payment after its maturity will waive the right to declare a forfeiture if default occurs in subsequent instalments." *Boone v. Templeman* (Cal.) *supra*.

In *Phelps v. Illinois C. R. Co.* (1872) 63 Ill. 468, a suit to enforce specifically a real estate contract in which time was of the essence, the court said: "It is urged by appellant that the re-

ceipt by the company of money on a payment which was past due operates as a waiver of the right to declare a forfeiture. The argument amounts to this,—that inasmuch as the company accepted payments which were long due, therefore the company cannot insist upon the terms of the contract as to the other payments. We do not see the force of the argument."

In *McAdams v. Felkner* (Cal.) *supra*, an action of ejectment, the vendee contended that although time was of the essence of the contract, this provision had been waived by the vendor's acceptance of payments past due. In holding that this waiver did not apply to subsequent instalments, the court said: "The facts that defendant had paid some part of the purchase price, and had made some improvements on the premises and that defendants had been allowed to make some previous payments after they had become due, do not, under the terms of the contract constitute a defense to this action."

In *Baker v. Smith* (Ky.) *supra*, an action to enforce a vendor's lien, the court said: "The mere failure of appellees to take advantage of the first default by appellant was not prejudicial to them, and did not affect their right to rely upon such omission at the time this suit was brought, especially as the testimony in the case shows that the number of these defaults increased as the years went by; and that he failed to pay 109 demands in the year 1898, in which the suit was instituted. As appellant first neglected to perform the duties imposed upon him by the contract, appellees were entitled to avail themselves of the contract provisions arising upon such default, and ask a sale of the coupons held by them as collateral, and for an enforcement of their vendor's lien against the real estate."

In *True v. Northern P. R. Co.* (1914) 126 Minn. 72, 147 N. W. 948, the court in holding that the acceptance of one instalment after the date specified did not preclude the vendor from insisting on prompt payment of subsequent instalments, said: "Plaintiff contends that defendant waived its right to de-

clare these contracts forfeited by accepting a second payment on one of them some three months after it became due. Clearly this was not a waiver as a matter of law."

In *White Invest. Co. v. Demarco* (1915) 89 Wash. 34, 153 Pac. 1060, a vendee in an instalment contract in which time was made of the essence defaulted in payments, and thereupon the vendor brought action to terminate the contract. By agreement of the parties the back payments were made and the action was dismissed. Afterward the vendees were again in default, and after a demand had been made on them, and they had refused to pay, action was brought by the vendor to quiet title to the property. In holding that there was no waiver, Mount, J., said: "The appellants argue in their brief that, because the respondent accepted payments after default had been made, the respondent is not now entitled to hold the appellants strictly to the terms of the contract. But, as we have seen above, the only time the respondent accepted payments in default was after an action had been brought to set aside the contract. That action was settled by agreement by payment of the amount then past due, and the action was then dismissed. After that time, the appellants were again in default, and refused upon notice to make further payments. This fact takes the case out of the rule contended for by the appellants, that the respondent has waived the terms of the contract by a course of conduct."

b. Qualification of rule.

If the vendor in a contract for the sale of land, whereby time is made of the essence, repeatedly receives payments after the date when they are due, and thereby establishes a course of dealing inconsistent with insistence on the strict performance of the contract, he cannot thereafter declare a forfeiture for a failure to make a payment promptly, unless he has given notice to the vendee of his intention to require prompt payment in the future.

California. — *Noyes v. Schlegel* (1908) 9 Cal. App. 516, 99 Pac. 726; *Boone v. Templeman* (1910) 158 Cal. 290, 139 Am. St. Rep. 126, 110 Pac. 947;

Stevinson v. Joy (1912) 164 Cal. 279, 128 Pac. 751; *Bishop v. Barndt* (1919) — Cal. App. —, 184 Pac. 901. And see *Butte Creek Consol. Dredging Co. v. Olney* (1916) 173 Cal. 697, 161 Pac. 260; *Bayside Land Co. v. Phillips* (1919) — Cal. App. —, 184 Pac. 951.

Connecticut.—*Bronson v. Leibold* (1913) 87 Conn. 293, 87 Atl. 979; *Grippio v. Davis* (1918) 92 Conn. 693, 104 Atl. 165.

Illinois.—*Monson v. Bragdon* (1895) 159 Ill. 61, 42 N. E. 383; *Fox v. Grange* (1913) 261 Ill. 116, 103 N. E. 576.

Iowa.—*Rump v. Schwartz* (1881) 56 Iowa, 611, 10 N. W. 99; *Davidson v. Hawkeye Ins. Co.* (1887) 71 Iowa, 532, 60 Am. Rep. 818, 32 N. W. 514.

Kansas.—*Shade v. Oldroyd* (1888) 39 Kan. 313, 18 Pac. 198.

Missouri.—*Price v. Rausche* (1916) — Mo. —, 186 S. W. 968.

New York.—*McCarty v. Myers* (1875) 5 Hun, 83; *Harris v. Troup* (1840) 8 Paige, 423; *Barnett v. Sussman* (1907) 116 App. Div. 859, 102 N. Y. Supp. 287; *Kibbe v. Crossman* (1910) 139 App. Div. 388, 124 N. Y. Supp. 3.

Oregon.—*Graham v. Merchant* (1903) 43 Or. 294, 72 Pac. 1088; *Gray v. Pelton* (1913) 67 Or. 239, 185 Pac. 755.

South Dakota.—*Keator v. Ferguson* (1906) 20 S. D. 473, 129 Am. St. Rep. 947, 107 N. W. 678; *Speer v. Phillips* (1909) 24 S. D. 257, 123 N. W. 722; *J. I. Case Threshing Mach. Co. v. Farnsworth* (1912) 28 S. D. 432, 134 N. W. 819.

"While a waiver of a default in one payment would not operate as a waiver of a subsequent failure, the court should consider all the circumstances and the conduct of the parties in their dealings and treatment of the contract." *Gray v. Pelton* (Or.) supra.

"Grange, however, might waive the provision of the contract as to time of payment, and a habit of accepting payments of a less amount or after the time stipulated is one of the usual ways of waiving such a provision." *Fox v. Grange* (Ill.) supra.

"The receipt of payments by the defendant on account of the purchase price, in varying amounts and at ir-

regular times, through a long period, continued during the period of interest of the plaintiff until the refusal to accept the payment tendered on February 1, 1916, constituted a waiver of the provision for weekly payments during this time." *Grippio v. Davis* (Conn.) supra.

"When the vendor receives from the vendee payments upon the contract after the day on which, by its terms, they are payable, the forfeiture (if nonpayment at the time designated for payment produces a forfeiture) is thereby waived; and if the vendor desires that the future payments shall be promptly made, or if he desires payments due and unpaid to be paid, he must in the one case notify the purchaser that prompt payment thereafter will be exacted, and, in the other, that the money due and unpaid must be paid by a day designated; and if the purchaser fails to pay as required, the vendor may forfeit the contract and maintain ejectment for the possession of the land." *McCarty v. Myers* (N. Y.) supra.

In *Shade v. Oldroyd* (Kan.) supra, the court, in refusing to enforce a forfeiture where payments were not made on the dates specified, said: "We are very clear, too, that, under the circumstances detailed in this record, the trial court did not err in holding that this was a case in which a strict forfeiture could not be insisted upon, the condition being one for the payment of money only, and all preceding payments having been made without much regard to the precise time of their maturity."

In *Boone v. Templeman* (1910) 158 Cal. 290, 139 Am. St. Rep. 126, 110 Pac. 947, after referring to the rule that the acceptance of a single delayed payment will not waive as to future payments a provision that time is of the essence, the court said: "But in the present case we have much more than this. Boone was in the possession and in actual use of the land during the whole period. A payment of \$50 was due on the price on the 5th day of every month after November, 1901. Not one of these payments had been made on the day they were due, nor,

except the first, until months afterwards. Fourteen payments in succession had been accepted after maturity, and without objection or protest of any kind. Interest fell due each month, but nothing was paid as interest, and none was demanded, nor were any objections raised on that score. After the acceptance of the last sum paid, twenty-four additional payments of principal and interest fell due and were not paid, Boone remaining in possession and Templeman apparently acquiescing in the continuance of the contract, giving no notice to the contrary, nor doing anything inconsistent therewith for still another period of fourteen months. We think from these facts a court might infer a waiver of the conditions regarding forfeiture and time."

The contract involved in *Noyes v. Schlegel* (1908) 9 Cal. App. 516, 99 Pac. 726, stipulated for payments in instalments, and provided for a forfeiture for nonpayment of instalments when due, time being declared an essential element. The vendor accepted payments after the time when they became due, telling the vendee that he did not object to the delay in making payments so long as the entire amount was paid within the period prescribed by the contract. The vendor, however, subsequently declared a forfeiture of the contract, and the vendee, within a reasonable time thereafter, tendered the total amount due under the contract. The court affirmed a decree in favor of the plaintiff for specific performance, holding that the vendor, by his oral agreement and by his acceptance of overdue payments, waived the right to declare a forfeiture for the vendee's failure to pay on time, and released the vendee from the operation of the time clause as to the instalments which were not paid promptly.

It appeared in *Stevinson v. Joy* (1912) 164 Cal. 279, 128 Pac. 751, that a vendor entered into a written contract with the vendee, whereby the vendor extended to the vendee the privilege of purchasing land for a specified sum, payable \$2 weekly until the total sum paid should equal the amount of the purchase price. Time,

and, in particular, time of payment, was declared to be material and of the essence of the contract, and a provision was made for forfeiture in case payments were not made at or within the times limited. The vendor accepted from the vendee various sums of money at various times long after the same were due, which were credited on the purchase price. It was held that this constituted a waiver of the provision with reference to time being of the essence of the contract, which could be renewed only by giving definite notice of an intention to enforce it.

In *Bronson v. Leibold* (1913) 87 Conn. 293, 87 Atl. 979, it appeared that the plaintiff and the defendant executed an agreement by which the plaintiff agreed to sell to the defendant a farm, and to give him a deed for the same on his paying therefor a stipulated amount in different payments at named dates. The defendant took possession of the farm, making various payments on account of the purchase price, but not at the times or in the amounts provided in the contract. These payments were received by the plaintiff and applied on the purchase price. On the last occasion that defendant was delinquent in his payment, the plaintiff's attorney wrote to him concerning the contract. The defendant, ignorant of his legal rights, quitclaimed the property to the plaintiff, who then gave him a one-year lease of the premises. Shortly after, having consulted an attorney, who advised him of his rights, the defendant tendered the amount due under the contract, and demanded a conveyance of the premises. The plaintiff refused the tender, and declined to execute the conveyance, subsequently bringing an action for rent, in which the defendant counterclaimed to cancel the deed and procure a reconveyance of the property. It was held that the plaintiff's acceptance of payments on the contract at times other than those contracted for constituted a waiver of his right to insist on a forfeiture for failure to comply strictly with the contract, and the defendant, at the time he gave the plaintiff a release of his

interest in the property under the contract, had the right to redeem, and no legal proceeding less than a foreclosure could have ousted him from possession.

In *Monson v. Bragdon* (1895) 159 Ill. 61, 42 N. E. 383, an action to enforce specifically an instalment contract for the sale of real estate, it was held that a stipulation in the contract declaring time to be of the essence was waived by the vendor's acceptance of payments later than the date specified, and that the vendor, in order to claim a forfeiture, must thereafter give a definite and specific notice of his intention so to do.

So, in *Rump v. Schwartz* (1881) 56 Iowa, 611, 10 N. W. 99, a provision in a contract for the sale of real estate making time of the essence was held to have been waived by the vendor, who, after default by the vendee in making payments, enforced payment of a portion of the sum by the sale of property mortgaged as security; and the vendor, it was held, could not insist on a forfeiture of the contract after the vendee tendered the balance due.

By the contract involved in *Price v. Rausche* (1916) — Mo. —, 186 S. W. 968, the vendor agreed to convey land to the vendee on the payment of monthly instalments to the amount of the purchase price, time being made of the essence of the contract. The vendor repeatedly accepted payments on the contract after the time stipulated. In ruling on the legal effect of these acts the court said: "Although time is mentioned as of the essence of said contract, yet it was continuously waived by the Beils, and payments accepted when offered. Under the foregoing circumstances, it became the duty of said Beils, if they concluded to declare a forfeiture, to notify the purchaser of said lot that at a reasonable time mentioned, in the future, if said deferred payments were not made, etc., the contract of sale should become rescinded."

The same principle was declared in *Barnett v. Sussman* (1907) 116 App. Div. 859, 102 N. Y. Supp. 287, a case where realty was sold under a contract

providing for payments in monthly instalments at regular stated periods, and stipulating that, on default in any payment, the vendor might, thirty days thereafter, elect, without notice, that all payments should become forfeited to her as liquidated damages. It was held that the acceptance by the vendor, from the beginning, of payments not made according to the contract, but irregularly as to time and amount, the purchaser being at all times in arrears, was a waiver of the forfeiture clause, which could not be revived, except on notice to the purchasers that if they did not pay the balance due within a reasonable time specified, the forfeiture would then be exercised.

So, in *Gray v. Pelton* (1913) 67 Or. 239, 135 Pac. 755, it was held that the vendor in a contract for the sale of land calling for payments on designated dates, and making time of the essence, had waived the stipulation as to time, by accepting payments after the date specified, and could not declare a forfeiture without giving the vendee a specific notice to comply with the terms of the contract, and a reasonable time in which to do so.

It was shown in *Graham v. Merchant* (1903) 43 Or. 294, 72 Pac. 1088, that a contract for the sale of land provided for the payment of the purchase price in instalments at specified dates, and contained a provision for forfeiture in case payments should not be made as agreed on. It was held that the vendor, by accepting payments after the vendee was in default, waived his right to declare a forfeiture, and could not thereafter do so without giving notice, and allowing the vendee a reasonable time in which to comply with the contract.

Similarly, in *Speer v. Phillips* (1909) 24 S. D. 257, 123 N. W. 722, it appeared that the vendor received a payment twenty-eight days after it was due, and further voluntarily extended the time for paying interest and taxes. It was held that he had waived the benefit of a provision in the contract making time of the essence, and that, before he could lawfully terminate the contract, he must give notice to the vendee, and fix a further time which would

give the vendee a reasonable opportunity to comply with the terms of the contract.

In *Keator v. Ferguson* (1906) 20 S. D. 473, 129 Am. St. Rep. 947, 107 N. W. 678, the vendee of real estate sought specific performance against the vendor. The court said: "It seems eminently just and equitable that a party who has neglected to enforce the provisions of his contract, providing that time shall be of the essence of the contract, at the time the default is made, and accepts performance of the terms thereafter, should not be allowed, upon a subsequent default, to enforce the provision without giving the other party notice that he intends to enforce the same, and a reasonable opportunity to comply with the terms of the contract. To hold otherwise would enable a party to take undue advantage of his contract by accepting payments after the time they were to be paid by the strict terms, and after having induced a party to make a number of such payments, then, without notice, and without giving the party an opportunity to comply with the terms of the contract, declare it terminated, and the amount paid thereunder forfeited. In the case now before us the defendant had received \$400 of her principal, and certain improvements had been made upon the property; she had permitted the plaintiff to believe, at least, that she would not insist upon a strict performance of the terms of the contract by receiving the sum of \$222 some twelve or thirteen days after the same was claimed to be due by her, without objection, and had permitted the rent for the year 1900 to remain unpaid, apparently without objection, and by waiting until the 4th day of October, thirteen days after she claimed the payment to be due, before notifying the plaintiff of her election; and she must therefore be regarded as having waived the benefits of the provision

making time the essence of the contract to the extent, at least, that she was required to give the plaintiff notice of her intent to terminate the contract, and give him a reasonable opportunity to comply with the same."

In *J. I. Case Threshing Mach. Co. v. Farnsworth* (1912) 28 S. D. 432, 134 N. W. 819, action was brought to enforce specifically two contracts for the sale of real property. It appeared that one contract provided that time should be of the essence, and further provided for the filing of a declaration of forfeiture by the vendor with the registrar of deeds, while the other contract contained no such provisions. The court said: "If time had been expressly declared to be of the essence of the obligation in both contracts, the defendant was not in position to insist upon a forfeiture. She had not only neglected to promptly assert her rights, but had, as appears from uncontradicted evidence, on December 1, 1908, after the vendee was in default, accepted a payment of interest, stating: 'There, that settles that for one year.' It may be that the receipts for this interest did not show an agreement to extend any payment, and that the payment of accrued interest was not sufficient consideration to support an oral extension; nevertheless, the defendant's conduct operated as a waiver of her right to insist upon a strict compliance with the terms of either contract as to the time of payment. . . . The trial court found that, on or about November 15, 1909, the defendant demanded of the vendee payment in full for all of the lands, in accordance with the terms of the contracts. If this means that immediate payment was demanded, it constituted no defense, as the vendee was entitled to a reasonable time in which to perform,—strict compliance with the terms of the contract, as to the time of payment, having been previously waived by the vendor." W. F. F.

R. J. MONROE et al., Appts.,

v.

RAILROAD COMMISSION OF WISCONSIN, Resp't.

Wisconsin Supreme Court — November 4, 1919.

(— Wis. —, 174 N. W. 450.)

Public Service Commission — power over jitney busses.

1. No general supervisory power of control over jitney busses rests in the Railroad Commission after it has once acted in issuing a certificate to operate such vehicles, under statutes conferring upon it power with respect to the issuance of such certificates, but making no provision for subsequent supervision, where suggestions looking to such supervision were expressly rejected by the legislature.

[See note on this question beginning on page 1011.]

— source of jurisdiction.

2. All power and jurisdiction of the Railroad Commission must be found within the four corners of the statutes

creating it, since it is a tribunal of purely statutory creation.

[See 22 R. C. L. 783.]

(Vinje, J., dissents.)

APPEAL by plaintiffs from an order of the Circuit Court for Dane County (Stevens, J.) sustaining a demurrer to the complaint in an action brought to have an order of the defendant relating to the operation of motor vehicles set aside and declared null and void. *Reversed.*

Statement by Eschweiler, J.:

Prior to the commencement of this action the plaintiffs had been operating motor vehicles for the carriage of passengers for hire in the city of Racine, Wisconsin, under the provisions of chapter 546, Laws of 1915, being §§ 1797-62 et seq. Having given the required bond and made due application for and obtained the certificate provided for in said law from the defendant, plaintiffs respectively paid the license fee required under the ordinance of said city, and obtained from its mayor and common council licenses to so operate.

Four routes appear to have been designated by said Railroad Commission for the operation of such motor vehicles in the city of Racine on the printed form of applications of the respective plaintiffs, and one of such routes, numbered (1), and the territory four blocks east, west, north, and south, was selected by plaintiffs, respectively, as being the

general route or territory over which it was proposed to operate such motor vehicles.

The Milwaukee Light, Heat, & Traction Company, operating a street railway system in the said city of Racine, made application to the defendant Commission, requesting that an investigation be made and an order issued authorizing an increase in the fares for street railway service in the said city on the ground that the prevailing rates of fare were inadequate to care for the increased operating costs; and, further, that a large number of automobiles carrying passengers for hire, commonly known as jitneys, operated in the city of Racine, and that the service afforded by the same was not adequate or systematized, and that the said jitneys are substantially unregulated and untaxed, and that the revenues of said street railway system have been substantially lessened in consequence of such operation.

During the pendency of the hearing of such application the Commission, on its own motion, determined to make further investigation relating to the routes and service prescribed for bonded carriers or jitneys in the said city, with a view of possible change and restricting of the routes in the city of Racine over which said bonded carriers or jitneys may operate, and thereupon gave notice that a hearing would be had before the Commission to further investigate said matters and all questions relating to the operation of bonded carriers or jitneys in the city of Racine, both as to routes and service, and fixed a time and place for such hearing.

Objection was made on behalf of the plaintiffs and others similarly situated to the jurisdiction of the Railroad Commission to take such proceedings or make any order in the premises with relation to the operation of such motor vehicles.

December 28, 1918, an order was made by said Railroad Commission as follows:

"In the Matter of the Application of the Milwaukee Light, Heat, & Traction Company, for a Revision of the Rates of Fare on Its Street Railway System in the City of Racine.

"In the Matter of the Investigation on Motion of the Commission of Routes and Service of Bonded Carriers or Jitneys within the City of Racine.

"An order was entered in the above-entitled matter on September 9, 1918, with respect to street railway rates in Racine, jurisdiction being retained with respect to the routes and service of bonded carriers or jitneys. The Commission has kept in touch with the local situation since that time, and has made some further study of the routes and service of the bonded carriers.

"At the present time there are no operators on routes Nos. 2, 3, and 4, and service on these routes has at no time been satisfactorily developed. It appears advisable, therefore, to discontinue these

routes, and they are hereby canceled.

"There are at present ten operators on route No. 1. In view of the popularity of this route, no change appears to be advisable. However, until there is further development of other possible routes which would be serviceable to the community, we deem it to be in the interest of the public to restrict the number of operators on route No. 1 to ten.

"A new route is hereby approved and designated as route No. 2. The route is as follows: (Description omitted).

"Until the above-described route is developed and occupied by at least ten operators, no further applications for route 1 will be granted, except to fill vacancies caused by the withdrawal of present operators on that route. New routes will be designated from time to time should conditions warrant, and, if necessity therefor arises, further restrictions will be established. Jurisdiction in this proceeding is retained for this purpose."

Thereupon the plaintiffs commenced this action on their own behalf, and on behalf of others similarly situated, to have said order set aside, vacated, and declared null and void. The defendants demurred to such complaint, and, upon the demurrer being sustained, the plaintiffs appealed.

Mr. J. Elmer Lehr, for appellants: The Railroad Commission, under chapter 546, Laws of 1915, has no authority, power, or jurisdiction to designate or establish a change of routes or limit the number of "jitneys," being motor vehicles carrying passengers for hire, as defined by § 1797-62, Wisconsin Statutes.

Messrs. John J. Blaine, Attorney General, and J. F. Baker, Assistant Attorney General, for respondent:

The Railroad Commission has the power to control motor vehicles that come under the Jitney Law, after the Commission has issued the certificate provided for by ¶ 2, § 1797-64, of the statutes.

Eschweiler, J., delivered the opinion of the court:

The question involved in this appeal is whether there is a general supervisory power of control by the Railroad Commission after it has once acted, in issuing the required certificate over the motor vehicles operating in passenger transportation, commonly known as jitneys.

The text or substance of chapter 546 of the Laws of 1915, creating §§ 1797-62 to 1797-68 of the Statutes, so far as deemed necessary for this case, is as follows:

Section 1797-62 provides that the operator of any such motor vehicle "is hereby declared to be a common carrier, and is hereby required to furnish reasonable and adequate service at just and reasonable rates, and is hereby required to operate over such general routes or within such territory, and during such hours as may be reasonably required for the accommodation of the public in accordance with the following provisions."

Section 1797-63 provides that no such vehicle shall be operated until there shall have been filed with and accepted by the Railroad Commission of Wisconsin a good and sufficient bond in amounts specified for all damages that may be recovered against the operator of such vehicle by reason of the negligent use and operation of such vehicle. And in case such bond so filed should become inoperative, such vehicle shall not be operated until a bond meeting the requirements shall have been filed.

Section 1797-64:

"Such bond shall be accompanied by an application for the acceptance thereof by the Railroad Commission, which application shall state the name and residence of the applicant, the general route, or the territory, over which it is proposed to operate the motor vehicle described in such bond, the proposed hours of such operation and the rate of fare to be charged for carriage therein.

"If the Railroad Commission
9 A.L.R.—64.

shall determine that such bond complies with the provisions of § 1797-63 and that the rates specified in the application accompanying the same are reasonable for such character of service, and that the proposed general route, or territory to be covered, and the hours of such operation, are reasonably adapted to the accommodation of the public, it shall, regardless of any other service now furnished, accept such bond and shall thereupon issue to such applicant a certificate setting forth the fact that the applicant has in respect to the vehicle described therein complied with the provisions of § 1797-63 and § 1797-64."

Section 1797-65: "Every order and determination of the Railroad Commission under the provisions of § 1797-64 shall be subject to review in the manner provided by § 1797m-65 to § 1797m-71."

Section 1797-67: "Any person, firm or corporation operating any motor vehicle described in § 1797-62 who shall fail to comply with the provisions of § 1797-63 and § 1797-64 and § 1797-66, shall transport in any such vehicle a larger number of passengers than the number specified in such bond as the carrying capacity of such vehicle, shall charge a rate of fare other than that specified in the application accompanying such bond, or shall fail to operate such vehicle upon the general route, or within the territory, and during the hours set forth in such application, shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than \$10 nor more than \$100 for each offense and in default thereof may be committed to the county jail for not less than ten nor more than ninety days."

Section 1797-68: "Every city, village or town within or through which any motor vehicle described in § 1797-62 shall be operated may require that local consent for the operation thereof be procured and as a condition of such consent may require reasonable compensation for the repair and maintenance of

pavements and bridges, and compensation for the regulation of street traffic, and for any other expense occasioned by the operation of such motor vehicle."

The following situation presents itself:

(1) There is no express language either in the chapter here involved or the law establishing the Railroad Commission, which provides for any such subsequent supervision and control.

(2) The obligation imposed by § 1797-62, Stat. declaring such motor vehicles to be common carriers and to furnish reasonable and adequate service at just and reasonable rates, and to operate within such territory and during such hours as may be reasonably required for the accommodation of the public, would indicate that it refers to a continuing service and operation which necessarily, from the nature of such service and the constantly changing conditions, require modifications from time to time.

(3) That unless such power as was exercised by the Commission in the instant case is within its jurisdiction there is no other board, commission, or tribunal, except the courts, by which supervisory control could be exercised or the questions as to whether the rates and service are reasonably adequate for the accommodation of the public be determined.

(4) That by § 1797-68, Stat. above quoted, the several municipalities in which such service is proposed may give or withhold local consent for their operation, and as a condition to such consent may require a reasonable compensation.

That the hours of operation, the territory to be traversed, and the rates of fare to be charged, are all conditions that necessarily are subject to change from time to time and need constant supervision and change, and that the power to determine like questions involved has already been vested by the legislature in the Railroad Commission as

to similar questions arising in the much broader fields of general railroad transportation, urban and interurban street railway service, and of the public utilities of the state, is very persuasive in favor of the conclusion reached by the court below that such power is in the Railroad Commission.

But the consideration of other matters involved compels us to reach the opposite conclusion.

The advent of such operation of automobiles in the field of common carriers of passengers on the streets of the various municipalities in this state produced a number of bills presented in both houses of the legislature of 1915. They were finally all referred to a joint committee, with members from both houses, and public hearings had, and after rejection of a number of the proposed bills and suggested amendments thereto the chapter as now found in the sections above quoted was finally reported to the two houses as substitute amendment No. 2S to 464S, and adopted.

Among the provisions so presented, considered, and subsequently rejected were the following: (a) In event of the proposed change of routing by the jitneys a supplemental certificate to such effect was to be issued by the Railroad Commission; (b) that in case any such jitney should, without ten days' prior notice thereof to the Railroad Commission, at any time abandon its regular schedule, any deficiency thereby caused should not be considered in proceedings involving the sufficiency of street railway service in the same municipality; (c) for the subsequent cancellation by the Railroad Commission of such certificate after notice and application therefor and then a return of the insurance policy; (d) that before any ordinance should be granted by a city or village for permission to use the streets of such municipality for such service such certificate should be first submitted to and approved by the Railroad Commission as an amendment to § 940b, Stat.;

(e) that a proposed amendment to § 1797-2, Stat. to provide that all motor vehicles for the carriage of persons for hire for the purpose of affording a means of local street or highway transportation should be within the term "railroad."

(Manifestly to bring the vehicles in question here under the general control and regulation of the Railroad Commission.)

It is therefore evident that the legislature considered and rejected provisions which would have quite

Public Service
Commission—
power over
jitney busses.

plainly and expressly given to the Railroad Commission such power as was attempted to be exercised by it in the present instance.

By § 1797-67, Stat., above quoted, express provision has been made, declaring certain violations of the act to be misdemeanors, and providing for their punishment, but no provision is to be found declaring that a violation of rules, regulations, or provisions made or declared by the Railroad Commission subsequent to the issuing of the original certificate shall be so punished.

On the other hand, any railroad by § 1797-27, Stat., or public utility by § 1797m-95, Stat., is subject to a penalty for violating or neglecting or refusing to obey any lawful requirement or order made by the

Commission or any judgment made by any court upon its application for any such violation, neglect, or refusal.

We should have therefore, if defendant's construction of the statute were adopted, the somewhat anomalous situation of an operator of such vehicle being subject under § 1797-67 to a conviction as for a misdemeanor and a consequent fine for violation of the conditions of the original certificate issued by the Commission, and yet not subject to any penalty whatsoever so far as can be found in this act for violating any subsequent change of any old or of any new order that might be made by the Commission.

The Railroad Commission being a tribunal of purely statutory creation, ^{—source of jurisdiction.} its power and jurisdiction must be found within the four corners of the statutes creating it, and we can find within our statutes no such power or jurisdiction as was attempted to be exercised in the present case, and it follows therefrom that the demurrer to plaintiffs' complaint should have been overruled.

Order reversed and record remanded, with directions to the Circuit Court to overrule defendant's demurrer, and for further proceedings according to law.

Vinje, J., dissents.

ANNOTATION.

Jurisdiction of Public Service Commission over carriers transporting by motor trucks or busses.

The earlier cases upon this question are treated in the annotation following *Western Asso. v. Railroad Commission*, 1 A.L.R. 1455, the present annotation merely covering the supplemental cases.

The recent cases in the main support the general proposition laid down in the original annotation, namely, that the jurisdiction of Public Service Commissions extends to carriers transporting either passengers or goods, or both, by motor trucks or busses. In

some jurisdictions the statutes make express provision to this effect, while in others the conclusion is the result of construing more general provisions.

In New York the provision of the Transportation Corporations Law of 1913, which expressly provided that any person or corporation owning or operating a jitney-bus line or motor-vehicle line or route over state highways for the transportation of passengers or freight for hire was a common carrier and subject to the jurisdiction

of the Public Service Commission Law, but which was repealed by Laws 1915, chap. 667 (see annotation in 1 A.L.R. 1463), has been held to have been restored by an amendment in 1919 (Laws 1919, chap. 307), so that the Commission clearly has jurisdiction over bus lines operated partly in a village in competition with a street railway and partly in the country. *Niagara Gorge R. Co. v. Gaiser* (1919) 109 Misc. 38, 178 N. Y. Supp. 156. This conclusion seems to obviate the necessity of drawing the lines as carefully as was done in the *Re Troy Auto Car Co.* (1916; N. Y. 2d Dist.) P.U.R.1917A, 703. And see *Re Blevins* (1919; N. Y. 2d Dist.) P.U.R.1919F, 58, wherein the New York Public Service Commission exercised jurisdiction over a motor-bus line which was partly within and partly without incorporated municipalities.

And in Massachusetts, by statute enacted in 1918, jitneys were expressly subjected to the control and regulation of the Public Service Commission by the grant of the right to review all local rules and regulations dealing with their operation. See *Re Union Street R. Co.* (1919; Mass.) P.U.R.1919C, 900.

And the Utah statutes in most explicit language give the Utilities Commission exclusive jurisdiction over auto corporations which carry passengers or freight. It was so ruled in *Public Utilities Commission v. Garviloch* (1919) — Utah, —, P.U.R. 1919E, 182, 181 Pac. 272, wherein it was held that an auto owner who carried passengers over a route established in favor of another carrier, and in competition with the latter, was to that extent a public utility and subject to the jurisdiction of the Commission, although he himself had no established route and did not operate according to a fixed schedule, but that the Utilities Act did not extend to the carrying of passengers in a taxicab to a point on the established route, where the cab was under their direction and control for the time, and was operated for a price agreed upon for such special trip or trips.

And where a state statute defines

the term "public utility" as including every corporation that now or hereafter may own, control, operate, or manage within the state for public use any plant, equipment, or property used or to be used for or in connection with the transportation of persons between points within the state, without any limitation as to routes or portions of routes outside the corporate limits of a city or village, it has been held that the jurisdiction of the Commission extends to all carriers of passengers within such state, so that the Commission cannot arbitrarily deny a certificate of convenience and necessity to a motor-bus line, on the ground that the act should not apply to proposed motor-bus lines operated over the public highways of the state in part outside the corporate limits of a city or village. *State Public Utilities Commission v. Bartonville Bus Line* (1919) 290 Ill. 574, P.U.R.1920B, 310, 125 N. E. 373.

And it has been held that, notwithstanding a statute may expressly declare that jitney-bus operators are common carriers, and may require such operators to obtain certificates to operate, such jurisdiction does not extend to general supervisory power of control where the statute makes no provision therefor, and especially where suggestions looking to such supervision were expressly rejected by the legislature. *MONROE v. RAILROAD COMMISSION* (reported herewith) ante. 1007. This it will be remembered was upon the theory that, since such a Commission is of purely statutory creation, all power and jurisdiction must be found within the creating statute.

In Colorado the Public Utilities Commission has been held not to have jurisdiction over an automobile transportation corporation which is not operating "in competition with" railroads or street railroads. Thus, in *Mills v. Rocky Mountain Park Transp. Co.* (1920; Colo.) P.U.R.1920B, 557, it was held that an automobile transportation corporation which, for hire, indiscriminately carried passengers and baggage between definite points, but not in competition with railroads or street railroads, was neither a "com-

mon carrier" nor a "public utility" within the meaning of the Colorado Public Utilities Act, which, in defining the jurisdiction of the Commission, declared that the term "common carrier" included every corporation or person affording a means of transportation "by automobile or other vehicle whatever, similar to that ordinarily afforded by railroads or street railroads, and in competition therewith . . . between fixed points or over established routes," and that any person or corporation "engaged in transporting passengers, freight or express for hire in this state in any automobile or other vehicle whatever, and operating for the purpose of affording a means of transportation similar to that afforded by railroads or street railways, and in competition therewith . . . between fixed points or over established routes, is hereby declared to be affected with a public interest, and to be a public utility," etc., and subject to the jurisdiction of the Commission. The Commission upheld the contention that one transporting passengers, etc., by automobile was not subject to the jurisdiction of the Commission, even though conducted over established routes or between fixed points, "unless such points or routes are served by railroad or street car competition directly," and overruled the contention that the kind of competition meant by the statute was not that for which another was striving at the time, but that by the phrase "in competition therewith" was meant "the kind of competition that indiscriminately accepts, discharges, and lays down passengers," etc., "between fixed points or over established routes similar to that service as ordinarily furnished and afforded by railroads and street railways." The Commission said: "But to sustain that [the latter] theory of interpretation would be to ignore the ordinary and well-understood meaning of the phrase quoted, 'and in competition therewith;' indeed, it would become necessary to read the statute as though the phrase were not there, for without the use of the words of qualification, the clear meaning of the statute would be as contended for

by complainant. But under all the canons of construction of statutes, no court, much less this Commission, may disregard the usual and well-known meaning of words in common use; for when such words are used it is to be presumed that the legislature intended thereby the usual and common meaning as understood by people generally, and there would appear to be no doubt concerning the usual and common meaning of the words 'and in competition therewith' to be that striving to secure an object or thing indulged in by two or more persons or corporations at the same time. The use of the word 'competition' conveys to the mind a clear, distinct, and definite meaning as it ordinarily is used in this statute. . . . So, in this case to give to the words 'in competition therewith' the construction so forcibly contended for by counsel for complainant 'would be a departure from the usual course of the human mind, as exhibited in composition.' The Commission is satisfied that the legislature meant something by the use of the words, 'or qualification or limitation,' and that the meaning was such as would not be a departure from 'the usual course of the human mind, as exhibited in composition,' and that the intent was to give jurisdiction to the Commission only in event an automobile service for the carrying of passengers and freight is in actual competition with a railroad or street railway in the conduct of its business over an established route or between fixed points."

In Maryland, where the statutes confer jurisdiction upon the Public Service Commission over "common carriers," which term is defined as including all railroad corporations and all persons operating agencies for public use in the conveyance of persons or property within the state, including "all automobile transportation companies, and all persons and associations of persons, whether incorporated or not, operating automobiles or motor cars, or motor vehicles, for public use in the conveyance of persons or property within this state," it has been held that the owner of an

automobile who entered into an arrangement with five other men employed at the same place as himself, to carry them for a fixed compensation between their homes and places of work, was not a "common carrier," and not subject to the jurisdiction of the Commission, the use of the contractor's auto being limited to the transportation of the persons mentioned, to the exclusion of the public generally. *Towers v. Wildason* (1920) — Md. —, P.U.R.1920D, 229, 109 Atl. 471. And the New York Public Service Commission has held (*Re International R. Co.* (1919; N. Y. 2d Dist.) P.U.R.1919F, 63) that the operation of a "sight-seeing automobile which made a trip a day between two cities at a certain round-trip fare, and which visited points of interest at both terminals, did not constitute the operation of "bus line," a "stage route," or a "motor-vehicle line or route" within the meaning of the New York Public Service Commissions Law, which rendered such carriers subject to the jurisdiction of the Commission. It was said that the enterprise under consideration merely provided a pleasure excursion, and should not be treated as a "common carrier" unless the statute clearly so required, which it did not.

In *Chicago v. Mayer* (1919) 290 Ill. 142, 124 N. E. 842, it was held that the Illinois Public Utilities Act which gives the Utilities Commission jurisdiction over "common carriers," which term is defined as including "all railroads, street railroads, express com-

panies, private car lines, sleeping car companies, fast freight lines, steamboat lines, and other common carriers by water, and every corporation, company, association," etc., owning, operating or managing "any such agency for public use in the transportation of persons or property" within the state, did not apply to one engaged in the moving and express business in a city by means of motor trucks and horse-drawn vehicles, the court saying that it was obvious that the legislature did not intend, when it defined "common carrier," that the term should be understood to include every person who carried or transferred baggage or carried on any sort of express business, but rather that "it intended only to put within the jurisdiction of the Public Utilities Commission, railroads, street railroads, express companies, and all other companies organized for the purpose of carrying on a large and extensive business as a common carrier."

And that a local stage or express and baggage transfer line is not a common carrier within the meaning of § 2, subd. 9, of the New York Public Service Commissions Law, so as to prevent its being the agent, with authority to stipulate for the usual terms of transportation, of one who ordered it to take certain trunks to a railroad station and express them to a certain point, see *Walker v. Taylor* (1919) 186 App. Div. 544, 174 N. Y. Supp. 520.

G. J. C.

STATE BANK OF KINGMAN

v.

R. A. SHEPHERD, Appt.

Kansas Supreme Court — July 5, 1919.

(105 Kan. 206, 182 Pac. 653.)

Exemptions — tools — contemplated occupation.

1. Where a person is engaged in an occupation which entitles him to hold certain tools and implements exempt from legal process, he cannot by a mere unexecuted intention to change his calling, unaccompanied by

Headnotes by MASON, J.

any overt act, acquire the right to claim exemption with respect to the equipment to be used in such contemplated occupation. The special findings in the present case are held to be consistent with a general verdict of nonexemption.

[See note on this question beginning on page 1020.]

Mortgage — for money to purchase property — purchase money.

2. Where a person has by a single contract arranged to purchase several articles, making payment partly in property and partly in cash, and obtains the money necessary to enable him to carry out the contract by giving a mortgage upon all the property purchased,

under the representation that it is to be used in making payment therefor, the purchase-money character of the mortgage as to a part of the property cannot be defeated by a showing that the buyer and seller had an understanding between themselves that the cash payment was to apply solely to another part.

APPEAL by defendant from a judgment of the District Court for Kingman County (Hay, J.) in favor of plaintiff in an action of replevin brought to recover possession of certain property. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. Charles C. Calkin, for appellant:

There is no longer any doubt as to the right of one engaged in the butcher business to have exempt the "tools and implements" of said business.

Hoyt v. Pullman, 51 Okla. 717, L.R.A. 1916B, 1288, 152 Pac. 386; *Reeves & Co. v. Bascue*, 76 Kan. 333, 123 Am. St. Rep. 137, 91 Pac. 77; *Bliss v. Vedder*, 34 Kan. 57, 55 Am. Rep. 237, 7 Pac. 599.

It has always been the policy of the courts in Kansas to construe this exemption statute liberally in favor of the person claiming the exemption.

Reeves & Co. v. Bascue, 76 Kan. 333, 123 Am. St. Rep. 137, 91 Pac. 77; *Mallory v. Berry*, 16 Kan. 293.

A chattel mortgage covering exempt personal property not joined in by the wife is void and not voidable.

Jackman v. Lambertson, 71 Kan. 138, 80 Pac. 55; *Skinner v. First Nat. Bank*, 63 Kan. 842, 66 Pac. 997.

Defendant lost the right to claim the exemption of a farmer, and acquired the right to claim the exemption of a butcher, as of the date he traded the one business for the other.

Randolph v. Wilhite, 78 Kan. 355, 96 Pac. 492; *Jensen v. Griffin*, 32 S. D. 613, 50 L.R.A. (N.S.) 1128, 144 N. W. 119; *Mallory v. Berry*, 16 Kan. 293; *Baker v. Willis*, 123 Mass. 194, 25 Am. Rep. 61; *Smalley v. Masten*, 8 Mich. 529, 77 Am. Dec. 467.

Mr. S. S. Alexander for appellee.

Mason, J., delivered the opinion of the court:

The State Bank of Kingman brought an action against R. A.

Shepherd for the recovery of personal property under a chattel mortgage. Judgment was rendered in its favor, and the defendant appeals. The plaintiff also took an independent appeal, but most, if not all, of the assignments of error argued in its brief, relate to trial rulings, and it filed no motion for a new trial. If examination of any of these assignments would otherwise be required, it is rendered unnecessary by the view taken of the questions raised by the defendant; therefore, this feature of the case may be disregarded.

The enforcement of the mortgage was resisted on the ground that it was void because it lacked the signature of Shepherd's wife, and the property in controversy—the tools and implements of a butcher—was exempt. Gen. Stat. 1915, § 6506. The bank contended that the claim of exemption was unfounded, because at the time the mortgage was given Shepherd was a farmer, and not a butcher, and also that the lien attached regardless of the question of exemption, because it was for a part of the purchase price. A general verdict was returned in favor of the plaintiff, and the sole ground on which the defendant asks a reversal is that several special findings are inconsistent with it.

The evidence tended to show these

facts: Shepherd owned a farm near Kingman which he wished to exchange for a butcher's shop and equipment in town. He negotiated a deal to that end, which involved his paying the owner about \$1,500 in cash. He arranged with the bank to lend him this amount to enable him to make the payment, upon his agreement to secure the loan by a mortgage on the property he was to acquire. This arrangement was carried out. The mortgage which was given covered the tools and equipment in the butcher's shop, some meat on hand, and a quantity of merchandise,—canned and bottled goods,—and secured the defendant's entire indebtedness to the bank, including a prior loan of some \$3,500, on which it held other security as well. Later, a renewal mortgage was given, and still later the defendant became bankrupt. The bank then brought the present action of replevin, seeking to recover the tools and implements, the meat on hand, and the stock of merchandise. The trustee in bankruptcy was held to be entitled to the merchandise other than the meat, and that decision is not contested. The plaintiff consented to a judgment against it on account of the meat, so that the only property here involved is the outfit of tools and implements.

The verdict may have been founded upon either or both of the two theories presented by the plaintiff,—that the property was not exempt, or that the mortgage was given for purchase money. The judgment must be affirmed unless each theory is rendered untenable by special findings inconsistent therewith.

1. Under our statute, a debtor who is engaged in several occupations can claim exemption with respect to the tools and instruments used in but one of them, and that must be his main or principal pursuit or business. *Jenkins v. McNall*, 27 Kan. 532, 41 Am. Rep. 422.

The following are the special findings relating to the question whether, at the time the chattel mortgage

was given, the principal business of the defendant was running the butcher shop:

Did the defendant, R. A. Shepherd, hold a public sale on his farm on or about December 18, 1917, and forty-one days after the note dated November 7, 1916, and the chattel mortgage dated November 7, 1917, were given?

Yes.

Did R. A. Shepherd continue to run and manage his farm till the day of the sale?

Yes.

Did the defendant, R. A. Shepherd, up until the time of his farm sale in December, continue to spend his nights on said farm and look after same?

Yes.

Were the tools and implements involved herein used and kept in stock by said R. A. Shepherd, defendant, on the dates of the mortgages, to wit, November 7, 1916, and May 17, 1917, for the purpose of carrying on the trade or the business of a butcher?

Yes.

On what date did the defendant, Shepherd, take charge of the butcher business formerly operated by Clyde M. Bay and proceed to operate same?

Sometime between the 1st and 5th of November, 1916.

These findings must be given any construction to which they are fairly open that will harmonize them with the general verdict. The defendant testified that after the trade for the butcher's shop had been agreed to, and prior to December 18, while he was still staying on the farm at night, he moved back and forth every day, and his son was staying in town and taking care of the shop. The findings that the defendant took charge of the butcher business between the 1st and 5th of November, and that on the 7th he was using the tools and implements for the purpose of carrying it on, are readily to be interpreted as meaning that he was, at the time

referred to, operating it through his son, and not in person. All the findings, therefore, are consistent with the theory that, while the defendant formed the plan of becoming a butcher as early as November 1st, he did not carry it into effect until some five or six weeks after the mortgage had been given, and that in the meantime he continued to be a farmer; or that, even if he might be said to be engaged in the business of a butcher during that period, farming continued to be his principal occupation. A considerable number of farming implements were included in the trade for the butcher shop, but no finding was made that these were all the defendant had, and he testified that he had a few others. If, after the trade had been made and before the public sale at the farm had taken place, a controversy had arisen in which the defendant claimed that the farming tools which he still owned were exempt, we discover nothing in the findings quoted that would necessarily be fatal to the contention he would then be making that he was still deriving his principal support from farming. The court gave an instruction reading: "You are instructed that personal property cannot be impressed with the claim of an exemption by a mere mental process on the part of the owner, unaccompanied by any overt act, whatsoever; and that the mere intention of the defendant, Shepherd, at any future time, however short, to change his occupation from that of a farmer to that of a butcher, if this was done, and take possession of the butcher business, and run it as his main and principal business, would not alone impress the articles of personal property in controversy with a valid claim for exemption."

The defendant treats this instruction as erroneous, but does not ask a new trial on account of it, maintaining that, if this court will now apply what he regards as the correct rule on the subject, to the situation presented by the special find-

ings quoted, the result will be a judgment in his favor. The trial court did not say that the property could not have been rendered exempt without an actual and physical change of occupation by the defendant, but merely that a naked intention to make such change in the future

Exemptions—
tools—
contemplated
occupation.

could not, in and of itself, accomplish that result. In this we perceive no error. *Bush v. Adams*, 72 Kan. 556, 84 Pac. 122. Although in some circumstances property may be rendered exempt by the purpose for which it has been acquired, so long as a person is in such a position that he may assert an exemption with respect to a calling which he has followed in the past and in which he still continues, we do not think an unexecuted intention formed in his mind to adopt another calling can alone have that effect. If the facts established by the special findings had been agreed to in advance, we think the question whether the butcher's tools were exempt would still have been a proper one for submission to the jury.

The defendant places much reliance upon a case holding the immediate physical occupancy of land required for a homestead not to be necessary to its exemption. *Randolph v. Wilhite*, 78 Kan. 355, 96 Pac. 492. There, however, all questions of fact not specifically found to the contrary were by the general decision resolved in favor of the exemption, necessarily implying that the tract originally occupied had ceased to be a homestead at the time the new tract was purchased. Here the implication from the general verdict is that the defendant continued to make farming his principal calling after he had executed the mortgage. In that case the court concluded that there was a virtual although not a physical occupancy; in this the jury must be regarded as having believed that no change such as would render the butcher's tools exempt had been ef-

fect, although a purpose to make one in the future had been formed.

2. The contract under which Shepherd acquired the butcher shop was in writing. On its face it called for the exchange of the farm for the butcher business, including the stock on hand, tools, and fixtures, and a feed lot. But the evidence showed, and the jury found, that the agreement as between the parties to it included an additional stipulation, which was omitted from the writing by mutual mistake, to the effect that Shepherd should pay in cash the value of the stock of merchandise according to an invoice to be made. If the bank furnished Shepherd for that purpose the money with which he bought the butcher's tools, taking a mortgage upon them as its security, the mortgage was one for purchase money (*Foster Lumber Co. v. Harlan County Bank*, 71 Kan. 158, 114 Am. St. Rep. 470, 80 Pac. 49, 6 Ann. Cas. 44; *Warren Mortg. Co. v. Winters*, 94 Kan. 615, 146 Pac. 1012, Ann. Cas. 1916C, 956; 13 R. C. L. 604, 605), and was valid without the signature of his wife (*Boggs v. O. S. Kelly Mfg. Co.* 76 Kan. 9, 15 L.R.A. (N.S.) 461, 90 Pac. 765; *Beach v. Fireovid*, 84 Kan. 357, 114 Pac. 206, Ann. Cas. 1912A, 670). The defendant does not dispute this, but asserts that, inasmuch as the only cash payment made in the deal by which he acquired the tools was measured by the invoice value of the merchandise which he obtained at the same time, the money borrowed from the bank was used for the purchase of the stock kept for sale, and not for the purchase of the implements. To this the plaintiff responds that it furnished the money upon the defendant's representation that he was to use it for the purchase of the tools, as well as the other property, and, inasmuch as it was used to make the cash payment required to enable the plaintiff to make the deal at all, the mortgage securing it must be regarded as a lien for the purchase price in spite of the fact that the buyer and seller had an understand-

ing between themselves that the amount of the cash payment was to be determined by the invoice value of the merchandise that was included in the deal. There was sufficient evidence to support the plaintiff's view of the facts in this regard. One of its officers testified that the defendant told him that he had a chance to buy the butcher shop, but that it would take \$2,000 to \$2,500 to swing the deal, and asked if he could borrow that amount of the bank; that he was told the bank could not lend him that much; that later he reported that he could probably swing the deal if he could get \$1,500, and was going to try; that the bank agreed to furnish this, taking a mortgage on the entire meat market, and that this arrangement was carried out. The language was not as explicit as could be framed, but it was sufficient to present a fair question for the jury whether the person conducting the negotiations on the part of the bank understood, and the defendant intended that he should understand, that the money was to be used in paying for the butcher's implements, as well as for the merchandise.

The jury found that the tools and merchandise were sold to the defendant in one contract, and that the mortgage was given to secure the money to pay the cash due under it; that the understanding of the parties to the trade was that the defendant should pay for the stock of goods at its invoice price; that he paid no other money except the sum so ascertained. The jury also stated that the money borrowed from the bank was not used for the purchase of the tools and implements, but this really adds nothing to the other findings, being a mere interpretation of the specific facts already found.

The question presented is, therefore, this: Where a person has by a single contract arranged to purchase several articles, making payment partly in property and partly in cash, and obtains the money necessary to enable him to carry out the contract by giving a mortgage upon

all the property purchased, under the representation that it is being used in the purchase thereof, can the purchase-money character of the mortgage as to one part of the property be defeated by a showing that the buyer and seller had an understanding between themselves that the cash payment was to apply solely to another part? Upon this phase of the matter the court gave an instruction reading: "If the jury find, and believe, from the evidence in the case, that the money loaned by the plaintiff to the defendant, Shepherd, or any part thereof, was so loaned by the plaintiff bank with the understanding and agreement between the said bank and the said Shepherd that it was being loaned by said bank and borrowed by the said Shepherd for the purpose of purchasing the property in controversy, which might otherwise be claimed to be exempt by the said defendant, Shepherd, then I say to you that the jury would be warranted in finding that said mortgage, or mortgages, were purchase-money mortgages, and that the same would constitute a lien upon such property, and that the special interest of the plaintiff bank in and to such articles of personal property would be measured by the amount of money which was advanced by the plaintiff bank to the defendant, Shepherd, for the purchase of the property in controversy, and this would be true, even although you further find that all of the money so advanced was not used by the defendant, Shepherd, in paying for such property."

In a sense the borrowed money was not used to pay for the tools, if the buyer and seller understood between themselves that it was applied specifically to the purchase of the merchandise. It might be justifiable, however, to say that the money became a part of the purchase price of all the property if its payment was necessary (as appears to have been the case) to enable the deal to go through at all. But this is a mere matter of the form of expression.

We agree with the trial court that, if the money was furnished upon the representation that it was to be used in paying for all the property on which the bank was to have a mortgage, and it was paid to the seller as a necessary part of the performance of the contract, it is not prevented from being treated as a part of the purchase price by the fact that its amount was determined by the invoice of the merchandise, and that the buyer and seller regarded it as applied to the payment therefor. This view of the law warrants a verdict for the plaintiff notwithstanding the special findings, and the jury must be deemed to have placed such interpretation on the evidence as to make the principle applicable and bring about that result. Doubtless, the fact that a borrower obtained a loan on the representation that he was to use the money in making part payment on property he was buying, where he did not actually so use it, would not characterize the resulting debt as one incurred for purchase money. But where the money is borrowed on that representation, and is used in making the cash payment on a single trading contract by which the borrower acquires the stock in trade and equipment of a business, the privileged character of the debt as one incurred for the purchase price ought not to be restricted by a private understanding, to which the lender was not a party, that the money payment should be considered as applying to a particular portion of it.

Before the giving of the renewal mortgage, on which the action was based, the total indebtedness covered thereby had been reduced, but this was apparently brought about by the bank's realizing on security which had been given it for the older debt before the \$1,500 here involved had been furnished. At all events, the payments were not shown to have been made in any other manner, so that the situation is not

Mortgage—
for money to
purchase
property—pur-
chase money.

affected by them. The defendant invokes the authority of a case declaring that a mortgage executed by a husband alone on the homestead of himself and wife, a part of the debt secured having been incurred for the purchase price and the rest for something else, is enforceable only with respect to the former portion. *Pratt v. Topeka Bank*, 12 Kan. 570. Of course, the mortgage could create a lien on the tools, if they were exempt, only to the extent of the \$1,500 loaned at the time of their purchase. The principle of the case cited has no further application here, by reason of the use of the

money by the defendant to enable him to make the deal as a whole and the lack of any apportionment (so far as concerns the relations of the borrower and lender) of the \$1,500 between the different items of the property acquired,—conditions which the general verdict must be deemed to have established. In this situation, the whole of the sum borrowed became a lien upon all of the property. See, as perhaps having some bearing on the matter, note in 86 Am. St. Rep. 177; *Trammell v. Rosen*, — Tex. Civ. App. —, 163 S. W. 145.

The judgment is affirmed.

ANNOTATION.

What are "tools," "implements," "instruments," "utensils," or "apparatus" within the meaning of debtor's exemption laws.

The earlier cases on this question are discussed in the note in 2 A.L.R. at page 818.

A statute exempting "the tools, tool chests, and implements of a mechanic or artisan, necessary to carry on his trade, not exceeding in value the sum of \$500," does not embrace and render exempt a soda fountain and bar used in a candy store and soft drinks establishment. *Lindquist v. Clayton* (1919) — Utah, —, 179 Pac. 655.

Machinery connected with a grain mill and propelled by an electric motor was held not to be exempt as tools and apparatus of the debtor's trade in a bankruptcy proceeding in *Peyton v. Farmers' Nat. Bank* (1919) 261 Fed. 326. The court in distinguishing the case of *Green v. Raymond* (1882) 58 Tex. 80, 44 Am. Rep. 601, discussed in the earlier note, says that "that case is probably to be distinguished by reason of the power used to propel the machinery. Where hand power is used the machinery is held to be 'tools or apparatus of trade,' but where steam or any other power than hand is used, machinery so propelled is held not to be included within the statutory terms." The court in the *Peyton Case* relies upon two early Texas cases (*Cullers v. James*, 66 Tex. 494, 1 S. W. 314, and *Willis v.*

Morris (1886) 66 Tex. 628, 59 Am. Rep. 634, 1 S. W. 799). In the latter case, which involved the question whether machinery and tools for the manufacture of cotton gins were exempt, the court stated that "expensive and complicated machinery propelled by steam power or any power other than hand is not exempt as 'tools of trade,' the latter phrase being held to apply only to simple instruments used by hand. . . . The word 'apparatus' used in the statute may take a wider range and embrace such minor machinery as may be operated by hand and such as courts of higher authority have held not to be included under the term 'tools,' as used in similar enactments." In the *Cullers Case*, which involved the machinery in a cotton gin and gristmill, the court dismisses the claim to exemption with the statements: "The proposition that the mill and gin machinery are exempt as tools of trade cannot be seriously insisted upon. . . . No authority has been cited which has gone far enough to embrace as tools of trade this kind of property, and the analogies and reason of the law do not persuade us to pioneer such extreme doctrine." See the reported case (*STATE BANK v. SHEPHERD*, ante, 1014). W. A. E.

CENTRAL CLAY DRAINAGE DISTRICT, Appt.,
v.
GEORGE A. BOOSER et al.

Arkansas Supreme Court—March 15, 1920.

(— Ark. —, 219 S. W. 336.)

Water — right to close navigable stream — floating of logs.

1. A stream navigable only for floating logs during a portion of the year may be closed by the legislature, where the closing will effect a reclamation of a vast area of rich agricultural land and benefit the health of the community.

[See note on this question beginning on page 1025.]

Constitutional law — police power — authority of states.

2. The states may, under their police power, regulate within their lim-

its all matters which tend to promote the peace, health, convenience, and prosperity of their people.

[See 6 R. C. L. 203.]

APPEAL by plaintiff from a decree of the Chancery Court for Clay County (Wheatley, Ch.) in favor of defendants in a suit brought to restrain them from erecting booms or floating logs in a certain river or in the ditches constituting a part of plaintiff's drainage system. *Reversed with directions.*

Statement by Hart, J:

Appellant is a drainage district, duly organized under the laws of the state of Arkansas for the purpose of reclaiming lands for agricultural purposes by drainage. Cache river runs through Clay county, Arkansas, and its course was straightened by the drainage commissioners, and as straightened it was used as the main drainage ditch. Appellees claim that Cache river is navigable, and as such is one of the public highways of the state, on which they have a right to float logs and to erect booms to be utilized in floating logs. The general assembly passed an act closing Cache river to navigation in Clay county, Arkansas. Appellant brought this suit against appellees to restrain them from erecting booms in Cache river or floating logs in it, or in the subsidiary drainage ditches in Clay county, Arkansas.

According to the testimony of the civil engineer of the Central Clay Drainage District, it was formed under the general laws of the state of Arkansas, and Cache river runs

through the central portion of Clay county. In the central portion of the county Cache river flowed into a large area of sunk lands, and is called Cache lake. The main drainage ditch has been dug through Cache lake, and on down into Greene county, where it again connects with Cache river. The waters of Cache river have been diverted into this main drainage ditch, so that Cache river, as straightened by the drainage ditch, drains and reclaims large areas of agricultural land which, before the drainage ditch was constructed, were not susceptible of cultivation. There are one main ditch and twenty-six subsidiary ditches; 90,000 acres of land are drained by the ditches. Appellees have erected booms in one of the subsidiary ditches, and are engaged in floating logs down the subsidiary ditch, as well as the main drainage ditch. The booms obstruct the flow of the water in the drainage ditches, and the banks of the ditches are injured by rolling logs down them into the ditches. The main injury to the ditches is done by obstructing the

flow of the water, and thereby causing them to fill up, and thus defeat the object for which the drainage district was formed.

According to the testimony of appellees, Cache river is a navigable stream in Clay county, although its principal navigable use of late years has been to float logs. About thirty-five years ago a small steamboat, 10 or 12 feet wide and 25 feet long, plied its waters in Clay county. It was principally used in towing logs. After its use was discontinued, float roads have been cut through Cache lake into the main channel of Cache river, and logs have been floated down it every year. Cache river can be used for floating logs about six months in the year, and it will take appellees about eight years to finish cutting and floating their logs. They state that their use of the river in floating logs does not in any manner impair its use as a drainage ditch.

The chancellor found the issues in favor of the appellees and dismissed the complaint of appellant for want of equity, upon condition, however, that appellees execute a bond that they will repair all damages to the ditches or banks thereof, and remove any logs that sink and tend to obstruct the channel, during the period of time they are engaged in floating logs. The case is here on appeal.

Messrs. L. Hunter and B. B. Hollifield, for appellant:

If any artificial means are necessary to condition a stream or body of water for floating purposes, or for purposes of navigation, then it cannot be navigable or floatable.

Little Rock, M. R. & T. R. Co. v. Brooks, 39 Ark. 403, 43 Am. Rep. 277; Barboro v. Boyle, 119 Ark. 377, 178 S. W. 378; Ligare v. Chicago, M. & N. R. Co. 166 Ill. 249, 46 N. E. 803; 1 Farnham, Waters, 103, 124.

Messrs. Lamb & Frierson, for appellees:

Cache river and Cache lake are navigable, or floatable, streams and highways of commerce.

17 R. C. L. 1120-1125; Willow River Club v. Wade, 42 L.R.A. 305 and note, 100 Wis. 86, 76 N. W. 273; Gaston v.

Mace, 5 L.R.A. 392, and note, 33 W. Va. 14, 25 Am. St. Rep. 848, 10 S. E. 60; Hot Springs Lumber & Mfg. Co. v. Revercomb, 106 Va. 176, 9 L.R.A. (N.S.) 894, 55 S. E. 580; Blackman v. Mauldin, 164 Ala. 337, 27 L.R.A. (N.S.) 670, 51 So. 23; Carlson v. St. Louis River Dam & Improv. Co. 41 L.R.A. 371, and note, 73 Minn. 128, 72 Am. St. Rep. 610, 75 N. W. 1044; Idaho Northern R. Co. v. Post Falls Lumber Co. 20 Idaho, 695, 38 L.R.A. (N.S.) 114, 119 Pac. 1098, 2 N. C. C. A. 464; Henderson v. Doniphan Lumber Co. 94 Ark. 370, 28 L.R.A. (N.S.) 144, 127 S. W. 459; Little Rock, M. & T. R. Co. v. Brooks, 39 Ark. 403, 43 Am. Rep. 277; McKinney v. Northcutt, 114 Mo. App. 146, 89 S. W. 351; Kregar v. Fogarty, 78 Kan. 541, 96 Pac. 845.

The fact that obstructions must be removed in order to float logs does not prove Cache river and Cache lake non-navigable.

Idaho Northern R. Co. v. Post Falls Lumber Co. 20 Idaho, 695, 38 L.R.A. (N.S.) 114, 119 Pac. 1098, 2 N. C. C. A. 464; Brown v. Chadbourne, 31 Me. 9, 50 Am. Dec. 641.

Since Cache lake and Cache river were navigable and established as navigable highways by prescriptive use, then the artificial channel or ditch which diverts and cuts off the established waterways is also to be treated as a navigable stream; hence these ditches are navigable.

Whisler v. Wilkinson, 22 Wis. 576; Willow River Club v. Wade, 42 L.R.A. 323, and note; Chicago, M. & St. P. R. Co. v. Minneapolis, 115 Minn. 460, 51 L.R.A. (N.S.) 236, 133 N. W. 169, Ann. Cas. 1912D, 1029; Chicago, M. & St. P. R. Co. v. Minneapolis, 232 U. S. 430, 58 L. ed. 671, 34 Sup. Ct. Rep. 400; 29 Cyc. 305; State ex rel. Lyon v. Columbia Water Power Co. 82 S. C. 181, 22 L.R.A. (N.S.) 435, 129 Am. St. Rep. 876, 63 S. E. 884, 17 Ann. Cas. 343; Stimson v. Brookline, 197 Mass. 568, 16 L.R.A. (N.S.) 280, 125 Am. St. Rep. 382, 83 N. E. 893, 14 Ann. Cas. 907; Lathrop v. Racine, 119 Wis. 461, 97 N. W. 192; Freeman v. Weeks, 45 Mich. 335, 7 N. W. 904; Freeman v. Weeks, 48 Mich. 255, 12 N. W. 215; Meir v. Kroft, — Iowa, —, 80 N. W. 521; The Robert W. Parsons (Perry v. Haines) 191 U. S. 17, 48 L. ed. 73, 24 Sup. Ct. Rep. 8; Ligare v. Chicago, M. & N. R. Co. 166 Ill. 249, 46 N. E. 803; Monteith v. Honey, 135 Ark. 407, 205 S. W. 812.

Hart, J., delivered the opinion of the court:

According to the record the main drainage ditch consists of Cache river, as straightened by the ditch which was dug through Cache lake, and extended southward into Greene county, where it again joins Cache river. This artificial channel is about 100 feet wide and 10 or 12 feet deep. Counsel for appellees contend that where an artificial channel is cut for the purpose of straightening a navigable stream, and the stream as straightened is navigable in fact, the public have the same right to navigate it as they did before the artificial channel was cut. Hence they claim that, Cache river being a navigable stream before the artificial channel was cut, the main ditch became a part of the channel of Cache river, and that they have a right to navigate it just as they did before the drainage ditch was created.

In making this contention they have not given full effect to an act of the legislature passed in 1917, which accepts the declaration of Congress that Cache river is not navigable. 2 Ark. Acts 1917, p. 1884. This act recites that the Congress of the United States in 1916 passed an act (Act July 27, 1916, chap. 260, 39 Stat. at L. 391) that Cache river, in the state of Arkansas, be declared a non-navigable stream within the meaning of the Constitution and laws of the United States, and that this provision shall become void after one year, unless within that time the legislature of Arkansas shall pass an act expressly approving the declaration. The Arkansas act further recites that Cache river is not in point of fact navigable, and that the necessity of making bridges over it drawbridges would greatly restrict the development of the adjacent country. Section 1 of the act provides that the general assembly for the state of Arkansas doth approve the declaration of the Congress of the United States in declaring Cache river to be non-navigable.

It is contended by counsel for appellees that the main purpose of this

act is to provide for bridges over Cache river without draws, and that the act has no relation to navigating the river by floating rafts and logs on it. The act must be construed according to the language used. The act of Congress plainly declares that Cache river in the state of Arkansas is declared to be a non-navigable stream within the meaning of the Constitution and laws of the United States. The Constitution of the United States (article 1, § 8) gives Congress the power to regulate interstate commerce, and under it Congress has the power to pass laws regulating the navigation of public rivers and to prevent obstructions to the navigation thereof. The evident purpose of the act of Congress was to withdraw any power Congress might have over the navigation of Cache river, so that it should pass wholly under the control of the state. This is made manifest by the language of the act, which declares Cache river to be non-navigable, provided within a year thereafter the legislature of Arkansas shall pass an act approving the declaration.

It is true the act of the general assembly, after reciting this fact, also recites that the necessity of making the bridges over Cache river with draws greatly restricts the development of the adjacent country. This, however, was only one of the reasons for legislative action. The main fact is that the legislature declared the stream to be a non-navigable one. This brings us to a consideration of the question of whether or not it had the power to do so. Numerous cases might be cited which recognize the right of states to partially obstruct navigation in cases like this, by the erection of permanent bridges without draws across the rivers, and by allowing booms to be erected in the rivers for the purpose of facilitating the floating of logs; but we do not deem it necessary to do so, and go straight to the discussion of the broader power of whether the state may entirely close a navigable river, when the power exercised does not conflict

with the jurisdiction of Congress over it.

It is well settled that the states, under the police power, have full power to regulate within their limits

**Constitutional
law—police
power—author-
ity of states.**

all matters which tend to promote the peace, health, convenience, and prosperity of their people. In regard to streams which are navigable for only a part of the year and for only limited purposes, the question of the right to close the stream to navigation as a measure of public benefit is of great public importance, and has been the subject of much consideration. While there is some diversity of opinion, the question depends upon the importance of the navigation as compared with the interests which would be promoted by sacrificing it.

In *Willson v. Black Bird Creek Marsh Co.* 2 Pet. 245, 7 L. ed. 412, the Supreme Court of the United States recognized the right of the state to close Black Bird creek against navigation. There the plaintiffs were authorized to construct a dam across the stream, which passed through a deep level marsh. The court said: "The value of the property on its banks must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved. Measures calculated to produce these objects, provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the states."

Again the doctrine was recognized in *Gilman v. Philadelphia*, 3 Wall. 713, 18 L. ed. 96, where a bridge was constructed across the Schuylkill river which had the effect to obstruct the navigation of that river. In discussing the question the court said: "It must not be forgotten that bridges, which are connecting parts of turnpikes, streets, and railroads, are means of commercial transportation as well as navigable waters, and that the commerce which passes over a bridge

may be much greater than would ever be transported on the water it obstructs. It is for the municipal power to weigh the considerations which belong to the subject, and to decide which shall be preferred, and how far either shall be made subservient to the other. The states have always exercised this power, and from the nature and objects of the two systems of government they must always continue to exercise it, subject, however, in all cases, to the paramount authority of Congress, whenever the power of the states shall be exerted within the sphere of the commercial power which belongs to the nation."

In *Leovy v. United States*, 177 U. S. 621, 44 L. ed. 914, 20 Sup. Ct. Rep. 797, Red Pass, a navigable stream, was closed to navigation by a dam across it, for the purpose of constructing a drainage district organized under the laws of the state of Louisiana, and it was held that under the police power the state had the power to construct the dam across Red Pass. In discussing the question the court said: "Nor are we disposed to concur in the doubt expressed whether any navigable water wholly within the limits of a state can be closed under the exercise of the police power for any purpose whatever. Such a doubt might be justified if there was express legislation of the United States forbidding the act proposed. But, as we have seen, in the present case the reclamation of swamp and overflowed lands was not only not forbidden, but was recognized as the duty of the state, in consideration of the grant of the public lands. And for the reasons already given we do not construe the acts of Congress under which this indictment was brought as intended to apply to the case of a stream of the history and character disclosed in this record. Hence the state authorities were left free to act in such a manner as they thought fit to promote the health and prosperity of the people concerned."

The question came up for discus-

(— Ark. —, 219 S. W. 336.)

sion by the supreme court of Delaware in the case of *Bailey v. Philadelphia, W. & B. R. Co.* 4 Harr. (Del.) 389, 44 Am. Dec. 593, and the court said: "It is true that in relation to great rivers, which afford essential means of commerce with other states and the world, certain restrictions are imposed on the states themselves by the Constitution of the United States; but of such a river as this it may be assumed, at least since the case of *Willson v. Black Bird Creek Marsh Co.* 2 Pet. 251, 7 L. ed. 414, that the state has the unrestricted right of a proprietor over its waters, and may obstruct or close the same, if the public interest or convenience requires it to do so. As a public highway, it is free to all citizens for navigation or fishery; but when the legislature deems it more beneficial to the public to close this highway by a permanent bridge, or to exclude the fish from its waters by a dam, it is a question only of public expediency, and furnishes no just ground of complaint from individuals who have heretofore enjoyed benefits and advantages which may be abridged or cut off by the improvement."

In *Selman v. Wolfe*, 27 Tex. 68, the court said that the legislature, if in its judgment the public interest will be promoted by so doing, may undoubtedly either partially or wholly obstruct navigable streams exclusively within the state. To the same effect see *Depew v. Wabash &*

E. Canal, 5 Ind. 8; *Ingraham v. Chicago, D. & M. R. Co.* 34 Iowa, 249, and *Com. v. Breed*, 4 Pick. 460.

In the case at bar it appears from the record that a vast area of rich agricultural lands will be reclaimed by the construction of the proposed improvement, and undoubtedly the health of the community will be greatly benefited. It does not appear that the stream has been used for the purpose of navigation for many years, except for the purpose of floating logs on it. It is true appellees say that this will be the only way of getting out their logs, and that it will take them eight years to finish cutting and floating out their logs. This was a matter that addressed itself to the legislature. It was the proper judge of what was expedient in this behalf. In all cases of this sort the legislature has the power to inquire when the public health, convenience, and necessity demand whether a stream like the one in question shall be partly or wholly closed to navigation, when such act of the legislature is not opposed to any action of Congress on the subject.

It follows that the court erred in dismissing the complaint for want of equity, and for that error the decree will be reversed, and the cause remanded, with directions to the Chancery Court to grant the relief prayed for.

Water—right to close navigable stream—floating of logs.

ANNOTATION.

Power of state to prohibit or regulate floating of logs.

With but one exception, the cases seem to be in accord with the holding of the reported case (*CENTRAL CLAY DRAINAGE DIST. v. BOOSER*, ante, 1021) to the effect that a state under its police power has the right to regulate the floating of logs on a stream or other body of water, there being no act of Congress to the contrary. *Hospes v. O'Brien* (1885) 24 Fed. 145; *Evans v. Com.* (1888) 10 Ky. L. Rep. 29, 7 S. W. 925; *Harrigan v. Connecticut River* 9 A.L.R.—65.

Lumber Co. (1880) 129 Mass. 580, 37 Am. Rep. 387; *Hutton v. Webb* (1900) 126 N. C. 897, 59 L.R.A. 44, 36 S. E. 341; *Scott v. Willson* (1825) 3 N. H. 321; *Craig v. Kline* (1870) 65 Pa. 399, 3 Am. Rep. 636. See also *Henry v. Roberts* (1885) 50 Fed. 902; *Treat v. Lord* (1856) 42 Me. 552, 66 Am. Dec. 298; *West Branch Lumbermen's Exch. v. Fisher* (1892) 150 Pa. 475, 24 Atl. 735; *French v. Connecticut River Lumber Co.* (1887) 145 Mass. 261, 14 N. E.

113; *Barron v. Davis* (1828) 4 N. H. 338; *Hynecka v. Smith* (1856) 26 Pa. 499. Compare *Carson River Lumber Co. v. Patterson* (1867) 33 Cal. 334.

In the reported case (*CENTRAL CLAY DRAINAGE DIST. v. BOOSER*) it is held that an act of the Arkansas legislature, accepting the declaration of Congress that a certain river within the state is not navigable and closing the river to navigation, is valid, and that the floating of logs thereon may be enjoined.

A statute of Minnesota, authorizing the surveyor general to scale "all rafts, brails, or logs which may pass down or through Lake Croix," was held in *Hospes v. O'Brien* (1885) 24 Fed. 145, to be constitutional, the court saying: "This law is not in violation of the commercial clauses of the Constitution of the United States. Such legislation now exists, or has at some time existed, in nearly all the states. Persons and property are subject to restraint to secure the general comfort and prosperity. Laws regulating traffic and merchandise of all kinds are on the statute books of all the states. They are impediments and restraints of trade in some sense, but not necessarily, for that reason, regulations of interstate or foreign commerce within the meaning of the Constitution."

Similarly, in *Craig v. Kline* (1870) 65 Pa. 399, 3 Am. Rep. 636, it was held that a state, in the exercise of its police power, had the right to regulate the manner in which its streams should be used in the absence of any act of Congress to abridge that power, and that an act of the legislature of Pennsylvania, prohibiting the floating of loose logs between certain points in the Susquehanna river, not being repugnant to any law of Congress regulating commerce on that river, was constitutional.

In *Hutton v. Webb* (1900) 126 N. C. 897, 59 L.R.A. 44, 36 S. E. 341, the court recognized the power of the legislature to levy tolls and assessments for keeping in order public highways used for floatage, but held that when one is deprived of a vested easement, such as the right to float logs, he must

be compensated therefor. Hence an act imposing a toll on those exercising such easement was held to be unconstitutional, where there was no corresponding benefit to him who paid the toll.

Harrigan v. Connecticut River Lumber Co. (1880) 129 Mass. 580, 37 Am. Rep. 387, was an action for injuries to the plaintiff's boat caused by logs floated down the Connecticut river by the defendant. The plaintiff contended that the logs were being floated in violation of a state statute, providing that "no person shall cause or permit to be driven or floated down Connecticut river, any masts, spars, logs, or other timber, unless the same are formed and bound into rafts and placed under the care of a sufficient number of persons to govern and manage the same so as to prevent damage thereby," and that therefore the defendant was *prima facie* guilty of negligence. It was held that the statute was constitutional, being a valid exercise of the police power, the court saying: "This legislation does not attempt to deprive the Connecticut river of the character of a highway. It does not interfere with any use of it as such, and all interstate commerce may be conducted over its waters with the same freedom as over its roads, bridges, and other highways. If the legislature had ordered that the Connecticut river should not be used for the transportation of logs, masts, and spars from the state of Vermont to the state of Connecticut, a very different question would have been presented. That question does not arise, and need not be discussed. That it is competent for the legislature of a state to prescribe the mode in which its ways shall be used, to avoid collision and conflict and to prevent injury to persons or property rightfully thereon, and to prevent obstructions therein, cannot be questioned, and such legislation has no relation to, and does not interfere with, commerce between the states." In *French v. Connecticut River Lumber Co.* (1887) 145 Mass. 261, 14 N. E. 113, a similar statute was recognized, no question being raised as to its constitutionality.

In *Evans v. Com.* (1888) 10 Ky. L. Rep. 29, 7 S. W. 925, the defendant was fined \$200 under an act providing that "hereafter it shall be unlawful for any person or persons to turn adrift on the Licking river, below Salersville, in Magoffin county, any loose sawlogs, for the purpose of floating or drifting the same down said river loose and unrafted." The court held that while the stream was navigable, and while all persons have a right to a reasonable use of such streams, equal to their rights in a public highway, the legislature may determine the manner in which this reasonable use may be exercised, and prevent by legislation the obstruction of a navigable stream by floating loose logs on it in such a way as to destroy its use to the public for the purposes of navigation. However, it was held that the fine should not have been imposed in this instance, because the logs had been in a place where the owner had a right to put them, and by reason of a sudden rise in the river the logs had scattered down the river. For this reason the judgment was reversed.

In *Scott v. Wilson* (1825) 3 N. H. 321, an act providing that "from and after the 1st day of November, 1809, all pine timber found floating in said Connecticut river, without being rafted, or under the immediate care and control of some person or persons, and also all pine timber which, by being put into said river without being rafted or under such control, shall be found on the banks or meadows adjoining said river, shall and hereby is forfeited to any person, who will take up the same," was held to be constitutional. It was contended that the statute was repugnant to that provision in the Federal Constitution that Congress shall have power "to regulate commerce with foreign nations, and among the several states, and with Indian tribes," but the court said: "To regulate commerce among the states is to prescribe the rules by which the commerce among the states shall be governed. The act under consideration at this time prescribes no rule by which the commerce between any two states is to be governed. Its

object was to prevent the damage which resulted to individuals from floating timber down the river in a particular manner, and not to regulate the intercourse between states or individuals. We are therefore of opinion that this objection cannot prevail."

In other cases involving acts regulating the salvage of logs found floating in a stream, no question appears to have been raised as to the constitutionality of the statutes. *Barron v. Davis* (1828) 4 N. H. 338; *West Branch Lumbermen's Exch. v. Fisher* (1892) 150 Pa. 475, 24 Atl. 735; *Hynecka v. Smith* (1856) 26 Pa. 499.

The case of *Treat v. Lord* (1856) 42 Me. 552, 66 Am. Dec. 298, contains a dictum to the same effect as the rule heretofore laid down. In that case the plaintiff sought to recover damages for injury to his dams and mills caused by logs floated down the stream by the defendants. The jury were instructed that a conveyance by the state to the plaintiff of all its right, title, and interest in and to the lands on which the mills and dams were situated did not destroy the easement of the public to float logs in the stream, provided the stream was, in its inherent capacity, suitable for the passage of logs. On appeal the court, in affirming a judgment for defendant, said: "This instruction is based upon the fact that the public had an easement in said stream for the passage of logs, at the time of said conveyance,—an easement which conferred upon all persons having occasion so to use it, the right to do so, without any license or grant from said commonwealth. It is true, the right to control, abridge, or even destroy such easement then existed in said commonwealth, by virtue of its sovereignty or right of eminent domain, disconnected from, and not dependent upon, its ownership of the soil; but until so exercised by positive legislation, all persons might lawfully enjoy such easement in common with said commonwealth."

In *Henry v. Roberts* (1892) 50 Fed. 902, it was held that the provisions in the Maryland Code, giving to the owner of land on Chesapeake bay and its tributaries a lien on logs cast on the

shore, constituted a valid exercise of the police power.

But compare *Carson River Lumber Co. v. Patterson* (1867) 33 Cal. 334, wherein the question arose as to the constitutionality of an act of the California legislature, providing for the collection of tolls for the floating of logs down a certain river. The action was brought on a promissory note given by the appellants to the toll collector, for tolls claimed by him to

be due under the act. It appeared that the destination of the logs was the state of Nevada, and the court held that as the power to regulate commerce between the states in that particular way was prohibited to the states by the Federal Constitution, the act was unconstitutional and void, the toll as imposed by the act being on all lumber floated down the stream, irrespective of its destination.

R. G. R.

**CARL BOMBARDIER, by Next Friend,
v.
ALFRED GOODRICH.**

Vermont Supreme Court — May 6, 1920.

(— Vt. —, 110 Atl. 11.)

Infant — disaffirmance of contract — effect of father's approval.

1. That the father of an infant was present when the infant entered into a contract, and approved the same, does not affect the right of the infant to disaffirm it.

[See note on this question beginning on page 1030.]

Appeal — intendment — in favor of judgment.

2. All reasonable intendments are in favor of the judgment below.

[See 2 R. C. L. 219.]

Rescission — infant's contract — necessity of tender of property received.

3. Denial of rescission of an infant's contract because it was approved by the infant's father waives the necessity of a tender of the property received by the infant.

— sufficiency of tender.

4. An infant is required to return only the unexpended portion of the money received by him on a trade to secure a rescission of the contract.

[See 14 R. C. L. 238, 239.]

Execution — when certified execution proper.

5. A certified execution is proper in trover by an infant to recover property delivered under a contract which he has rescinded after the other contracting party has refused to surrender the property to the infant and sold it to another.

EXCEPTIONS by defendant to rulings of the Orange County Court (Butler, J.) made during the trial of an action of trover for alleged conversion by defendant of a horse, which resulted in a verdict for plaintiff. *Affirmed.* The facts are stated in the opinion of the court.

Mr. Max L. Powell, for defendant:
In case of gifts from a father of property that requires care and expense of maintenance, like a horse or piano, given to son or daughter in recognition of services at home, the father's advice and approval as to a sale or exchange are binding, and the

trade, when fair and free from fraud, cannot be rescinded.

Baker v. Baker, 41 Vt. 58; 22 Cyc. 584.

This is an executed contract and cannot be disaffirmed without restoring to the other party what has been received.

Farr v. Sumner, 12 Vt. 32, 36 Am. Dec. 327; Taft v. Pike, 14 Vt. 409, 39 Am. Dec. 228; Welch v. Welch, 103 Mass. 562; Hall v. Butterfield, 59 N. H. 354, 47 Am. Rep. 210; Locke v. Smith, 41 N. H. 346.

No certified execution could be granted.

Soule v. Austin, 35 Vt. 518; Watson v. Goodno, 66 Vt. 230, 28 Atl. 987; Boutwell v. Harriman, 58 Vt. 516, 2 Atl. 159; Hill v. Cox, 54 Vt. 627; Whiting v. Dow, 42 Vt. 262; Styles v. Shanks, 46 Vt. 612.

Mr. Earle R. Davis, for plaintiff:

Any contract of a minor not for necessities is voidable at the election of the minor, if rescinded while an infant or immediately on reaching majority.

Abell v. Warren, 4 Vt. 149; Person v. Chase, 37 Vt. 647, 88 Am. Dec. 630; Meeker v. Hurd, 31 Vt. 639.

In order to avoid a contract, an infant must offer to restore the consideration that he has received, so far as it remains under his control, but if by any means he has lost, destroyed, or wasted it, then he need only restore what remains, and cannot be held to account for the use while in his possession.

Hoyt v. Wilkinson, 57 Vt. 404; Price v. Furman, 27 Vt. 268, 65 Am. Dec. 194.

The sale of the plaintiff's horse, with full knowledge of the boy's offer to rescind, was a wilful conversion of it.

Hoyt v. Wilkinson, *supra*.

If this were strictly a matter of tender, even then the plaintiff is excused from further attempt to make the tender by the defendant's refusal to accept. The plaintiff was not required to do something when he has been advised by the defendant if he should do, it would be useless.

Jones v. Valentine's School, 122 Wis. 318, 99 N. W. 1043; House v. Alexander, 105 Ind. 109, 55 Am. Rep. 189, 4 N. E. 891.

The court was justified in finding that the action arose from the wilful and malicious conduct of the defendant; and thereby was justified in ordering a certified execution to issue.

Watson v. Goodno, 66 Vt. 230, 28 Atl. 987; Boutwell v. Harriman, 58 Vt. 516, 2 Atl. 159.

Powers, J., delivered the opinion of the court:

The right of an infant to rescind his contract is unaffected by the

fact that his father was present advising and approving the transaction. The assent of the father adds nothing to the binding force of an infant's promise. The

Infant-disaffirmance of contract—effect of father's approval.

father is entitled to the earnings of his minor child, but by force of his relationship, merely, he cannot bind the minor by contracts made in his behalf, and has no authority to sell, pledge, or transfer the latter's property. To be sure, the father is the natural guardian of the minor, but this relation only affects his right to the custody of the person, and does not enlarge his rights in the property of the minor. Sparhawk v. Buell, 9 Vt. at p. 73; Keeler v. Fassett, 21 Vt. 539, 52 Am. Dec. 71; Ferguson v. Phoenix Mut. L. Ins. Co. 84 Vt. 350, 35 L.R.A.(N.S.) 844, 79 Atl. 997. Circumstances might be such that a father would be entitled to property acquired by a minor child in consideration of his services which belonged to the father, but that is not the case before us.

This plaintiff, then, a minor, who, with the advice and approval of his father, had exchanged horses with the defendant, was well within his rights when he rescinded, or attempted to rescind, that contract. It is quite apparent from the findings that the father did not make the contract of exchange. He merely advised and approved. The plaintiff was the contracting party. The defendant asks us to draw certain inferences which would materially favor his case, but this we cannot do, for that would subvert the familiar

Appeal—intendment—in favor of judgment.

rule that all reasonable intendments are in favor of the judgment below, and only necessary inferences are to be here drawn against it. Nor can we heed the defendant's appeal for the announcement of what he regards as a more wholesome doctrine than the one that has heretofore obtained in this jurisdiction, for that would be to recede from the estab-

lished rules of law applicable to the subject-matter of the litigation.

The contract here in question was made in the town of Williamstown. Some ten days later the plaintiff met the defendant on the highway between Jonesville and Bolton, and notified him that the trade was rescinded. He demanded a return of the bay horse which he traded to the defendant, and offered to return the stallion and what he had left of the boot money on the following day at the place where the original trade was made.

The defendant insists that this did not amount to a valid rescission for lack of a tender of the property acquired by the plaintiff in the exchange. But we do not need to pass upon this question, for the defendant refused to surrender the bay horse, and refused to recognize the rescission, specifying as reason for his refusal that the plaintiff's father was present and agreed to the exchange. In these circumstances, the rescission was complete without a tender of the prop-

**Rescission—
infant's contract
—necessity of
tender of prop-
erty received.**

erty acquired in the trade. *Barrett v. Tyler*, 76 Vt. 108, 56 Atl. 534; *Bailey v. Manley*, 77 Vt. 157, 59 Atl. 200.

Nor was the validity of the rescission in any way affected by the fact that the plaintiff offered to pay back only \$40 of the \$50 boot money. He had spent \$10 of this money for veterinary services for the stallion, and the law required him to return only what he had left of it. *Price v. Furman*, 27 Vt. 268, 65 Am. Dec. 194.

There was no error in granting a certified execution. The action was tort in the form of trover. The defendant's refusal to surrender the horse and his subsequent sale of it amounted to a deliberate conversion of it, and a certified execution could properly be granted. *Boutwell v. Harriman*, 58 Vt. 516, 2 Atl. 159; *Watson v. Goodno*, 66 Vt. 229, 28 Atl. 987; *Flanders v. Mullin*, 80 Vt. 124, 66 Atl. 789, 12 Ann. Cas. 1010.

**Execution—
when certified
execution
proper.**

Judgment affirmed.

ANNOTATION.

Parent's approval or sanction of infant's contract as affecting latter's liability on, or right to disaffirm, it.

It is a general and well-recognized rule that an infant's contract, except for necessities under certain circumstances, is voidable at his instance, and in the few cases which have discussed the question, the view is taken that the parent's approval or sanction of the contract does not affect the infant's liability on, or his right to disaffirm, it.

Thus, in the reported case (*BOMBARDIER v. GOODRICH*, ante, 1028), it was claimed that the consent of the parent to a horse trade by an infant validated the contract and prevented the subsequent avoidance of it. The court holds to the contrary, stating that the assent of the father added nothing to the binding force of the infant's promise.

In *Indianapolis Chair Mfg. Co. v. Wilcox* (1877) 59 Ind. 429, the evidence showed that the plaintiff, an infant, while in the employ of the defendant company, purchased, with the consent of his father, two shares of stock in the company, to be paid for in weekly instalments. Before the stock had been completely paid for the plaintiff repudiated the contract, and demanded a refund of his money. In holding that the father's consent to the contract made it none the less voidable, the court said: "Under the evidence, the wages of the appellee belonged to him, and not to his father; and his father's consent to his contract with the appellant, if such consent had been shown by the evidence, would not have made his contract any the less

voidable. The appellee, an infant, contracted with the appellant for the purchase of two shares of its capital stock, at the price of \$200, for which he gave his note; and he agreed to and did pay for this stock at \$2 per week out of his weekly earnings, until his payments amounted in the aggregate to \$178.76, the sum sued for. Under the well-settled law of this state, the appellee's contract with the appellant for the purchase of the stock was voidable, and could be avoided at any time by the appellee during his minority, or on his arrival at full age."

Similarly, in *Wuller v. Chuse Grocery Co.* (1909) 241 Ill. 398, 28 L.R.A. (N.S.) 128, 132 Am. St. Rep. 216, 89 N. E. 796, 16 Ann. Cas. 522, wherein

it appeared that a minor had paid for and received corporate stock, it was held that he could repudiate the contract and recover the purchase money, the court saying that the contract of an infant gains no additional force from the fact that the infant is engaged in business for himself or is emancipated.

Compare *Breed v. Judd* (1854) 1 Gray (Mass.) 455, 12 Mor. Min. Rep. 293, wherein it was held that an infant could not disaffirm a contract which was completely executed and which was reasonable and beneficial to him. It appeared that the contract was entered into with the assent of the infant's father, but that fact does not seem to have influenced the court's decision. E. C. B.

JOSEPH O. DENTON, Plff. in Err.,

v.

CITY OF SAPULPA et al.

Oklahoma Supreme Court — April 20, 1920.

(— Okla. —, 189 Pac. 532.)

Public utility — burial ground as.

The words "public utilities," as used in § 27, article 10, of the Constitution of the state of Oklahoma, embrace a burial ground or cemetery to be purchased, owned, and controlled by a city and opened to the use of the public under reasonable regulations for the burial of the dead.

[See note on this question beginning on page 1033.]

Headnote by BAILEY, J.

ERROR to the District Court for Creek County (Wright, J.) to review a judgment in favor of defendants in an action brought to enjoin them from issuing certain bonds for the purchase and maintenance of lands for cemetery purposes. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. Robert B. Keenan, for plaintiff in error:

A cemetery is a private enterprise, which a municipality cannot engage in under § 27 of art. 10 of the Constitution.

Mr. L. J. Burt, for defendants in error:

The terms "public use" and "public utility" are synonymous, and a cemetery, where owned and exclusively

controlled by the city, is a public utility within the meaning of the Constitution.

State ex rel. *Edwards v. Millar*, 21 Okla. 448, 96 Pac. 747; State ex rel. *Manhattan Constr. Co. v. Barnes*, 22 Okla. 191, 97 Pac. 997; *Barnes v. Hill*, 23 Okla. 207, 99 Pac. 927; *Oklahoma City v. State*, 28 Okla. 780, 115 Pac. 1108; *Afton v. Gill*, 57 Okla. 36, 156 Pac. 658; *Coleman v. Frame*, 26 Okla.

193, 31 L.R.A. (N.S.) 556, 109 Pac. 928; *Hooper v. State*, 26 Okla. 646, 110 Pac. 912; *Dingman v. Sapulpa*, 27 Okla. 116, 111 Pac. 319; *Valley City Salt Co. v. Brown*, 7 W. Va. 191, 5 Mor. Min. Rep. 397; *Aldridge v. Tuscumbia, C. & D. R. Co.* 2 Stew. & P. (Ala.) 199, 23 Am. Dec. 307.

A burial ground which is in fact public is unquestionably a legitimate object in favor of which the right of eminent domain may be exercised.

Edwards v. Stonington Cemetery Asso. 20 Conn. 466; *Edgecumbe v. Burlington*, 46 Vt. 218.

Bailey, J., delivered the opinion of the court:

This was an action begun in the district court of Creek county by plaintiff in error, a resident citizen and taxpayer of the city of Sapulpa, Creek county, Oklahoma, on behalf of himself and other taxpaying citizens, seeking to enjoin the officers of the city of Sapulpa from issuing, disposing of, and delivering certain negotiable coupon bonds of the city of Sapulpa, which bonds had been regularly and lawfully voted at an election held in the city of Sapulpa. Said bonds were voted for the purpose of providing funds for the purchase of lands for cemetery purposes, to be owned, controlled, and managed exclusively by said city of Sapulpa. The trial court denied the application for injunction.

Under an agreed statement of facts, the court found that the city of Sapulpa was a city of the first class; that the election held for the purpose of determining whether such bonds should be issued was duly called, held, and conducted; that the land to be purchased and owned was to be controlled and managed exclusively by the city of Sapulpa for cemetery purposes. The court concluded as a matter of law that the city is acting within its legal and lawful authority in voting and issuing said bonds. Plaintiff in error in his brief says: "The transcript will disclose that the facts relevant to the determination of this controversy were agreed upon by both parties and that there is but one propo-

sition of law involved: Is a public cemetery a public utility?"

The answer to this question must be found in the provision of § 27, article 10, of the Constitution of the state of Oklahoma, which provides: "Any incorporated city or town in this state may, by a majority of the qualified property tax paying voters of such city or town, voting at an election to be held for that purpose, be allowed to become indebted in a larger amount than that specified in § 26, for the purpose of purchasing or constructing public utilities, or for repairing the same, to be owned exclusively by such city."

This court has had frequent occasion to consider the meaning of the words "public utilities," and to decide what constitutes a public utility within the meaning of the provisions of the Constitution, this court having held that such public conveniences and necessities as sewers, a convention hall, public parks, and fire stations and equipment came within the embrace of the term "public utilities." *State ex rel. Edwards v. Millar*, 21 Okla. 448, 96 Pac. 747; *State ex rel. Manhattan Constr. Co. v. Barnes*, 22 Okla. 191, 97 Pac. 997; *Barnes v. Hill*, 23 Okla. 207, 99 Pac. 927; *Ardmore v. State*, 24 Okla. 862, 104 Pac. 913; *Coleman v. Frame*, 26 Okla. 193, 31 L.R.A. (N.S.) 556, 109 Pac. 928; *Hooper v. State*, 26 Okla. 646, 110 Pac. 912; *Dingman v. Sapulpa*, 27 Okla. 116, 111 Pac. 319; *Oklahoma City v. State*, 28 Okla. 780, 115 Pac. 1108. These cases indicate the weight and consideration given by this court to the elements of public safety, health, comfort, and public control, as such elements may affect and determine whether such utilities constitute a public utility; but this court has also defined these words in a more general sense, as is stated in *State ex rel. Manhattan Constr. Co. v. Barnes*, 22 Okla. 191, 97 Pac. 997, where it is said: "The term 'public utility,' as used in this section of the Constitution, was before this court for construction in *State ex rel. Edwards v. Millar*, su-

pra. In that case it was held that sewers are public utilities, within the meaning of the term as used in the Constitution, and Valley City Salt Co. v. Brown, 7 W. Va. 191, 5 Mor. Min. Rep. 397, in which the term 'public utility' is construed as being synonymous with 'public use,' was cited with approval."

The meaning of the term "public use" is then given careful consideration. Accepting this application of the words "public utility" we are not without authority, for it was said in Evergreen Cemetery Asso. v. New Haven, 43 Conn. 234, 21 Am. Rep. 643: "The use of land for a burying ground is a public use, and, for such a purpose, it may be taken, if need be, under the right of eminent domain."

And in Farneman v. Mt. Pleasant Cemetery Asso. 135 Ind. 344, 35 N. E. 271, the supreme court of Indiana says: "It seems to be settled law that lands may be condemned for the purpose of a public cemetery where the public in general have a right to obtain interment, and that lands taken for the purpose of enlarging a public cemetery is devoting it to a public use."

See also Balch v. Essex County, 103 Mass. 106.

And likewise it is held in Starr Burying Ground Asso. v. North Lane Cemetery Asso. 77 Conn. 83, 58 Atl. 467: "Where land is appropriated for a burying ground by a town or other municipal corporation, . . . and the land so appropriated is open, under reasonable regulations, to the use of the public for the burial of the dead, it may become a public burial ground, and its use a public use."

Burial places are indispensable, and so strongly has it been recog-

nized that the proper and decent sepulture of the dead is necessary, not only to the health, but as a ministration to the sensibilities and feelings, of the living, that it has been held: "Convenient to the city of the living, a depository of the dead must be established and maintained. It concerns the public health, and if such places were not prepared by private enterprise it would be the duty of the state to act in the premises." Lake View v. Rose Hill Cemetery Co. 70 Ill. 191, 22 Am. Rep. 71.

The sentiment of mankind and the civilization of the age require and demand that these "silent cities" be furnished and maintained, and the public peace, comfort, and contentment of the people would be disturbed if such places were wanting. The necessity for the city to make such provisions is not a question for our consideration, but has been concluded by the act of the municipal authorities.

We have not deemed it necessary to refer to or discuss the statutory provisions relating to the acquisition, management, and control of cemeteries by municipalities, for the reason that such provisions of the ^{Public utility—}burial ground as. statute could only

tend to strengthen the views we have announced. We think the situation and facts presented easily bring the purposes within the term "public use," and therefore within the term "public utility," as used in the section of the Constitution to which reference has been made.

We therefore hold that the trial court did not err in the judgment rendered, and the same is affirmed.

Owen, Ch. J., and Rainey, Kane, Pitchford, Johnson, and Higgins, JJ., concur.

ANNOTATION.

What are "public utilities" within constitutional or statutory provisions relating to purchase, construction, or repair of same by municipal corporation.

The question under annotation herein, viz., what constitutes a "public utility" within the meaning of con-

stitutional or statutory provisions relating to the purchase, construction, or repair of the same by municipal cor-

porations, has not arisen in many states for the reason that the constitution or statute does not in terms refer to "public utilities." The provision of the Oklahoma Constitution involved in the reported case (*DENTON v. SAPULPA*, ante, 1031), which, it will be observed, relates to the amount of indebtedness that may be incurred for the purposes named, has been before the courts of that state a number of times. The term "public utilities" has been held to include:

—sewers, *State ex rel. Edwards v. Millar* (1908) 21 Okla. 448, 96 Pac. 747;

—a convention hall to be owned, controlled, and used exclusively by a city, *State ex rel. Manhattan Constr. Co. v. Barnes* (1908) 22 Okla. 191, 97 Pac. 997;

—a public park, *Barnes v. Hill* (1909) 23 Okla. 207, 99 Pac. 927; *Ardmore v. State* (1909) 24 Okla. 862, 104 Pac. 913;

—a public waterworks system, *Dunagan v. Red Rock* (1916) — Okla. —, 158 Pac. 1170;

—public fire stations, *Oklahoma City v. State* (1911) 28 Okla. 780, 115 Pac. 1108 (but the court in *Coleman v. Frame* (1910) 26 Okla. 193, 31 L.R.A.(N.S.) 556, 109 Pac. 928, states that the term "fire department improvements" includes "many things that may be 'public utilities,' but it also includes many that are not");

—street cleaning equipment, *Oklahoma City v. State* (1911) 28 Okla. 780, 115 Pac. 1108.

An electric light plant was assumed to be a public utility in *Woodward v. Raynor* (1911) 29 Okla. 493, 119 Pac. 964.

On the contrary, street improvements have been held not to be public utilities within the meaning of this provision. *Coleman v. Frame* (1910) 26 Okla. 193, 31 L.R.A.(N.S.) 556, 109

Pac. 928; *Hooper v. State* (1910) 26 Okla. 646, 110 Pac. 912 (paving of street and alley intersections, with the necessary curbing and drainage); *Dingman v. Sapulpa* (1910) 27 Okla. 116, 111 Pac. 319 (viaduct approaches). That streets are public utilities is not denied by the Oklahoma court, but the constitutional provision by its terms requires the public utility to be owned exclusively by the municipality, and as, under the Oklahoma law, streets are not owned exclusively by the municipality, it was held that street improvements were not of that class of public utilities comprehended in the constitutional provision.

So, a bridge to be owned jointly by the municipality and a township was held not to be such a public utility as was comprehended in this constitutional provision, in *Re Miami* (1914) 43 Okla. 205, 141 Pac. 1174.

A provision in a municipal charter relative to the acquisition, construction, and completion of public utilities, which grants the power to acquire "any public utility," includes street railroads. *Platt v. San Francisco* (1910) 158 Cal. 74, 110 Pac. 304.

In *Schurtz v. Grand Rapids* (1919) — Mich. —, 175 N. W. 421, a bill to restrain a municipality from acquiring the property of a water company without an affirmative vote of the electors, the court states: "We think that the term 'public utility' means every corporation, company, individual, association of persons, their trustees, lessees, or receivers, that may own, control, or manage, except for private use, any equipment, plant, or generating machinery in the operation of a public business or utility. Utility means the state or quality of being useful. Was this plant one useful to the public? If so, it was a public utility. We think it was such." W. A. E.

CHARLES H. BEBB et al., Copartners Doing Business under the Firm
Name and Style of Bebb & Gould,

v.

F. M. JORDAN.

Washington Supreme Court (Dept. No. 2)—April 22, 1920.

(— Wash. —, 189 Pac. 553.)

Municipal corporation — authority to prescribe yard space for building.

1. Statutory authority to regulate the manner in which buildings shall be constructed and maintained empowers a city to prescribe the court and yard space which must be provided for the building.

[See note on this question beginning on page 1040.]

Constitutional law — deprivation of property — prescribing yard space.

2. No constitutional rights of a property owner are infringed by prescribing the amount of court and yard space which must be allowed for apartment houses erected on the property.

[See 6 R. C. L. 213; 19 R. C. L. 829.]

Municipal corporation — building regulations — reasonableness.

3. Requiring court area of 1,680 square feet and yard space 13 feet deep on the alley for an apartment house of eight stories in height is not arbitrary or unreasonable per se.

[See 4 R. C. L. 395.]

Architect — right to compensation for services — unsuitable building.

4. An architect employed to draw the plans and specifications for a building on a particular lot can recover no compensation if he produces plans for a building which, because of municipal building regulations, cannot be erected on the lot specified.

[See 2 R. C. L. 401.]

— liability for following specific directions.

5. An architect is not excused for drawing plans for a building for a specified lot, which cannot be erected thereon because of municipal building regulations, because his employer told him he wanted a building similar to one designated which also violated the municipal ordinances, if the latter does not know of the violation.

— work done on order subsequently countermanded.

6. An architect is entitled to recover for work done upon plans which he has been employed to prepare, where his employment is terminated by the owner before the plans are completed.

— right to rely upon defenses.

7. One ordering plans from an architect cannot avoid payment for the work done upon them upon the ground that they would have called for a building which exceeded the agreed amount in cost, or violated the municipal ordinances, if he stopped the work before they were completed.

(Bridges, J., dissents.)

CROSS APPEALS from a judgment of the Superior Court for King County (Hall, J.) in favor of plaintiffs in an action brought to recover for services rendered as architects in designing and drawing plans and specifications for an apartment building. Defendant appealing from the judgment in favor of plaintiff, and plaintiff appealing from the amount of the judgment. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. George E. de Steiguer and Peters & Powell, for defendant:

Where an architect submits estimates of the probable cost of a building, he cannot recover for his plans

unless the estimate is reasonably within the actual cost.

5 C. J. 262; 6 Cyc. 30, 31; Graham v. Bell-Irving, 46 Wash. 607, 91 Pac. 8; 2 Am. & Eng. Enc. Law, 2d ed. 818;

Ada Street M. E. Church v. Garnsey, 66 Ill. 132; Dudley v. Strain, — Tex. Civ. App. —, 130 S. W. 778; Feltham v. Sharp, 99 Ga. 260, 25 S. E. 619; Maack v. Schneider, 57 Mo. App. 431; Smith v. Dickey, 74 Tex. 61, 11 S. W. 1049; Williar v. Nagle, 109 Md. 75, 71 Atl. 427, 16 Ann. Cas. 982; Wees v. Warren, 72 Mo. App. 641.

In order for plaintiffs to recover at all it must be shown that they delivered or tendered to defendant the plans and specifications for which they seek to recover.

Hill v. Sheffield, 117 N. Y. Supp. 99; Kutts v. Pelby, 20 Pick. 65; Graf v. Laev, 120 Wis. 177, 97 N. W. 898; Wandelt v. Cohen, 15 Misc. 90, 36 N. Y. Supp. 811; 6 Cyc. 31; Isaksson v. Williams, 26 Fed. 642; Irwin v. Williar, 110 U. S. 499, 28 L. ed. 225, 4 Sup. Ct. Rep. 160; Robbins v. Maher, 14 N. D. 228, 103 N. W. 755; Bernard v. Mott, 89 Mo. App. 403; Great Western Elevator Co. v. White, 56 C. C. A. 388, 118 Fed. 406; Packer v. Pentecost, 50 Ill. App. 228; Pennell v. Delta Transp. Co. 94 Mich. 247, 53 N. W. 1049; Citizens Nat. Bank v. Ariss, 68 Wash. 449, 123 Pac. 593; 12 Cyc. 1041.

It was just as much a part of the contract, on the part of the architects, to design a building that would comply with the fire and safety and other provisions of the Seattle building code, as it was to design a building generally that would stand up when it was built, and failing in this they could not recover.

Progress Amusement Co. v. Baker, 106 Wash. 64, 179 Pac. 81; Hart v. City Theatres Co. 215 N. Y. 322, 109 N. E. 497; Burger v. Koelsch, 77 Hun, 44, 28 N. Y. Supp. 460; Straus v. Buchman, 96 App. Div. 270, 89 N. Y. Supp. 226.

Plaintiffs nowhere asked the court to find that the ordinances were invalid or unreasonable. Therefore, they cannot now, in review for the first time, raise this point, if there were in fact any merit in the point.

Meals v. De Soto Placer Min. Co. 33 Wash. 304, 74 Pac. 470; Riverside Land Co. v. Pietsch, 35 Wash. 220, 77 Pac. 195; Mielke v. Miller, 100 Wash. 124, 170 Pac. 143; Thayer v. Snohomish Logging Co. 101 Wash. 458, 172 Pac. 552.

Messrs. Kerr & McCord for plaintiffs.

Fullerton, J., delivered the opinion of the court:

In this action the plaintiffs, Bebb & Gould, sued to recover from the defendant Jordan some \$10,058.16, for services rendered as architects in designing and drawing plans and specifications for an apartment building which the defendant contemplated constructing. After issue joined the action was tried by the court sitting without a jury, and a judgment was awarded the plaintiffs in the sum of \$4,071.80. From this judgment both parties appeal.

The record discloses that sometime in October, 1916, the defendant, being then the owner of a vacant lot in the city of Seattle, conceived the idea of improving the lot by erecting thereon an apartment building. There was then a six-story apartment building upon a near-by lot owned by one W. D. Perkins, and known as the Sheridan Apartments. The defendant examined the building, and was given to understand that it cost less than \$100,000. He then went to the plaintiffs' offices, and, meeting Mr. Bebb of the plaintiffs' firm, told him he thought of improving his lot and what he had learned of the Perkins building, requesting Bebb to examine the building and ascertain what a similar building would cost, saying to him further that if the cost of a similar building, including architect's fees, would not exceed \$100,000, he would erect such a building upon his lot. Mr. Bebb procured the plans of the building, consulted with a contractor who had bid on its construction, and, ascertaining to his own satisfaction that the building could be constructed within the cost as limited, so informed the defendant. The defendant thereupon told him to prepare the plans and specifications for the building. The work was entered upon, but before the plans were completed the defendant conceived the idea of increasing the building from a six-story structure to one of eight stories. He went to

the plaintiffs' offices and, finding that Mr. Bebb was away on a business trip in the East, took the question up with the person in charge of the offices. He was told by this person that the addition of two stories would add to the cost of the building approximately the sum of \$30,000. He thereupon directed plans to be drawn for a building of eight stories instead of six. This change required the strengthening of the supporting parts of the framework of the lower stories to take care of the additional weight, and consequently the preparation of practically new plans and specifications. While the general plan of the building would remain the same, the dimensions of the rooms would not, as the increased size of the supporting parts would take up more of the available space. New plans were, in consequence, prepared, and, when completed, bids were taken for the construction of the building. The lowest bid received was in excess of the estimated costs by approximately \$40,000. The defendant thereupon abandoned the enterprise, and refused to pay for the architects' services. This action was then brought, with the result before stated.

The defendant interposed a number of defenses, the principal defense being that the plans prepared were useless to him, as a building erected on the lot in question in accordance therewith would be a violation of the building ordinances of the city of Seattle. These ordinances require for a building of the height of this one a court area for light and air of 1,680 square feet, whereas the plans provide for an area of 1,288 feet only. The ordinances also require of a building, erected upon a lot in the situation of this lot, yard room on the alley 13 feet in depth, whereas these plans provide for a building covering the entire lot, leaving no space as yard room. It was testified, apparently without contradiction, that to make the plans comply with the first of these conditions would ne-

cessitate the cutting out of an apartment of two rooms on each of the floors, and that to comply with the second would require a redrawing of the entire plans.

It cannot be successfully denied, we think, that defects of this sort are defects of substance, and not mere immaterial variances, and that if the city has power to enact such ordinances, and the particular ordinance is not an arbitrary exercise of the power, the defendant could not lawfully erect a building in accordance with the plans submitted on the lot for which the building was designed. The plaintiffs, however, question both the power of the city to enact the ordinance, and its reasonableness. The first of these questions does not require discussion at length. By the express provisions of the statute (Rem. Code, § 7507), municipalities of the first class are given power "to regulate the manner in which stone, brick, and other buildings . . . shall be constructed and maintained." As the city of Seattle is of the designated class, and as the ordinance in question is regulative in its nature, there is no question of the city's power to enact it unless the legislature which delegated the power to the city is itself without such power. But regulations as to the height and character of buildings which may be erected in populous communities are common, and, if aimed at promoting the public health, safety, or welfare, and tend reasonably so to do, are open to no constitutional objection on the question of power to enact such ordinances.

Municipal corporation—authority to prescribe yard space for building.

Constitutional law—deprivation of property—prescribing yard space.

Whether a particular ordinance is arbitrary or unreasonable is usually a more serious question. In this instance we cannot conclude that the ordinance is so. In *Olympia v. Mann*, 1 Wash. 389,

Municipal corporation—building regulations—reasonableness.

12 L.R.A. 150, 25 Pac. 337, we held an ordinance establishing fire limits and prohibiting the construction of wooden buildings therein a reasonable exercise of the power, and to the same effect is *Seattle v. Hinckley*, 40 Wash. 468, 2 L.R.A. (N.S.) 398, 82 Pac. 747, where we held valid an ordinance requiring the construction on certain buildings of fire escapes of a designated kind. In *Eubank v. Richmond*, 110 Va. 749, 67 S. E. 376, 19 Ann. Cas. 186, a statute authorizing cities and towns to establish building lines adjoining a city park, so that buildings shall be at least a certain distance from the street line, was held to be a valid exercise of the police power. In *Building Commission v. Kunin*, 181 Mich. 604, 148 N. W. 207, Ann. Cas. 1916C, 959, a provision in the building ordinances of the city named that in the rear of every tenement house subsequently erected, there shall be a yard not less than 15 feet in depth extending the entire width of lot, open "from the ground to the sky," was held to be reasonable and a valid exercise of the police power. The principle of these cases sustains the ordinance here involved. If it be a legitimate exercise of legislative power to prescribe fire limits and restrict the character of buildings that may be erected therein, or to require buildings to be equipped with fire escapes of a certain design, or to require buildings to comply with a prescribed street line facing a public park, or to require an open space in the rear of a tenement house, then clearly it is a reasonable exercise of the same power to require that a building designed for apartment use have a court of a prescribed area for light and air and an open space in its rear. The purpose in each instance is the same, namely, the protection of the lives, health, and comfort of the people of the city.

The plans and specifications being thus unsuitable for a building on the described lot, can the architects recover on quantum meruit for the reasonable value of their serv-

ices in preparing them? Unquestionably, an architect, when employed generally to draw plans and specifications for a building of a given style and dimensions, may recover for the reasonable value of his services on a compliance with the terms of the employment, even though the building planned be one which the employer cannot erect at the place it is his purpose to erect it. But the rule is otherwise where the lot or the location of the lot on which the building is intended to be erected is made known to him. In such a case he is bound to know the building restrictions of the particular place, and draw the plans and specifications accordingly, else forfeit his right of recovery for his services.

Architect—right to compensation for services—unsuitable building.

This on the familiar principle that in all such contracts of employment there is an implied condition that the work, when completed, shall be suitable and proper for the purposes intended. An architect is an expert in his particular line of work. He so holds himself out, and is employed because he is such. He is not only bound to know the character of materials necessary to the construction of a safe and durable building of the design required, but is bound to know also the building restrictions imposed by the law of the place where he is informed the building is to be erected.

In *Straus v. Buchman*, 96 App. Div. 270, 89 N. Y. Supp. 226, the plaintiff purchased a partially completed building, and employed the defendants as architects to superintend and supervise the remainder of the work to be performed thereon. At the time of the purchase, a change in the plans of the building, of which the defendants were fully advised, was agreed upon between the plaintiff and his vendor, the change requiring a new support for certain tail beams. These the architects permitted to be rested on studding partitions, contrary to the requirements of a statute applicable

to buildings at that place. The building, when completed, proved to be defective, and the plaintiff sued the defendants in damages. Holding the defendants liable, the court said: "The placing of these timbers, and the manner in which they were secured, was not only a serious defect, but a direct violation of the statute in force at that time, relating to the construction of buildings in the city of New York (Laws of 1882, chap. 410, 476, as amended by Laws of 1892, chap. 275, p. 547), which provided that 'in no case shall either end of a beam or beams rest on stud partitions.' It was the duty of the defendants, under their contract with plaintiff, not only to see that the beams were properly placed, but especially to see that the placing of them conformed to the requirements of the statute. This they failed to do."

In *Nave v. McGrane*, 19 Idaho, 111, 113 Pac. 82, the plaintiff, an architect, sued to recover for his services in drawing plans for a building which the defendant contemplated constructing. At the trial it was shown that the building, as designed by the architect, violated the building ordinances of the city where the building was intended to be erected. It was held that the architect could not recover, the court saying: "So far as an architect is concerned, there is always an implied contract that the work shall be suitable and capable of being used for the purpose for which it is prepared. Apart from questions of public policy, this principle would prevent him from recovering upon plans and specifications prepared in violation of law, unless he was directed to so prepare them by the owner."

See also *Progress Amusement Co. v. Baker*, 106 Wash. 64, 179 Pac. 81; *Hart v. City Theatres Co.* 215 N. Y. 322, 109 N. E. 497; *Burger v. Koelsch*, 77 Hun, 44, 28 N. Y. Supp. 460; 5 C. J. 260.

The trial court in its findings, while recognizing that the plans and specifications, as drawn, violated the

building ordinances of the city of Seattle, held the architect excused because the defendant desired a building in conformity with the Sheridan Apartments, and that this building violated the ordinances in the same manner that the plans submitted violated them. But we think it plain that this fact would not excuse the architects. The rule might be otherwise had the defendant known the fact and directed plans to be drawn in accordance therewith in spite of such knowledge. But the evidence makes it clear that he had no such knowledge, and that a mere inspection of the building and the ordinances would not disclose the fact to a person not skilled in building construction. On the other hand, the plaintiffs did know of it, or ought to have known of it, and it was negligence on their part not to so inform the defendant before entering upon the work of drawing the plans. It follows there can be no recovery for the plans of the eight-story building.

—liability for following specific directions.

As to the services performed on the plans for the six-story building, we think the plaintiffs are entitled to recover their reasonable value. The defendant employed the plaintiffs to prepare them, and stopped the work thereon before they were completed. By these acts, unless a sufficient reason intervened, he obligated himself to pay such sum as the services performed thereon were reasonably worth. The defendant seeks to escape liability by showing that the plans, as far as they had been prepared contemplated a building which could not be constructed within the limit of cost agreed upon, and showed, as do the plans for the building of eight stories, a violation of the city ordinances. As to the first of these objections the evidence was contradictory, and, to our minds, supports the one theory as well as the other.

—work done on order subsequently countermanded.

But we think the true answer is that the plans were incomplete when the defendant stopped

—right to rely upon defenses.

work upon them, and that he cannot now be heard to say that when completed they would have violated the contract as to cost, or the city ordinances, or would have been otherwise defective. These are matters that cannot now be certainly known, and the reason they are in this uncertain condition is because of the defendant's acts, not because of the acts of the plaintiffs.

The plaintiff Bebb testified that the reasonable value of the services rendered by his office on these plans was \$3,100. In this he has the support of other architects, while there is no evidence to the contrary. We think, therefore, that the sum named should be the measure of the plaintiffs' recovery.

The judgment entered is there-

fore reversed, and the cause remanded, with instructions to enter a judgment in favor of the plaintiffs for \$3,100.

Holcomb, Ch. J., and Tolman and Mount, JJ., concur.

Bridges, J., dissenting:

I heartily concur in that part of the foregoing opinion which denies relief to respondents, but I cannot agree that they are entitled to any judgment in their favor. It is plain to my mind that the original agreement for plans and specifications for the six-story building afterwards became merged in the contract for the eight-story structure. I cannot agree that there were two contracts, and that recovery may be had on one and denied on the other. I am therefore of the view that the judgment should be reversed, and the case remanded, with instructions to dismiss.

ANNOTATION.

Validity of building regulation requiring areas or open spaces for light and air.

The validity of an ordinance such as that involved in the reported case *BEBB v. JORDAN*, ante, 1035 has not been before the courts in many instances. See *Building Commission v. Kunin* (1914) 181 Mich. 604, 148 N. W. 207, Ann. Cas. 1916C, 959, set out in the reported case.

The constitutionality of a statute providing that no dwelling house or other building should front upon any street, alley, or court which should be of less width than 20 feet, without being made to recede so that such street, alley, or court should be of that width, the buildings on either side equally receding, the damages for which widening shall be assessed and paid to the owner, was sustained in *Re Perry's Ct.* (1873) 30 Phila. Leg. Int. (Pa.) 116. This statute has been before the courts of Pennsylvania in a number of instances, but no other case involves the question of its validity. See *Philadelphia v. Michener* (1873) 30 Phila. Leg. Int. (Pa.) 116; *Guarantee Trust & S. D. Co. v. Phil-*

adelphia (1873) 30 Phila. Leg. Int. (Pa.) 240; *Philadelphia v. Neumann* (1883) 16 Phila. (Pa.) 99; *Eichel v. Zimmerman* (1884) 17 Phila. (Pa.) 290.

A statute requiring every new dwelling house to have an open space attached to it in the rear or at the side, equal to at least 12 feet square, was before the court for construction in *Brice's Appeal* (1879) 89 Pa. 85, but no question was raised as to its validity. This statute was before the court for construction also in *Zimmerman v. Heid* (1888) 5 Pa. Co. Ct. 520; *Philadelphia v. Brown* (1891) 9 Pa. Co. Ct. 670; *Schultz v. Doak* (1860) 4 Phila. (Pa.) 151; *Eichel v. Zimmerman* (1855) 17 Phila. (Pa.) 290.

A statute providing that when a tenement house runs from one street to another, and the lot on which it was erected is of a certain size, there shall be a yard space through the center of the lot midway between the two streets, which space shall extend

across the full width of the lot, and never be less than 12 feet in depth from wall to wall, and, in case of lots of a larger size, never be less than 24 feet in depth, was before the court

for construction in *People ex rel. Gabriel v. Butler* (1906) 115 App. Div. 655, 100 N. Y. Supp. 978, but there was no question as to its validity.

W. A. E.

S. O. WHITE et al., Plffs. in Err.,

v.

E. A. HARRIGAN et al.

Oklahoma Supreme Court — November 25, 1919.

(— Okla. —, 186 Pac. 224.)

Fraud — misrepresentation of law.

1. Generally speaking, a misrepresentation of law affords no grounds of redress or relief on the theory that all men are supposed to know the law. It is not universally true, however, that a misrepresentation of the law is not binding upon the party who made it. Where one has superior means of information, professes a knowledge of the law, and thereby obtains an unconscionable advantage of another who is ignorant and has not been in situation to become informed, the injured party is entitled to relief as well as if the representation had been made concerning a matter of fact.

[See note on this question beginning on page 1051.]

— what constitutes.

2. The record examined, and held that the representations made constituted fraud.

[See 12 R. C. L. 296.]

(Johnson, J., dissents.)

ERROR to the District Court for Carter County (Freeman, J.) to review a judgment in favor of plaintiffs in a suit to cancel a deed alleged to have been secured from them by fraud. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Potterf & Gray, for plaintiffs in error:

It being true that the plaintiffs had paid only a part of their agreed purchase price, they could not have claimed as bona fide purchasers of the title, but could only claim protection to the extent of the money they had paid out without notice of Charlie Punneo's rights.

39 Cyc. 1765.

An allegation of fraud in transfer of realty must be sustained by practical, conclusive proof.

Moore v. Adams, 26 Okla. 48, 108 Pac. 392; Elliott v. Merriman, 47 Okla. 717, 150 Pac. 695; Kansas Mill Owners' & M. Mut. F. Ins. Co. v. Rammelsberg, 58 Kan. 531, 50 Pac. 446.

ers' & M. Mut. F. Ins. Co. v. Rammelsberg, 58 Kan. 531, 50 Pac. 446.

The court erred in overruling the motion of defendants for judgment upon the pleadings.

Whitney v. Dewey, 10 Idaho, 633, 69 L.R.A. 572, 80 Pac. 1117; Dyer v. Skadan, 128 Mich. 348, 92 Am. St. Rep. 461, 87 N. W. 277; Wipfler v. Wipfler, 153 Mich. 18, 16 L.R.A. (N.S.) 941, 116 N. W. 544; Holdom v. Ayer, 110 Ill. 448; Elphick v. Hoffman, 49 Conn. 331; McNaughton v. Conkling, 9 Wis. 316.

Objection that evidence is incompetent, irrelevant, and immaterial is

sufficient in the absence of a request for a more specific statement.

Gilbert v. Citizens' Nat. Bank, — Okla. —, L.R.A.1917A, 740, 160 Pac. 635.

An amendment to conform to the proof can only be allowed for the purpose of conforming to testimony admitted without objection.

— 1 Enc. Pl. & Pr. 585, 586; *Walker v. O'Connell*, 59 Kan. 306, 52 Pac. 894; *Leggat v. Palmer*, 39 Mont. 302, 102 Pac. 327.

Fraud cannot be based upon a misrepresentation of law, or upon a misrepresentation of the legal effect of a written instrument.

Mutual L. Ins. Co. v. Phinney, 178 U. S. 327, 44 L. ed. 1088, 20 Sup. Ct. Rep. 906; *Rheingans v. Smith*, Ann. Cas. 1913B, 1140, and note, 161 Cal. 362, 119 Pac. 494; *Thompson v. Phoenix Ins. Co.* 75 Me. 55, 46 Am. Rep. 357.

Messrs. H. A. Ledbetter and F. N. Adams, for defendants in error:

Harrigan was not given a fair chance, and was out-managed by the schemes and fraudulent maneuvers on the part of defendants, which justified the court in finding that he was ignorant, illiterate, and inexperienced in business affairs.

Hankins v. Farmers' & M. Bank, 42 Okla. 330, 141 Pac. 272; *Thompson v. Vaught*, — Okla. —, 160 Pac. 625.

The court had a right to hear all the testimony and all the surrounding circumstances leading up to the supposed title held by S. O. White, and by reason of which it is not at liberty to set aside the findings of fact at the trial court unless, after a consideration of the entire record, it appear that such findings were clearly against the weight of the evidence.

Thomas v. Halsell, — Okla. —, 164 Pac. 458.

When it appears to the court that justice has been done, the cause will not be reversed, although special requests for particular findings of fact had been made.

McAlpin v. Hixon, 45 Okla. 376, 145 Pac. 386.

A motion for judgment upon the pleadings should be denied where the pleadings raise an issue of fact to be tried.

Noland v. Owens, 13 Okla. 408, 74 Pac. 954; *St. Louis & S. F. R. Co. v. Kerns*, 41 Okla. 167, 136 Pac. 169; *White v. Hocker*, 58 Okla. 38, 158 Pac. 440; *Robert v. Mullen*, — Okla. —, 160 Pac. 83.

Fraud in equity is proven by circumstances.

Wingate v. Render, 58 Okla. 656, 160 Pac. 614; *Chicago, R. I. & P. R. Co. v. Cotton*, — Okla. —, 162 Pac. 763; *Pevehouse v. Adams*, 52 Okla. 495, 153 Pac. 65; *Smith v. Skelton*, — Okla. —, 163 Pac. 268; *Thomas v. Halsell*, — Okla. —, 164 Pac. 458; *Schock v. Fish*, 45 Okla. 12, 144 Pac. 584; *Wimberly v. Winstock*, 46 Okla. 645, 149 Pac. 238; *Tucker v. Thraves*, 50 Okla. 691, 151 Pac. 598.

It was not error to allow plaintiffs to amend their petition after the close of the trial.

E. Van Winkle Gin & Mach. Works v. Brooks, 53 Okla. 411, 156 Pac. 1152; *Edmondston v. Porter*, — Okla. —, 162 Pac. 692.

Higgins, J., delivered the opinion of the court:

In this opinion E. A. Harrigan and others will be referred to as plaintiffs, and S. O. White and others as defendants; they so appearing in the trial court.

This is a suit by the plaintiffs to cancel a deed alleged to have been secured from them by fraud, and certain other deeds and instruments of writing, for reason the same were a cloud on the title to the lands involved in this suit. The judgment of the trial court was in their favor, from which judgment an appeal to review the same has been taken to this court.

A derangement of title of the parties to this suit is as follows: Ed Punneo in 1911, at a sale of the unallotted lands of the Choctaw and Chickasaw Nations, purchased the lands in question, and in 1916 received a patent therefor. On November 20, 1912, Ed Punneo by warranty deed conveyed the land to W. H. McCown, and on December 7, 1915, McCown conveyed the same by warranty deed to E. A. Harrigan, one of the plaintiffs in this suit. On December 2, 1911, Ed Punneo executed to his brother, Charley Punneo, an instrument in writing as follows:

Know all men by these presents that I, Ed Punneo, of Fox, in Carter county and the state of Oklahoma, party of the first part, in the con-

sideration of the sum of \$590 to me paid by Chas. Punneo, of Fox, party of the second part, the receipt whereof is hereby acknowledged, have bargained, sold, conveyed, and transferred, and by these presents do bargain, sell, grant, convey, transfer, and deliver unto the said party of the second part, his executors, administrators, and assigns, the following described property:

One bay horse mule branded P on left shoulder and X on left thigh, C on left jaw. One gray mule branded C on left jaw, and bay mare, wire cut on left leg. One gray mare, brand unknown. One buggy Rock-iler, farming tools, one lister cultivator. One planter, one set of buggy harness, 1,500 feet of lumber, receipt against 80 acres of land described as follows: N.E. $\frac{1}{4}$ of N.E. $\frac{1}{4}$ of section 20, T. 2 S., 3 W.

To have and to hold the same unto the said party of the second part, his executors, administrators, and assigns forever, and I do warrant my title to said property and do covenant and agree to and with said party of the second part to defend the said described property hereby sold unto the said party of the second part, his executors, administrators, and assigns, against all and every person whomsoever.

In witness whereof I have hereunto set my hand this the 2d day of December, 1911.

Ed Punneo.

Witness: M. Z. Cofey. J. W. Morris.

Indorsed as follows:

"Bill of Sale, 1916. Ed Punneo to Chas. Punneo. Filed Jan. 31, 1912, at 8:30 o'clock A. M. S. S. Tolson, Register of Deeds, Carter County, Oklahoma."

As this instrument is indorsed a "Bill of Sale," we will hereafter refer to it as such.

On June 6, 1916, Charley Punneo by warranty deed conveyed the lands to S. O. White, one of the defendants, and Hannah Punneo, his mother. On August 25, 1916, E. A. Harrigan and his wife, Nora Harrigan, by quitclaim deed conveyed the land to

S. O. White, and on the same day Hannah Punneo by quitclaim deed conveyed the land to S. O. White. On September 27, 1916, S. O. White by quitclaim deed conveyed the land to his father-in-law, J. B. Leach, who, on the same day, executed to the attorney of S. O. White a power of attorney.

This suit is to cancel the deed of August 25, 1916, on the grounds of fraud, and to cancel the bill of sale, the deed from Punneo to White and Punneo, the deed from Punneo to White, the deed from White to Leach, and the power of attorney executed by Leach, for the reason that these instruments were a cloud upon the title of plaintiffs to the lands involved.

The bill of sale was not acknowledged by a notary, was not indexed or recorded, as is required of a real estate mortgage, and was placed among the files of the chattel mortgages. The plaintiff alleges that he therefore knew nothing of the bill of sale; that he purchased the lands in good faith, paying a valuable consideration.

There is no attempt to explain the irregularities of the bill of sale. None of the Punneos appeared as a witness. One witness did testify that, in a conversation with White, he told him that one of the Punneos said that Ed Punneo was indebted to J. S. Mullen for rent, and the bill of sale given to the brother was to place the property beyond an execution.

At the time the Harrigans executed their deed to White there was paid them by White the sum of \$620, which he borrowed from Leach, one of the other defendants. White also assumed and agreed to pay a mortgage on the land in the sum of \$1,500.

In this suit a tender back of \$620 was made in open court and refused by defendants. It is pleaded that Leach and the attorney to whom the power of attorney was granted were either connected with the fraud or knew of the fraud in the securing of

the deed on August 25, 1916, from the Harrigans to White.

The only contest before the trial court was whether there was fraud in the securing of the deed above referred to from Harrigan to White. The history of the case is as follows:

Oil was discovered in Carter county, and developments were being had in the vicinity of the land involved, and the land possessed a prospective oil value. Charley Punneo in 1916, nearly five years after the bill of sale had been executed to him, went to White, one of the defendants, and told him of this old bill of sale which was hidden away in the files of the chattel mortgages of the county clerk of Carter county, though he had remained silent for nearly five years, knowing his brother had sold the lands to other parties. White agreed to secure the land for him under this bill of sale for one half of same. White was not an attorney, but a clerk in the store of his father-in-law, J. B. Leach. White procured an attorney, the one to whom his father-in-law executed the power of attorney.

Charley Punneo executed to White and to his mother, Hannah Punneo, the deed of June 6, 1916, no consideration therein passing. Punneo was to be the owner of one half of the land, and White and his mother, Hannah Punneo, was to hold in trust for him this one half. This deed of June 6, 1916, was placed of record on the day of its execution. It so happened that Harrigan was on a trade with other parties about this date, agreeing to sell 30 acres for \$50 an acre, which would pay off the mortgage then on the land, leaving him the other portion clear of debt; but, when the time came to close out the deal, this deed from Punneo to White and Punneo was found of record, defeating the sale. Harrigan commenced suit at once to cancel the deed from Charley Punneo to White and Hannah Punneo, dated June 6, 1916, as a cloud on his title, and while this suit was pending the transactions between White and the

Harrigans in regard to the execution of the deed of August 25, 1916, from Harrigan to White, took place.

The history of this matter is as follows: White, who lived at Comanche, accompanied by his lawyer, went to the justice of the peace who prepared the bill of sale between the Punneos, and secured from him an affidavit to that effect, sworn to before a notary. They then went to the office of the county clerk of Carter county, and under the seal of that office secured a certified copy of the bill of sale. Then with blank deeds they went forth to prove there was good title in them, not to the attorney who had filed the suit to cancel off the White-Punneo deed, but to the defendant himself. He and his attorney drove out in an automobile to the western part of Carter county, first to the home of the father of Ed Harrigan, having gone there by mistake, and then, accompanied by the father, went to the home of E. A. Harrigan. This is the time in which the deed of August 25, 1916, from the Harrigans to White, was secured. It is alleged that the Harrigans were ignorant, uneducated, and illiterate persons, not versed in business, but having to rely on others for advice as to business matters, and that White was a shrewd business man.

There was evidence introduced as to the education and experience of E. A. Harrigan,—“that he had gone to school some five or six months; had got as high as McGuffey's Third Reader; his education being at a school in Board's bottom, between the towns of Nebo and Daugherty, in what is now Murray county, Oklahoma. He was twenty-four years of age, had a wife and a baby, and had followed farming as a vocation, and had been making his own living since he was fifteen years of age. On the other hand, there was dealing with him to secure his deed to the land in question White, a clerk in a store, who had with him an attorney. The father of E. A. Harrigan, from the evidence, appeared to possess little education.

It is clearly to be seen that in the arguments between the parties as to title to the lands the Harrigans were at a considerable disadvantage. The record is quite voluminous as to what took place at this meeting. It appears that White first talked to Harrigan, then his attorney talked to him.

Bud Remington, called by the plaintiffs, testified as follows: "That they (referring to White and his attorney) asked him (referring to Harrigan) in a short time what he was going to do. Mr. Harrigan said at that time he was going to fight it through; and then Mr. White came up with a bill of sale on the place. He said he had the first bill of sale on the place, the oldest bill of sale from Ed Punneo to his brother, Charley Punneo, before he sold the land to McCown. It was filed for record and showed the date it was filed on, and then they said it was not properly filed, but it was the neglect of the clerk,—fault of the clerk,—and it was just as good as if it was properly filed. He said it was a bill of sale from Ed Punneo to Charles Punneo they was reading, and when young Harrigan said he guessed he would fight it through, White says, 'We will beat you and McCown and oil companies.' They said to young Harrigan that it was a deed in the form of a bill of sale. They said if they had their law book so they could show him. That they went over this four or five times, not less than five; they repeated it over when he refused, and then they would repeat it over, you know. I do not remember what the attorney for White said about the McCown deed being void."

J. C. Harrigan, father of E. A. Harrigan, called by the plaintiffs, testified: That he was present the 25th day of August, 1916, when the conversations leading up to the execution of a deed by his son to White took place. "I do not know that I can tell all the conversation; I can tell part of it, what I remember. They told him they had a bill of sale to the land that Ed Punneo—that

was made back away ahead of McCown's deed and made to Ed's brother; we know him as Dick—and went on to say this deed was all right, it was good and would stand up in court; said it was sorry got up, but finally got a good deed out of—He told my son this and said he believed he would be protected as an innocent purchaser, so he would get his money back then and there if he would make him a deed to the place; he held up this supposed to be certified copy, I believe he called it; he says it will absolutely stand up; they said they would buy him out; if they did not, they was going to beat him any way. They said they had absolutely the oldest title. White talked some; then the attorney took it. White started, and the attorney took it. The attorney said the title would stand up; that if he had his law book there he would show it to us; he wished he had it. My son traded his own cattle and stock with McCown for the place. He has been looking after his business since he was twenty-one. You (referring to the attorney) made him believe all the time he did not have any deed; that his money was gone, and this was his only chance to get it; that it might be that he could get it out of the one from whom he purchased, if he was worth it; if he could not get it out of him, he would lose it. Yes, I said I believed you was a lawyer, and was telling the truth, and knew what you was talking about. I believed myself that was the only way. I didn't know nothing about the land business. I had no experience. This is the first place I ever bought in my life."

E. A. Harrigan, the plaintiff, testified as follows: "I will be twenty-four years old April 5th next. My wife's name is Nora. We have got one little baby boy born right in the house where we live. I have made two crops out there. I farm myself. I bought the land from W. H. McCown. I was to pay him \$2,000, of which I paid him \$500 in cash and gave a mortgage for the remainder, due in five payments, \$300 at a pay-

ment. White and his attorney came to see me. There was present my father and Uncle Billie Pennington. They said they knew I bought as an innocent purchaser, and they wanted to get me out so they could go after McCown and Punneo, go after them, and if they could not take the money back they would beat us all the same together. They drew a little piece of paper and says, 'This is a deed in the form of a bill of sale,' and handed it to me. They said it was not put of record properly, but it would hold up as good as if it had been; that it wasn't their fault. He said he was not in fault, said something about they knew about it when they handed it to me, said it was a bad job, said the old justice at Pooleville made it out, and it was a bad job, but they could make a good deed out of it. They went on to say that McCown would beat me out of what I paid him; that he was worth it now, but might not be later on. They left the impression that everybody else was going to crook me but them, and they was coming straight. They said I was an innocent purchaser and wanted to pay me back my money and get me out between them and McCown. They wanted to pay me the same money back that I had been out on the land. They said McCown's deed was void, and they had the only title to the land; that they were going to beat them and me, too, provided I would not take the money back now. I told them I had been down and looked over the record, and I did not find what they said there. Pa says, 'You do not know where to look.' He (White) said it was there; we checked it upon the records, and it was absolutely as good as a warranty deed on the records. I had agreed to sell 30 acres of the land to Dr. Potter and Morris Sass for \$50 an acre, \$1,500, the amount of the mortgage to McCown. They (White and his attorney) said the bill of sale covered all the 80 acres, and said the bill of sale would show that they had the only true title to the land. I did not read the bill of sale.

I relied upon what they said. I sure would not have given any deed to it to White had I not believed their statements to be true that they had better title, when I could sell 30 acres of it for \$50 an acre, and clear away what I got it for; what I had been out. I sold the land to White because they made me believe I had no title, and they was going to beat me out of what I had been out on it. My best recollection I spent \$252 of the money White paid me. My complaint is that they told me that they had a title absolutely better."

W. H. McCown, called by the plaintiffs, testified: "I bought the land in question from Ed Punneo. I have known Charley Punneo for several years. Never heard of him asserting any title to the land until this thing came up. I sold the land to E. A. Harrigan on August 25, 1916. The lands involved had a market value of \$50 to \$75 an acre."

Morris Sass, called by plaintiffs, testified: "That the market value of the land on August 25, 1916, was \$75 per acre; that is, he had contracted a few days prior to that day with Harrigan to pay him \$50 per acre, which they had contracted to sell at \$75 per acre."

D. E. Barker testified: That the land had a market value for oil and gas on August 25, 1916; it was supposed to be worth \$50 or \$60 or \$100 an acre. "I would not take \$150 an acre for mine about as near."

Wirt Franklin testified that he was in the oil business, and that on August 30, 1916, White came and offered to sell him the lands in question, and that he offered him \$50 an acre for all of it, but the trade was not consummated.

E. Dunlap testified: "That on August 25, 1916, the market value of the lease on the land was \$40, \$50, or \$60 an acre, around \$50; that in the latter part of September following the McMann well came in in the same section, which would increase the value very materially."

S. O. White, in behalf of himself and other defendants, testified: "That he lived in Comanche; was

in the grocery business; never had a lawsuit. In June, 1916, old man Punneo and Charley came to the store with an instrument signed by Morris Sass and a note signed by Wade McCown, asking Charley to sign a deed and mail to Morris Sass. I came to an agreement to look after the land for one half of it. A few days later Charley Punneo executed a deed to Hannah Punneo and myself. Hannah was Charley's mother. The same day after I got the deed from the Harrigans Hannah Punneo executed a deed to me. I did not pay her anything for the deed. They were putting the rest of the title in me, that I might sell it. I saw Harrigan for the first time the day I took title from him. I did not know of Harrigan's deed when Charley deeded the land to me and his mother. I found the bill of sale in July, 1916, and took a certified copy. I went out to see Harrigan. My attorney went along. We told him we had a bill of sale from Ed Punneo to Charley Punneo. I had the certified copy. Both of the Harrigans, father and son, looked at it. We discussed the way the words were spelled. I told him the original was in the clerk's office in the chattel mortgage files. I told him it was a true copy, and the reason why people could not find it they had been looking at the wrong place all the time. I called it a bill of sale. We laughed over the way the words were spelled. They asked my attorney whether the bill of sale would transfer land. My attorney says, 'I am White's lawyer,' and he did not think they would rely upon what he said. The father spoke up and says that this is the first time he ever knew one could sell land by a bill of sale, and asked the opinion of my attorney, who told him that, where the parties knew about the bill of sale, the land could be delivered, but it couldn't outside of the parties that knew about it; that was his opinion. I talked with my attorney. He said I ought to go out and they would settle it out of court, as the winner in a lawsuit is the loser. I wanted my attorney

along to draw the papers. My attorney told them they would be protected to the amount they had in the land any way it went, and he was an innocent purchaser. I paid him \$618, and agreed to pay the mortgage of \$1,500. Harrigan and his wife made me a deed and signed an agreement to dismiss the suit to cancel deed, which suit also included damages. Harrigan's father asked his son if he could get his money out of McCown's deed, who replied that he would rather have \$618 than any man's deed, as a bird in a cage is worth two in the bush. Harrigan and wife went across line into Stephens county, where the signature and acknowledgment of deed was had before a notary public. We had with us and showed to Harrigan the affidavit of the justice and the deed of Charley Punneo to him and Hannah Punneo. I showed him everything. He had put everything on the table for him to look at. We told him that Ed Punneo told us that McCown knew of the bill of sale. I got the \$630 from my father-in-law, Mr. Leach, and I told him about the transaction. I had part of the land sold for \$50 an acre. Mr. Leach and myself are partners in business. The Punneos have an interest in the lands. They got half of it. I did not tell my father-in-law all the transaction. I kept him posted pretty well. I told him Punneo was getting half of it."

The evidence of the attorney was substantially as given by White, claiming that no unfair advantage was taken of Harrigan.

At the conclusion of the evidence, the plaintiffs were permitted, over the objections of the defendants, to amend their petition by alleging facts largely in keeping with the evidence of White and his attorney as to what they did in the securing of the deed from Harrigan, and that Charley Punneo still retained an interest in the lands. At the request of defendants, the court made findings of facts and conclusions of law. The court found that the deed of August 25, 1916, from the Harri-

gans to White, was secured by fraud, and that the other deeds affecting the Harrigans' title to the lands involved were a cloud thereon.

The defendants assign as error: First, that the court erred in that the findings of facts are contrary to and unsupported by the evidence; second, in failing to make certain findings; third, in overruling motion of defendants for judgment on pleadings; fourth, in the admission of incompetent evidence; fifth, in permitting plaintiffs to amend their petition; sixth, in rendering judgment contrary to the evidence and failing to enter judgment for the defendants.

We will first discuss the sixth assignment of error, or that part thereof that states the judgment is contrary to the evidence. The defendants contend that misrepresentations by them, if any, were of law, and not of fact, and for that reason an action for fraud cannot be based thereon,—citing as authorities *Mutual L. Ins. Co. v. Phinney*, 178 U. S. 327, 44 L. ed. 1088, 20 Sup. Ct. Rep. 906; *Thompson v. Phoenix Ins. Co.* 75 Me. 55, 46 Am. Rep. 357; *Rheingans v. Smith*, 161 Cal. 362, 119 Pac. 494, Ann. Cas. 1913B, 1140.

In *Bigelow on Fraud*, vol. 1, pp. 487 and 488, it is stated: "Generally speaking, a misrepresentation of law affords no ground of redress or relief; the misrepresentation should be of fact. . . . The ground upon which this rule rests is often said to be that all men are presumed to know the law. '*Ignorantia legis neminem excusat.*' But this is not quite satisfactory. It may be doubted if the maxim was ever intended to excuse fraud; its more natural explanation is that it was intended not so much as a bar to the innocent as a warning to the guilty, and as a rule for upholding the performance of contracts and of written instruments. The law is a special branch of learning, like the higher mathematics; and to know its peculiar features one must make one's self a specialist in the subject.

. . . It is not, however, universally true that a misrepresentation of the law is not binding upon the party who made it. . . . Indeed, where one has had superior means of information, professes a knowledge of the law, and thereby obtains an unconscionable advantage of another who is ignorant, and has not been in a situation to become informed, the injured party is entitled to relief as well as if the misrepresentation had been concerning matter of fact."

In 12 R. C. L. pp. 295, 296, it is stated: "As a general rule, fraud cannot be predicated upon misrepresentations as to matters of law, nor upon opinions on questions of law based on facts known to both parties alike. . . . Reasons given for this rule are that everyone is presumed to know the law, both civil and criminal, and is bound to take notice of it, and hence has no right to rely on such representations or opinions, and will not be permitted to say that he was misled by them. . . . The rule that fraud cannot be predicated on misrepresentations as to matters of law may be rendered inapplicable by the existence of peculiar facts and circumstances. . . . The same is true where one who himself knows the law deceives another by misrepresenting the law to him, or, knowing him to be ignorant of it, takes advantage of him through such ignorance, or where the person to whom the representations are made relies upon the supposed superior knowledge and experience of the other party, and on his statement that it is unnecessary or inadvisable for him to consult a lawyer."

In 20 Cyc. 19, 20, it is stated: "It is presumed that the law is equally within the knowledge of all persons; and assertions of law, although false, such as misrepresentations as to the legal effect of a particular written instrument or obligations are, as a general rule, regarded as mere expressions of opinion, and cannot be made the basis of an action for deceit. Where, however, a confidential relation exists between

Fraud—misrepresentation of law.

the parties, of which one knowingly avails himself to mislead the other by a misrepresentation of the law, or where, as has been said, one knowingly takes advantage of the other's actual ignorance of the law to mislead him by misstatements thereof, an action may be maintained."

The general law that a misrepresentation of law affords no grounds of redress or relief has its exceptions, as is seen by the law laid down by the above textbook writers. One of the exceptions is that, where one of the parties has had a superior means of information, professes a knowledge of the law, and thereby obtains an unconscionable advantage of another who is ignorant, then a cause of action will lie as if the misrepresentations had been concerning a matter of fact. If the representations here were of law, as contended by the defendants, then the next question to consider is whether the law was misrepresented. In this case defendants made representations to the plaintiff as to the validity of the bill of sale and the invalidity of the deed to Harrigan. Was White or his attorney justified, from a legal standpoint, in the making of such representations? The bill of sale from one brother to another brother was not acknowledged, neither was it recorded or indexed in a manner as provided by law. There was the description of personal property therein. The description of land did not describe any land, and it had been filed away as though it were a chattel mortgage. That was what the face of the bill of sale showed. In addition to that, there was the act of Charley Punneo in remaining silent for nearly five years, until the land had possessed a speculative oil value. There was no consideration for the White-Punneo deed. All of this marks the instrument as one of a most doubtful nature. It becomes doubly doubtful when upon trial no effort was made by the defendants to uphold the good faith of the Punneo bill of sale between the brothers,

though it might be well to say it was claimed that one of the Punneos was out of the state at the time of trial, but the records fail to disclose that the cause was asked to be continued for that reason. Another suspicious circumstance is that White and his attorney went to Harrigan to argue law, as they contend, and not to his attorney. It is true there is no legal obligation upon one to go to the lawyer, but it is undoubtedly the better policy to do so, especially when the difference is claimed to be one of law. Harrigan, on the other hand, had a good record title, having purchased the land in good faith, for a valuable consideration.

A consideration of the above facts forces us to the conclusion that White had no title under the bill of sale, and this was known to him and his attorney; that they knew that Harrigan had a good title under his deeds, and that the representations as to title by White and his attorney deceived Harrigan as to his title, and secured to them an advantage; to wit, title to his lands. A deed was immediately prepared, executed, acknowledged, and delivered before Harrigan could place himself in a situation to be informed as to his rights.

The next question is whether or not Harrigan acted under ignorance in the execution of his deed to White. The record shows that in all his past life he had been to school some five or six months at a country school in what is now Murray county, and this was before he had reached his fifteenth year; that he had gone as far as McGuffey's Third Reader; that he was twenty-three years of age at the time the deed was executed, and was a farmer. We would therefore say that Harrigan, when it came to passing upon the legality of the deeds in question, was an ignorant man, and, owing to the fact that White was represented by an attorney, this necessarily meant that he (White) had superior means of information and professed a knowledge of the law. Did Harrigan act upon the representations

made to him by White and the attorney? There was undoubtedly some impelling influence operating upon his mind, which caused him to sell his property to White for about half its value. The record does not disclose any influence other than the representations made by defendants to him.

It appears from the evidence set forth above that, after much argument by the parties, on the day the deed was executed, the father of E. A. Harrigan, who was present, was convinced by the attorney that what he said in reference to title was true, and, in his ignorance, he bowed to the superior knowledge of the attorney, for he stated: " 'Yes,' I said, 'I believed you was a lawyer, and was telling the truth, and knew what you was talking about.' I did not know nothing about the land business."

E. A. Harrigan testified: "They left the impression that everybody else was going to crook me but them, and they was coming straight. . . . They wanted to pay me the same money back that I had been out on the land. They said McCown's deed was void, and they had the only title to the land, and they were going to beat them and me, too, provided I would not take the money back. . . . I relied upon what they said. I sure would not have given any deed to it to White had I not believed their statements to be true that they had better title, when I could sell 30 acres for \$50 an acre. . . . I sold the land to White because they made me believe I had no title, and they were going to beat me out of what I had been out on it."

A consideration of this evidence, and the fact that Harrigan made a sacrifice of practically one half the value of his land, when the record does not show that
 -what constitutes. there was any influence other than the representations by defendants operating upon his mind, leads us to the very convincing certainty that he believed the representations made and acted thereupon to his prejudice and to the benefit of the defendants.

We find that the amended petition sets forth a cause of action based on fraud, and the evidence was sufficient to enter judgment thereon in favor of plaintiffs.

Now, in regard to the first and second assignments of error, we have carefully examined the findings of the court, and find that the same are in keeping with the evidence on all material issues, and that a finding was had on all material issues.

The defendants contend in the third assignment of error that the motion for a judgment on the pleadings should have been sustained by the court for the reason that no reply was ever filed to the answer. We do not find under the pleadings in this case that a reply was required, but, be that as it may, the defendants made no objections to going to trial for failure to file a reply, so thereby waived a reply, if one was required. *Johnson v. J. J. Douglass Co.* 8 Okla. 594, 58 Pac. 743; *Burford v. Hughes*, 75 Okla. 150, 182 Pac. 689. The mere request for a judgment on the pleadings, without specifically calling the attention of the court to the fact that no reply had been filed, was not sufficient. The court's attention to the failure to file a reply must be given, and an objection to going to trial without one must be made.

We have examined defendants' fourth assignment of error, and find that there is no prejudicial error therein. This is in reference to admission of evidence the defendants claim not to be at issue, and to the exclusion of other evidence.

The defendants contend in their fifth assignment of error that the court erred in permitting the amended petition to be amended after the evidence closed. This amendment largely covers the facts brought out by White and his attorney in their evidence adduced at the trial. The defendants contend that a pleading cannot be amended to conform to the evidence if the evidence went in under objections. The evidence in this case, which went in

under objections, was competent under the first amended petition. We believe the trial court committed no error in permitting this amendment to the amended petition, but, in view of the fact that this opinion holds that the amended petition on which the plaintiffs went to trial stated a cause of action, and the evidence thereunder justified the verdict, a further discussion of this assignment of error is not necessary.

The evidence in this case shows that none of the parties who deraign their title or interest from bill of sale of Charley Punneo hold the same in good faith. They were familiar with what Charley Punneo and S. O. White did to secure title to the lands involved, and the evidence further shows that the bill of sale, or any claim Charley Punneo had to the land, was unknown to McCown or Harrigan. The contention that Nora Harrigan, wife of E. A. Harrigan, who joined with him in the deed, was not a proper party plaintiff, is without merit.

The plaintiffs tendered in the pleadings to defendants \$620, the sum so paid them by defendant S. O. White, which amount he borrowed from his father-in-law, J. B. Leach, and further made a tender of this sum in cash in open court at the time of trial. They further admit that J. B. Leach has paid to W. H. Mc-

Cown the sum of \$353.50 to apply as payment on notes executed by E. A. Harrigan to W. H. McCown, for which a mortgage on said lands was given. The plaintiffs in their brief express a willingness that the court affirm this judgment upon condition that this money be paid back by them.

The court will not render a conditional judgment, but will direct E. A. Harrigan, plaintiff, within ninety days from date mandate is spread of record, to pay to the court clerk of Carter county for the benefit of J. B. Leach, one of the defendants, the sum of \$353.50, with interest thereon at the rate of 6 per cent per annum from January 1, 1917, and in default of payment all rights and remedies the mortgagee had to enforce payment of same are subrogated to J. B. Leach.

Neither of the attorneys appearing for the defendants in this cause was their attorney at the time the deed of August 25, 1916, was executed, in which the finding here is that a fraud was perpetrated on plaintiffs.

The judgment is affirmed.

Owen, Ch. J., and Rainey, McNeill, and Pitchford, JJ., concur.

Johnson, J., dissents.

Petition for rehearing denied January 6, 1920.

ANNOTATION.

Misrepresentation as regards validity of conveyance or transfer of property as fraud.

I. General misrepresentation as to title, 1051.

II. Misrepresentation as to legal question affecting title, 1054.

III. Misrepresentation of fact affecting title, 1062.

I. General misrepresentation as to title.

Where the facts affecting a title are fully known to both the parties to a transfer thereof, a general expression of opinion by one of them as to the condition of the title cannot, as a general rule, be made the basis of a charge of fraud.

Alabama.—Saltonstall v. Gordon (1858) 33 Ala. 149.

Arkansas.—Fitzhugh v. Davis (1885) 46 Ark. 337.

California.—Robins v. Hope (1881) 57 Cal. 493; Choate v. Hyde (1900) 129 Cal. 580, 62 Pac. 118.

Colorado.—Cooper v. Hunter (1896) 8 Colo. App. 101, 44 Pac. 144.

Illinois.—Drake v. Latham (1869) 50 Ill. 270; Botsford v. Wilson (1874) 75 Ill. 132.

Kentucky.—English v. Thomasson (1884) 82 Ky. 280.

Maine.—*Hoyt v. Bradley* (1847) 27 Me. 242.

Oregon.—*Fellows v. Evans* (1898) 33 Or. 30, 53 Pac. 491.

Texas.—*Hawkins v. Wells* (1897) 17 Tex. Civ. App. 360, 43 S. W. 816.

Compare *Moreland v. Atchison* (1857) 19 Tex. 303; *Corbett v. McGregor* (1904) — Tex. Civ. App. —, 84 S. W. 278; *Buchanan v. Burnett* (1908) 52 Tex. Civ. App. 68, 114 S. W. 406, affirmed in (1909) 102 Tex. 492, 132 Am. St. Rep. 900, 119 S. W. 1141.

In *Fitzhugh v. Davis* (Ark.) *supra*, the evidence showed that the plaintiff purchased from the defendant certain property. At the time of the sale it was known to the contracting parties that a third person claimed an interest in the property, which interest was afterwards established by judicial decree. The defendant, at the time of making the sale, informed the plaintiff that he believed that there was no prospect of the claim ever being asserted. Relying on these representations, the plaintiff purchased the property, and, on the establishment of the title of the third person, brought an action to rescind the contract. The court held that the statements of the defendant were expressions of opinion, and not fraudulent, saying: "The statements made by appellee in regard to his title were, in the absence of artifice or concealment, mere expressions of opinion in regard to his title, and could not be classed as fraudulent misrepresentations. The validity of the claim of Mrs. Whittaker depended upon the construction of a complicated will, about which learned counsel differed, and the vigor with which appellee, under advice of able attorneys, litigated the case through a long and expensive lawsuit, showed the sincerity of his belief in the construction he then put on this will. An honest expression of opinion in such case, though erroneous, is not fraud."

So it has been held that where a purchaser represents that he has the title, and that the vendors have no title, and asks for a quitclaim deed from the vendors in order merely to confirm a prior deed of the vendors' guardian, which he says is valid, the

representation is one of law, and is not legally fraudulent, since a person is always presumed to know the state of his own title to real property in transactions with strangers. *Robins v. Hope* (Cal.) *supra*.

In *Cooper v. Hunter* (Colo.) *supra*, an action on a promissory note, it appeared that the note was given as consideration for a claim on public lands quitclaimed by the plaintiff to the defendant. Subsequent to the filing of his answer, the defendant moved to be permitted to serve an amended answer, which set forth a representation made by the plaintiff that he had a valid claim on the public lands, and that the defendant, relying on the representation, took the deed and executed the note. The court, in holding that if the amendment had been allowed, the plaintiff would still have been entitled to judgment, as a claim on public lands is a legal conclusion from facts, and not such as to afford ground for relief, said: "It is not stated that the plaintiff represented the existence of any facts, and therefrom drew the conclusion that he had a claim. Neither are any facts stated upon which the falsity of the representations might be predicated. When the plaintiff said that he had a valid claim, he stated nothing but a conclusion of his own; and in averring that he had not a valid or any claim, the defendants simply stated a conclusion of their own. Generally speaking, a misrepresentation, to afford ground for relief, must relate to facts."

A like decision was made in *Drake v. Latham* (1869) 50 Ill. 270, an action to foreclose a mortgage executed by the defendants to secure the payment of a promissory note, the defense interposed being that the note was given for the purchase price of a tax title to a tract of land occupied and owned by the defendants, which the plaintiff represented to be "a good tax title." It was held that the misrepresentation was one of law, and therefore not actionable. The court said: "If a person sells a tract of land, claiming to be the owner, and knowing that he is not so, he is guilty of a fraud, for which the vendee may rescind the contract;

but if he professes to sell, not the paramount title, but only a claim derived from a particular source, such as the sale of the land for taxes, and he has a claim thus derived, he is not guilty of a fraud for which the vendee can rescind, merely because he expresses an opinion as to the legal value or strength of his claim, which the facts do not justify, so long as he makes no false statement as to what those facts are. By telling his vendee that he is only selling him a tax title, he puts him on his guard. He informs him of the source of his title, and the vendee is thus at liberty to investigate for himself the validity of the tax sale. We cannot hold that a vendor professing to sell merely a tax title, though he calls it good, is to be understood as professing to sell the paramount title, when it is known to all persons that these titles have hardly ever passed the scrutiny of the courts, when investigated, as a question of paramount title. The answer in this case avers that the facts showing this title was worthless were known to Latham, as they appeared on the face of his title papers. But in that event, they were equally known to the appellant, and it is immaterial, as a legal question, what opinion Latham may have entertained or expressed as to their effect upon his claim or title, when the facts themselves were known to the appellant, and Latham was guilty of no misrepresentation in regard to them. While we would by no means relax the rules which courts of equity apply in order to secure fair dealing, we are of opinion that the answer in this case discloses nothing which the law pronounces a fraud, and to sustain this defense would be to invite litigation in every case where the purchaser of either real or personal property finds he has made a foolish bargain."

So, in *English v. Thomasson* (1884) 82 Ky. 280, an action to enforce a vendor's lien on property which the defendant had purchased from the plaintiff, it was alleged that at the time of the purchase the plaintiff fraudulently and falsely represented to the defendant that he had a perfect

title to the land, when in fact the title was defective, a considerable portion of the property being a part of a highway. The testimony showed that the misrepresentation was made innocently, the plaintiff believing the statement to be true. The court held that the defense was not good, stating that a representation as to the title, made by the vendor to the vendee at the time of the sale, which the former believes to be true, but which is, in fact, untrue, will not authorize the rescission of the contract, if it has been executed by the acceptance by the vendee of a recorded conveyance containing a covenant of general warranty as to the title.

Where both parties claimed title to land, and the complainants' agent employed an experienced lawyer to investigate the facts connected with their conflicting claims, and proposed a compromise which the defendant accepted, it was held that assertions by the defendant during the controversy, respecting the validity of his title, were the mere expression of an opinion, and could not be made the basis of a charge of fraud. *Saltonstall v. Gordon* (1858) 33 Ala. 149.

Where a grantor communicated all of the facts concerning the title to land to his grantee, it was held that the grantor was not liable for representations that the title was perfect, as his statements were but an expression of opinion based on the facts. *Fellows v. Evans* (1898) 33 Or. 30, 53 Pac. 491.

And in *Hawkins v. Wells* (1897) 17 Tex. Civ. App. 360, 43 S. W. 816, where the defendant, a vendor of land, expressed his opinion that the title to the land was good, when conveying it to the plaintiff, it was held that the statement was merely the expression of an opinion, and the purchaser was not entitled to have the sale rescinded because the title proved to be defective.

But in *Moreland v. Atchison* (1857) 19 Tex. 303, it appeared that the defendant sold to the plaintiff a tract of land and represented that the title thereto was good. After title had passed, the plaintiff discovered that although the land was claimed by pre-

emption, it was within a district reserved from the operation of the pre-emption laws. In an action brought to cancel the deed, it was held that the misrepresentation was not only one of law, but also of fact, and the plaintiff was entitled to recover. The court said: "The truth or falsehood of the representation did not depend upon a mere question of law; nor would a knowledge of the law alone have enabled the plaintiff to detect its falsehood. He might have known that the land included within the boundaries of the colony was reserved by law from location and pre-emption, and still have been ignorant of the fact that this land was within the bounds of the reserved territory. Whether the defendant had or could make a good title to the land was a question of fact as well as law, no less in this than in other cases where there had been a prior appropriation of the land. The misrepresentation, therefore, was of matter of fact, as well as law. The consequence is, that the defendant has obtained the property of the plaintiff without consideration, and by means which does not divest the latter of his title, and ought not, on principle, to deprive him of his remedy. We conclude that the plaintiff has stated a case which entitled him to his action to recover back his property or its value."

So, in *Corbett v. McGregor* (1904) — Tex. Civ. App. —, 84 S. W. 278, an action for the rescission of a conveyance of land which was alleged to have been procured by fraudulent misrepresentations as to the title of the land given in exchange therefor, it appeared that the vendor was aware of the defect in the title, but concealed it from the plaintiff, referring him to his attorney, who assured him that the title was good. The court held that the plaintiff was entitled to receive a good and marketable title, and as it appeared from the allegation of the petition that he was induced to accept a doubtful title, the deed should be rescinded.

Similarly, in *Buchanan v. Burnett* (1908) 52 Tex. Civ. App. 68, 114 S. W. 406, affirmed in (1909) 102 Tex. 492,

132 Am. St. Rep. 900, 119 S. W. 1141, an action to cancel a conveyance, it appeared that the vendor made representations to the plaintiff that his title was good, and, acting on these representations, the plaintiff purchased the property. The title was subsequently found to be defective, and it was held that an unqualified declaration by a vendor as to the ownership of land and of title thereto was an affirmation of fact rather than an expression of opinion, and therefore actionable. The court said: "An unqualified expression of ownership—of absolute title—is an affirmation of fact notwithstanding it may involve an opinion as to the legal sufficiency of the evidences of such title; and it is well settled that false representations of the vendor, affecting the validity and sufficiency of his title, upon which the vendee had a right to rely, and did rely, and which induced the vendee to make the purchase, constitute such legal fraud as authorized a court of equity to rescind the contract and decree a return of the purchase money paid. Whether the representation was made with or without knowledge of its falsity is immaterial. In either event the vendor is bound to make reparation for the injury. Neither does the fact that the vendee has accepted conveyance with covenants of warranty deprive him of his remedy of rescission."

II. Misrepresentation as to legal question affecting title.

If the facts affecting a title are fully known to both parties to a sale thereof, misrepresentations by one of the parties as to the law affecting the title in question cannot be made the basis of a charge of fraud.

Alabama. — *Martin v. Wharton* (1863) 38 Ala. 637; *Beall v. McGehee* (1876) 57 Ala. 438.

Arkansas. — *McDonald v. Smith* (1910) 95 Ark. 523, 130 S. W. 515.

Illinois. — *Fish v. Cleland* (1864) 33 Ill. 238; *Dowdall v. Cannedy* (1889) 32 Ill. App. 207.

Indiana. — *Platt v. Scott* (1843) 6 Blackf. 389, 39 Am. Dec. 436; *Smither v. Calvert* (1873) 44 Ind. 242; *Conwell v. Clifford* (1873) 45 Ind. 392; *Burt v.*

Bowles (1879) 69 Ind. 4; Pence v. Young (1899) 22 Ind. App. 427, 53 N. E. 1060.

Kentucky.—Pickrell & C. Co. v. Castleman Blakemore Co. (1917) 174 Ky. 1, 191 S. W. 680.

Maine.—Abbott v. Treat (1886) 78 Me. 121, 3 Atl. 44.

Minnesota.—Catlin v. Fletcher (1864) 9 Minn. 85, Gil. 75; Cobb v. Wright (1890) 43 Minn. 83, 44 N. W. 662.

New York.—Anonymous (1896) 19 Misc. 197, 43 N. Y. Supp. 63, affirmed on opinion of court below, in (1897) 23 App. Div. 70, 48 N. Y. Supp. 1103.

Wisconsin.—Prince v. Overholser (1890) 75 Wis. 646, 44 N. W. 775.

In McDonald v. Smith (Ark.) supra, it appeared that a wife had conveyed land to her husband, and that a person who desired to purchase the land from the husband told the wife that the husband could convey without her consent. By reason of such representation she joined in a conveyance of the land to the purchaser. It was held that the representation of the purchaser to the wife was only an expression of an opinion, and therefore was not a fraudulent representation. The court said: "The testimony tends to prove that for twenty years her conveyance to her husband had been recognized and approved by Mrs. Smith; and for years, with her knowledge and consent, he held himself out to the world as the owner of the land. When, therefore, King told Mrs. Smith that her husband was endeavoring to sell the land, and that he could do so, he made no statement which he knew to be untrue, or which was necessarily false. Under the circumstances of this case, it is doubtful if the statement was untrue, although it was only an expression of opinion of law, and not strictly a statement of fact. It was therefore not a fraudulent misrepresentation. 2 Pom. Eq. Jur. § 882."

A statement by a vendor, made while negotiations between himself and the purchaser were pending, to the effect that his wife, if she survived him, would be entitled to dower only in the lands of which he died seised and possessed, and not in lands sold and con-

veyed by him during coverture, has been held to be merely a representation as to a matter of law, and not to constitute fraud. Martin v. Wharton (Ala.) supra.

In Fish v. Cleland (Ill.) supra, wherein it appeared that the purchaser represented to the vendor that land, in which the vendor had a life estate and the purchaser, together with others, an estate in remainder, could not be sold without the consent of all the tenants in common, the court, in holding that there was no legal fraud, said: "The representation of the appellant that the property could not be sold without all the parties interested therein consented, if understood to mean that a voluntary sale could not be made without such consent, was true, and one which everyone must know was true; but if the representation is understood to mean that a sale could not be had by an order of court without the consent of all parties, then it was a representation in regard to the law of the land, of which the one party is presumed to know as much as the other. A representation of what the law will or will not permit to be done is one upon which the party to whom it is made has no right to rely, and if he does so, it is his own folly, and he cannot ask the law to relieve him from the consequences. The truth or falsehood of such a representation can be tested by ordinary vigilance and attention. It is an opinion in regard to the law, and is always understood as such."

So, in Platt v. Scott (1843) 6 Blackf. (Ind.) 389, 39 Am. Dec. 436, it was held that in the sale of a United States land warrant a misrepresentation as to the character of the lands on which, under the Federal statute, the warrant could be located, could not be made the basis of a charge of fraud. See, to the same effect, Prince v. Overholser (1890) 75 Wis. 646, 44 N. W. 775.

And in Conwell v. Clifford (1873) 45 Ind. 392, an action to foreclose a mortgage given to secure a promissory note, it appeared that the plaintiff fraudulently represented to the defendant that the heirs of a certain person had a good title to the land in

question. In holding that an opinion as to title of this nature would not affect the validity of the conveyance, the court said: "The allegation that the plaintiff fraudulently represented that the heirs of Conwell had a good title to the land does not show the representation of a fact, but simply a legal opinion. 'To constitute a misrepresentation a ground of fraud for avoiding the contract, or to entitle the injured party to his action, it must be in regard to a material fact, operating as an inducement to the purchase or the making of the contract, and upon which the purchaser or person making the contract had a clear right to rely. *Frenzel v. Miller* (1871) 37 Ind. 17. There is no averment that the appellant made any false representations of any fact, or that he concealed anything from the appellee; nothing showing any inquiry by the appellee relative to the title. An examination of the county record would have disclosed to him its history, and put him upon inquiry, so that he might have learned whether the auditor's sale was legal or not. He was not justified in blindly relying upon the opinion of the appellant."

So, in *Pence v. Young* (1899) 22 Ind. App. 427, 53 N. E. 1060, where it appeared that the plaintiff was induced to execute a conveyance of property to the defendant's testator, her father, by his representations that the land of her maternal grandparent descended to him instead of to her, it was held that the misrepresentations were as to matters of law, and, the facts affecting the title being fully known to both parties, an expression of opinion as to the law could not be made the basis of a charge of fraud.

Where an administrator made a statement that certain property could not be sold without a decree of the court, and thereby the plaintiff was induced to quitclaim her interest in the property, it was held that the statement was an opinion as to a matter of law, and would not invalidate the quitclaim deed. *Dowdall v. Canedy* (1889) 32 Ill. App. 207.

Similarly, in *Pickrell & C. Co. v. Castleman Blakemore Co.* (1917) 174

Ky. 1, 191 S. W. 680, the plaintiff alleged that a verbal agreement was entered into at the same time as the written contract which was made the subject of the action, and that the defendant made statements and assurances by which the plaintiff was induced to consent to the omission of that agreement from the writing. The court stated that as the parties were *sui juris*, and dealing at arm's length, the misrepresentations were not the basis of an action, as the false representations were as to matters of law, and without any misrepresentation or concealment of fact they did not amount to fraud.

The plaintiff in *Cobb v. Wright* (1890) 43 Minn. 83, 44 N. W. 662, was induced to make a conveyance to the defendants by representations that his title had been divested by legal proceedings. Holding that the plaintiff was not entitled to a reconveyance, the court said: "The case being such as we have indicated, we think that the plaintiffs were not entitled to recover. The plaintiff, in this negotiation, stood on an equal footing with the defendant. If, in fact, there was any tendency in common between them, he did not, upon that ground, repose confidence in the defendant, for he did not know that relation; nor did the defendant avail himself of such relation as a means to secure the end complained of. The parties dealt as strangers. The plaintiff was informed, notwithstanding the defendant's representations, that some persons interested in the land had raised questions as to the defendant's title, and that they were unwilling to accept that title without a conveyance from the plaintiffs. He knew that, if the plaintiffs had any remaining interest, this deed would be effectual to transfer it, and that the very purpose of it was to effect that result. From the very nature of the representations, he must be deemed to have known that the defendant's statements that he had the title, and that the plaintiff's interest had been divested, could be but the expression of an opinion concerning the effect of legal transactions. He had the means of knowledge equal to those of the de-

fendant. If, under those circumstances, he executed the deed conveying the interests of the plaintiffs, relying upon the mere representations of the defendant, he is not entitled to relief. He should be deemed chargeable with want of the ordinary discretion which the law requires men to exercise in their own behalf, if he executed a conveyance of real estate trusting to the assurance of the grantee that it would convey nothing. Under such circumstances, neither courts of equity nor of law will ordinarily afford relief."

In *Catlin v. Fletcher* (1864) 9 Minn. 85, Gil. 75, an action to set aside a mortgage, it appeared that the defendant, in order to induce the plaintiff to execute the instrument, represented to her that he would not enforce it against her, but would collect the money from the indorser of the note, and that when the money was collected from the indorser, the mortgage would be cleared off. It was held that the misrepresentations were of law, and were not the basis of an action. The court said: "With regard to the representations of defendant that Swift could not enforce the mortgage, it may be remarked that there are not sufficient facts before this court to show that it was false in fact, or that defendant knew that the statement was false. But, assuming that the statement was not true, it was not a misrepresentation of a material fact, but one in regard to the legal effect of the conveyance, and such misrepresentations will not avoid the instrument. . . . If that fact was in any wise material to plaintiff, and she chose to rely upon the opinion or statement of the defendant in regard to it without consulting any other person, not even her husband, she certainly fails to present a case entitling her to the interposition of a court of equity in her behalf."

So, in *Smither v. Calvert* (1873) 44 Ind. 242, it was held that where the language of a deed was known to the grantee, a charge of fraud could not be based on a representation as to the legal effect thereof, the court saying: "As to the part of the first paragraph

relating to the character of the deed, we think there can be no doubt. As we have seen, the deed was a warranty deed, although not a deed of general warranty. It is alleged, in substance, that the plaintiffs stated, when the deed was offered to them, that it was not such a deed as they were entitled to receive, and that they afterward received it upon the representation of one of the agents of the defendant that it was a warranty deed, and all the kind of deed required in the state of Iowa to convey lands. We think fraud cannot be predicated upon such a representation. It was such a deed, no doubt, as would convey lands in Iowa. It was not a general warranty deed, and the plaintiffs knew it was not. It showed upon its face that it was not a general warranty deed."

Likewise, in *Abbott v. Treat* (1886) 78 Me. 121, 3 Atl. 44, there was evidence from which it appeared that the plaintiff had conveyed by warranty deed to the defendant property which included part of a body of water in which a third person held fishing rights. The third person brought an action against the defendant for trespass, and the defendant falsely represented to the plaintiff that the latter was liable on his covenants in the deed to the defendant to pay whatever judgment the third party might recover. The plaintiff thereupon executed a bond to the defendant for the payment of the judgment. The suit at bar was in equity to cancel the bond in question. It was held that the representation as to legal liability did not amount to fraud of which a court of equity would take cognizance, but was to be regarded as an expression of opinion rather than as the assertion of a fact. The court said: "By this it should not be understood that we mean to say that there may be no case of misrepresentation in regard to the law where a court of equity would not intervene. It may be that if a party should intentionally deceive another by misrepresenting the law to him, or should thereby knowingly take advantage of his ignorance, knowing him to be ignorant of it, for the purpose of deceiving him, a court of equity would

grant relief on the ground of fraud. But we do not feel that this case falls within that principle. An examination of the evidence leaves no doubt in the mind that the defendant believed the plaintiff liable upon his covenants for the amount of damage and cost in the Mathews suit. Judgment had been rendered against him. Costs and expenses had been incurred by him in attempting to maintain his title to what undoubtedly he believed his deed included. And if his position is correct as to the location of the line,—if his deed includes the shore,—then the plaintiff was liable on one or more of the covenants at the time the bond was given."

In *Anonymous* (1896) 19 Misc. 197; 43 N. Y. Supp. 63, affirmed on opinion of court below in (1897) 23 App. Div. 70, 48 N. Y. Supp. 1103, it appeared that property owned by the plaintiff having been sold for taxes several times, the defendant wrote to the plaintiff and obtained a release of her title, his letter stating that the lots were not very valuable, and that she was divested of all rights in both parcels, and that, as an experiment, the defendant was going to bring a series of suits to set those sales aside. It was held that the representations were not of fact, but of legal inferences, and fell short of those representations of law which may be the foundation of a charge of fraud.

But in a number of instances representations as to a matter of law affecting a title have been held to amount to legal fraud in view of circumstances of confidence, superior knowledge, or fiduciary relations.

Georgia.—*Sims v. Ferrill* (1872) 45 Ga. 585.

Illinois.—*Stephens v. Collison* (1911) 249 Ill. 225, 94 N. E. 664; *Hicks v. Deemer* (1900) 87 Ill. App. 384, reversed on other grounds in (1900) 187 Ill. 164, 58 N. E. 252.

Iowa.—*Schneider v. Schneider* (1904) 125 Iowa, 1, 98 N. W. 159.

Kentucky.—*Bridgewater v. Byassee* (1906) 29 Ky. L. Rep. 377, 93 S. W. 35.

Maine.—*Jordan v. Stevens* (1863) 51 Me. 78, 81 Am. Dec. 556.

Massachusetts.—*Hogan v. Wixted*

(1885) 138 Mass. 270; *Busiere v. Reilly* (1905) 189 Mass. 518, 75 N. E. 958.

Oklahoma.—See the reported case (*WHITE v. HARRIGAN*, ante, 1041).

Texas.—*Ramey v. Allisom* (1885) 64 Tex. 697.

England.—*Reynell v. Sprye* (1852) 1 DeG. M. & G. 660, 42 Eng. Reprint, 710, 21 L. J. Ch. N. S. 633.

In the reported case (*WHITE v. HARRIGAN*, ante, 1041), a suit was brought to cancel a deed alleged to have been secured by fraud. The evidence showed that both parties claimed title from a common grantor,—the plaintiff by a warranty deed and the defendant through a bill of sale transferring personality and conveying the realty in question, which had been executed about a year prior to the deed under which the plaintiff claimed title, but the bill of sale had never been acknowledged or recorded. The defendants obtained the deed in question from the plaintiff by means of representations that the bill of sale constituted a valid transfer, and, having been executed prior to the plaintiff's instrument, deprived the latter of all interest in the realty. Relying on these representations the plaintiff executed the instrument which was sought to be canceled in the suit at bar. It was held that a fraud had been perpetrated on the plaintiff, and that he was entitled to a cancellation of the instrument; the court stating that although a misrepresentation of law afforded no grounds of redress or relief, if one of the parties possessed a superior means of information, professed a knowledge of the law, and thereby obtained an unconscionable advantage of another who was ignorant, then a cause of action would lie as if the misrepresentations had been concerning a matter of fact.

So, in *Jordan v. Stevens* (1863) 51 Me. 78, 81 Am. Dec. 556, it appeared that the plaintiff was given a life lease on certain property by her father shortly before his death, which was to take effect on his death. The defendants, other children of the deceased, represented to the plaintiff that the lease was void, because it was not to take effect until a future day.

Supposing from their representations that her title to the homestead by the lease had failed, she was induced by them to relinquish all her interest in the whole estate of her father, in consideration of a new life lease from them of the same property embraced in her first lease. It was held that the plaintiff was entitled to relief, the court saying: "No government could be administered at all under which ignorance of the criminal law should be held a sufficient excuse for violating it." And the same principle is applicable to the civil law. This is not on the ground that everyone is presumed to know the law. . . . The ground on which the doctrine rests is this,—that it is impossible to uphold the government, and so to maintain its administration as to protect public and private rights, except on the principle that the rights and liabilities of everyone shall be the same as if he knew the law. . . . Instead of saying that there are 'exceptions' to the rule, it would probably be more correct to say that, while relief will never be granted merely on account of the mistake of the law, there are cases where there are other elements, not in themselves sufficient to authorize the court to interpose, but which, combined with such a mistake, will entitle the party to relief. . . . If a party who himself knows the law should deceive another, by misrepresenting the law to him; or, knowing him to be ignorant of it, should therein take advantage of him, relief would be granted on the ground of fraud. So that such a case is within neither the rule nor the exception. . . . The case at bar is one of this kind. The parties were not on equal terms. The plaintiff was ignorant, in business affairs as well as in other respects. Having confidence in the defendants, she relied upon what they told her. It does not appear that she doubted the validity of her father's lease to her until such doubts were communicated to her from them. The proposition for her to release her interest in all the other property did not originate with her, but with them; and she was induced to accept it by the fear,

which they had impressed upon her, that she otherwise would have to give up the homestead. She acted under their influence. They believed that there was a defect in the first lease, and they meant to take advantage of it. As was said by the master of the rolls, afterwards Lord Kenyon, in *Evans v. Llewellyn* (1787) 1 Cox, Ch. Cas. 333, 29 Eng. Reprint, 1191: "Though there was no fraud, there was something like fraud; for an undue advantage was taken of her situation. The party was not competent to protect herself; and therefore this court is bound to afford her such protection."

Hogan v. Wixted (1885) 138 Mass. 270, presented a similar question. The evidence showed that the plaintiff's wife died, being the owner in fee of the land a reconveyance of which was sought in the suit at bar. Under the law of the state, the plaintiff was entitled to the whole estate; but the defendant represented to him that he was entitled only to a life estate, and thereby induced the plaintiff to part with his estate at much less than its actual value. In holding the plaintiff to be entitled to relief, the court said: "It does not appear that the plaintiff made any further inquiry as to his legal interest in this estate; and, as it is not shown that James Wixted in any way, either by words or conduct, fraudulently or otherwise, induced him to forbear inquiry, it is contended—upon the ground that, under such circumstances, false representations as to the condition, situation, and value of real estate are not actionable—that no action can here be maintained. . . . But it is thus held for the reason that such representations, from their nature and character, are but matters of opinion and estimate, as to which men may well differ, and therefore that to them the rule of caveat emptor applies. In the case at bar, there was a distinct statement known to be untrue. Even if the plaintiff might have discovered its falsity by taking legal counsel, as he has been deceived thereby and has acted thereon to his own injury, he is entitled to a remedy."

Similarly, in *Busiere v. Reilly* (1905) 189 Mass. 518, 75 N. E. 958, wherein it was shown that the plaintiff's intestate was induced to execute a deed of property to the defendant, her brother, by reason of his representations that the instrument would not deprive her of the right to dispose of the property during her lifetime, it was held that the deed should be canceled and the property reconveyed. The court said: "The defendant's representations related to a question of fact; namely, her title to the property; and were exactly the same character as in *Motherway v. Wall* (1897) 168 Mass. 333, 47 N. E. 135. Moreover, he was her brother, a visitor at her house from his home in a distant state, and so far as the existence of a relationship of trust and confidence between him and her had a bearing, it must now, after the verdict of the jury, be presumed that this was sufficiently proved. A mistake as to title is a mistake of fact, even though arising from an erroneous view of the legal effect of a deed. *Livingstone v. Murphy* (1905) 187 Mass. 315, 105 Am. St. Rep. 400, 72 N. E. 1012. And it has been held that although a misrepresentation as to matter of law may not of itself constitute an actionable fraud, yet any misrepresentation of the legal effect of a deed or other instrument which has deceived one who had justifiably reposed special trust and confidence in the maker of such representation may constitute such fraud. *Townsend v. Cowles* (1858) 31 Ala. 428; *Decker v. Hardin* (1819) 5 N. J. L. 579; *Jordan v. Stevens* (1862) 51 Me. 81, 81 Am. Dec. 556; *Abbott v. Treat* (1886) 78 Me. 126, 3 Atl. 44. So, if a grantor is ignorant of the law, and the other party, knowing this fact and also knowing the law, takes advantage of his ignorance to misstate the law, and by inequitable, unfair, and deceptive conduct confirms his mistake and conceals the truth, the grantor has been allowed relief in equity."

Likewise, in *Bridgewater v. Byassee* (1906) 29 Ky. L. Rep. 377, 93 S. W. 35, it appeared that the defendant was in possession of certain land, and the de-

fendant's vendor had purchased the land from one Hall, whose wife had not joined in the deed. After the death of Hall, his wife conveyed her interest to the plaintiff, who was an attorney. The plaintiff demanded possession of the property, representing to the defendant that the latter had no interest therein. By reason of these misrepresentations the defendant was induced to execute a contract for the sale of the land, which the plaintiff sought to enforce in the suit at bar. It was said that the relation between the parties was such that the plaintiff took an undue advantage of the defendant in securing the execution of the deed, and the misrepresentations were such as to warrant a cancellation of the deed.

A like decision was made in *Schneider v. Schneider* (1904) 125 Iowa, 1, 98 N. W. 159, wherein it appeared that the plaintiff was a resident of a foreign country, and the defendant was the representative of the estate of the plaintiff's brother. The intestate was survived by a wife, who was confined in an insane asylum. The defendant, in a series of letters, represented to the plaintiff that the property of her brother was subject to a life estate in the wife, and by such misrepresentations induced the plaintiff to sell her interest in the property to him for an inadequate sum. In holding the representations to be of fact and to support a charge of fraud, the court said: "It is next said, as a reason why plaintiff should not be granted relief, that defendant's representations were matters of opinion, or representations as to the law, and therefore will not sustain a charge of fraud. The rule upon which appellee here relies is not without marked exceptions. A statement respecting the condition of title to property, while in one sense a legal conclusion, is yet in one sense so far an assertion of fact that, if untrue, it affords, under some circumstances, at least, sufficient grounds for equitable relief to the party who thereby has been deceived. . . . A party having superior knowledge of the property sold, and giving a false opinion in regard to a matter

of fact, with intent to affect the price to be paid, is guilty of fraud. . . . Whether a false statement of opinion amounts to a fraud depends largely, if not entirely, upon whether the parties do or do not deal on equal terms. If the person to whom the statement is made has reason to rely, and does rely, upon the other, as a friendly adviser, and not as one trying to drive a good bargain at his expense, he will be granted relief if such confidence be abused. . . . Where, in a contract of sale, the parties are not equally familiar with the value of the property, and one of them expressly relies upon the knowledge and representations of the other, false statements of value, which are ordinarily held to be mere matters of opinion, are fraudulent."

In *Stephens v. Collison* (1911) 249 Ill. 225, 94 N. E. 664, where the representatives of an estate represented to the plaintiff that certain deeds could not be set aside, it was held that although the misrepresentations were as to matters of law, the plaintiff could obtain relief. The court said: "The rule as to misrepresentations of law is not the same where a fiduciary relation exists as it is where there is no such relation between the parties. Courts of equity look with suspicion upon any transaction by which a person occupying a relation of trust and confidence towards another obtains any benefit from the confiding party, and, under some circumstances, in such cases, will set aside a transaction on the ground that a confidential relation existed, whether the misrepresentations were as to facts or the law."

Where an attorney consulted by the vendor, who was also agent for the purchaser, represented to the vendor that he took only a life interest under a will, whereas he took a fee simple, and the conveyance in fee was made in reliance on such representation, it was held that this constituted fraud for which an action for damages could be maintained. *Hicks v. Deemer* (1900) 87 Ill. App. 384, reversed on other grounds in (1900) 187 Ill. 164, 58 N. E. 252.

So, in *Sims v. Ferrill* (1872) 45 Ga. 585, the court said: "Trust and confidence reposed in a brother-in-law by his widowed sister-in-law requires the utmost good faith and fair dealing in any contract of sale between them. A misrepresentation of the law by the brother-in-law to his sister-in-law, whereby she is led to believe her title to property held by her is invalid, and on this account she sells it to him, which sale is much to his advantage, vitiates the sale at her election, even though such misrepresentation was made in good faith."

And in *Reynell v. Sprye* (1852) 1 DeG. M. & G. 660, 42 Eng. Reprint, 710, it appeared that one R. was ignorant of his contingent remainder interest in fee as an heir of a distant relative. One S., in the treaty which ultimately led to a conveyance to him of a half interest in the land, falsely represented that expensive litigation was necessary to establish R.'s right; that it was usual among men of character, in case of litigation the result of which was uncertain, for the plaintiff to share the property recovered with the solicitor, who agreed to bear all expenses; and that R.'s interest was contingent on his surviving the life tenant of the property, whereas it was merely contingent on the life tenant not leaving, on her death, a child,—a remote possibility, as the life tenant, a woman, had been married for over twenty years and had had no child. It was held that these were such misrepresentations as entitled R. to have the conveyance set aside. In the course of the opinion Lord Justice Cranworth said: "It would not be right that I should leave unnoticed an argument much pressed at the bar, and which carries a semblance of justice, but to which I have not felt it possible to yield my assent. It was said that during the whole of the negotiations Captain Sprye not only left Sir Thomas Reynell at perfect liberty to consult his friends and professional advisers, but even on several occasions recommended him to do so. To a great extent this certainly was the case; and if the relief sought in this suit had rested on mere mistake, if Cap-

tain Sprye had not by misrepresentations of fact, which I cannot treat as unintentional, led Sir Thomas Reynell to believe that his rights were different from what in truth they were, it may be that the argument to which I am now adverting would have prevailed. In such a case, perhaps, this court might have considered that it was the folly of Sir Thomas Reynell to have acted without advice, and might have refused to assist any person who was so singularly little alive to his own rights. 'Qui vult decipi,' it is said, 'decipiatur.' But no such question can arise in a case like the present, where one contracting party has intentionally misled the other, by describing his rights as being different from what he knew them really to be. In such a case it is no answer to the charge of imputed fraud to say that the party alleged to be guilty of it recommended the other to take advice, or even put into his hands the means of discovering the truth. However negligent the party may have been to whom the incorrect statement has been made, yet that is a matter affording no ground of defense to the other. No man can complain that another has too implicitly relied on the truth of what he has himself stated."

III. Misrepresentation of fact affecting title.

While misstatements of law alone will not constitute fraud, when such misstatements are accompanied by concealment or misrepresentation of facts, they may be made the basis of a charge of fraud. *Herman v. Hall* (1897) 140 Mo. 270, 41 S. W. 733; *Holt v. Gordon* (1915) — Tex. Civ. App. —, 176 S. W. 902; *Schuttler v. Brandfass* (1895) 41 W. Va. 201, 23 S. E. 808. See also *Lamb v. Lamb* (1891) 130 Ind. 273, 30 Am. St. Rep. 227, 30 N. E. 26. Compare *Rheingans v. Smith* (1911) 161 Cal. 362, 119 Pac. 494, Ann. Cas. 1913B, 1140.

Where a vendor of lands exhibited a deed from a court for a part of the land conveyed, and stated to the vendee that the deed exhibited was the only conveyance of the land, and the vendee was thereby induced to withdraw his demand for an abstract, and

to rely on the representation that there was no other entry of record concerning the title, it was held that the defendant was guilty of fraud in thus inducing the plaintiff to buy, it appearing that there were encumbrances on the property. *Herman v. Hall* (1897) 140 Mo. 270, 41 S. W. 733.

So, in *Epp v. Hinton* (1914) 91 Kan. 513, L.R.A.1915A, 675, 138 Pac. 576. order modified and rehearing denied in (1914) 91 Kan. 919, 139 Pac. 379. an action to recover damages for misrepresentations made as an inducement to the purchase of real property. it appeared that the transaction out of which the controversy grew was an exchange of lands. The plaintiff received valid water rights with reference to a part of the land conveyed to him, and knew that he was not to receive a similar formal evidence of a right to use the water on the remainder, but was led to believe that water was available for irrigating it, and that his ownership of the land entitled him to use the water. It was argued that, under these conditions, the question whether the owner of the land was entitled to water for irrigation was not one of fact, but of opinion or law, and that a written statement with respect thereto could not amount to such a false representation as to constitute fraud. In holding the representation to be one of fact and actionable, the court said: "The question whether land is irrigable, in the sense that the owner has a legal right to water to be used upon it, necessarily depends upon the local law on the subject. It is said that a false representation as to a matter of law will not support an action for deceit, because it is essentially an expression of opinion. . . . But the question. What is the law of another state? is regarded as one of fact . . . and a misstatement concerning it may be actionable (20 Cyc. 54). We think the representations here relied upon could form the basis of the action apart from this consideration. The matter did not turn upon some general proposition—a naked legal question. There was evidence that the plaintiff was told that conditions existed that made

it safe for him to depend upon using the water unchallenged, from the circumstance that it had previously been used upon this land. As a practical matter this was a question of fact. The modern tendency—a wholesome one—is to restrict rather than extend the immunity of one who gains an advantage over another by purposely misleading him."

Similarly it was shown in *Holt v. Gordon* (1915) — Tex. Civ. App. —, 176 S. W. 902, that the grantee's attorney represented to the grantor that the property covered by a previous deed of trust, and offered as security, was a homestead, and therefore the deed of trust was invalid. Holding that there was fraud, the court said: "While the alleged representations that the property was Gordon's homestead, and therefore the deed of trust was invalid and unenforceable, were but the expressions of opinions concerning the legal effect of the deed of trust, yet we are of the opinion that they furnished a sufficient predicate for Gordon's plea that the deed of trust was vitiated on account of fraud practised by Holt."

In *Schuttler v. Brandfass* (1895) 41 W. Va. 201, 23 S. E. 808, it appeared that the defendant, the executor of a will, represented to the plaintiffs, children of the testator, that the will was worthless, and stated that unless they signed an agreement providing for a redivision he would proceed to sell the property covered thereby, although the will contained no power of sale of the realty. The plaintiffs were induced by these representations to sign the agreement and execute deeds, which they sought later to rescind in the suit at bar. It was held that the agreement and deeds should be rescinded, the court stating that while misstatements of law will not alone constitute fraud, when such misstatements are accompanied by concealment of facts, and advantage is taken of one's ignorance of the law, or there is a relation of trust and confidence between the parties, it will constitute such fraud as will be relieved by equity.

In *Lamb v. Lamb* (1892) 130 Ind.

273, 30 Am. St. Rep. 227, 30 N. E. 36, it appeared that the parties entered into a contract of marriage, and the plaintiff was induced to convey all of her property to her prospective husband by his representations that the instrument was executed to satisfy his children as to the propriety of the marriage. In holding that there had been such fraud as to invalidate the instrument, the court said: "If the only fraud on the part of the appellee was in misrepresenting the legal effect of the written contract, there could be no recovery in this case unless the situation and relationship of the parties are such as to take the case out of the ordinary rule. It is established law that where parties deal at arm's length in respect to ordinary business matters, the false representation of the legal effect of a written instrument will not constitute fraud. But the rule that the false representation of the legal effect of a written instrument will not constitute actionable fraud does not, by any means, apply to all cases; on the contrary, there are very many cases over which it does not extend. . . . But there was here more than the misrepresentation of the legal effect of an instrument; there was deception, and undue advantage was taken of an ignorant woman by one who had obtained her confidence. There was deception in pretending to take the woman to an attorney who could act as her adviser and protect her interests as his client, but in fact taking her to the attorney of the defendant, who was under a duty to him, and could not be the confidential adviser of one whose interests were adverse to his. There was undue advantage taken in putting the woman off with property so grossly disproportionate in value to the estate of her intended husband, and in violating the duty the defendant was under to make no untruthful representations."

But in *Rheingans v. Smith* (1911). 161 Cal. 362, 119 Pac. 494, Ann. Cas. 1913B, 1140, the plaintiff sued to cancel a contract executed by him to the defendant. By the terms of the contract the plaintiff agreed to sell a tract

of land to the defendant, and it was alleged that the instrument had been executed by the fraud of the defendant. The evidence showed that the plaintiff had given an option on the land to a corporation, to be exercised within ninety days. Before the end of that period the defendant represented to the vendor that the option

had expired, and offered to buy the premises, agreeing that if the corporation holding the option should exercise the right, the vendee would regard the agreement between himself and the plaintiff as ineffective. It was held that the plaintiff had failed to show legal fraud in the false representations charged.
E. C. B.

CHARLES L. DRAKE, Appt.,
v.
ALBERTHA DRAKE, Respt.

Minnesota Supreme Court — April 30, 1920.

(— Minn. —, 177 N. W. 624.)

Husband and wife — action to enjoin tort.

1. The husband cannot maintain against his wife an action in equity to restrain and enjoin the commission of acts towards him which amount to nothing more than a tort or series of torts.

[See note on this question beginning on page 1066.]

— injunction against nagging.

2. The rule applies to acts and conduct on the part of the wife commonly known as nagging.

— effect of statute.

3. The Married Woman's Act (Gen.

Stat. 1913, § 7142) was not intended to vest in either husband or wife a right of action of that kind.

[See 13 R. C. L. 1395; note in 6 L.R.A. 1038.]

Headnotes by BROWN, Ch. J.

APPEAL by plaintiff from an order of the District Court for Hennepin County (Molyneaux, J.) sustaining a general demurrer to the complaint in an action brought to enjoin defendant from further acts and conduct injurious to the health and comfort of plaintiff. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. Eugene S. Bibb for appellant:

A husband can maintain an injunction suit against his wife.

Gillespie v. Gillespie, 64 Minn. 381, 67 N. W. 206; Chestnut v. Chestnut, 77 Ill. 346; Berdell v. Parkhurst, 19 Hun, 358; Carney v. Gleissner, 62 Wis. 494, 22 N. W. 735; Whitney v. Whitney, 49 Barb. 319; Mason v. Mason, 66 Hun, 386, 21 N. Y. Supp. 306; Granger v. Granger, 2 N. Y. S. R. 211; Lindsay v. Archibald, 65 Mo. App. 117; Porter v. Bank of Rutland, 19 Vt. 410; Joyce, Inj. § 973; Stratton v. Stratton, 58 N. H. 473, 42 Am. Rep. 604; Kempson v. Kempson, 63 N. J. Eq. 783, 58 L.R.A. 484, 92 Am. St. Rep. 682, 52 Atl. 360, 625; Duval v. Duval, 56 N. J. Eq. 375, 39 Atl. 687, 40 Atl. 440.

The complaint states facts sufficient to warrant the court generally in issuing the injunction.

Long v. Beard, 4 N. C. (Term Rep. 256); 22 Cyc. 772; Re Debs, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900; Buck v. Massie, 109 La. 776, 33 So. 767; Allison Bros. Co. v. Allison, 4 Silv. Sup. Ct. 222, 7 N. Y. Supp. 268; McGregor v. Case, 80 Minn. 214, 83 N. W. 140; Schurmeier v. St. Paul & P. R. Co. 8 Minn. 113, Gil. 88, 83 Am. Dec. 770.

Messrs. Brady, Robertson, & Bonner. for respondent:

A husband cannot maintain an action against his wife for purely personal wrongs committed or threatened

to be committed by her against him during coverture.

Strom v. Strom, 98 Minn. 427, 6 L.R.A.(N.S.) 191, 116 Am. St. Rep. 387, 107 N. W. 1047; 13 R. C. L. p. 1452, § 500; *Frankel v. Frankel*, 73 Am. St. Rep. 280, note; 22 Cyc. 901.

Independent of the existence of the marital relation, the complaint furnishes no basis for equitable relief.

5 Pom. Eq. Jur. § 2050; *Goldberg, B. & Co. v. Stablemen's Union*, 149 Cal. 429, 8 L.R.A.(N.S.) 460, 117 Am. St. Rep. 145, 86 Pac. 806, 9 Ann. Cas. 1219; 22 Cyc. 899.

Brown, Ch. J., delivered the opinion of the court:

The parties to this action are husband and wife, though they have not lived together as such since November, 1918, plaintiff having separated from defendant because, as he claims, of her abusive conduct toward him. Her conduct in that respect, according to the allegations of the complaint, has been so oppressive, persistent, and long-continued as to become injurious to plaintiff's health and comfort, and he seeks by this action to have her restrained by injunction from further acts and conduct of the kind.

The complaint alleges that since the year 1916 defendant has carried on a systematic campaign against plaintiff of cruel and inhuman treatment, by annoying and otherwise making life miserable for him; that she goes to his office and there, in the presence of others, charges him with being an immoral man, and heaps upon him all sorts of abuse by false and untrue accusations; that she has attempted to drive him into bankruptcy, and has practically ruined his health; that by false and untrue charges she has caused societies to which he belonged to cancel his membership therein; that when she meets him on the public streets she creates a scene by calling to him in a loud voice to attract the attention of passers-by, causing plaintiff great annoyance and embarrassment; that she creates like scenes in the church to which plaintiff belongs; that on August 29, 1919, she employed private detectives to waylay and beat

him up, which would have resulted seriously had not third persons interfered for his protection; and finally that, unless restrained, defendant will continue like acts of misconduct to the annoyance, chagrin, and irreparable injury of plaintiff.

A general demurrer was interposed to the complaint, which was sustained, and plaintiff appealed. The single question presented is whether, under our statutes, the husband may maintain a suit in equity against the wife to restrain conduct of the character stated and charged in the complaint. We answer it in the negative.

The allegations of the complaint, somewhat indefinite in several respects, taken as a whole, charge acts of misconduct on the part of defendant amounting to what is commonly known and understood as nagging, constituting in law nothing more than a series of personal torts, involving neither a breach of contract nor specific property right. The action then sounds in tort, and that it cannot be main- ^{Husband and wife—action to enjoin tort.} tained seems settled by the decision in

Strom v. Strom, 98 Minn. 427, 6 L.R.A.(N.S.) 191, 116 Am. St. Rep. 387, 107 N. W. 1047. That was a similar action, one for an alleged assault and battery committed by the husband on the wife, and was brought by the wife, and not by the husband, as in the case at bar. The court, in disposing of the case, recognized and referred to the common-law disability of either spouse to maintain such an action against the other, and held that in the enactment of the so-called Married Woman's Act (Gen. Stat. 1913, § 7142), by which many of the common-law disabilities of the wife were removed, and she was placed upon an equality with the husband in respect to the management and control of her separate property, the legislature did not intend to abrogate the rule of the common law on the subject, by extending to the wife a right of action for a tort committed against her by the husband dur-

ing coverture. In other words, that the rights and privileges granted by the statute had reference solely to the management, control, and protection of her property rights. The rule applies equally to the husband; the statute vested in him no other

—effect of
statute.

or greater right than that which was thereby conferred upon the wife. No property is involved in this action, and in the Strom Case a claim for damages for an assault and battery was held not a property right within the intent and purpose of the statute.

The authorities in other jurisdictions are not in harmony, though the statutory provisions upon the subject appear substantially the same in all. A majority in number of adjudicated cases apply the rule followed in this state. *Thompson v. Thompson*, 218 U. S. 611, 54 L. ed. 1180, 30 L.R.A. (N.S.) 1153, 31 Sup. Ct. Rep. 111, 21 Ann. Cas. 921; there was a dissenting opinion in that case by Mr. Justice Harlan, concurred in by two of his associates. *Bandfield v. Bandfield*, 117 Mich. 80, 40 L.R.A. 757, 72 Am. St. Rep. 550, 75 N. W. 287; *Schultz v. Christopher*, 65 Wash. 496, 38 L.R.A. (N.S.) 780, 118 Pac. 629; 13 R. C. L. 1395. The case of *Peters v. Peters*, 156 Cal. 32, 23 L.R.A. (N.S.) 699, 103 Pac. 219, was similar to that at bar, being one by the husband against the wife for assault and battery, and the California supreme court, construing a statute substantially like that of this state, held that it could not be maintained. The contrary was held in *Brown v. Brown*, 88 Conn. 42, 52 L.R.A. (N.S.) 185, 89 Atl. 889, Ann. Cas. 1915D, 70, and *Fiedler v. Fiedler*, 42

Okla. 124, 52 L.R.A. (N.S.) 189, 140 Pac. 1022, though the statutes of those states for all practical purposes are the same as in the states where the right of action is denied.

We prefer the rule of the Strom Case, and think it should be adhered to until such time as the legislature shall deem it wise and prudent to open up a field for marring or disturbing the tranquillity of family relations, heretofore withheld as to actions of this kind, by dragging into court for judicial investigation at the suit of a peevish, fault-finding husband, or at the suit of the nagging, ill-tempered wife, matters of no serious moment, which, if permitted to slumber in the home closet, would silently be forgiven or forgotten. If that source of litigation is to be opened up at all, it should come about by legislation. Neither husband nor wife is without an appropriate remedy in such matters, where of a character to be redressed by the courts. The divorce courts are open to them when the facts will justify relief of that character, and when the misconduct complained of is of a nature to constitute a crime, the criminal laws will furnish adequate protection. But the welfare of the home, the abiding place of domestic love and affection, the maintenance of which in all its sacredness, undisturbed by a public exposure of trivial family disagreements, is so essential to society, demands and requires that no new grounds for its disturbance or disruption by judicial proceedings be ingrafted on the law by rule of court, not sanctioned or made necessary by express legislation.

—injunction
against
nagging.

Order affirmed.

ANNOTATION.

Right of one spouse to enjoin torts of other.

In the reported case (*DRAKE v. DRAKE*, ante, 1064), an action by a husband to restrain his wife from committing acts of misconduct amounting to what is commonly known as

"nagging," it is held that such acts are nothing more than a series of personal torts, and that equity will not restrain them. The court follows a previous decision to the effect that the

legislaturc, by the enactment of the so-called Married Woman's Act, did not intend to abrogate the rule of the common law by extending to the wife a right of action for torts committed against her by the husband during coverture, the rule applying with equal force to the husband.

No other cases have been found directly in point, although *Adams v. Adams* (1868) 100 Mass. 365, 1 Am. Rep. 111, is somewhat similar in principle. In that case the court recognized the writ of *supplicavit*, where its purpose was to protect the complaining party from personal violence or abuse, but held that such writ could

not be used between husband and wife where the acts complained of afforded sufficient grounds for divorce.

In *Prather v. Prather* (1809) 4 S. C. Eq. (4 Desauss.) 33, a writ of *supplicavit* was granted, requiring the defendant to cohabit with his wife and treat her as a man should treat his wife.

See also *Codd v. Codd* (1816) 2 Johns. Ch. (N. Y.) 141, wherein the question whether a writ of *supplicavit* would issue to protect a married woman from acts of personal violence by her husband was raised, but not decided.

R. G. R.

TREMONT TRUST COMPANY

v.

LOUIS BURACK.

Massachusetts Supreme Judicial Court — April 1, 1920.

(— Mass. —, 126 N. E. 782.)

Bank — validity of stipulation — public policy.

1. A stipulation that a bank shall not be liable for paying a stopped check if it occurs through inadvertence is not invalid as against public policy.

[See note on this question beginning on page 1069.]

Contract — failure to read — effect.

2. Failure of a depositor signing a request to stop payment of a check to read the provisions of the request does not, in the absence of fraud, relieve him from their operation.

Check — right to stop payment.

3. The drawer of a check retains the right to countermand its payment at any time before it is paid or is certified and delivered to a bona fide purchaser for value.

[See 5 R. C. L. 526-528.]

Bank — payment of stopped check — liability.

4. In the absence of express contract limiting its implied obligation to

the drawer, the drawee pays at its peril a check, payment of which has been stopped.

— obligation to payee of check.

5. The payee of a check is not an assignee of the fund, and the bank incurs no obligation to him before acceptance of the check.

[See 5 R. C. L. 488-492.]

— payment due to inadvertence.

6. A contract relieving a bank from liability for paying stopped checks through inadvertence includes a payment because of failure to recognize the check on account of press of other business.

EXCEPTIONS by plaintiff to rulings of the Superior Court for Suffolk County (Morton, J.), made during the trial of an action brought to recover the amount alleged to have been overdrawn by defendant, which resulted in a verdict in his favor. *Sustained.*

It was shown by the evidence that defendant had been a depositor in the plaintiff bank, and was also a stockholder in it. Defendant denied overdrawing his account, and stated in his answer that the bank had charged him the sum of \$400 against his deposit account which he claimed it had no right to do.

Further facts appear in the opinion of the court.

Messrs. Arthur Berenson and Herbert U. Smith, for plaintiff:

The promise on the part of the plaintiff to use the best methods known to it to prevent oversight and accident in stopping payment on the check was gratuitous and without consideration, and therefore the plaintiff is not liable unless it was grossly negligent.

Smith v. First Nat. Bank, 99 Mass. 605, 97 Am. Dec. 59, 1 Am. Neg. Cas. 523; Massaletti v. Fitzroy, 228 Mass. 487, L.R.A.1918C, 264, 118 N. E. 168, Ann. Cas. 1918B, 1088; Bergeron v. Forest, 233 Mass. 392, 124 N. E. 74.

The defendant could not stop payment as against a bona fide holder for value.

Gage Hotel Co. v. Union Nat. Bank, 171 Ill. 531, 39 L.R.A. 479, 63 Am. St. Rep. 270, 49 N. E. 420; Union Nat. Bank v. Oceana County Bank, 80 Ill. 212, 22 Am. Rep. 185; Loan & Sav. Bank v. Farmers & M. Bank, 74 S. C. 210, 114 Am. St. Rep. 991, 54 S. E. 364; Pease v. Landauer, 63 Wis. 20, 53 Am. Rep. 247, 22 N. W. 847.

Defendant suffered no loss by the failure of the plaintiff to stop payment, since he was absolutely liable to Burke, a bona fide holder for value.

Jacks v. Darrin, 3 E. D. Smith, 557; Parker-Fain Grocer Co. v. Orr, 1 Ga. App. 628, 57 S. E. 1074; Ames v. Meriam, 98 Mass. 294; First Nat. Bank v. Harris, 108 Mass. 514; Robertson v. Coleman, 141 Mass. 231, 55 Am. Rep. 471, 4 N. E. 619; Pease & Dwyer v. State Nat. Bank, 114 Tenn. 693, 88 S. W. 172; Bill v. Stewart, 156 Mass. 508, 31 N. E. 386.

Messrs. Hurwitz & Hurwitz and Frank L. Simpson for defendant.

Pierce, J., delivered the opinion of the court:

This is an action of contract to recover from the defendant the amount of money which the plaintiff (hereinafter called the bank), on presentment, paid to a holder of a check drawn on the bank by the defendant, in excess of the deposit standing to the credit of the defendant when the check was paid. The defendant admits that he drew the

check, that it was an overdraft, and that it was paid by the bank to the holder through the clearing house. The plaintiff and defendant are in substantial agreement that, on the day the check was issued and before presentment to or payment by the bank, the defendant notified the bank to stop payment of the check. It is also agreed that, without reading, the defendant, at the time when he ordered the payment stopped, at the request of the plaintiff, signed a card upon which the following agreement was printed:

"The Tremont Trust Company, Boston, Mass., will please stop payment of the above-described check. The undersigned agrees to hold the Tremont Trust Company harmless for said amount and for all expenses and costs incurred by it on account of refusing payment of said check and further agrees not to hold the Tremont Trust Company liable on account of payment contrary to this request if same occur through inadvertence or accident.

"Drawer: L. H. Burack."

Written on other side of card:

"The Tremont Trust Company receives this request with the understanding and upon the express condition that it will use the best methods known to it to prevent oversight and accident, but that it shall not be in any way liable for its act should said check be paid by it in the course of its business."

In passing it is to be observed that the fact that the defendant did not read what was printed on the front and back of the card cannot affect the rights and obligations of the parties, because, in the absence of fraud, the defendant is assumed to have assented to all the provisions of that contract, and agreed to be bound by its terms. Fonseca v. Cunard S. S. Co. 153

Contract—failure to read—effect.

(— Mass. —, 186 N. E. 782.)

Mass. 553, 12 L.R.A. 340, 25 Am. St. Rep. 660, 27 N. E. 665.

By the great weight of authority, the drawer of a check retains the right to countermand its payment at any time before it is paid or is certified and delivered to a bona fide holder for value.

Check—right to stop payment.

Florence Min. Co. v. Brown, 124 U. S. 385, 31 L. ed. 424, 8 Sup. Ct. Rep. 531. See cases collected in 2 Morse, Banks & Bkg. and in 7 C. J. § 429; Pease & Dwyer v. State Nat. Bank, 114 Tenn. 693, 88 S. W. 172. In the absence of an express contract limiting its implied obligation to the

Bank—payment of stopped check—liability.

drawer, the drawee pays at his peril when payment of the check has been stopped. Usher v. A. S. Tucker Co. 217 Mass. 441, 443, L.R.A.1916F, 826, 105 N. E. 360. The consideration for an express agreement, or for the implied obligation not to pay a holder of a check after payment of it has been stopped, is found in, and springs from, the mercantile relation of the parties and the reciprocal rights and obligations which the law attaches to that relation. The

—obligation to payee of check.

payee is not an assignee of the fund and the bank incurs no obligation to him before its acceptance of the check; his rights are against the drawer of the check. Rev. Laws, chap. 73, § 206; Carr v. National Security Bank, 107 Mass. 45, 9 Am. Rep. 6; Bullard v. Randall, 1 Gray, 605, 61 Am. Dec. 483.

In the case at bar the jury found upon issues submitted to it that the

plaintiff was "negligent in failing to stop payment after receiving the order to stop." Upon the record two decisive questions are presented:

(1) Do the terms of the agreement include negligence? (2) Is it illegal for a bank to contract against the negligence of its employees in failing to stop the payment of a check after receiving an order to stop its payment? The word inadvertence in the printed agreement embraces the effect of inattention, the result of carelessness, oversight, mistake, or fault of negligence and the condition or character of being inadvertent, inattentive, or heedless. The word "accident" is used in the sense of a happening of an event without the concurrence of the will of the person by whose agency it was caused. It is manifest the quoted words were intended to exonerate the bank from the kind of negligence shown by the record, and we are unable to see any-

—payment due to inadvertence.

thing illegal, or anything opposed to public policy, in a stipulation or agreement which relieves a bank so circumstanced from

—validity of stipulation—public policy.

the results of the mere inattention, carelessness, oversight, or mistakes of its employees. It follows that the plaintiff's exceptions to the charge, wherein it was said, "The law, as I understand it, does not recognize the right of the bank to contract against its own negligence," were properly saved, as inconsistent with requests numbered 4 and 5, and its exceptions must be sustained.

ANNOTATION.

Validity, construction, and effect of stipulation or notice as to liability of bank which fails to comply with order stopping payment of check.

A conclusion not altogether in accord with that in the reported case (TREMONT TRUST Co. v. BURACK, ante, 1067) was reached by an inferior court in New York. Elder v. Franklin Nat. Bank (1899) 25 Misc. 716, 55 N. Y. Supp. 576. In that case the depositor's

pass book contained a stipulation that "it is further agreed that the bank shall not be responsible for the execution of an order to stop payment of a check previously drawn; that the bank will endeavor to execute such order, but that no liability shall be created

by failure so to do, and that no rule, usage, or custom shall be construed to create such liability." It was found as a fact that the depositor had no notice of this stipulation in the pass book, but the reviewing court holds that if he had had notice, the bank would still be liable under the facts of the case, which were as follows: After drawing the check, and before it was paid, the depositor sent a notice in writing to the bank not to pay it; the notice was duly received, and in accordance therewith and pursuant to the practice of the bank an entry of its receipt was made by the paying teller in a book kept for the purpose, and a similar entry was made by the book-keeper in his ledger against the depositor's account; notwithstanding this, when the check in question came in through the clearing house it was paid through an oversight, as the bank officials testified. Speaking of the stipulation in the pass book, the court states that "it will be observed that such agreement does not declare unconditionally that for the failure to observe a stop order the bank shall

not be liable, but it invites the assent of its depositors to the engagement by agreeing that it will endeavor to execute such orders. This is a most important qualification, and was doubtless inserted as an assurance to them that the bank would still exercise some care in the matter. . . . Upon a proper construction of the language used in the agreement we are of the opinion that its fair import was that the defendant should not be liable if in good faith it paid the check that had been stopped, unless it failed properly to fulfil its agreement to endeavor to comply with the depositor's direction. In other words, the promise to make such endeavor necessarily imported the exercise by the bank of at least ordinary care in so doing. . . . We are clearly of the opinion that the construction which we have given to the agreement in question is sustained by both reason and authority, and as the record discloses evidence enough to support the finding of the trial justice that the defendant had been negligent, it follows that the judgment must be affirmed." W. A. E.

ORA IRING, Appt.,

v.

WALTER A. IRING.

Kentucky Court of Appeals — May 7, 1920.

(— Ky. —, 221 S. W. 219.)

Divorce — second for same cause.

A divorce from her second husband for cruel treatment cannot be granted to a woman divorced from her first husband for that cause, under a statute providing that there shall not be granted to any person more than one divorce, except for living in adultery, to the person not in fault, and for the causes for which a divorce may be granted both husband and wife, cruel treatment being a cause for divorce only to the wife.

[See note on this question beginning on page 1076.]

APPEAL by plaintiff from a judgment of the Chancery Branch, Second Division, of the Circuit Court for Jefferson County, dismissing a petition filed for a divorce. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. Clem W. Huggins for appellant.
Messrs. J. M. Chilton and Nat C.
Cureton for appellee.

Carroll, Ch. J., delivered the opinion of the court:

This is a divorce case, and the only question is whether the appellant, Ora Iring, was entitled to have a divorce from her husband, appellee, Walter A. Iring.

In her petition, which was filed in March, 1919, the only ground upon which she sought a divorce was "that, without like or any fault on her part, the defendant has behaved toward her in such cruel and inhuman manner for not less than six months as to indicate a settled aversion to her and such as to destroy permanently her peace and happiness."

To this petition the defendant was duly summoned, but did not appear, and evidence taken on behalf of plaintiff supported her ground for divorce. After this the county attorney of Jefferson county, by leave of the court, was permitted to and did file an answer, as it was his right and duty to do under § 2119, Kentucky Statutes, resisting the application for divorce on the ground that on March 5, 1914, the plaintiff, Ora Iring, had filed an action for divorce in the Jefferson circuit court against her then husband, Lunsford Boies, in which petition it was set up as the only cause of divorce relied on that defendant, Lunsford Boies, "without like or any fault upon her part, has habitually behaved toward plaintiff for not less than six months in such cruel and inhuman manner as to indicate a settled aversion to her and to destroy permanently her peace and happiness." The answer further averred that the plaintiff in that action, having taken evidence that supported her cause, was in May, 1914, granted an absolute divorce from the defendant, Lunsford Boies, and "therefore was not entitled to have a divorce from Iring, as she was seeking such divorce upon the same identical ground that she pro-

cured a divorce from her former husband, Lunsford Boies."

To this answer Mrs. Iring, by counsel, filed a general demurrer, which was overruled, and thereupon, declining to plead further, her petition was dismissed, and she has brought the case here by appeal.

In § 2117 of the Kentucky Statutes it is provided that:

"Courts having general equity jurisdiction may grant a divorce for any of the following causes, to both husband and wife:

"1. Such impotency or malformation as prevents sexual intercourse.

"2. Living apart without any cohabitation for five consecutive years next before the application.

"Also to the party not in fault, for the following causes:

"2. Living in adultery with another man or woman. . . .

"Also to the wife, when not in like fault, for the following causes:

"Habitually behaving toward her by the husband, for not less than six months, in such cruel and inhuman manner as to indicate a settled aversion to her, or to destroy permanently her peace or happiness. . . .

"Also to the husband for the following causes: . . .

"2. When not in like fault, habitual drunkenness on the part of the wife of not less than one year's duration.

"3. Adultery by the wife, or such lewd, lascivious behavior on her part as proves her to be unchaste, without actual proof of an act of adultery."

It is further provided in § 2118 that "a judgment of divorce authorizes either party to marry again, but there shall not be granted to any person more than one divorce, except for living in adultery, to the party not in fault, and for the causes for which a divorce may be granted to both husband and wife."

And in § 2120 that "every judgment for a divorce may, at any time, be annulled by the court ren-

dering it on the joint application of the parties, and they restored to the condition of husband and wife; but no divorce shall thereafter be granted between them for the same or a like cause."

It will be observed that Mrs. Iring was granted a divorce from her former husband, Boies, upon the identical ground that she sought to obtain a divorce from her husband, Walter A. Iring, and therefore the correctness of the judgment of the lower court refusing her a divorce and dismissing her petition depends upon the proper construction of § 2118, *supra*.

Repeating again this section in part, it provides that "there shall not be granted to any person more than one divorce, except for living in adultery, to the party not in fault, and for the causes for which a divorce may be granted to both husband and wife;" and it is contended by counsel for Mrs. Iring that the meaning of this section is that, except for living in adultery and for the causes for which a divorce may be granted to husband and wife, not more than one divorce shall be granted to the same person from the same person; or, in other words, that where a divorce is granted and the parties marry again, or the divorce is annulled under § 2120, they may not be divorced a second time except for adultery or the causes that authorize a divorce to both husband and wife.

The lower court, however, rejected this construction, and, giving the section a broader meaning, ruled that not more than one divorce could be granted to any person except upon the ground that the other party had been living in adultery, or for a cause for which a divorce might be granted to both husband and wife, and, as the cause for which Mrs. Iring was granted a divorce from her first husband, Boies, and the cause for which she sought a divorce from her present husband, Iring, was not a cause for which a divorce might be granted to both parties, but only a ground upon

which the wife might obtain a divorce, her petition must be dismissed.

From this statement of the case it will be seen that the question before us falls within a very narrow compass, depending upon whether the construction of § 2118, insisted on by counsel for Mrs. Iring, or that adopted by the lower court, shall prevail.

In opposition to the construction put upon the statute by the lower court, counsel for Mrs. Iring earnestly insist that it would be detrimental to public morals to forbid persons who had been divorced from marrying again, would have a tendency to encourage dissolute habits, and, besides, would be contrary to justice as well as cruel and inhuman punishment to deny to a good and pure woman the right to secure a second divorce if she was so unfortunate as to innocently contract a second marriage with a brutal, mean, or worthless man, and this only because she had previously obtained a divorce from a former husband for a cause other than living in adultery or that was not available to both parties.

The eloquent and pathetic description of the pitiable plight in which the statute, according to its construction by the lower court, would leave a good, but unfortunate, woman who had contracted a second unhappy marriage, is quite affecting, but we cannot yield to its persuasive and touching influence, because our duty is to administer the law as we find it written, when it is within the power of the legislature to enact it and there is no room for difference of opinion as to its meaning.

The courts have nothing to do with the making of laws concerning the marriage relation,—who may enter into it, or the causes for which divorces may be granted. The regulation and control of the whole subject, in all of its aspects, have been confided to the legislature, free from any constitutional limitation, with the exception that in the third

Constitution of the state, adopted in 1850 (art. 2, § 32), as well as in the present Constitution, adopted in 1891 (§ 59), the legislature was prohibited from granting divorces, a practice that had been freely indulged in by the legislature from the beginning of the state down to the adoption of the Constitution of 1850.

To many lawyers of to-day it may seem curious that at every session of the legislature from the beginning of the state down to 1850 divorces were granted by special acts; some of these acts divorcing, under a title such as "An Act for the Divorce of R. Tomlinson et al.," as many as a dozen couples. The legislature, in granting these divorces, did not set out in the acts the causes for which they were granted, contenting itself with a brief statement that the parties named in the act were divorced; and in *Berthelemy v. Johnson*, 3 B. Mon. 90, 38 Am. Dec. 179, and *Cabell v. Cabell*, 1 Met. (Ky.) 319, these legislative divorces were held to be valid. Nor does it appear that prior to 1809 any general law prescribing causes for which divorces might be granted had been enacted.

In 1809, however (see *Littell's Statute Law of Kentucky*, vol. 4, p. 19), the legislature adopted an act investing the circuit courts of the state with the power and jurisdiction to decree divorces "in favor of a husband, where his wife shall have voluntarily left his bed and board with the intention of abandonment, for the space of three years, or where she shall have abandoned him and lived in adultery with another man or men, or shall have been condemned for a felony in any court of record within the United States. In favor of a wife, where her husband shall have left her, with the intention of abandonment, for the space of two years; or where he shall have abandoned her and lived in adultery with another woman or other women, or shall have been condemned for a felony in any court of record within the United States, or

9 A.L.R.—68.

where his treatment of her is so cruel, barbarous and inhuman as actually to endanger her life."

And further provided that the decree "shall not operate so as to release the offending party, who shall nevertheless remain subject to all the pains and penalties which the law prescribes against a marriage whilst a former husband or wife is living; nor shall it authorize the injured party again to contract matrimony within two years from the time of pronouncing such final decree."

The next general law on the subject was an act of 1843 (see Acts 1842-43, p. 29) amending the Act of 1809 by enlarging the causes for which divorces might be granted and authorizing the courts to decree divorces: "1st. In favor of the husband, where the wife shall be pregnant by another man, before the marriage, without the husband's knowledge. 2d. Where the wife shall abandon the husband for the space of one year. 3d. Where the wife shall be guilty of adultery. 4th. Where there shall be such malformation as to render sexual intercourse impossible. 5th. In favor of the wife, where the husband shall abandon her, and be guilty of acts of adultery, or where the husband has abandoned her for the space of one year. 6th. Where the husband shall be impotent at the time of marriage. 7th. Where the husband shall habitually behave toward the wife in so cruel and inhuman manner, as to destroy her peace and happiness. 8th. Where the husband shall become an habitual drunkard, and shall be wasting his estate, and no provision shall be made for the support of his wife, but in such case, the court shall exercise a sound and cautious discretion; and alimony may be decreed in such cases."

This act further provided "that in all cases where one party has been divorced, the other party is hereby released from all the obligations of the marriage contract, and restored to all the rights of single

persons. That from the rendition of any decree for any of the above causes, the party obtaining said decree, shall be entitled to all the rights and privileges of unmarried persons."

In 1850 (see Acts of 1849-50, p. 54) another act regulating divorces was enacted, creating other causes for divorce by the provision "that in all cases whatever, where either party to a marriage contract shall have concealed from the other party to such contract, heretofore entered into, or which may hereafter be entered into, at the time of marriage, any contagious and loathsome disease under which he or she may be laboring; or where such marriage contract has been entered into under duress, by force, or fraud, or where such duress, force, or fraud, has been practised, or may hereafter be practised, in the procurement of such marriage, as renders such contract, by the rules of law, void ab initio; or where either party to such contract of marriage shall have been guilty of such immoral conduct, or is addicted to such obscene or degrading habits as are destructive of the happiness of the parties or either of them; or where such parties to such contract of marriage, heretofore entered into, or which may hereafter be entered into, shall have separated and lived apart, without any communication whatsoever for the space of five years before the commencement of any suit for a divorce; or where either party to such contract of marriage, heretofore entered into, shall have been guilty of such unbecoming and disrespectful conduct as exposing, unnecessarily, the other to public notoriety and reproach for alleged abandonment in any public newspapers or journals of this state by publication, or by other unnecessary and cruel conduct, endeavored to disgrace the same, it shall be lawful for the judges of the several circuit courts of this commonwealth, upon bill filed by the party so aggrieved or complaining, alleging such facts, or either of them, as above enumerated, to entertain ju-

risdiction of the same, and to cause a jury to be impaneled and sworn to try the issue in said cause; and if, thereupon, it shall appear by competent proof, that the allegation or allegations so charged, are true, and the jury so impaneled, shall so find the same in their verdict, the court before whom such suit is pending, shall, thereupon, enter up a decree of divorce upon such verdict."

In 1851 (see Acts of 1850-51, vol. 1, p. 217, and Revised Statutes, vol. 2, p. 17), following the Constitution of 1850, a general law on the subject of divorce and alimony was adopted, providing that "the courts having chancery jurisdiction may decree a divorce for any of the following causes."

The causes set out are, with the exception of some verbal differences, the same as the causes that may be found in the Kentucky statutes.

It was further provided in this act that "no decree of divorce shall authorize or permit the party obtaining it to marry again until one year after final decree, except where it is herein allowed in favor of both parties; nor shall the party against whom the decree is rendered marry again in less than five years thereafter."

In 1854 (see Revised Statutes, vol. 2, p. 29) this provision was amended so as to allow the party obtaining a divorce to marry again at any time after the decree, and the party against whom the decree was rendered to marry at any time within one year thereafter.

It was further provided in the Act of 1851 (see Revised Statutes, vol. 2, p. 20) that "every decree for a divorce may at any time be revoked or annulled by the court rendering it, on the joint application of the parties, and they thereby restored to the condition of husband and wife; but no divorce shall thereafter be granted between them for the same or a like cause."

This last section, which, with the exception of some immaterial, verbal differences, is the same as § 2120 of the Kentucky Statutes, has been

a part of the body of the law since that time.

In 1873, when the statute law of the state was enacted and put in one body under the title of "General Statutes of Kentucky," the causes for which divorces might be granted were set forth substantially as in the Act of 1851. See General Statutes of Kentucky, chap. 52, art. 3, p. 522. It was, however, provided that "a judgment of divorce authorizes either party to marry again." In this Act of 1873 (see General Statutes, chap. 52, art. 3, § 5) there appeared in the statute law of the state for the first time what is now § 2118 of the Kentucky Statutes.

From this compendium of the general divorce laws of the state, as found in the statutes, it will be seen that from time to time the causes for which a divorce might be granted have been enlarged, and that until the Act of 1851 a decree of divorce authorized either party, without limitation, to marry. But in Act of 1851 the party obtaining the divorce, unless upon a cause allowing a divorce to both parties, could not marry for one year after the decree, nor could the defendant marry within less than five years.

It will also be noticed that the Act of 1809 required three years' abandonment to constitute a ground for divorce, while in subsequent acts, and now, one year is sufficient, and that in the Act of 1842 the question whether a divorce should be granted should be submitted to a jury.

It is provided in the Kentucky Statutes (§ 2117) that "a jury shall not be impaneled in any action for divorce, alimony or maintenance," although before the adoption of this statute in 1893 there was no prohibition against jury trials; the statute merely providing that "the courts having general equity jurisdiction may grant divorces."

It will further be observed that § 2120 of the Kentucky Statutes, providing that on the joint application of the parties a decree of divorce might be annulled, first made its ap-

pearance in the statute law of the state of 1851, and has been a part of the law since that time. But § 2118 of the Kentucky Statutes was first incorporated into the law in 1873.

It is very clear that § 2120 refers to parties who, after being divorced, remarry, or accomplish the same end by having the divorce proceedings annulled, and also evident that the legislature did not deem this provision broad enough, and accordingly enacted what is now § 2118, and there can be no doubt that the purpose of § 2118 was to place a limitation upon the right of divorce by preventing any party from obtaining divorce except for a cause for which a divorce might be granted to both parties, or on the ground of adultery.

The legislature, as we have said, could have failed to provide that a divorce might be granted for any cause, and, if it had not legislated on the subject at all, no divorce could be obtained; or it might, after having allowed divorces for certain causes, have provided that neither party should ever marry again, or that one of them might, but the other could not, or have placed any limitation it saw proper upon the right to remarry.

The legislature did not, however, deem it wise to deny divorce or to prohibit absolutely the remarriage of divorced persons, but was content to say that a party who had obtained a divorce and afterwards married a person other than a former spouse could not obtain a second divorce except for the cause of living in adultery, or for a cause for which a divorce might be granted to both husband and wife.

So that, under this section, no person can obtain a second divorce unless upon the ground of adultery, or for the cause for which a divorce Divorce—second for same cause. may be granted to

both parties. The result of this is that, if a second unhappy marriage is contracted, and the aggrieved party cannot secure a divorce on the ground of adultery, or for a

cause that will authorize a divorce to both parties, the parties must continue as husband and wife until there has been a "living apart without any cohabitation for five consecutive years," at the expiration of which time either may obtain a divorce, as this furnishes cause to both parties.

It follows from what we have said that Mrs. Iring can only obtain a divorce upon the ground that Iring was guilty of adultery, or by "living apart from him without any cohabitation for five consecutive years."

Wherefore the judgment is affirmed.

ANNOTATION.

Construction and effect of statute providing against more than one divorce.

By a Kentucky statute which was enacted in 1873, it was declared that there shall not be granted to any person more than one divorce, except for living in adultery, to the party not in fault, and for the causes for which a divorce may be granted to both husband and wife; and the statutes enumerate such impotency or malformation as prevents sexual intercourse, and living apart without any cohabitation for five consecutive years, as the grounds upon which a divorce may be granted to both husband and wife.

Under this statute it has been held that a party who has once obtained a divorce cannot obtain another from the same person except upon the grounds specifically enumerated; i. e., adultery, impotency, or living apart for the required period without cohabitation. *Gouge v. Gouge* (1893) 14 Ky. L. Rep. 571, holding that a second divorce for drunkenness cannot be granted to a party who has previously obtained a divorce from the same party for like cause.

Nor can a party who has once obtained a divorce from one spouse upon

a ground not among those enumerated obtain a second divorce upon the same ground from a second and different spouse. Thus in the reported case (*IRING v. IRING*, ante, 1070), it was held that a wife who had obtained a divorce from one husband on the ground of cruel and inhuman treatment could not obtain a divorce for the same cause from a subsequent husband. It will be remembered that the complainant contended that the statute should be limited in its application to cases where the second action was between the same parties as the first, but this construction, as above indicated, was rejected by the court.

But it has been held that the word "divorce," as used in the statute, means an "absolute divorce," so that an absolute divorce upon the ground of drunkenness does not prevent the granting of subsequent separation or divorce from bed and board to the same person upon the same ground. *Gouge v. Gouge* (Ky.) supra.

G. J. C.

CHRISTINA GEBHARDT, Resp.,

v.

UNITED RAILWAYS COMPANY OF ST. LOUIS, Appt.

Missouri Supreme Court (Div. No. 1) — March 2, 1920.

(— Mo. —, 220 S. W. 677.)

Evidence — privileged communication — statement to attorney.

1. One employed to institute a lawsuit is not, after withdrawing from the case, prevented from testifying to statements made by the client show-

ing absence of any cause of action, on the ground that such statements were privileged.

[See note on this question beginning on page 1081.]

Attorney and client — absence of cause of action — withdrawal from case.

2. An attorney must, upon learning by examination of his client before trial that he has no cause of action and can succeed only by perjury, withdraw at once from the case.

[See 2 R. C. L. 958.]

Evidence — admissions by infant.

3. An infant plaintiff who has arrived at years of discretion so as to be a competent witness may make admissions against interest which are admissible against him at the trial.

[See 1 R. C. L. 488; 14 R. C. L. 282.]

Infant — power of next friend to admit away rights.

4. A guardian ad litem or next friend of an infant cannot admit away the infant's rights in the pleadings.

[See 14 R. C. L. 291.]

Evidence — of attempt at bribery — conspiracy.

5. Where there is evidence of a conspiracy between an infant and next friend to defraud a defendant by a false claim of injury, evidence is admissible of attempts by the next friend to bribe witnesses to give false testimony in the case.

APPEAL by defendant from an order of the Circuit Court of the City of St. Louis (Davis, J.) granting plaintiff's motion for new trial in an action brought to recover damages for personal injuries alleged to have been received when defendant's car left the track. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Charles W. Bates, T. E. Francis, and Chauncey H. Clarke, for appellant:

Plaintiff's admission to Fensky, her attorney, in the presence of Gillespie, who was not her attorney, that she was not on the car at the time of the accident, was made in pursuance of the perpetration of a fraud upon defendant.

Hamill v. England, 50 Mo. App. 338; State v. Faulkner, 175 Mo. 546, 75 S. W. 116; State v. Lehman, 175 Mo. 619, 75 S. W. 139; State v. McChesney, 16 Mo. App. 259.

Plaintiff's admission to Fensky, her attorney, was not privileged as a confidential communication between attorney and client, for the reason that it was not made to him in confidence, but was made to him in the presence of Gillespie, who was not her attorney, but a third party, and to her a total stranger.

Doheny v. Lacy, 168 N. Y. 213, 61 N. E. 255; People v. Farmer, 194 N. Y. 251, 87 N. E. 457.

A showing that in the obtainment of evidence Gebhardt was guilty of attempted subornation of perjury was relevant, for the reason that it revealed the fraudulent nature of plaintiff's case, and it was admissible under the doctrine of respondeat superior.

Adams v. Hannibal & St. J. R. Co. 74 Mo. 553, 41 Am. Rep. 333.

Evidence of Gebhardt's attempted subornation of perjury was admissible for the reason that plaintiff and her next friend were joint conspirators in the attempted perpetration of a fraud upon defendant, which attempt was made in pursuance of such plan and with reference to that object.

Hellman v. Somerville, 212 Mo. 415, 111 S. W. 30; State ex rel. Kimbrell v. People's Ice, Storage & Fuel Co. 246 Mo. 168, 151 S. W. 101; Palmer v. Huckstep, 197 Mo. App. 512, 196 S. W. 1053; State v. Fields, 234 Mo. 615, 138 S. W. 518; State ex rel. Redmon v. Durrant, 53 Mo. App. 493.

The relationship of attorney and client is a prime prerequisite to the existence of privilege.

Wilson v. Godlove, 34 Mo. 337; Huffman v. Huffman, 132 Mo. App. 44, 111 S. W. 848.

Plaintiff, although a minor, absent a denial or explanation, is conclusively bound, as if an adult, by her admissions.

Pledge v. Griffith, 199 Mo. App. 303, 202 S. W. 460; Hamblett v. Hamblett, 6 N. H. 333; Atchison, T. & S. F. R. Co. v. Potter, 60 Kan. 808, 72 Am. St. Rep. 386, 58 Pac. 471, 6 Am. Neg. Rep. 512; Haile v. Lillie, 3 Hill, 149; McCoon v. Smith, 3 Hill, 147, 38 Am. Dec. 623; 1 R. C. L. p. 488, § 25; 14 R. C. L. p. 282, § 51; Koester v. Rochester Candy Works, 194 N. Y. 92, 19 L.R.A.

(N.S.) 783, 87 N. E. 77, 16 Ann. Cas. 589; Coons v. Pritchard, 69 Fla. 362, L.R.A.1915F, 558, 68 So. 225, 9 N. C. C. A. 483; Mather v. Clark, 2 Aik. (Vt.) 209; O'Neill v. Read, 7 Ir. L. Rep. 434.

Messrs. William L. Bohnenkamp and James T. Roberts for respondent.

Small, C., filed the following opinion:

I. Appeal from the circuit court of the city of St. Louis.

Suit for \$15,000 for personal injuries. The jury found for defendant. The court granted a new trial to plaintiff on the ground that the court erred in admitting testimony on behalf of defendant, from which order defendant appealed. The testimony, so improperly admitted as contended for by respondent's learned counsel, was that of the witness Charles Fensky, who was the original attorney for plaintiff, and one Grant Gillespie, who testified in effect that plaintiff told them in each other's presence that she was not on the car as stated in her petition, and consequently was not injured by the defendant; and that the court also erred in admitting the testimony of several witnesses to the effect that Louis Gebhardt, the plaintiff's father and next friend in the case, attempted to bribe them to commit perjury in testifying that plaintiff was on the car.

The only question raised on this appeal is whether said testimony was properly admitted.

Plaintiff testified: That on June 7, 1913, she left the laundry where she worked, at about 3 o'clock in the afternoon, and took a Delmar avenue car to go to her home on Wren avenue. That a Miss Laura Woods accompanied her to Union avenue, where they took a Union avenue car going north. Miss Woods rode with her until they reached Mathews avenue, when she alighted. As soon as Miss Woods got off, the plaintiff testified she fell asleep and rode out to the end of the car line, which was a block beyond Wren avenue where she intended to get off. That she did not awaken when the car turned around at the end of its

journey, but remained in her seat asleep, riding backwards, until the car on its return trip reached Bircher road, where it ran off the track and she was injured. She says she was acquainted with the conductor, a Mr. Daly, and that he carried her back to Bircher road, where the accident happened, without awakening her, or turning the seat, or collecting another fare from her, or putting her off at Wren avenue.

There is no controversy in the evidence that a car did leave the track at Bircher road, and that there were a number of passengers on it at the time, some of whom were injured. But there was no evidence of anyone to corroborate the story of the plaintiff that she was on the car at the time, or that in going home that afternoon she fell asleep and rode out to the end of the car line, or that she remained sleeping in the car and was in the car when it made its return journey.

The suit was originally brought by Charles Fensky, as attorney for plaintiff, on February 16, 1914, by her father, Louis Gebhardt, as her next friend. On March 13, 1917, on the suggestion of plaintiff that she had attained the age of eighteen years, the court ordered that her next friend be discharged, and that the further prosecution of the suit should be in her own name and right. On the trial March 19, 1917, Charles Fensky, plaintiff's original attorney, testified on behalf of the defendant that he withdrew from the case in open court, before it was first set for trial, on October 20, 1914, and that the plaintiff and her father were both present in court, and that he (Fensky) made a statement to the court in their presence at the time of so withdrawing. On objection of counsel for plaintiff, he was not permitted to say what that statement was. But, over the objection of plaintiff's counsel that the conversation was privileged, Fensky was permitted to state that, about three days before he withdrew from the case, the plaintiff was in his office, and that she admitted in the presence of another

attorney, Grant Gillespie, who was in no way connected with her case, that she was not on the car at all; that after that statement he went into open court and withdrew from the case.

Grant Gillespie testified for defendant: That he had an office in the same suite with Charles Fensky, and a few days prior to October 20, 1914, he was called into Fensky's office, while the plaintiff was there. That although he and Fensky had discussed this case and had conferences about it together as lawyers in the case, he (Gillespie) was not an attorney in the case, and was not in any wise connected with it. Over the plaintiff's objection that the conversation was privileged, the court permitted Gillespie to testify that, while he was in Fensky's office on this occasion, the question came up as to whether or not the plaintiff was on the car, and that she said that she took the car and went to Union avenue, and there she transferred to the Union avenue line; that she rode to the end of the line out to Walnut park; that she went to sleep on the car, and when she awakened it was in the crash of the wreck, coming back somewhere near down the railroad tracks where they cross Union avenue. That he asked her whether she was on the car, and she said, "Well, I must have been." And he said, "You know whether you were on the car or not," and for her to tell the truth about it. Then she went on "and said she 'wasn't on the car.' "

Joseph Logomarsino testified for defendant that he was on the car when it was derailed, and that he had a case against the company for injuries to himself; that Charles Fensky was his attorney, and that his case was settled; that he did not see the plaintiff there. And, over the objection of plaintiff that the testimony was hearsay, he testified that plaintiff's father, Louis Gebhardt, came to see him and asked him if he saw plaintiff on the car, and that he told Gebhardt that he did not see her. Gebhardt came a second time, and this time he

brought the plaintiff with him, and the witness said: "I don't recognize her in those clothes." Gebhardt asked plaintiff to go home and change her clothes, which she did, and returned, and still the witness could not recognize her as being on the car. The first time Gebhardt came, he brought the witness nearly a half a pint of whisky and a cigar. The next time Gebhardt said to witness, "If you can remember seeing my little girl on the car, I will give you \$100," to which the witness replied, "There is nothing doing."

Mrs. Dietz, a witness for defendant, testified that she was on the car, and that she was one of the injured, and had a suit against the company, and that Charles Fensky was her attorney; that her case had been disposed of; that she was acquainted with the plaintiff, and with the plaintiff's father and mother; that she did not see plaintiff on the car at the time of the accident. And over plaintiff's objection that it was hearsay, Mrs. Dietz testified that plaintiff's father, Louis Gebhardt, was a friend of her husband's; that she saw him several times at her home, and he said to her, "he wanted to have his case set, and he could not find any witnesses for it," and he asked her, "could" she "do him a favor, and he give me \$50 if I did swear to it I saw her in the car;" that she told him she would not do it, that she would tell nothing but the truth; that, afterwards, a few days or a week or so, she had a conversation with the plaintiff, in which the plaintiff asked her (the witness) to "do her a favor," and said to her: "Mrs. Dietz, will you please, after you come to the court, and they ask you about it, would you please not say anything about father promised you money; he will beat me."

Plaintiff in her testimony denied the conversation testified to by all the witnesses against her.

Louis Gebhardt, the father and next friend of plaintiff, who brought the suit, was not called as a witness.

Plaintiff testified that she had no conversation with Grant Gillespie,

but that he was there with Charles Fensky, and she thought they were both attorneys together, when Gillespie was there talking with Fensky about her case. The only time she saw Gillespie was when Fensky brought him in; that she thought that Gillespie was one of the attorneys, but at no time was he one of her attorneys. He had never had anything to do with her case, but they were there together and discussed the case together. She had no agreement nor contract of any kind with Grant Gillespie.

II. We have no doubt that the testimony of the witness Fensky was entirely proper. It is true that after a crime has been committed the accused or guilty person may freely consult and even disclose his guilt to his attorney, in order to prepare his defense. In such circumstances, the law puts the seal of secrecy upon such communications. But neither under our statute (Mo. Rev. Stat. 1909, § 6362) nor at common law, of which said statute is simply declaratory, can a person employ an attorney for the purpose of aiding and abetting him in the commission of a future crime or fraud, and thereby seal the lips of his lawyer to secrecy and thus prevent the exposure or detection of such crime or fraud. The privileged communication may be a shield of defense as to crimes already committed, but it cannot be used as a sword or weapon of offense to enable persons to carry out contemplated crimes against society. The law does not make a law office a nest of vipers in which to hatch out frauds and perjuries. This case was first set for trial on the 20th of October, 1914, and it was not only

Attorney and client—absence of cause of action—withdrawal from case.

the right, but it was the duty, of Attorney Fensky, when he found, upon examining his client before the trial, that the case had no foundation in fact and could not be successfully maintained without perjury, to at once withdraw from

the case, as he did, and to prevent the consummation of the contemplated crime and fraud by testifying to the facts as related to him by the plaintiff. Such communication was not privileged. It is unnecessary to add anything to what has been so forcibly said on this subject by Judge Ellison in *Hamil v. England*, 50 Mo. App. 338, and by Judge Gantt in *State v. Faulkner*, 175 Mo. 546, 75 S. W. 116, and *State v. Lehman*, 175 Mo. 619, 75 S. W. 139.

Evidence—privileged communication—statement to attorney.

The testimony of the witness Grant Gillespie was therefore also admissible, even if he had been plaintiff's attorney, which he was not.

III. We must also rule against the proposition urged by respondent's counsel that an infant is incapable of making admissions of fact which would be admissible against him in the trial of his cause. The plaintiff in this case had reached the age of discretion, and was competent as a witness. She was, therefore, competent to make admissions against herself, and it was

for the triers of fact to determine —admissions by infant.

the effect of any such admissions, in view of her age, intelligence, and all the facts and circumstances in the case. *Pledge v. Griffith*, 199 Mo. App. 303, 202 S. W. 460; *Atchison. T. & S. F. R. Co. v. Potter*, 60 Kan. 808, 72 Am. St. Rep. 385, 58 Pac. 471, 6 Am. Neg. Rep. 512; *Chicago City R. Co. v. Tuohy*, 196 Ill. 410, 58 L.R.A. 270, 63 N. E. 997; *Hamblett v. Hamblett*, 6 N. H. 349; 1 R. C. L. 488; 14 R. C. L. 282, and cases cited.

It is true that a guardian ad litem of an infant, in his answer, or his next friend, in his petition, cannot admit

Infant—power of next friend to admit away rights.

away the rights of the infant. But it does not follow from this that the infant himself, if of sufficient age and discretion to make him a competent witness, could not be re-

quired to testify to the truth, although by so doing the infant's cause or defense would be destroyed. If he is competent to tell the truth against himself in court, he is also competent to tell the truth by making admissions against himself out of court.

IV. We also hold that the trial court properly admitted the testimony of the witnesses Mrs. Dietz and Logomarsino, to the effect that Louis Gebhardt, the father and next

Evidence—
of attempt at
bribery—
conspiracy.

friend of the plaintiff, attempted to bribe them to swear falsely that his

daughter was on the car. This testimony was not admissible on the ground that said Louis Gebhardt had brought the suit for the plaintiff, as her next friend, but on the ground that there was evidence tending to show a conspiracy on the part of the plaintiff and her father to bring suit and recover judgment upon the false claim that plaintiff was injured as stated in her petition, when in truth she was not. The evidence of Charles Fensky and Grant Gillespie tended to prove that she knew her claim was false and fraudulent, and had known so from the beginning. If this be true, it is a reasonable inference that her father knew the same thing and probably instigated her to bring the fraudulent suit. It might also be inferred that they worked together from the start to accomplish the same illegal purpose. According to the testimony of Logomarsino, plaintiff was with her father the second and third times when he visited Logomarsino and offered him a bribe. She even changed her clothes so that Logomarsino might recognize her as one he had seen on

the car when she knew she was not on the car, according to the statement of Fensky and Gillespie. The plaintiff also requested Mrs. Dietz, as stated by her, that if she was called as a witness in court and questioned with reference to it, not to disclose that her father had promised Mrs. Dietz money to give false testimony. There was abundant evidence, therefore, of a conspiracy between the plaintiff and her father, of which the latter was the chief architect, but nevertheless in which the plaintiff participated, to bolster up the plaintiff's case with perjury and false testimony, and therefore the acts and statements of one of them, even in the absence of the other, were competent evidence against either or both of them. *State v. Walker*, 98 Mo. 95, 9 S. W. 646, 11 S. W. 1133; *State ex rel. Kimbrell v. People's Ice, Storage & Fuel Co.* 246 Mo. loc. cit. 219, 151 S. W. 101; *State v. Fields*, 234 Mo. loc. cit. 615, 138 S. W. 518; *Hellman v. Somerville*, 212 Mo. loc. cit. 431, 432, 111 S. W. 30.

The order of the Circuit Court sustaining plaintiff's motion for new trial is reversed and set aside, and said court is directed to make an order overruling said motion for new trial, and to reinstate the judgment for defendant.

Ragland, C., concurs.

Brown, C., not sitting.

Per Curiam:

The foregoing opinion by Small, C., is adopted as the opinion of the court.

All the Judges concur.

Petition for rehearing denied, April 10, 1920.

ANNOTATION.

Privilege of communication to attorney by client in attempt to establish false claim.

The privilege of a communication to an attorney by his client in the attempt to establish a false claim is dis-

cussed in 5 A.L.R. 977. The reported case is apparently the only recent case which has considered the subject.

In the reported case (*GEBHARDT v. UNITED R. CO.* ante, 1076) the plaintiff sued for alleged personal injuries received in an accident on the defendant's railway. On the trial of the action the original attorney for the plaintiff was allowed to testify that the plaintiff had admitted to him that she was not on the defendant's car, as stated in her petition, and consequently was not injured by the defendant. It was contended that such a statement, if made, was a privileged com-

munication. The court holds to the contrary, saying that neither under the Missouri statute, nor at common law, of which the statute is simply declaratory, can a person employ an attorney for the purpose of aiding and abetting him in the commission of a future crime or fraud, and thereby seal the lips of his lawyer to secrecy and thus prevent the exposure or detection of such crime or fraud.

E. C. B.

ANNA R. KELLER, Plff. in Certiorari,
v.
STATE BANK OF ROCK ISLAND.

Illinois Supreme Court — April 21, 1920.

(292 Ill. 553, 127 N. E. 94.)

Alteration of instrument — reduction of amount of check.

1. Reducing the amount of a check without the consent of the drawer renders the instrument void.

[See note on this question beginning on page 1087.]

— effect.

2. The material alteration of a negotiable instrument by a party to it, without consent of the maker, renders the instrument void, and it cannot be enforced even by a subsequent purchaser in good faith without notice.

[See 1 R. C. L. 990; 3 R. C. L. 1271.]

Check — authority to fill blank.

3. Delivery of a check with the amount left blank confers implied authority upon the custodian of the paper to fill the blank.

[See 1 R. C. L. 1017.]

— reducing amount — avoiding instrument.

4. Reducing, without consent of the drawer, the amount filled into a blank check by the payee, to bring it within the drawer's deposit account, renders

the check void, although the blank might have been filled for the correct amount in the first instance.

[See 1 R. C. L. 975, 990.]

Bills and notes — power to change instrument.

5. A blank indorsement on a promissory note which has been filled up to state the contract incorrectly may be corrected so as to state the contract correctly.

Appeal — reversal — necessity of remanding.

6. When the intermediate appellate court reverses without remanding and without finding the ultimate facts upon which its judgment is based, the supreme court must, upon reversal, remand the case.

CERTIORARI to the Appellate Court, Second District, to review a judgment reversing a judgment of the Circuit Court for Rock Island County (Ramsay, J.) in favor of plaintiff in an action brought to recover the balance alleged to be due on a bank account. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Kenworthy, Dietz, Shallberg, Harper, & Sinnett, for plaintiff in certiorari:

A bank has no right to charge the payment of a check, altered in any material matter, against the depositor's account, which check, by reason of its alteration, is never a valid instrument for any purpose, and confers no authority on the bank to pay the amount.

Crawford v. West Side Bank, 100 N. Y. 53, 53 Am. Rep. 152, 2 N. E. 881.

An alteration of a check by the holder, consisting of the changing of the name of the bank on which the check is drawn, is a material alteration.

Morris v. Beaumont Nat. Bank, 37 Tex. Civ. App. 97, 83 S. W. 36; Whitsett v. People's Nat. Bank, 138 Mo. App. 81, 119 S. W. 999.

If a change is shown to have been made after the execution of the instrument, it will be presumed to have been made by the party producing it, or with his privity, fraudulently in so far as legal fraud attaches to the wilful change of the instrument by one of the parties thereto.

Burwell v. Orr, 84 Ill. 465; 2 Cyc. 235.

An alteration may be material even though it may have the effect of reducing the liability of the party bound by the instrument.

Gardiner v. Harback, 21 Ill. 129; Soaps v. Eichberg, 42 Ill. App. 375; New York L. Ins. Co. v. Martindale, 75 Kan. 142, 21 L.R.A.(N.S.) 1045, 121 Am. St. Rep. 362, 88 Pac. 559, 12 Ann. Cas. 677; Phoenix Ins. Co. v. McKernan, 100 Ky. 97, 37 S. W. 490; Washington Finance Corp. v. Glass, 74 Wash. 653, 46 L.R.A.(N.S.) 1043, 134 Pac. 480; Hecht v. Shenners, 126 Wis. 27, 105 N. W. 309; Coburn v. Webb, 56 Ind. 96, 26 Am. Rep. 15.

No recovery can be had upon the contract, either in its altered form or in its original condition.

Hayes v. Wagner, 220 Ill. 256, 77 N. E. 211.

Where a material alteration appears on the face of the instrument, the onus is on the person holding it to show that the alteration was made before attestation or that the alteration has been assented to by the maker of the instrument.

Hodge v. Gilman, 20 Ill. 437; Walters v. Short, 10 Ill. 252.

Any material alteration of a written instrument, made after its execution by a party claiming thereunder, or with his

privity, without the authority or consent of the other party to the instrument, invalidates the instrument in the hands of the party responsible for the alteration and his assigns, as to all unconsenting parties.

Hayes v. Wagner, 220 Ill. 256, 77 N. E. 211; Landt v. McCullough, 206 Ill. 214, 69 N. E. 107; Merritt v. Boyden, 191 Ill. 136, 85 Am. St. Rep. 246, 60 N. E. 907; Ryan v. First Nat. Bank, 148 Ill. 349, 35 N. E. 1120; Burwell v. Orr, 84 Ill. 465; Montag v. Linn, 23 Ill. 551; Gardiner v. Harback, 21 Ill. 129; Babcock v. Henkle, 117 Ill. App. 640.

One party to an instrument has no right to reform its language without the consent of the other party, however inaccurately the real contract between the parties may be expressed.

2 Cyc. 149; Kelly v. Trumble, 74 Ill. 428; Merritt v. Dewey, 218 Ill. 605, 2 L.R.A.(N.S.) 217, 75 N. E. 1066.

The so-called finding of facts by the appellate court is not such a finding as the statute contemplates should be made, where that court reverses without remanding, for it is not a finding of any ultimate fact, but is a finding of the evidentiary fact merely, and the finding of an evidentiary fact which is not the ultimate and controlling fact in the case will be regarded as surplusage.

Laughlin v. Norton, 267 Ill. 478, 108 N. E. 648; Schaefer v. Washington Safety Deposit Co. 281 Ill. 44, 117 N. E. 781, Ann. Cas. 1918C, 906.

Petitioner is entitled to a review of rulings made by the trial court to the prejudice of petitioner, and this court will review the findings of fact by the appellate court if it appears the same was influenced or affected by evidence erroneously admitted by the trial court.

Iroquois Furnace Co. v. Elphicke, 200 Ill. 420, 65 N. E. 784; Seeberger v. McCormick, 178 Ill. 407, 53 N. E. 340.

Messrs. Connelly & Walker and Marshall & Marshall for defendant in certiorari.

Dunn, Ch. J., delivered the opinion of the court:

The appellate court for the second district reversed a judgment of the circuit court of Rock Island county against the State Bank of Rock Island in favor of Anna R. Keller, and the case has been certified to us for review in response to a writ of certiorari.

On June 4, 1914, Mrs. Pearl I.

Hawley, who had a savings account in the State Bank of Rock Island, went with her mother, Anna R. Keller, to the bank and had the account changed and a new book issued in the name of "Anna R. Keller or Pearl I. Hawley." The change was made because Mrs. Hawley feared that her husband might interfere with the account. The amount was \$1,874.75, which was reduced by checks of Mrs. Hawley paid from time to time, and interest was credited semiannually. Mrs. Keller never drew any checks against the account. Mrs. Hawley died January 18, 1917, and soon after Mrs. Keller, claiming there was a balance due on the account, demanded payment, which was refused, and thereupon she sued the bank in assumpsit. The bank defended on the ground that it had paid the whole amount on checks signed by Mrs. Hawley. The trial resulted in a verdict for the plaintiff and a judgment for \$1,059.74. The bank claimed to have paid this amount on a check of Mrs. Hawley which the plaintiff in error claims was not signed by her, or, if it was signed by her, was materially changed without her authority before payment.

Mrs. Hawley lived with her husband, William C. Hawley, on a farm near Ainsworth, Iowa. The contested check was written on a blank of the Commercial Savings Bank of Washington, Iowa, with a line drawn through those names and the words "Rock Island State Bank" and "Rock Island, Ill.," written above them. It was dated January 2, 1917, the payee was the Ainsworth Savings Bank, and its amount was \$1,079.48. It was presented for payment by the People's National Bank of Rock Island on January 13, 1917. It bore the rubber stamp indorsements of the Ainsworth Savings Bank, the Iowa National Bank of Davenport, Iowa, and the People's National Bank. Payment was refused, the check was stamped on its face "insufficient funds," and was returned to the People's National Bank. This bank returned it to the

Iowa National Bank, which informed the Ainsworth Savings Bank by telephone that payment had been refused because of insufficient funds and the check was coming back. Stephens, the cashier of the Ainsworth Savings Bank, then authorized the Iowa National Bank to change the amount, which was done by L. G. Bein, assistant cashier of the Iowa National Bank, drawing a line through the amounts written in the body of the check and in figures in the margin and writing above them in red ink the amount \$1,059.74. Bein also wrote on the back of the check the statement that the amount had been changed by that bank and was guaranteed to be \$1,059.74, January 15, 1917. The check so altered was then deposited again with the People's National Bank, and on January 16, 1917, was presented to the defendant in error and paid.

On the day the check for \$1,079.48 was presented and dishonored, the bank wrote a letter to Mrs. Hawley informing her that payment of her check had been refused because of insufficient funds; that her balance was \$1,059.74; and that a check for that amount would be honored. Her husband testified that he showed her this letter, but not that she read it or could have read it or was conscious, and that the next morning he went to the Ainsworth Savings Bank. There was no evidence of any statement made by Mrs. Hawley either at that time or when the check was signed. The plaintiff in error testified that Mrs. Hawley was unconscious from January 9 until her death, on January 18, and there is no evidence that she was not. Stephens, the cashier of the Ainsworth Savings Bank, testified that the check was first brought to him by Hawley with the name of the payee and the amount blank. Stephens wrote in the name of the payee and the amount, which he got from Hawley, who had him figure the interest on the account. Stephens then sent the check to the Iowa National Bank for collection,

and when afterward informed by that bank that the amount was not correct he conferred with Hawley, and then told the bank that Hawley was willing for them to change the amount.

The appellate court did not remand the cause, but made a finding of fact "that the check of January 2, 1917, drawn in favor of Ainsworth Savings Bank, was the genuine check of Pearl I. Hawley, duly signed and delivered by her."

The plaintiff in error insists that the finding did not include all the ultimate facts in the case and was not sufficient to justify a judgment against her. Her counsel argue that there were two questions of fact in the case, viz.: First, did the check bear the genuine signature of Pearl I. Hawley? Second, was it materially altered after delivery without her authority? Assuming that these two questions are in the record, it is manifest that the appellate court's finding does not touch the second. It may be, and we must assume, as the appellate court has found, that the check of January 2, 1917, was Mrs. Hawley's genuine check; but that check was never paid. That was a check for \$1,079.48, and was dishonored because of insufficient funds. The material alteration of a negotiable instrument

Alteration of
instrument—
effect.

by a party to it,
without the consent
of the maker, ren-

ders the instrument void, and it cannot be enforced, even by a subsequent purchaser in good faith without notice. *Pankey v. Mitchell*, Breesse, 301; *Burwell v. Orr*, 84 Ill. 465. It is immaterial whether the alteration is injurious or beneficial to the party who is liable on the instrument. Reducing the amount

—reduction of
amount of
check.

without the maker's
knowledge will void
the instrument.

Moore v. Hutchinson, 69 Mo. 429; *State Sav. Bank v. Shaffer*, 9 Neb. 1, 31 Am. Rep. 394, 1 N. W. 980; *New York L. Ins. Co. v. Martindale*, 75 Kan. 142, 21 L.R.A. (N.S.) 1045, 121 Am. St. Rep. 362, 88 Pac. 559, 12

Ann. Cas. 677; *Johnston v. May*, 76 Ind. 298; *Hewins v. Cargill*, 67 Me. 554; *Chism v. Toomer*, 27 Ark. 108; *Keene v. Weeks*, 19 R. I. 309, 33 Atl. 446; *Fillmore County v. Greenleaf*, 80 Minn. 242, 83 N. W. 157. The question is, not whether the change is injurious or beneficial to the maker of the instrument, but does it materially affect his rights? Is the changed instrument the contract which he made? "In the one case no less than in the other the altered paper is not the contract which the party has made, and in neither case can the courts declare it to be his contract or enforce it as such. The law proceeds on the idea that the identity of the contract has been destroyed,—that the contract made is not the contract before the court,—that the party did not make the contract which is before the court; and, so adjudging, it cannot go further and hold him bound by it, on speculations, however probable and plausible, that he would or ought to have entered into the altered agreement, because it involved less liability than the original and only paper executed by him." *Montgomery v. Crossthwait*, 90 Ala. 553, 12 L.R.A. 140, 24 Am. St. Rep. 832, 8 So. 498.

Where a person signs a negotiable instrument which is incomplete because the amount is left blank, and delivers it for use, the custodian of the paper has im-

plied authority to
fill in the amount.
Check—
authority to
fill blank.

Merritt v. Boyden, 191 Ill. 136, 85 Am. St. Rep. 246, 60 N. E. 907. Accordingly, when the cashier of the Ainsworth State Bank, at the direction of William C. Hawley, wrote into the paper bearing Mrs. Hawley's name the amount of \$1,079.48, the paper became her genuine check for that amount, as was found by the appellate court. It was not paid, but after its dishonor the payee caused the amount to be changed to \$1,059.74. This made another and different check. There is no finding that this change was authorized by Mrs. Hawley or that this check was her genuine check. When she gave

her check in blank, she gave the custodian implied authority to perfect the check by filling the blank. There is no evidence of any other authority than that implied by law. Hawley perfected the check by causing the blank to be filled. This was in accordance with his implied authority, and Mrs. Hawley became bound by the check. He was not, however, authorized to bind her by another check. He had made the check which he was authorized to make, and he could not make another without further authority.

Counsel for the defendant in error refer to cases holding that the holder of a negotiable instrument indorsed in blank may correct the contract which he has written above a blank indorsement, even as late as the trial. It is true that a blank indorsement on a promissory note which has been filled up to state the contract incorrectly may be corrected so as to state the contract correctly; but in the present case the blank was filled in accordance with the authority of the agent and became by that act binding on his principal, as the appellate court has found. He could not without other authority bind her by another check.

The defendant in error contends that the plaintiff in error did not argue, either in the trial court or the appellate court, that the check was void by reason of the alterations. The record of the trial court presents this question, the evidence was all introduced, and the bill of exceptions does not show any waiver by the plaintiff in error. We cannot presume it was waived. The defendant in error has obtained leave of the court to file, and has filed, a copy of the plaintiff in error's appellate court brief in support of its contention as to the claim of the plaintiff in error in that court. From this brief it appears that the plain-

tiff in error here, who was the appellee there, insisted that the only question before either the trial court or the appellate court was "whether or not this check was a forgery, or whether or not the bank had any right to pay the same even if it was not a forgery, when it had knowledge that the alterations on the face of the check were not made by the purported drawer of the check and without any inquiry as to whether or not the alterations on the face of the check were authorized by the drawer."

Again she says: "If the check purporting to have been drawn by Pearl I. Hawley was, in fact, drawn by her and the signature thereto was her genuine signature, then when that check was paid by appellant it constituted full payment and was a full and complete defense to this case."

That check, however, was not paid. There is no finding and no evidence that it was. It is evident that the legal effect of the alterations in the check upon the liability of the defendant in error was urged in both courts.

Errors occurring in the progress of the trial were assigned by the defendant in error upon the record of the trial court, but were not considered by the appellate court. Since the latter court reversed the judgment without re-mandating the cause and without a finding of the ultimate material facts upon which its judgment was based, the judgment must be reversed and the cause remanded to the appellate court. When the cause comes before that court again, it will either affirm the judgment or reverse it and remand the cause, or if it finds the facts differently from the trial court, it may reverse the judgment without remanding the cause, reciting the facts so found in its judgment.

Thompson, J., took no part in this decision.

-reducing
amount—
avoiding
instrument.

Bills and notes—
power to change
instrument.

Appeal—
reversal—
necessity of
remanding.

ANNOTATION.

Alteration of commercial paper by reducing the amount.

A reduction in the amount of a bill or note after its execution by a party, and without his consent, has been held to be a material alteration. *Chism v. Toomer* (1871) 27 Ark. 108; *KELLER v. STATE BANK* (reported herewith) ante, 1082; *Hewins v. Cargill* (1877) 67 Me. 554; *State Sav. Bank v. Shaffer* (1879) 9 Neb. 1, 31 Am. Rep. 394, 1 N. W. 980; *Adams v. Faircloth* (1906) — Tex. Civ. App. —, 97 S. W. 507. The test of a material alteration according to these cases is not whether an additional burden is imposed upon the complaining party, but whether the contract remains the same.

In *State Sav. Bank v. Shaffer* (1879) 9 Neb. 1, 31 Am. Rep. 394, 1 N. W. 980, supra, it was held that there could be no recovery upon a promissory note, even in the hands of an innocent purchaser before maturity, where the payee, after delivery of the note and before maturity, without the consent, of the makers, reduced the amount thereof. The court said that the policy of the law is to permit no tampering with written instruments, but added, that where an alteration is made under an honest mistake of right, and not fraudulently and with a view to gaining improper advantage, a recovery may be had upon the original consideration in the note.

In most of the foregoing cases, however, the alteration took place before the note was delivered as a completed obligation, without the knowledge or consent of the party who had previously signed the same; and in some, at least, there was a change in the consideration corresponding to the change in the amount of the note. In *Adams v. Faircloth* (1906) — Tex. Civ. App. —, 97 S. W. 507, one desiring to borrow money was informed by the person to whom he applied that the loan would be made if the name of a third party was secured on the note; the third party informed the borrower that he desired a sum of money also, and that the note should be made for the total of the two amounts: this was done,

but when the note was presented to the lender by the borrower, the latter, at the former's request, erased the figures and inserted the figures and words of the original amount which the lender had agreed to loan, the loan being then made and the note delivered. In holding this to be a material alteration, not binding upon the third person, the court states that the alteration changed the liability of the third person, and the materiality was not affected by the fact that it decreased his liability. In *Chism v. Toomer* (1871) 27 Ark. 108, the party complaining of the alteration signed the note and intrusted it to another to obtain the signatures of others; after the note was delivered to the other it was reduced from \$300 to \$110, and as thus altered negotiated. The court in this case said, in effect, that the court below seems to have come to the conclusion that, inasmuch as the defendant was not damaged by the alteration of his co-obligors, the change was not material; but that that was not the test to determine whether the alteration was material; the test is whether the alteration made it a new note; and not whether the new note was more or less beneficial to one of the obligors. In a subsequent part of the opinion, however, the court suggests a different reason for the decision, thus: "It may be said that the man who was willing to be held for \$300 ought not to be allowed to complain because he is only held for \$110. The answer is, that there may have been considerations which would have induced [defendant] to have signed a note for \$300, that would not have led him to sign a note for \$110. For aught we know, [defendant] was to have [been] paid a portion of the \$300, and if so, the altering of the note, without his consent, to a note for \$110, may have been the means of depriving him of the only consideration which moved him to sign the note in the first instance." This language suggests a distinction between a case where the

alteration is before negotiation and the consideration is reduced to correspond with the reduction in the paper, and a case where the amount of the paper is reduced after the same has been negotiated and the consideration has passed, and without any change in the amount or nature of the consideration for which the paper was given. In *Hewins v. Cargill* (1877) 67 Me. 554, the defendant signed his name on the back of a note for \$500; afterwards the note was altered to one for \$400 without his knowledge or consent. It does not appear whether the alteration was before or after delivery of the note by the maker, nor whether there was a corresponding reduction of the consideration. The court said: "True, the change is not disadvantageous to one who is holden to pay it, since it only reduces the amount for which he would otherwise be liable; but it makes another and a different contract of it; and any signer or indorser has a right to say, and can say truly, that the note in its altered form is not his contract."

The alteration of a tax collector's bond by reducing the amount thereof was held to be a material alteration in *Doane v. Eldridge* (1860) 16 Gray (Mass.) 254, for the reason, as stated by the court, that thereafter it did not "truly represent the obligation into which" the obligors entered. The alteration was made after the bond had been delivered, in order to correct an error due to an excessive assessment. The alteration of the official bond of a sheriff, after it had been signed by the principal and part of the sureties, was held to be a material alteration, which avoided the bond as to those who had not assented to the alteration, in *People v. Brown* (1845) 2 Dougl. (Mich.) 9. The court says that "whether the sureties were prejudiced or not is wholly immaterial. Any alteration in the terms of their contract, by the parties to it, which changes their situation without their consent, discharges them, when the contract has been actually made. Whether beneficial or not is for them, and them alone, to determine,—not for the other parties."

In *Towles v. Tanner* (1903) 21 App. D. C. 530, where a reduction of a note from \$1,100 to \$1,000 was treated as a material alteration, which relieved indorsers thereon from liability if the alteration was made after their indorsement, and without their assent, their contention was that the alteration was by the maker after the note had been delivered to him for negotiation.

In *New York L. Ins. Co. v. Martindale* (1907) 75 Kan. 142, 21 L.R.A. (N. S.) 1045, 121 Am. St. Rep. 362, 88 Pac. 559, 12 Ann. Cas. 674, where it was conceded that a note may be vitiated by an unauthorized alteration by lowering the rate of interest, the court said that the conversion was proper, since the paper as changed would be different from that entered into by the parties, and whether a better or worse one for the obligor is not material. Cases involving change in the rate of interest are not in general included.

There is some authority to the effect that the reduction of the amount of a note to correct a mutual mistake is not such a material alteration as will avoid it. Where a mutual mistake was made by the parties to a note, resulting from an error in calculation, and the erroneous amount was inserted in the note, and thereafter the marginal figures were struck through with a pen and the correct amount written above as follows, "\$118.09 correct amount," it was held in *Chamberlain v. Wright* (1896) — Tex. Civ. App. —, 35 S. W. 707, that there was no such alteration as avoided the note as against the maker. The court says that "the supposed change was simply indicative of a mistake to be corrected to appellee's advantage, and showed an honest purpose on the part of the holder not to avail himself of an error in his favor."

It has been held that, as between the parties, the striking out of the word "forty" from an amount in a note for \$840, and an indorsement on the back of the note to the effect that "this note changed to \$800,—\$40 advanced October 12, '99. G. G. November 2, '99,"—which indorsement was made by the payee after a partial pay-

ment thereof by the maker, who instructed the payee to indorse the amount on the note as interest, but instead indorsement was made as above stated, are not material alterations. *Whitehead v. Emmerich* (1906) 38 Colo. 13, 87 Pac. 790. But see *Doane v. Eldridge* (Mass.) *supra*.

The rule that the reduction of the amount of a note amounts to a material alteration has been applied in case of an indorsement of a fictitious payment upon a note before or at the time of negotiation, without the consent of a surety, for the purpose of reducing the amount of the note, the court holding that the indorsement of such a payment upon a note is as much a material alteration of the amount of the note as if it had been effected by erasure and interlineation on the face of the note. *Johnston v. May* (1881) 76 Ind. 293; *Washington Finance Corp. v. Glass* (1913) 74 Wash. 653, 46 L.R.A.(N.S.) 1043, 134 Pac. 480. It seems clear that if the indorsement of a fictitious credit for the purpose of reducing the amount of a note amounts to a material alteration, the actual reduction of the amount on the face of the note is a material alteration. Not all cases, however, hold that the indorsement of a credit for the purpose of reducing the amount is a material alteration; it has been held that such an indorsement does not amount to a material alteration. *Laub v. Rudd* (1873) 37 Iowa, 617.

In this case a note was executed by a principal maker and his surety, and left in possession of the principal maker with the understanding that it was to be delivered to the payee therein as evidence of the purchase price of cattle. The principal maker purchased other cattle, giving in payment thereof the note in question, and indorsed thereon as a credit the difference in the purchase price of the cattle. In holding this not to be such an alteration as discharged the surety the court says: "This indorsement effects no change upon the face of the note. It is the same note as respects date, amount, payee, and time of payment as before. If the note had been

9 A.L.R.—69.

negotiated and after that [the amount of the indorsement] had been credited thereon, no one would claim that such an alteration had been made as would discharge the surety. The effect is just the same when the credit is indorsed at the time of negotiation."

So, in *Bland v. Fidelity Trust Co.* (1916) 71 Fla. 499, L.R.A.1916F, 209, 71 So. 630, it is held that an indorsement of payment on a note has no more validity or effect than a receipt, and the addition of such an indorsement does not have the effect of vitiating the instrument.

In *Hakes v. Russ* (1910) 99 C. C. A. 327, 175 Fed. 751, it is held that the mere indorsement of a credit on a joint and several note is not a material alteration. *Lurton, Ch. J.*, observed that such a credit is not a change in the amount of the principal of a note or bond, and the cases which hold that the reduction of the amount of an obligation is a material alteration are not in point. He said, however, that if the credit was the result of an agreement to relieve certain persons from signing the note, then the failure to have the joint and several note signed by those persons according to the agreement with each of those who did sign would be a material change in the contract. In *Voris v. Birdsall* (1915) — Okla. —, 153 Pac. 673, however, where it was secretly agreed between the vendor of a horse and two of a number of purchasers that if they would join the other purchasers as joint purchasers, jointly executing with them the note in controversy, thereby inducing the other defendants to sign the same, the vendor would, prior to the delivery of the note, secretly, and without the knowledge of the other defendants, indorse upon each of the notes a credit as having been paid by them, the indorsement of such credit was held to constitute a material alteration of the note. In *Hawkins v. Humble* (1868) 5 Coldw. (Tenn.) 531, where a promissory note was given for the hire of a slave, and before the period of hiring expired the slave returned to its former owner and there remained, and the hirer and owner compromised the

matter without the knowledge or consent of the surety on the note, and entered a credit on the note for the amount the hire was reduced on account of the slave's return, it was held there could be no recovery on the note against the surety. The materiality of the alteration seems not to have entered into the decision in this case, the basis of the decision being that, the slave having returned to his owner, there could be no recovery on the obligation for his services except on a new contract, and it was held not competent for the principal debtor to waive his legal rights under the original contract and decline to take advantage of the forfeiture so as to bind the surety.

Where there has been no cancellation of the writing on the original note, but a memorandum written thereon indicating an obligation for a lesser amount than that for which the writing was originally drawn, there is some difference of opinion as to there being a material alteration.

In *State Solicitors' Co. v. Savage* (1897) 39 Fla. 703, 23 So. 413, where a bank, in discounting a note for \$1,500, secured by the mortgage of a third person, loaned only \$1,000 thereon, and indorsed on the note the statement, "the said principal sum being reduced to \$1,000" and also indorsed a like statement on the mortgage, there was held not to be a material alteration of the note. The court says that "there has been no change in the original physical form of the note by erasure or interlineation; and while it may be conceded that a note may be altered by indorsements or memoranda thereon without disturbing its physical appearance, . . . yet if the memoranda or indorsements do not have the legal effect to alter the legal import and operation of the note, but express a new, distinct, and collateral

agreement between the payee and principal named therein, it will only be evidence of the new agreement intended, and it cannot be said that the note, the evidence of the prior agreement, was thereby altered. . . .

This was not an alteration of the note, but in legal effect a credit of \$500 on it." In *Douglass v. Wilkinson* (1837) 17 Wend. (N. Y.) 431, affirmed in (1839) 22 Wend. 559, an accommodation note for \$2,500, which was indorsed by the payee with a direction to the cashier of the bank at which it was made payable to "pay on within \$750," was held to be a valid obligation for \$750. In *Merchants' & M. Bank v. Evans* (1876) 9 W. Va. 373, where a joint accommodation note, signed by several parties for \$6,000, was, without the knowledge of the sureties, discounted at a bank for \$4,000, the cashier indorsing upon the note, "discounted for \$4,000, and should be so read," such indorsement was held not to invalidate the note, since this was equivalent to the bank paying the full amount of the note and immediately receiving back the difference.

On the contrary, a surety who had, for the accommodation of another, joined such other in a note for \$3,000, and intrusted it to the other for negotiation, was held not liable to the payee bank, which refused to discount the note for \$3,000, but did discount it for \$2,000, and wrote across the face of the note: "\$2,000. This note was discounted for \$2,000, which amount is due upon it," and signed the memorandum "John H. Ebert, cashier," it being held that the surety, not having assented to the modification, was not liable upon the paper as a note for \$2,000, nor for the money loaned as upon his request. *Portage County Branch Bank v. Lane* (1858) 8 Ohio St. 405. W. A. E.

STATE OF KANSAS
v.
E. C. WILCOX
and
HERMAN C. ERICSSON et al., Appts.

Kansas Supreme Court — June 7, 1913.

(90 Kan. 80, 132 Pac. 982.)

Libel — communication to public officer — privilege.

1. The general rule that communications made to a prosecuting officer are privileged when made in good faith, in the prosecution of an inquiry regarding a crime which has been committed, cannot be successfully invoked by the defendants in an action for criminal libel where the communications were made to the prosecuting officer in furtherance of a conspiracy to commit an indictable offense.

[See note on this question beginning on page 1099.]

Indictment — affidavit attached to information — sufficiency.

2. Where copies of affidavits which purport to have been sworn to before a notary public on a certain date are attached to an information which charges a criminal libel based thereon, the information sufficiently sets forth the manner and time of the publication.

Libel — evidence of subsequent publications.

3. In a prosecution against several persons for criminal libel, evidence of publications made subsequent to the one relied upon by the state, which appear to have been so connected with the main purpose as to make them part of the *res gestæ*, is admissible as proof of malice, and where it is claimed that the several defendants conspired and confederated together for the purpose of committing the offense, such evidence is admissible as tending to establish the conspiracy.

[See 17 R. C. L. 467.]

Trial — libel — privilege — question of law and fact.

4. Under the facts stated in the opinion, the question of qualified privilege becomes a mixed question of fact and of law, and the court properly admitted evidence of the communications and submitted to the jury the question whether the same were privileged, admonishing them that they should wholly disregard the communications unless they found from the evidence

that when the communications were made to the prosecuting officer, the defendants knew them to be false and knew that no offense had been committed, but made them as part of a plan agreed upon between themselves to bring a false and baseless accusation against the libelee.

Conspiracy — declarations of co-conspirator.

5. In this case it was held that there was no violation of the general rule which requires that before the acts and declarations of one of the alleged conspirators may be proved a *prima facie* showing of a conspiracy must be offered.

[See 5 R. C. L. 1089.]

Evidence — privileged communication — statements to prosecuting attorney.

6. There is no relation of attorney and client between a prosecuting attorney and persons presenting a charge to him, which will make their communications to him privileged, in case they are prosecuted for criminal libel growing out of the charges made.

[See 17 R. C. L. 337.]

Libel — communications to prosecuting attorney — ulterior purpose.

7. Communications known to be false, to a prosecuting attorney in order to instigate proceedings against an innocent person for the wreaking of private vengeance or to levy blackmail, are not privileged.

[See 17 R. C. L. 337.]

—communications to notary public.

8. Communications to a notary public before whom affidavits charging

crime are verified, are not privileged if they were not made in view of any criminal proceedings contemplated.

APPEAL by defendants Ericsson et al. from a judgment of the District Court for Shawnee County convicting them of criminal libel. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. A. M. Harvey, J. E. Addington, C. A. Crowley, and E. C. Wilcox for appellants.

Messrs. John S. Dawson, Attorney General, W. E. Atchison, A. L. Noble, J. N. Tinch, Ernest R. Simon, and James A. McClure for appellee.

Porter, J., delivered the opinion of the court:

Herman C. Ericsson, Cory Black, and E. C. Wilcox were jointly charged in one information with criminal libel. On the trial Wilcox was acquitted. Ericsson and Black were found guilty, and appeal.

The information, in substance, charged that the three defendants, together with Charlotte Thomann, H. C. Medlock, and Leta Foster, conspiring and confederating together, and aiding, assisting, and abetting each other, wilfully and maliciously intending to vilify and defame one P. B. Gillett, procured to be made public and circulated certain false and libelous affidavits charging him with misconduct with Leta Foster, a girl of less than eighteen years of age. Copies of the affidavits alleged to be libelous were attached to the information. Two of these purported to have been verified before a notary public of Shawnee county on February 10, 1912; one by Leta Foster, the other by Charlotte Thomann. Two others purported to be sworn to before the same notary February 19, 1912; one by Ericsson and one by Medlock. All the affidavits purported to refer to the conduct of the person libeled and the said Leta Foster in a certain room in the National hotel in the city of Topeka on the morning of January 30, 1912. E. C. Wilcox has been engaged in the practice of law at Anthony for twenty-five years, and was county attorney of Harper county for the two years ending in January, 1913. The person mentioned

in the information as the libelee, and who is the complaining witness, has been the judge of that district for the past fifteen years. In August, 1911, disbarment proceedings were filed in the supreme court against Wilcox, which are still pending. Some of the charges against him relate to matters alleged to have occurred in his practice before the district court, and if true indicate that for some years he has not been on friendly terms with the complaining witness.

Defendant Cory Black resides at Council Grove, where he is engaged in the furniture business. He formerly lived in Harper county, and for more than twenty years has been a close, intimate friend of Wilcox. It is the theory of the prosecution that Black undertook the task of assisting his friend out of difficulties, and that in furtherance of such design he conspired with the others mentioned in the information to procure the alleged false and libelous charge to be made in order that it might be used as a "counterirritant" in the disbarment proceedings. While the evidence does not show that the complaining witness had been active in the proceedings to disbar Wilcox, there was evidence which fairly tended to show that Wilcox either believed such to be the case, or that he thought that the judge of the court possessed an influence over others which, if brought to bear upon them, would result to his advantage in the disbarment proceedings. During the holiday season of 1911 Black, with his family, visited for a week at the home of Wilcox, returning to Council Grove the latter part of December. Defendant Ericsson is a private detective. He had recently spent some time at Anthony at work for the state and

assisting Wilcox, the county attorney, in prosecuting liquor cases. Black, immediately upon his return home, wrote to the ex-chief of police of Topeka, asking for the address of Ericsson. On the 4th or 5th of January Ericsson appeared at Council Grove; before that time he had never seen or heard of Black. After a short conference, according to his testimony, he was employed by Black at \$5 a day, and expenses, to look up the charges against Wilcox and to find out if there was any collusion on the part of any persons who might be prejudiced against Wilcox, and he was to look up both sides of that case. Ericsson was at Anthony four days later as a witness in a liquor case prosecuted by Wilcox. In his testimony in this case he denied that he had any conversation with Wilcox at that time about having been employed by Black, but admits that while at Anthony he secured such information as he could concerning the disbarment proceedings. Defendant Black testified that he employed Ericsson without the knowledge of Wilcox, entirely upon his own initiative, and only for the purpose of ascertaining whether the disbarment charges against his friend were true or false. To assist him in his investigation Ericsson employed H. C. Medlock, who lived in Topeka. On January 28 Medlock went to Florence and brought Leta Foster to Topeka, where she met Ericsson and received her instructions from him. It appears to have been understood that Judge Gillett would be in Topeka about that time, in attendance on the state bar association and the banquet of the Kansas Day Club. From the time of his arrival on the 28th until he left the city, on January 30, he was constantly shadowed by Ericsson and Medlock. They sat near him at the banquet and followed him to the National hotel, where he was stopping. The Thomann woman and Leta Foster by prearrangement were at the Fifth Avenue hotel. Medlock registered them under assumed names. Leta

Foster testified that Ericsson and Medlock and Mrs. Thomann persuaded her to go to the National hotel on the morning of January 30, where a room was procured for her; that she never spoke to or with the libelee, but that he was pointed out to her by Ericsson in the lobby of the hotel; that in the evening, after she had returned to the other hotel, Ericsson brought a typewriter to the room occupied by Medlock and Mrs. Thomann and made out a paper which, at his solicitation, she signed and acknowledged the next morning before a notary public. The paper appears to have been in the form of an affidavit, but was not sworn to. A similar paper was signed and acknowledged, but was not sworn to. A similar paper was signed and acknowledged by Medlock. Leta Foster further testified that Ericsson promised to pay her \$45 for her services, and assured her that nothing would be done with the paper she had signed to hurt her in any way, and that if the person charged therein with misconduct toward her should get hold of the paper, he would do nothing except "to let his lawyer friend go." Immediately after obtaining the written statements Ericsson went to Council Grove and made his first report to Black, and left with him the statements. This was on February 1. Black testified: "I told him that I wanted him to continue in my employ and secure additional information such as he could on the disbarment case and as regards these statements he had brought me; I did not know to what extent they might be of any interest. I could see no connection between them and the case for which he was employed by me, but that if he should have an opportunity to corroborate them in any way and cared to do so, he might do that. I told him I thought they were very crude and incomplete as proving the facts alleged."

He testified that on the same day he communicated with Wilcox by telephone and asked the latter to come to Council Grove; that Wilcox

arrived the next day and they discussed the character of the statements obtained by Ericsson. "I asked him if he considered them of any particular consequence as evidence and as to whether or not in his opinion, advising me as an attorney, it would be my duty to do anything with them, laying them before the prosecuting attorney. He said he considered them very crude and of very little consequence, and that unless it should develop they were clearly and completely corroborated, it would not be wise to do anything with them, but, he added further, that if the affidavits were undisputable that a crime had been committed, I, knowing these facts, should present the matter to the prosecuting officer. I also told him that Judge Gillett and I were good friends and it would give me pain to prosecute him. Mr. Wilcox especially cautioned me that they should not be exhibited to a soul unless in time they should be so thoroughly corroborated that I would feel it my duty to lay it before a county attorney. He expressed the thought that if it should become my duty to bring a prosecution of the kind I have just mentioned, in view of the fact that he and I were old friends, it might create a suspicion that I had done it with bad motives, and for that reason he especially cautioned me."

On the 10th of February, Ericsson made his second report to Black and delivered to him the affidavits sworn to by the Foster girl and by Mrs. Thomann, setting forth more fully the same charges contained in the former statements. Black admits that at this time he paid Ericsson for the services performed and took from the latter the following receipt:

Council Grove, Kansas,
February 10th, 1912.

Received of C. W. Black, three hundred eighty-nine 15-100 dollars in full payment for my professional services to date in shadowing and observing the conduct of one, Judge P. B. Gillett, of Kingman, Kansas,

and subsequently securing documentary evidence of his conduct and circumstances corroborative thereof.

All services rendered and documentary evidence secured and delivered by me in consideration of the above-mentioned sum are hereby vouched for as being true and as representing the whole truth so far as in my power to determine and state, and were secured by me in a legitimate manner and entirely of my own initiative as to methods and details.

It being understood that this evidence is to be used in the enforcement of the laws of the state of Kansas, and in furtherance of the public welfare.

H. C. Ericsson.

On February 20, Ericsson went to Council Grove and turned over to Black an affidavit of Medlock and one of his own executed February 19, correcting some discrepancies in dates that had crept into their former affidavits, and also delivered to him a photograph of the Foster girl which he had procured to be made a few days before at Topeka.

Shortly afterwards defendant Black wrote and sent to the libelee by registered mail the following letter:

Council Grove, Kansas,
February 29, 1912.

Hon. P. B. Gillett,
Kingman, Kansas.

Dear Judge:—

You will no doubt remember the writer as one of your old-time friends and supporters. One whose occupation was traveling at the time you first run for judge, when we all put our shoulder together and beat Judge McKay. How are you, Judge, and how are things in the old 24th district? I hope "everything is lovely and the goose hangs high."

A short time since I got "next" to something that you should know. The matter has been on my mind ever since and I have pondered seriously as to my duty in the premises. It is something I would not care to tell you over the phone or write about in detail, nor would I want to

talk about it to anyone but for fear some injustice might be done. I would not advise you to commit yourself in any way on paper, but if you feel sufficient interest, come and talk with me personally and privately. It's purely personal to you and undoubtedly needs your urgent attention.

I will say this much, only, Judge, that it relates to an alleged incident at Topeka on the morning of January 30th following the Kansas Day Banquet, and is covered by a number of very strong affidavits and some photos. I have seen part of the evidence. Seemed very strong to me and well corroborated.

I hope you may be able to show it to be a mistake and assure you of such efforts in your behalf on my part as would be compatible with law and the public welfare, and, whatever I can do, if anything, will be entirely gratuitous and solely because of the old friendship.

In order that this communication may reach no one but you I am registering it with special instructions not to deliver to anyone but you in person.

If you come, write so that I may not be away.

Sincerely,
C. W. Black.

Black's testimony is that he received no reply to this letter. He denies that Wilcox knew anything about his sending the letter until May 4. He claims to have paid all the expenses incurred in the employment of Ericsson from his own funds because of his friendship for Wilcox. On May 3, he was served with a subpoena to appear before a grand jury in the United States court at Fort Scott, and immediately thereafter called Wilcox by telephone and arranged for the latter to go with him to Fort Scott as his attorney. They came to Topeka on Sunday by the same train and went to the National hotel, where they were met by Ericsson. There Wilcox by telephone summoned Mr. Simon, the county attorney of Shawnee county, to meet them. Simon

came, and Wilcox, after a few minutes' conversation with him, called Black over to them and requested him to state what he knew. They exhibited to Simon the affidavits and photograph, and urged that a prosecution be commenced against Gillett. Mr. Simon took the affidavits and agreed to investigate the matter. The defendants then resumed their journey to Fort Scott, where they interviewed Mr. Bone, the district attorney, and left with him copies of the affidavits. In the meantime the Foster girl had made an affidavit denying the truth of the former affidavit and stating the circumstances under which she had been induced to sign it. On the Friday following Wilcox returned to Topeka, called upon Mr. Simon and asked for the return of the affidavits, which the county attorney refused. The next day he called again and repeated his request, and it was likewise refused. The information in this case was filed on May 11.

The objections to the sufficiency of the information are purely technical. The court rightly overruled a motion to require the state to set forth the particular manner and time of the publication. Both facts appeared from the exhibits attached to the information showing a publication on a certain date to R. W. Eaton, the notary public. *State v. Dowd*, 39 Kan. 412, 18 Pac. 483. The matters charged in the affidavits were libelous per se.

The principal claim of error relates to the admission of the testimony of E. R. Simon, county attorney, concerning the statements made to him by Wilcox, Black, and Ericsson at the time the affidavits were delivered to him, and the request was made that a prosecution against the libelee be instituted, and also the admission of evidence showing the conversation a few days later when Wilcox sought the return of the affidavits. It is insisted that these matters were privileged communica-

Indictment—
affidavit
attached to
information—
sufficiency.

tions. The court properly, we think, construed the question of privilege as a mixed question of law and fact, and

**Trial—libel—
privilege—
question of
law and fact.**

the whole matter is covered by the instructions, which, in substance, advised the jury that on grounds of public policy the law forbids a county attorney to testify to statements and communications made to him by third persons concerning the commission of an alleged offense or crime, and that a communication so made to him shall be kept secret and not revealed without the express consent of the person who made it; and that they should wholly disregard and dismiss from their minds the testimony of E. R. Simon respecting the communication between him and the defendants, unless the jury should find from the evidence that at the time the communications were made the defendants knew that the matters set forth in the affidavits were untrue and that the alleged offense at the National hotel had not been committed at all, and that the matters were presented by the defendants to the county attorney as a part of a plan, scheme, or agreement theretofore entered into by them to make a false and baseless accusation against the person charged therein, and as a mere pretense, and not in good faith. Upon reason and principle, without reference to authority, we have little hesitation in approving the doctrine of qualified privilege as thus declared by the trial court. It is absurd to say that a rule established by public policy for the purpose of preventing the failure of justice shall be employed to aid conspirators in concealing the evidence of the steps taken by them in furtherance of a crime as despicable as that of which the defendants were convicted. Public policy is not served by withholding communications which have not been made in good faith to the prosecuting officer, but which, on the contrary, are clearly shown to have been made as a part of a vile conspiracy to blacken

and defame one who is known by the authors of the communications to be wholly innocent of wrongdoing. Where the reason for the rule no longer exists, the rule fails.

The rule excluding evidence of such communications is based wholly upon grounds of public policy. There was no relation of

**Evidence—
privileged
communication
—statements to
prosecuting
attorney.**

attorney and client between the defendants and the prosecuting officer. The defendants rely upon the case of *Michael v. Matson*, 81 Kan. 360, L.R.A.1915D, 1, 105 Pac. 537, but in that case the entire good faith of the communications was assumed. In *Mueller v. Radebaugh*, 79 Kan. 306, 99 Pac. 612, it was ruled that "a communication to an officer of the law charging a person with a crime, made in an honest effort to recover stolen property and for the purpose of detecting and punishing the criminal, is privileged." (Syl. ¶ 1.)

Even in cases of attorney and client the existence of an unlawful purpose prevents the privilege from attaching. (1 Taylor, Ev. 10th ed. § 912). The author, in the same section, stated the exception to the general rule as follows: "If either from his (the attorney's) admission or from independent evidence it clearly appears that the communication was made by the client for a fraudulent or criminal purpose, as, for instance, if the solicitor was questioned as to the most skilful mode of effecting a fraud, or committing an indictable offense, or apparently, even if there is a definite charge that the solicitor had been consulted for an illegal purpose, the privilege does not exist, and he is bound to disclose such 'guilty project.'"

In *Henry v. Sneed*, 99 Mo. 407, 17 Am. St. Rep. 580, 12 S. W. 663, the question was whether conversations between husband and wife were erroneously admitted in evidence. The court, after commenting upon the fact that it was made clearly to appear that "the husband was used as a conduit through which the

fraud-feasors operated to induce the wife reluctantly to sign and acknowledge the deed of trust" (p. 420), held that the conversations were admissible as part of the *res gestæ*, and added that "in view of the other facts in evidence, it would be simply monstrous to permit a party to take advantage of his own wrong, and assist his own fraud by such an objection." (p. 421.)

In *Briggs v. Garrett*, 111 Pa. 404, 56 Am. Rep. 274, 2 Atl. 521, it was said in reference to a civil action for libel that it "is upon all fours with an action for a malicious prosecution. The latter is but an aggravated form of an action for libel, as in it the libel is sworn to before a magistrate. The cases make no distinction between them." (p. 414.)

In *Newell on Slander and Libel*, 2d ed. p. 423, the author says: "It is for the interest of the public that great freedom be allowed in complaints and accusations, however severe, if honestly made, with a view to have them inquired into, to have offenses punished, grievances redressed, and the laws carried into execution. And this extends not merely to regular courts of justice, but to all inquiries before magistrates, referees, municipal, military, and ecclesiastical bodies; and they are only restrained by this rule; viz., that they shall be made in good faith, to courts or tribunals having jurisdiction of the subject, and power to hear and decide the matter of complaint or accusation, and that they are not resorted to as a cloak for private malice."

Hageman, in his work on *Privileged Communications*, cites numerous cases from the English courts with respect to communications made by a client to an attorney in which it has been held that the privilege does not attach because the statements were made in furtherance of an unlawful purpose. Among the cases cited in the text is the celebrated case of *Annesley v. Anglesea*, 17 How. St. Tr. 1139, in which Sergeant Tisdall lays down

the rule thus: "If [the witness] is employed as an attorney in any unlawful or wicked act, his duty to the public obliges him to disclose it; no private obligations can dispense with that universal one which lies on every member of the society, to discover every design which may be formed contrary to the laws of the society to destroy the public welfare." (p. 1229.)

Another authority cited is *Vice Chancellor Turner*, who used this language in *Russell v. Jackson*, 9 Hare, 386, 68 Eng. Reprint, 558: "I am very much disposed to think that the existence of the illegal purpose would prevent any privilege attaching to the communications." (p. 391.)

"So it seems that everyone, whether counsel, attorney, or other person, is bound to divulge matters communicated with a view to the perpetration of a crime." (*Hageman, Privileged Communications*, § 81.)

The good faith of a communication is not to be determined solely by the motives which actuate the informer. He may have malicious motives for bringing the accused to justice; may be influenced by malevolent hatred in causing the accusation to be made, provided he have reasonable grounds for the belief that a crime has in fact been committed. But when, knowing that in fact no crime has been committed, he makes the communication in order that a prosecution shall be commenced against an innocent

person, for the purpose of wreaking private vengeance, or to levy blackmail, or for any other unlawful purpose, he commits an offense against the law, and cannot claim the protection which public policy has thrown around communications made in good faith for the purpose of having an honest inquiry concerning a suspected crime. The English cases holding that the publication is not privileged where defendant's object is to compromise a felony may be found in a note to 25

Libel—communications to prosecuting attorney—ulterior purpose.

Cyc. 391. Manifestly the general rule has no room for application to a case like the present, where the communications were made to a prosecuting officer in furtherance of a conspiracy to commit an indictable offense. It can hardly be seriously contended that there were not sufficient facts and circumstances shown by the state to warrant the submission to the jury of the question of qualified privilege. In fact, the defendants utterly failed to bring themselves within the general rule as it is thus stated by Newell in his work on Slander and Libel, 2d ed. p. 500, § 98: "Upon grounds of public policy communications which would otherwise be slanderous are protected as privileged if they are made in good faith in the prosecution of an inquiry regarding a crime which has been committed and for the purpose of detecting and bring to punishment the criminal."

The same rule was followed by this court in *Mueller v. Radebaugh*, 79 Kan. 306, 99 Pac. 612. (See also 25 Cyc. 391, and cases cited in note.)

Evidence of subsequent publication of the libel was admitted, and it is claimed this was error for the reason that the conspiracy, if one existed, necessarily terminated when the publication relied upon by the state was made. The contention cannot be sustained. The publication to E. R. Simon, county attorney, and to the United States district attorney, were so connected with the main purpose as to constitute them parts of the res gestæ, and the evidence was more-over admissible as proof of malice and to establish the fact of the conspiracy itself. The latter was necessarily shown by circumstantial evidence. By merely electing to rely upon the publication on February 10, to the notary public, the state was not precluded from offering evidence of subsequent publications

made in furtherance of the original purpose.

It is argued that the conversations with the notary public before whom the affidavits were verified were privileged; but they were not made in view of any criminal proceeding contemplated. Ericsson, who procured the affidavits to be made, was a deputy sheriff, but he was acting as a private detective under Black's employment. As suggested in the briefs of the state, it is significant that he at once removed the affidavits from the county where it was alleged an offense had been committed, and delivered them to a man who had no connection whatever with the prosecution or crime in Shawnee county or elsewhere, and they were only produced by the latter when it became evident that the conspiracy had failed, and that he and Ericsson were about to be called to account for their conduct. The return of the affidavits was not sought until it became known that the Foster girl had made a disclosure of the truth and had repudiated her first affidavit.

We are not disposed to search the record for purely technical errors which it is apparent could not have worked to the prejudice of the defendants. It is extremely doubtful if any unprejudiced person, after reading the evidence, particularly that offered by the defendants themselves, could entertain a reasonable doubt of their guilt. The payment by defendant Black of such a sum of money to the private detective for the purpose expressly stated in the receipt, which he admits he prepared and had signed by the detective, and the letter written by him to the libelee, were sufficient to warrant the jury in finding him guilty as charged. The evidence of Ericsson reads almost like an admission of practically every material averment in the information.

It is urged that it was grave error to admit evidence of statements

made by one defendant in the absence of the others. They were admitted upon the theory that the state would offer evidence sufficient to establish that a conspiracy as set forth in the information in fact existed. The rule upon which defendants rely with so much assurance, and which requires that before the acts and declarations of one of the alleged conspirators may be proved a prima facie showing of conspiracy must be made to the trial court, was not violated in this case. Conspiracies of the character in question are usually established only by circumstantial evidence. Much more evidence than we have attempted to set out in the limits of this opinion was introduced, which tends

to prove the existence of the conspiracy as charged; and we have already mentioned facts proved which, in our opinion, were sufficient to render the evidence complained of admissible.

The slight discrepancies in the original affidavits and the copies thereof attached to the information were unimportant and could not have misled the defendants.

The instructions given and those refused, and the objections and rulings upon the admission of testimony, have all been carefully examined, and no error is found.

The judgment is affirmed.

Petition for rehearing denied July 5, 1913.

ANNOTATION.

Evidence: privilege of communication made to public officers.

- I. In general, 1099.
- II. Communications to judicial officers, 1106.
- III. Communications to prosecuting officers:
 - a. In general, 1109.
 - b. By informers:
 - 1. Rule that the communications are privileged, 1112.
 - 2. Rule that the communications are not privileged, 1116.
 - c. By the accused, 1119.

I. In general.

The privilege of communication to tax officers is discussed in the note in 2 A.L.R. 1421.

There are several principles which enter into a determination of the right to procure the testimony of public officers. One is whether such officers, especially the higher officers, are amenable to the process of the courts. This principle is illustrated in the following cases, which hold foreign consuls not subject to process because of treaties: See *Re Dillon* (1854) 7 Sawy. 561, Fed. Cas. No. 3,914; *United States v. Trumbull* (1891) 48 Fed. 94; *Baiz v. Malo* (1899) 27 Misc. 685, 58 N.Y. Supp. 806. A document which is part of the archives of a foreign con-

sulate is privileged. *Kessler v. Best* (1903) 121 Fed. 439. In the cases in which the officer involved is held not amenable to judicial process, the fact that a communication to such officer is involved is immaterial; the exclusion does not rest upon any privileged character of a communication, but upon the broader ground that the officer is not subject to process. Such cases, which have clearly based the decision upon the principle that the officer is not subject to judicial process, have not been exhaustively considered herein. Where a communication to such an officer is involved, however, the courts have not always clearly stated the principle governing the decision.

Where the officer is held to be subject to the process of the courts, and can be compelled to attend as a witness, there is still a question whether communications made to him are not privileged so that he will not be compelled to disclose them. The privilege in the well-recognized relations in which communications are privileged is for the benefit of the individual. While there is a certain public policy in holding the communications privileged, the privilege is, as above stated, for the individual benefit. The rule

protecting privileged communications between attorney and client against disclosure is for the benefit of the client. 4 Wigmore, Ev. § 2321; 5 Chamberlayne, Ev. § 3695. In case of physician and patient, for the benefit of the patient. 4 Wigmore, Ev. § 2386; 5 Chamberlayne, Ev. § 3705A. In communications between husband and wife the privilege belongs to the one making the communication. 4 Wigmore, Ev. § 2340. That it is for the benefit of the individual is shown by the fact that it may be waived by the one for whose benefit the privilege is raised. 4 Wigmore, Ev. §§ 2327, 2340, 2388; 5 Chamberlayne, Ev. §§ 3695, 3705A.

Communications to public officers may be divided into, (a) communications relating to affairs of state, commonly known as state secrets, and (b) communications relating to matters affecting only an individual. In the case of communications to public officers of state secrets, the public interest is involved, and the courts holding such communications privileged have, in part at least, based the decision upon this protection of the public interest. Even in case of communications relating to public matters there is in some instances a private interest in having the communication held privileged. The distinction between the protection of the public interest and the protection of the interest of private individuals is concisely stated in *Hennessy v. Wright* (1888) L. R. 21 Q. B. Div. (Eng.) 509, where, in an action of libel brought by a colonial governor against a newspaper for statements made by the newspaper as to the reports made by the governor to the colonial secretary in which the plaintiff had been directed by the secretary of state not to produce or disclose certain documents, the court states that there are two aspects to the privileged character of such documents: "First, the publication of a state document may involve danger to the nation. If the confidential communications made by servants of the Crown to each other, by superiors to inferiors, or by inferiors to superiors, in the discharge of their duty to the

Crown, were liable to be made public in a court of justice at the instance of any suitor who thought proper to say '*fiat justitia ruat cælum*,' an order for discovery might involve the country in a war. Secondly, the publication of a state document may be injurious to servants of the Crown as individuals. There would be an end of all freedom in their official communications if they knew that any suitor—that, as in this case, anyone of their own body whom circumstances had made a suitor—could legally insist that any official communication of no matter how secret a character should be produced openly in a court of justice. Other exceptions allowed by the law to the absolute right of the suitor to discovery, the privilege of the communications which pass between a solicitor and his client, or that of those made by an informer to a revenue officer, may be explained in a similar manner."

It is necessary to distinguish between the privilege of communications to public officers which prevents the communications being a basis for an action in libel or slander, and the evidentiary question which merely prevents their disclosure. The former is a question of the substantive law of libel; the latter, a question of evidence. This discussion is limited to the evidentiary question. This does not mean, however, that all actions of libel or slander are excluded, for the evidentiary question arises in such action the same as in others.

Communications relating to matters of state have generally been held privileged, and the officer entitled to refuse to disclose them. Likewise, communications which do not so clearly relate to matters of state have also been held privileged. The governor of a state has been held to have a discretion to furnish or refuse a communication contained in a letter addressed to him with reference to an officer in a subsequent suit for libel. *Gray v. Pentland* (1815) 2 Serg. & R. (Pa.) 23. It was further held that parol evidence of the contents of the writing could not be required, the court stating that "public policy would seem to

be in the way of admitting parol evidence as well as of producing the original writing, for that would come to the same thing as to the policy. It would be a check on representations to the competent authority; it would restrain the free communications that might be necessary for the public good, in case of a candidate for office, or of one who was alleged unworthy to retain an office, to lay it down that a governor or the competent authority for appointing and removing should be compellable to produce papers for the purpose of supporting an action in a court of law." In approving of this case, the court, in *Thompson v. German Valley R. Co.* (1871) 22 N. J. Eq. 111, states that the governor will be allowed to withhold any paper or document in his possession, or any part of it, if in his opinion his official duty requires him to do so. Again, in *Hartman's Appeal* (1877) 85 Pa. 433, 27 Am. Rep. 667, the governor was held entitled to refuse information to a grand jury concerning the military or other means used in the suppression of riots which were under investigation by the grand jury, the court stating that the propriety of withholding information required by the grand jury must be determined by the governor himself, and the weight of the reasons influencing in the conclusion at which he arrives is for himself, and not for the court, to consider. The secretary of state, adjutant general, chief officers of the executive department, and two officers of the National Guard, were held to be governed by the same principles which governed in the case of the chief executive, the court stating that if the governor is exempt from attachment, his immunity protects his subordinates and agents.

In *Burr's Trial*, as reported by Robertson, it appears that a subpoena was issued to the President of the United States, directing him to bring to the trial a letter by General Wilkinson; in answer to this subpoena the President refused to attend the trial, but sent the letter to the United States attorney, authorizing the latter to exercise his discretion as to disclosing the contents. Chief Justice Marshall, in

directing the issuance of the subpoena, stated that if matter is contained in the letter which it would be "imprudent to disclose, which it is not the wish of the Executive to disclose, such matter, if it be not immediately and essentially applicable to the point, will, of course, be suppressed." And when the admissibility of the letter after it had been delivered to the United States attorney was under discussion, Chief Justice Marshall admitted that the President may have a discretion as to disclosing certain communications to him, but held that this is personal to the President, and in this particular case not having been exercised by him, but intrusted to another, the letter was ordered to be produced under certain restrictions. 1 *Burr's Trial*, pp. 177-189; 2 *Burr's Trial*, pp. 533-539.

In *Totten v. United States* (1875) 92 U. S. 105, 23 L. ed. 605, it was held that an action could not be maintained against the government in the court of claims upon a contract for secret services during the Civil War, made between the President and the claimant, for the reason that it would be necessary in such a suit to expose the details of dealing with individuals and officers to the serious detriment of the public; that the secrecy which such contracts imposed precludes any action for their enforcement.

A paper submitted to the executive council for the purpose of enabling it to perform its executive functions, and filed among its papers, ought not to be withdrawn by the clerk without its order; therefore an attachment ought not to be awarded against the clerk. *Morris v. Creel* (1860) 2 Va. Cas. 49.

In England communications between colonial and home officers have been held privileged. In *Hennessey v. Wright* (1888) L. R. 21 Q. B. Div. 509, 57 L. J. Q. B. N. S. 530, 59 L. T. N. S. 323, 53 J. P. 52, 9 Eng. Rul. Cas. 570, communications which passed between the colonial secretary and the governor of a colony, and between either of these high-officials and a royal commissioner appointed to investigate the affairs of the colony, were held to be state documents and *prima facie*

privileged from production. A correspondence which had taken place between the secretary of state and a colonial governor with reference to a complaint which had been made to the secretary of state against the governor was held privileged in *Anderson v. Hamilton* (1816) 2 Brod. & Bing. 156, note, 129 Eng. Reprint, 917, note, 8 Price, 244, note, 146 Eng. Reprint, 1191, note, 4 J. B. Moore, 593, 22 Revised Rep. 751, note.

In *Wright v. Mills* (1890) 62 L. T. N. S. (Eng.) 558, the right of the agent general of a colonial government to refuse to produce documents which his superiors objected that he should produce was sustained.

Communications between the attorney general of a province and the lieutenant governor with reference to the conduct of an officer thereof are confidential, and cannot be disclosed by the attorney general in a subsequent action against the lieutenant governor for libel. *Wyatt v. Gore* (1816) Holt N. P. (Eng.) 299.

The correspondence which took place between the board of directors of the East India Company and the commissioners for the affairs of India relative to a disputed claim against the East India Company was held privileged in *Smith v. East India Co.* (1841) 1 Phill. Ch. 50, 41 Eng. Reprint, 550. A statute placed all the affairs of the East India Company under the superintendence, direction, and control of the commissioners for the affairs of India, and it is stated that, in order that this superintendence and control should be exercised effectively for the benefit of the public, it was necessary that the most unreserved communications should take place between the directors and the board of control, and the directors were required by the statute to make communications of all their acts, transactions, and correspondence to the board of control. In view of these facts, it is stated that if such communications were subject to be produced in a court of justice at the suit of an individual, the effect would be to restrain the freedom of the communications and to render them more

cautious, guarded, and reserved, and for this reason the communications come within that class of official communications which are privileged.

Political communications between the government and East India Company were held privileged in *Wadeer v. East India Co.* (1856) 8 DeG. M. & G. 182, 44 Eng. Reprint, 360, 2 Jur. N. S. 407.

Reports made to the admiralty by the commanding officer of a battleship, relating to a collision, cannot be produced in an action growing out of such collision. *The Bellerophon* (1874) 44 L. J. Prob. N. S. (Eng.) 5, 31 L. T. N. S. 756, 23 Week. Rep. 248.

A report made by an inspector general of prisons to the lord lieutenant is privileged as a state document. *M'Elveney v. Connellan* (1864) 17 Ir. C. L. Rep. 55.

The provincial secretary cannot be compelled to produce a document filed with him by an officer in answer to charges made against such officer. *Gugy v. Maguire* (1863) 13 Lower Can. Rep. (Dec. des Tribunaux) 33. A provincial secretary cannot be compelled to produce a letter written to him charging another with keeping a house of ill fame. *Bradley v. McIntosh* (1883) 5 Ont. Rep. 227.

In *Cooke v. Maxwell* (1817) 2 Stark. (Eng.) 183, upon the theory that a communication by the governor of a colony to an officer, ordering the destruction of a building, was incompetent, the court held the officer might state that he acted under the governor's orders in destroying the building.

The report of a military inquiry held to investigate the conduct of an officer under the orders of the commander in chief, the report being delivered to the commander in chief and retained by him, is held to be an official document in possession of the secretary, and not competent to be disclosed, even if the secretary who had possession of the report had been willing to do so, in *Home v. Bentinck* (1820) 2 Brod. & B. 136, 129 Eng. Reprint, 909. Statements made by an officer before a court of inquiry instituted by the commander in chief, and made a part

of the minutes of such proceedings and delivered to the commander in chief, are held to be received by him as privileged communications, which cannot be produced or read in evidence upon an action in libel, in *Dawkins v. Rokeby* (1873) L. R. 8 Q. B. 255, affirmed in (1875) L. R. 7 H. L. 744, 33 L. T. N. S. 196, 23 Week. Rep. 931, 9 Eng. Rul. Cas. 39. The court in *Home v. Bentinck*, 2 Brod. & B. 130, 129 Eng. Reprint, 907, in holding the report of a military commission to the commander in chief confidential, states: "Now, before I examine the few instances alluded to as applying to cases of this description, let us see upon what ground and principle the present case rests. It is agreed that there are a number of cases of a particular description in which, for reasons of state and policy, information is not permitted to be disclosed. To begin with the ordinary cases, and those of a common description in courts of justice: In these courts, for reasons of public policy, persons are not to be asked the names of those from whom they receive information as to the frauds on the revenue. In all the trials for high treason of late years, the same course has been adopted, and, if parties were willing to disclose the sources of their information, they would not be suffered to do it by the judges. What is the ground upon which these cases stand except it be the ground of danger to the public good, which would result from disclosing the sources of such informations?—for no person would become an informer if his name might be disclosed in a court of justice, and if he might be subjected to the resentment of the party against whom he had informed. Does not this reasoning apply closely to the case now before us? This is an inquiry directed to be made by the commander in chief with a view to ascertain what the conduct of the party suspected might have been in the course of which a number of persons may be called before the court, and may give information as witnesses which they would not choose to have disclosed; but if the minutes of the court of inquiry are to be pro-

duced in this way, on an action brought by the party, they may reveal the name of every witness and the evidence given by each. Not only this, but they also reveal what has been said and done by each member of the existing court of inquiry. It seems, therefore, that the reception of the minutes would tend directly to disclose that which is not permitted to be disclosed, and therefore, independently of the character of the court, I should say, on the broad rule of public policy and convenience, that these matters, secret in their natures and involving delicate inquiry and the names of persons, stand protected." In holding that the court could not compel the secretary of state to produce a military report, it is stated in *Beatson v. Skene* (1860) 5 Hurlst. & N. 838, 157 Eng. Reprint, 1415, that "it is manifest (we think) that there must be a limit to the duty or the power of compelling the production of papers which are connected with acts of state. As an instance, we would put the case of a British minister at a foreign court, writing in that capacity a letter to the secretary of state for foreign affairs in this country, containing matter injurious to the reputation of a foreigner or a British subject. Can it be contended that the person referred to would have a right to compel the production of the letter in order to take the opinion of a jury whether the injurious matter was written maliciously or not? We are of opinion that, if the production of a state paper would be injurious to the public service, the general public interest must be considered paramount to the individual interest of a suitor in a court of justice; and the question then arises, How is this to be determined? It is manifest it must be determined either by the presiding judge, or by the responsible servant of the Crown in whose custody the paper is. The judge would be unable to determine it without ascertaining what the document was, and why the publication of it would be injurious to the public service,—an inquiry which cannot take place in private, and which taking place in public may do all the mischief which it is pro-

posed to guard against. It appears to us, therefore, that the question whether the production of the documents would be injurious to the public service must be determined, not by the judge, but by the head of the department having the custody of the paper; and if he is in attendance and states that in his opinion the production of the document would be injurious to the public service, we think the judge ought not to compel the production of it. The administration of justice is only a part of the general conduct of the affairs of any state or nation, and we think is (with respect to the production or nonproduction of a state paper in a court of justice) subordinate to the general welfare of the community. If, indeed, the head of the department does not attend personally to say that the production will be injurious, but sends the document to be produced or not as the judge may think proper, or as was the case in *Dickson v. Wilton*, before Lord Campbell (reported in (1859) 1 Fost. & F. (Eng.) 425), where a subordinate was sent with the document with instructions to object, but nothing more, the case may be different. . . . Perhaps cases might arise where the matter would be so clear that the judge might well ask for it, in spite of some official scruples as to producing it; but this must be considered rather as an extreme case, and extreme cases throw very little light on the practical rules of life."

In holding that a communication between officers of the government, recommending the removal of a clerk for inefficiency and bad conduct, could not be admitted in evidence to sustain an action for libel brought by the person whose removal was recommended, the court, in *Gardner v. Anderson*, Fed. Cas. No. 5,220, states that "communications in writing passing between officers of the government in the course of official duty, relating to the business of their offices, are privileged from disclosure on the ground of public policy, and the production will not be compelled by courts of law or equity. Neither will secondary evidence of their contents be admissible,

whether in the form of copies or of oral statement of witnesses who have read and recollected the same."

The lord chamberlain, whose duty it is to decide the proper persons to be admitted to state functions, cannot be held to disclose a communication made to him with reference to an individual, in an action by the latter for slander against the person alleged to have made the statement. *West v. West* (1911) 27 Times L. R. (Eng.) 189, affirmed as to this point by the court of appeals (1911) 27 Times L. R. 476.

Advice furnished by a corporation counsel to assessors under a statute making it the duty of the corporation counsel to furnish every department and officer of the city government such advice and legal assistance, as counselor or attorney in or out of court, as may be required, was held to be privileged in *People ex rel. Updyke v. Gillon* (1889) 18 N. Y. Civ. Proc. Rep. 109, 9 N. Y. Supp. 243.

It is held in *State ex rel. Douglas v. Tune* (1918) 199 Mo. App. 404, 203 S. W. 465, that the disclosure of a letter written by citizens to a complaint board cannot be compelled in an action in libel by the persons against whom the letter complained, against the writers. It was urged that the privilege, if any, belonged to the writers of the letter, and could not be raised by the officers of the complaint board. In answer to this contention, however, the court states that such officers may claim the privilege, and properly so.

But communications made to a labor commissioner at a conference between labor commissioners and an employer and employees, and the representatives of labor unions, with a view of settling a strike, are not privileged so as to exempt the commissioner from testifying in regard thereto in a suit for an injunction against the union. *White Mountain Freezer Co. v. Murphy* (1917) 78 N. H. 398, 101 Atl. 357. The duties of the labor commissioner, as defined by the statute involved in this case, were not to hear and decide controversies between employers and employees, but to endeavor to bring about an amicable adjustment, and, failing

that, to induce the parties to submit the dispute to arbitrators, or to a state board of conciliation and arbitration, and in case of failure to secure such reference in case of a strike, to investigate the cause of the controversy, ascertain which party is mainly responsible, and make and publish a report assigning such responsibility. In discussing the character of the action taken by the commissioner, the report states that there is no machinery provided for a judicial proceeding, that the only trace of judicial action that is found in the provision of the statute is that requiring him to hear all parties, and advise them, in certain circumstances, what, if anything, ought to be conceded by either or both; and the court continues that "while it may well be that the duty of conciliation imposed upon the commissioner can be better performed, as the legislature now seem to think [a statute enacted since the controversy involved in the case at bar provided that neither the proceedings nor any part thereof before the labor commissioner should be received in evidence for any purpose in any judicial proceeding, before any other court or tribunal whatever], if some or all communications to or before him are held privileged, the commissioner cannot claim the privilege of exemption as a witness in view of the numerous other duties imposed on him, unless at the time about which inquiry is sought of him, he was engaged in a purely judicial duty. It does not appear that the information sought of him in the present case was obtained by him while acting in such a capacity, and it is clear that judicial power which would excuse him from appearing as a witness has not been given to him."

A government letter carrier was compelled to answer questions relating to the delivery of letters to a party in a divorce action and to certain instructions given by her to him in *Smith v. Smith* (1899) 2 Penn. (Del.) 365, 45 Atl. 848, over the objection that the information was privileged and that public policy required that he should not disclose it.

A letter written in answer to a con-
9 A.L.R.—70.

fidential inquiry by a bank examiner, relating to the character of a bank in which the writer of the letter had stock, stating to the bank examiner that he had become alarmed and disposed of his stock, is not a privileged communication. *Cox v. Montague* (1897) 24 C. C. A. 364, 47 U. S. App. 384, 78 Fed. 845, appeal dismissed in (1897) 42 L. ed. 1213, 18 Sup. Ct. Rep. 944.

Communications passing between the applicant for a patent and the patent office touching an unissued patent are not privileged. *Edison Electric Light Co. v. United States Electric Lighting Co.* (1890) 44 Fed. 294, s. c. on subsequent appeal (1891) 45 Fed. 55. The rule of the patent office that "caveats and pending applications are preserved in secrecy. No information will be given without authority respecting the filing by any particular person of a caveat or of an application for a patent, or for the reissue of a patent, the pendency of any particular case before the office or the subject-matter of any particular application, unless it shall be necessary to the proper conduct of the business before the office,"—does not make a communication passing between the applicant and the patent office confidential.

A communication to an attorney who is acting simply as notary public was held not privileged in *Lukin v. Halder-son* (1900) 24 Ind. App. 645, 57 N. E. 254. At least there is no violation of the rule that communications between attorney and client are privileged, in permitting an attorney who acted as notary to state the place where the acknowledgment of a deed was taken. *Mutual L. Ins. Co. v. Corey* (1889) 54 Hun, 493, 7 N. Y. Supp. 939, reversed on other grounds in (1892) 135 N. Y. 326, 31 N. E. 1095.

In *People v. Farmer* (1909) 194 N. Y. 251, 87 N. E. 457, a prosecution for murder, in which an attorney who had taken an acknowledgment of a deed by the defendant was called to testify to the transaction, a provision of the Code prohibiting the disclosure of a communication to an attorney is stated not to be intended to prohibit the disclosure "of a communication, so far as

such communication is necessary to enable a public officer to act in his official capacity."

The fact that a notary public who drew a deed and took an acknowledgment was also a priest and spiritual adviser of the grantor does not prevent his testifying as to the intention of the grantor as to the land to be included in the deed, where it does not appear that the notary was consulted in his capacity as a priest, but was called simply in his character as notary public. *Partridge v. Partridge* (1909) 220 Mo. 321, 132 Am. St. Rep. 584, 119 S. W. 415.

See also the reported case (*STATE v. WILCOX*, ante, 1091) as to communications to notaries public.

Conversations of government detectives and other agents with witnesses, with the purpose and effect of inducing and influencing the evidence of such witnesses, do not amount to state secrets within the meaning of the rule protecting such secrets from disclosure, and when a witness so induced or influenced appears on the stand and testifies, he may be cross-examined as to any and all inducements made to him on the part of anyone in connection with his evidence. *King v. United States* (1902) 50 C. C. A. 647, 112 Fed. 988.

In *Kain v. Farrer* (1877) 37 L. T. N. S. (Eng.) 469, the right of public officers to refuse to testify as to documents in their possession, where such testimony would violate public policy, is recognized, but the affidavits of the officers stating the grounds for refusal were held insufficient in that case.

II. Communications to judicial officers.

It has been laid down as a general proposition that a judge may refuse to testify as to proceedings held before him, but that does not render his testimony incompetent. *Hale v. Wyatt* (1916) 78 N. H. 214, 98 Atl. 379; *White Mountain Freezer Co. v. Murphy* (1917) 78 N. H. 398, 101 Atl. 357. The opinion has been expressed that judges are not exempt from the duty that rests upon every citizen to disclose, when called upon, facts within his knowledge essential to the administration of justice. *White Mountain*

Freezer Co. v. Murphy (N. H.) supra. It is stated obiter in *Welcome v. Batchelder* (1843) 23 Me. 85, that public policy authorizes the excusing of a trial judge from testifying as to the testimony in a trial had before him, but it is held to be no ground of exception that he did not insist upon this right to be excused, and testified. It is not error to receive the testimony of a judge, given without objection, as to what took place before him in a former trial of a cause. *Hale v. Wyatt* (N. H.) supra. The court here recognizes that a judge may refuse to testify to the statements made before him, but this is held to be a personal privilege of which he may avail himself or not as he chooses, that such a statement is not privileged, that it lacks the element of confidentiality which is essential to a privileged communication; accordingly, the testimony of a probate judge as to statements made in appearing before him was held competent when testified to by him without objection. That an arbitrator cannot be examined in an action on his award to give evidence as to what was done before him is held in *Ellis v. Saltau* (1808) 4 Car. & P. (Eng.) 327, note. An application to procure the depositions of the chief clerk and stenographer of the surrogate for use upon the hearing of a motion to open a decree made by the surrogate awarding a stipulated amount to an attorney for services in an estate matter was denied in *Re Cohen* (1919) 174 N. Y. Supp. 427. The court said: "The office of surrogate is a judicial one, and the chief clerk and stenographer stand in a confidential relationship to the judge of said court in all matters in the consulting room. In the usual public duties of the office of surrogate wherein the acts are ministerial, a confidential relationship does not exist. The minutes of testimony made by the stenographer of the court are made public records by law. Public policy demands, and it is a sound doctrine, that those standing in confidential relation with a judge of a court of record as a clerk and stenographer with regard to statements in proceedings

pending before the court should not be compelled or allowed to betray the trust and confidence which such relationship implies." This, however, involved rather the process by and through which the surrogate arrived at his decision, and not a communication.

At least some of the cases in the foregoing paragraph relate not strictly to communications as that term is ordinarily understood, but to other matters. The privileged character of what is strictly a communication has been affirmed, and it has been held that a judge who convened the grand jury, which was investigating a crime, cannot be permitted to give in evidence a confession made to him by a witness called before such jury who is subsequently indicted and placed on trial, where the witness, being unable to obtain advice from a lawyer in whom he has confidence, went to the judge, and upon stating his difficulty was told by the judge that he could give him no advice, but that he should tell the truth, whereupon the witness made the confession. *People v. Pratt* (1903) 133 Mich. 125, 67 L.R.A. 923, 94 N. W. 752. The court, in discussing this question, states: "It is to be noted that the purpose of the defendant (though this does not appear to have been known to Judge Person) was 'to talk with someone he had confidence in.' It is obvious, too, that this confidence was given by reason of Judge Person's professional and official position and of the advice given by him to defendant. Is the communication made under these circumstances to be regarded as confidential and its disclosure forbidden by principles of public policy? . . . It seems to us that the principle which prohibits the disclosure of communications between attorney and client prohibits the disclosure under consideration. That principle is found in the common law, and is not confined in its application to cases where the technical relation of attorney and client exists." The court then discusses the rule governing a communication between attorney and client, and continues: "Have these principles any

application to the question under consideration? Defendant informed Judge Person that he wished advice as to what course he should pursue for his benefit. When advised by Judge Person to see an attorney he made known the circumstances which prevented his acting in accordance with this advice. Thereupon Judge Person said: 'I cannot give you any advice as to what you ought to do for your personal benefit, but you are not obliged to testify to anything that will incriminate yourself but if you do testify I will say this much to you: Tell the truth whatever it is.' This statement of Judge Person was obviously advice, and it was advice which properly should, and in this case did, come from a lawyer to a layman who desired to be advised. It is immaterial that the advice is so simple that an intelligent layman could have given it. This would perhaps characterize the best legal advice that ever was given, but it would be legal advice none the less. If it were true that the course of action prescribed by this advice was the only proper course to pursue, a relation of confidence nevertheless resulted from its being given. But it is not true that the course of action prescribed by this advice is the only course an honest lawyer might have advised defendant to follow. . . . If Judge Person had not been as he was, the judge of the circuit court for the county of Ingham, who had convened the grand jury, the principles of law above referred to would have prevented his disclosing the communication respondent made to him. It is true that Judge Person's position as judge of the circuit court prevented his becoming in law respondent's attorney. But it did not, in fact, prevent his advising respondent what course to pursue. How is the principle which regards as confidential communications between attorney and client affected by the fact that the attorney in this case was also a judge? If it be true that the fact that the attorney was the judge prevented his legally acting as attorney, it is also true that the fact that he occupied that position gave an increased weight

to his advice. The reasons for regarding as confidential, communications made in consequence of advice from an ordinary attorney, apply with full force, and are re-enforced by others, when that advice emanates from an attorney who is also a judge. The law protects these communications as confidential, because of the nature of the confidence which exists between the client and the attorney of his choice. That confidence is not diminished, but is increased, when the advice is given by the judge authorized, not merely to express an opinion, but to declare the law." The court then stated that the decision might be based on another ground, viz., the communication under consideration is privileged because made to the judge in control of deliberations of the grand jury for whom defendant had been called as a witness. An admission of guilt made by an accused to the justice before whom he was brought upon a charge of assault with intent of murder,—a charge that was dismissed upon the subsequent death of his victim,—when the justice was explaining the accused's rights as to preliminary examinations, was held not privileged upon a subsequent trial of the accused for murder, in *People v. Sharac* (1920) — Mich. —, 176 N. W. 431. The court, in distinguishing this case from the Pratt Case, said that "we do not think these facts bring the question presented within the ruling in the Pratt Case. No relation of attorney and client here existed, nor could the respondent have so understood. He did not go to the justice for legal advice, nor can we find from the record that he believed the justice was advising him as an attorney. While the record does not so state, it is apparent that at least the officer who had him in charge was also present. There was nothing said by the justice to induce the respondent to make the statement that he did, nor can we conclude that it was in any way privileged." In *People v. Hess* (1896) 8 App. Div. 143, 40 N. Y. Supp. 486, a communication made to a magistrate who conducted a preliminary examination as to an affray in which a homicide, of which

the defendant was accused, occurred, was held not privileged. The magistrate had been the counsel of the defendant in all his legal matters for some time previous to the homicide. At the time the examination began, the defendant said to the magistrate that he wanted him to be his attorney in the case, but the magistrate replied that he was the magistrate in the matter and could not be his attorney; thereupon the defendant sent for other counsel; subsequently, however, he made communications to the magistrate, stating to him that he did not wish to talk to the counsel employed by him in this case, but wished to talk with the magistrate. In holding the communications thus made not confidential, and therefore admissible, the court states that "clearly, according to the evidence of Hallenbeck [the magistrate] the relation of attorney and client did not exist between the defendant and Hallenbeck as to the affair then under consideration, and the defendant was distinctly so informed. The fact that, as to other matters, the relation may have existed, does not confer the privilege here, especially when the relation here is distinctly repudiated to the party."

In *Lindsey v. People* (1919) — Colo. —, — A.L.R. —, 181 Pac. 531, communications to the judge of a juvenile court by a child were held not privileged. This case, which has been widely commented upon, is pending in the United States Supreme Court at the date of the preparation of this note.

A statute referred to in *People v. Atwood* (1915) 188 Mich. 36, 154 N. W. 112, empowers the probate judge in each county, and makes it his duty, to issue without publicity a marriage license and to celebrate marriage in certain cases, and provides that all knowledge of any fact coming to the judge or his deputies should be deemed to be a privileged communication, and any violation of confidence a misdemeanor, but provides that "such file in the probate court, and the duplicate and record thereof in the office of the secretary of state, shall be open to inspection only upon the written order

of the judge of any circuit or the supreme court of this state, and only for such use as is designated in such order. Such order shall be made only upon the written request of the person or persons who were so married, or when necessary to the protection of property rights arising from or affected by such marriage." The court states that, assuming the license and marriage might have been proved by the record, upon the order of the court, the other could properly go no further, and states with reference to the order of the particular case, that that did not authorize either the probate judge or his clerk to state communications and facts received in confidence and privileged by the law.

Communications to a notary public and ex officio justice in regard to a mortgage which the communicant desired to have executed are not privileged communications, so as to prevent the officer from testifying to them at a subsequent trial of the communicant for obtaining money under false pretenses, by mortgaging property not belonging to him. *Frederick v. State* (1905) — Ala. —, 39 Sq. 915.

Communications to an acting magistrate who usually did business for the persons making the communications were held not confidential in *Pierson v. Steertz* (1841) *Morris* (Iowa) 136, and therefore the magistrate was held competent to testify to them in a subsequent action of trespass on the case for slander. The fact that the person to whom the communications were made was an acting magistrate is not given any emphasis, the court stating that the rule of exemption within which it was sought to include the case has never been extended further than to embrace disclosures made to practising attorneys for the purpose of obtaining professional advice.

Upon a habeas corpus proceeding a clerk of police and a police justice were permitted to testify as to the affidavits and papers on which a warrant of commitment had been issued, where neither the justice nor the clerk interposed any objection to being sworn. *Re Heyward* (1848) 1 Sandf. (N. Y.) 701.

III. Communications to prosecuting officers.

a. In general.

A deputy prosecuting attorney whose duty it was under a statute to conduct without charge or fee all proceedings for the foreclosure of certificates of delinquency of taxes was held not privileged from disclosing by whom he was employed in the foreclosure proceedings, nor the terms of such employment (*Collins v. Hoffman* (1911) 62 Wash. 278, 113 Pac. 625, Ann. Cas. 1913A, 1), and could, therefore, be held to testify in a subsequent action to set aside the foreclosure proceedings as fraudulent. It is further held in this case that not every act and communication between attorney and client, irrespective of its nature, is within the rule prohibiting the disclosure of certain communications, that whether or not they are within the rule depends upon the nature of the communication.

Information obtained by a witness at the instance of, or in connection with, and under the direction of, a prosecuting attorney, to use in the trial of indictments against members of the legislature for bribery, is held not to be privileged. *Sullivan v. Hill* (1913) 73 W. Va. 49, 79 S. E. 670, Ann. Cas. 1916B, 1115. Therefore, the witness may be compelled to testify to the same before a legislative committee investigating the charges of bribery. The objection by the prosecuting attorney was that the witnesses' evidence would disclose the information to the committee in advance of the trial of the accused members on the indictments found, and that the jurisdiction of the criminal court was exclusive of any other authority to try and punish the offending members of the legislature. The rule respecting state secrets was also appealed to. In answer to this defense, the court states: "We do not think that rule has any application to the case here. While there are instances in which public officers, on grounds of public policy, may not be compelled to disclose information obtained in the course of their employment, such as revenue officers and the like, no princi-

ple of public policy is involved here, as between witness and the state or the state's officer. There is no public policy of suppressing knowledge or information of the guilt or innocence of persons accused of crime, no matter how obtained, particularly where that knowledge or information is sought by a legislative committee in the lawful pursuit thereof. There may be instances where the mouth of a prosecutor could be closed by a citizen consulting and giving him information for the purpose of getting his advice on the propriety of some proposed or contemplated criminal proceeding. There the relationship of attorney and client might be established, and the information become privileged, cutting off the prosecuting officer from disclosing the information so acquired. But no such relationship of attorney and client existed between witness and prosecutor in this case."

Communications between an employer and the district attorney with reference to an assault upon a third person by the employee, who had been arrested and was being prosecuted criminally, are held to be not privileged, in *Cobb v. Simon* (1903) 119 Wis. 597, 100 Am. St. Rep. 909, 97 N. W. 276. According to the court "there was no relation of attorney and client between the parties, and the defendant [employer] was not even a prosecuting witness. It was rather an attempt on the part of the defendant to explain matters to the prosecuting officer from the defendant's standpoint." Accordingly, in a subsequent action against the employer for assault and false imprisonment, the district attorney was held competent to testify that in the conversation he stated to the defendant the version of the person assaulted.

In *State v. Leek* (1911) 152 Iowa, 12, 130 N. W. 1062, where in a criminal prosecution it was sought to show that the prosecution had been voluntarily commenced by the prosecuting witness, by the testimony of the county attorney who had charge of the prosecution at the time the case was investigated by the grand jury, to the effect that the prosecuting witness had

previously filed an information before a justice of the peace, the court, in admitting this testimony over the objection that the testimony related to a privileged communication as between him and the prosecuting witness, states that the record does not seem to be such as would justify discussion of the question whether such communications are privileged, for, in the first place, the defendant was not entitled to raise the question of privilege, inasmuch as she was not a party in any way to the communication, and in the second place the testimony of the county attorney did not relate to any communication, but only to the fact of the filing of the information which the state was allowed to prove as bearing on the question whether the prosecution was voluntarily commenced.

Communications to a deputy prosecuting attorney who is conducting the foreclosure proceedings of a delinquent tax certificate, by a third person, are not privileged unless the third person is the actual owner of the certificate for whom the nominal plaintiff was acting *Collins v. Hoffman* (1911) 62 Wash. 278, 113 Pac. 625. Ann. Cas. 1913A, 1.

Upon a motion to dismiss a writ of error upon the ground that the district attorney had been instructed by the Attorney General to dismiss it, it was held in *United States v. Six Lots of Ground* (1872) 1 Woods, 234, Fed. Cas. No. 16,299, that the correspondence between the district attorney and the Attorney General was confidential in its nature and could not be cited by third persons.

A prosecuting attorney who was called upon, not in the character of private counsel, but to make one of a committee with two sureties on the treasurer's bond to obtain a surrender of the treasurer's property upon a default by him, may testify in a subsequent action by one of the sureties against the treasurer to recover what he has been compelled to pay for the default, to matters occurring in the course of his service on the committee. *Lange v. Perley* (1882) 47 Mich. 352, 11 N. W. 193.

A communication relating to private business, to an attorney who is also the county attorney, has been excluded on the theory that it is a confidential communication, but such communication cannot, of course, be regarded as one to a public officer, the county attorney being engaged in transacting private business. *State v. Blydenburg* (1907) 135 Iowa, 264, 112 N. W. 634, 14 Ann. Cas. 443.

The testimony of prosecuting officers involves some matters that are not strictly communications, but which are very closely connected in principle with communications. The right to require prosecuting officers to disclose what took place in the grand jury room is one of such matters. While some cases dealing with the question have been included, no exhaustive discussion thereof has been attempted. That the relation of attorney and client does not exist, and therefore the prosecuting attorney is not precluded from testifying to statements made by a witness before the grand jury in the presence of the prosecuting attorney, is held in *State v. Van Buskirk* (1877) 59 Ind. 384, 3 Am. Crim. Rep. 353. Where the testimony of the county attorney relating to matters occurring in the grand jury room in the presence of the county attorney, who acted as clerk to the grand jury, was offered, and the person making the communication had already opened up the subject by attempting to explain her testimony before the grand jury, it was held that the county attorney might testify in regard thereto. *State v. Hector* (1913) 158 Iowa, 664, 138 N. W. 930. The court states: "Assuming that the matter was within the discretion of the court, we think it was so vital to the case that the county attorney should have been allowed to testify." Where, in the trial of a criminal case, the prosecuting witness testified contrary to a statement previously made by her to the state's attorney, the state's attorney may be called to the stand for the purpose of contradicting her, according to the court in *Riggins v. State* (1915) 125 Md. 165, 93 Atl. 437, Ann. Cas. 1916E, 1117, but, in so

holding, the court states that it does not wish to be understood as laying down any general rule to be applied in all cases of this character, "but what we here say applies only to this case or to cases of like facts and circumstances where there is no impairment of or interference with the fair and proper administration of justice, by permitting such disclosures to be made."

And see *People v. Davis* (1884) 52 Mich. 569, 18 N. W. 362, *infra*.

It is held to be the duty of the state's attorney not to divulge what passes in the grand jury room unless required to do so in a court of justice; if so required he cannot be excused from making the disclosure. *Clark v. Field* (1839) 12 Vt. 485. In a note to this decision by Redfield, Judge, it is stated that the decision, it is presumed, was not intended to settle the question, how far, under all circumstances, communications passing between the attorneys for the state and the grand jury might be privileged from disclosure, but that in all cases "the object of withholding the testimony is secrecy, and when the matter is once made public, that object becomes impossible. So that in the present case, when the testimony had been taken down, it might well be used. I apprehend that the true doctrine in regard to requiring a witness to disclose state secrets is that the court will exercise its discretion in each particular case."

In holding that a member of a grand jury who had acted as chairman of the court of sessions cannot be examined at the trial of a perjury alleged to have been committed before the grand jury, Patteson, Judge, states: "It is a new point, but I should advise the grand jury not to examine him. He is the president of a court of record, and it would be dangerous to allow such an examination, as the judges of England might be called upon to state what occurred before them in court." *Reg. v. Gazard*, 8 Car. & P. (Eng.) 595.

The question frequently arises in prosecutions of crime as to the right to require a disclosure of the identity

of informers. It is a general principle that the names of informers in public prosecutions cannot be disclosed. *Burr's Case* cited in *United States v. Moses* (1827) 4 Wash. C. C. 726, Fed. Cas. No. 15,825; *Reg. v. O'Connell* (1845) 1 Cox, C. C. (Eng.) 403; *Rex v. Akers* (1790) 6 Esp. (Eng.) 125, note. This rule prevents public officers from being compelled to make the disclosure, and applies in subsequent civil suits growing out of the criminal charges (*Marks v. Beyfus* (1890) L. R. 25 Q. B. Div. (Eng.) 494; *Humphrey v. Archibald* (1893) 20 Ont. App. Rep. 267), as well as to the criminal trial. Upon the trial of one charged with crime, a police officer who apprehended the accused is not bound to disclose the name of the person from whom was received the information which led to the detection and apprehension of the prisoner. *United States v. Moses* (Fed.) supra. Upon the trial of an information for obstructing a customhouse officer who was seeking smuggled goods, the defendant cannot inquire who gave the information as to the location of the smuggled goods. *Rex v. Akers* (Eng.) supra. A shorthand writer employed by the English government to go to Ireland and take notes of speeches set forth in an indictment cannot be asked at whose suggestion he came to Ireland. *Reg. v. O'Connell* (1845) 1 Cox, C. C. (Eng.) 403.

On the contrary, upon the trial of an indictment for administering poison, the police, who found a bottle containing similar poison in a place used by the defendant, were held bound to disclose the identity of those furnishing the information causing the search of this particular place. *Reg. v. Richardson* (1863) 3 Fost. & F. (Eng.) 693.

A witness cannot be asked whether he gave the information. *Atty. Gen. v. Briant* (1846) 15 Mees. & W. 169, 113 Eng. Reprint, 808, 15 L. J. Exch. N. S. 265.

But in *United States v. Moses* (Fed.) supra, it was held proper for the defense to ask whether the person in whose house the defendant was apprehended had told the police officer,

where such a question is asked for the purpose of showing or laying the ground for presuming that the accused was innocently at the place where the officer found him, in consequence of an insidious invitation given to him by the owner of the house.

The right to compel a disclosure of the identity of informers has not been generally considered herein, as no communication is involved in such a case.

b. By informers.

1. Rule that the communications are privileged.

Communications to prosecuting officers in regard to crime have frequently been before the courts, and there is a disagreement as to the confidential character of such communications. According to one line of authorities, a communication in regard to an alleged crime made by an informer or prosecuting witness to a prosecuting officer whose duty it is to prosecute crimes is a privileged communication and cannot be disclosed by the prosecuting officer upon being called as a witness in a subsequent civil suit. *Vogel v. Gruaz* (1883) 110 U. S. 311, 28 L. ed. 158, 4 Sup. Ct. Rep. 12 (slander); *Re Quarles* (1894) 158 U. S. 532, 39 L. ed. 1080, 15 Sup. Ct. Rep. 949 (obiter); *Oliver v. Pate* (1873) 43 Ind. 132 (malicious prosecution); *Gabriel v. McMullin* (1905) 127 Iowa, 426, 103 N. W. 355 (slander); *Michael v. Matson* (1909) 81 Kan. 360, L.R.A.1915D, 1, 105 Pac. 537 (malicious prosecution); *Worthington v. Scribner* (1872) 109 Mass. 487, 12 Am. Rep. 736. See *infra*. Nor can such communications be divulged in the trial of a criminal suit growing out of the communications. *State v. Brown* (1896) 2 Marv. (Del.) 380, 36 Atl. 458. But see *State v. Rash* (Del.) *infra*; *State v. Houseworth* (1894) 91 Iowa, 740, 60 N. W. 221.

The case of *Worthington v. Scribner* (1872) 109 Mass. 487, 12 Am. Rep. 736, was an action in tort, in which the declaration alleged "that the plaintiff was engaged in importing books into the United States; that the defendants, conspiring to injure him and

prevent his so importing books, and without probable cause, maliciously and falsely represented to the Treasury Department of the United States, and to the solicitor of the United States Treasury, that the plaintiff had purchased books with the intention of bringing them into the United States, either altogether in fraud of the United States revenue, or at a fraudulent undervaluation, and thus induced the Department and the solicitor to order the plaintiff's books to be seized when entered for import;" alleged that sundry cases of the plaintiff's books were seized and libeled on information of the United States courts, and that the information was afterwards dismissed, and the books released. To this declaration the defendants filed answer in which they denied all the plaintiff's allegations, and further alleged "that if any communication was made by any person to said solicitor or other officer of the United States, as alleged, or relative to any anticipated attempts to introduce goods into the United States without payment of the proper duties thereon, and not in conformity with the laws of the United States, the same would be a privileged communication, and would not be ground or cause for this action." Although the answer thus denies that the statement would be a ground or cause of an action, the court states the question before it as follows: "The question now before us is not one of the law of slander or libel, but of the law of evidence; not whether the communications of the defendants to the officers of the Treasury are so privileged from being considered as slanderous as to affect the right to maintain an action against the defendants upon or by reason of them; but whether they are privileged in a different sense, so that courts of justice will not compel or permit their disclosure without the assent of the government, to whose officers they were addressed." The court concludes, as follows, that "the reasons and authorities already stated conclusively show that the communications in question are privileged in the latter sense, and cannot be disclosed without the permission of the

Secretary of the Treasury." In coming to this conclusion the court argues that "it is the duty of every citizen to communicate to his government any information which he has of the commission of an offense against its laws. To encourage him in performing this duty without fear of consequences, the law holds such information to be among the secrets of state, and leaves the question, how far and under what circumstances the names of the informers and the channel of communication shall be suffered to be known, to the absolute discretion of the government, to be exercised according to its views of what the interests of the public require. Courts of justice, therefore, will not compel or allow the discovery of such information, either by the subordinate officer to whom it is given by the informer himself, or by any other person without the permission of the government. The evidence is excluded, not for the protection of the witness or of the party in the particular case, but upon general grounds of public policy, because of the confidential nature of such communications."

It has been held immaterial that the words were also spoken to persons other than the prosecuting officer (*Vogel v. Gruaz* (1883) 110 U. S. 311, 28 L. ed. 158, 4 Sup. Ct. Rep. 12, *supra*), or to the prosecuting officer in the presence of third persons (*Gabriel v. McMullin* (1905) 127 Iowa, 426, 103 N. W. 355).

In a criminal prosecution, the private stenographer of the attorney general cannot testify, for the purpose of contradicting a witness, to statements made by that witness to the attorney general while engaged with the witness in preparing the case for prosecution. *State v. Brown* (Del.) *supra*. The court states that the attorney general could not be required to disclose facts coming to his knowledge for the use of the state in the prosecution of the accused, nor can his private stenographer do so, as to permit this would be prejudicial to the public interest, and would in many cases defeat the ends of public justice.

Nor can the witness who made the

communication be asked to state what he had said on this occasion to the attorney general. *State v. Brown* (Del.) *supra*. The court states that in public prosecutions, witnesses for the state or those giving information to the prosecuting officer will not be permitted to disclose whether or not they have given information to such officer, that such communications are regarded as secrets of the state, or matters the disclosure of which would be prejudicial to the public interest; they are, therefore, protected, and all evidence thereof excluded from motives of public policy.

But see *State v. Rash* (Del.) *infra*.

Where the communications were made to the prosecuting officer in furtherance of a conspiracy to commit an indictable offense; they are not privileged; the county attorney may testify to them in a subsequent prosecution for criminal libel. *STATE v. WILCOX* (reported herewith) *ante*, 1091.

The courts which hold such a communication privileged are not agreed as to the reason therefor. In fact, a single court sometimes relies upon several reasons. It has been held to rest upon the theory that the prosecuting officer is the professional adviser of the informer. *Vogel v. Gruaz* (1883) 110 U. S. 311, 28 L. ed. 158, 4 Sup. Ct. Rep. 12; *Oliver v. Pate* (1873) 43 Ind. 132. The Supreme Court of the United States in the *Vogel* Case said: "We are of opinion that what was said by Bircher to Mr. Cook was an absolutely privileged communication. It was said to Mr. Cook while he was state's attorney, or prosecutor of crimes, for the county and while he was acting in that capacity. Bircher inquired for the state's attorney, and was introduced to him, and stated to him that he wanted to talk with him about a matter he wanted to bring before the grand jury in regard to Gruaz. He laid the matter before Mr. Cook, and charged Gruaz with having stolen his money, and was asked how and stated how, and inquired of Mr. Cook if there was any law in Illinois by which a man could be prosecuted for that. The grand jury was then in session, and Mr. Cook advised Bircher that he had

a good case, and directed him to the grand jury room, and Bircher went before the grand jury. If all this had taken place between Bircher and an attorney consulted by him who did not hold the public position which Mr. Cook did, clearly the communication would have been privileged, and not to be disclosed against the objection of Bircher. Under the circumstances shown, Mr. Cook was the professional adviser of Bircher, consulted by him on a statement of his case to learn his opinion as to whether there was ground in fact and in law for making an attempt to procure an indictment against Gruaz. The fact that Mr. Cook held the position of public prosecutor, and was not to be paid by Bircher for information or advice, did not destroy the relation which the law established between them. It made that relation more sacred on the ground of public policy." The court in the *Oliver* Case said that "the fact that the state furnishes the attorney can make no difference. The statement is made to one who for the time being and for that purpose occupies the position of legal adviser. And that must determine the question, and not who selects or employs him. The prosecutor acts as attorney and receives the communication in that capacity."

A statute governing the decision in *State v. Houseworth* (1894) 91 Iowa, 740, 60 N. W. 221, and *Gabriel v. McMullin* (1905) 127 Iowa, 426, 103 N. W. 315, provided that "no practising attorney . . . shall be allowed in giving testimony to disclose any confidential communication properly intrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline." Under this statute it was held not to be necessary that the communication be received from a client. The court states: "We do not understand it to be questioned but that the statements by the prosecuting witness to the county attorney were confidential, intrusted to him in his professional capacity, and were necessary and proper to enable him to discharge the functions

of his office according to the usual course of practice. This being true, it becomes a question whether or not statements of a prosecuting witness in a criminal case can come within the purview of the statute. Because of remarks by the district court while the question was pending before it, we are led to understand that much, if not controlling, importance, was given to the fact of whether or not the relation of attorney and client existed between the prosecuting witness and the county attorney; the court thinking that it did not exist, for it said: 'So far as the relation of attorney and client is concerned, none existed in the world.' While it is true that, as to attorneys, such communications are oftener made by clients than by others, we do not think there is any such limitation upon the operation of the statute, but that it matters not from whom the communication is received, if it be to a practising attorney in his professional capacity, and necessary for him to discharge the functions of his office. Mr. Ranck was attorney for the state. What transpired at the time of the alleged offense was necessary and proper to enable him to discharge the duties of his office. His client could not communicate with him, and all communications must be from third parties. But the statute nowhere fixes the communication to be privileged as between attorney and client, nor is it there by legal inference." *State v. Houseworth* (Iowa) *supra*.

Another theory upon which such communications have been held privileged is that public policy requires that citizens be free to lay before the proper officers facts disclosing the commission of crimes (*Vogel v. Gruaz* (1883) 110 U. S. 311, 28 L. ed. 158, 4 Sup. Ct. Rep. 12; *Oliver v. Pate* (1873) 43 Ind. 132; *Michael v. Matson* (1909) 81 Kan. 360, L.R.A.1915D, 1, 105 Pac. 537; *Worthington v. Scribner* (1872) 109 Mass. 487, 12 Am. Rep. 736); that when this has been done, the evidence is excluded, not for the protection of the witness or of the party in the particular case, but upon general grounds of public policy because of the con-

fidential nature of such communications. *Vogel v. Gruaz* (U. S.) and *Worthington v. Scribner* (Mass.) *supra*. See discussion of this case *supra*. The court in *Oliver v. Pate* (1873) 43 Ind. 132, states that "the state furnishes an attorney to prosecute all persons charged with crime. It is essential that he should be furnished with facts to enable him to successfully prosecute. Every good citizen, it is presumed, will aid in the conviction of offenders, and communicate to the prosecuting attorney all the facts within his knowledge tending to establish the guilt of such offender; and all such communications and statements made to him must be considered and held to be privileged, and must not be divulged without the consent of the party making them. . . . Public policy requires that a person in making communications to a prosecuting attorney relative to criminals or persons suspected of being guilty of crime should be at liberty to make a full statement to him without fear of disclosure." In *Michael v. Matson* (1909) 81 Kan. 365, L.R.A.1915D, 1, 105 Pac. 537, where in an action for malicious prosecution, the county attorney was called as a witness by the plaintiff, and was permitted to relate the conversation between himself and the defendant relating to the prosecution, out of which the action for malicious prosecution grew, the court, in excluding the evidence, states: "The defendant objected to this on the ground that his statements to the county attorney under the circumstances were privileged. We think the objection should have been sustained, not on the theory that the relation of attorney and client existed, thus rendering the communication incompetent under the statute, . . . but for the reason that the evidence was inadmissible on grounds of public policy. The rule forbidding an attorney to disclose his client's secrets exists independent of the statute. Its basis is not the mere fact that the communication was confidentially made. . . . The reason for its existence is, that 'the law has considered it the wisest policy to encourage and sanction this

confidence by requiring that on such facts the mouth of the attorney shall be forever sealed.' . . . The interest of the public in protecting the privacy of a communication seems, indeed, greater when it is made to a prosecuting officer in that capacity than when it is made by a client to his attorney."

The court, in *State v. Houseworth* (1894) 91 Iowa, 740, 6 N. W. 221, states: "We do not think it necessary to consider the question from the standpoint of public policy, which has received some attention in argument, as we think, under the provisions of the statute, the objection should have been sustained." That is, the communication should have been held confidential. But in *Gabriel v. McMullin* (1905) 127 Iowa, 426, 103 N. W. 355, the court considered the question of public policy and states that, "aside from the statute, we think the rule of exclusion should be applied to all matters concerning the administration of justice on the ground of public policy. A county attorney is an officer whose duty it is to investigate crime and prosecute therefor, not in the interest of the individual who may have suffered, but for the good of the state, and it is very clear to us that it is not only the privilege but the duty of every citizen who knows of facts tending to show the commission of a crime to communicate such information to the public officer whose duty it is to investigate the matter and to commence a criminal prosecution, if a crime has been committed. Any other rule would hamper the administration of justice. A party having knowledge of facts tending to show that a crime has been committed will hesitate to lay such facts before the proper officer if the information thus given may be made the basis of an action for damages against him."

See *State v. Brown* (1896) 2 Marv. (Del.) 380, 36 Atl. 458, supra.

2. Rule that the communications are not privileged.

On the contrary, communications to prosecuting officers by informer in regard to an alleged crime have been held not privileged. *State v. Rash* (1910) 2 Boyce (Del.) 77, 78 Atl. 405;

Granger v. Warrington (1846) 8 Ill. 299; *Cole v. Andrews* (1898) 74 Minn. 93, 76 N. W. 962 (malicious prosecution); *Meysenberg v. Engelke* (1885) 18 Mo. App. 346 (malicious prosecution). Accordingly, in *Granger v. Warrington* (1846) 8 Ill. 299, the state's attorney was held a competent witness in an action for malicious arrest, imprisonment, and prosecution, to testify that after the commencement of the trespass suit for which the action in malicious prosecution was brought, the defendant in the malicious prosecution action had come to him and made complaint against the plaintiff in the action for malicious prosecution relating to the transaction, and sought an indictment against him.

Upon the subsequent prosecution of the informer for perjury, statements made by the informer to the prosecuting attorney investigating a charge of bribery were held not privileged, and the prosecuting attorney was permitted to testify in regard thereto, in *State v. Rash* (1910) 2 Boyce (Del.) 77, 78 Atl. 405.

A public stenographer who took down shorthand notes and correctly transcribed the testimony of the informer before the prosecuting attorney, and produced the transcript, was permitted to testify to the statements made by the informer, in *State v. Rash* (Del.) supra.

In an action for the sale of worthless bank stock, an attorney who had been assisting the solicitor general, and who was treated as an official, was held entitled to testify to communications made to him by the plaintiff, when an indictment was being prepared against another person for the sale of the same bank stock, the court stating that there was no relation of attorney and client between the official and the plaintiff in the present case, who was anxious to have an indictment returned against another person; therefore, the official was not incompetent on the ground of the existence of such confidential relation; but the court adds that it may be that a case might arise where it would be improper to allow a species of "raid"

upon the office of the solicitor general in connection with his preparation of a pending case, but that the present is not of that character." *Fite v. Bennett* (1914) 142 Ga. 660, 83 S. E. 515.

A communication from the prosecuting witness to an attorney employed by him to assist in the prosecution is treated as confidential in *Pinson v. Campbell* (1907) 124 Mo. App. 260, 101 S. W. 621, but the client is there held to have waived the privilege.

At least, there has been held to be no relation of attorney and client between the prosecuting witness and state's attorney which confers any privilege upon the witness; and the state's attorney may testify to statements tending to discredit the testimony of the witness in the trial of a criminal prosecution growing out of the communications. In *People v. Davis* (1884) 52 Mich. 569, 18 N. W. 362, the court states: "If, then, there is any privilege in the case, it must be the privilege of the state, in whose interest O'Rourke [the prosecuting witness] assumed to act when making his communication to the prosecuting officer. And we are not called upon in this case to consider whether there may not be cases in which the prosecuting attorney would be excused in the interest of the state from disclosing what had been told to him with a view to the commencement of criminal proceedings. There would be strong reasons in many cases why the counsel of the state should be inviolably kept, and nothing we shall say in this case will be intended to lay down a rule except for the very case at bar and others standing upon the same facts. In this case, the prosecutor testified that on a particular day and at a place specified he witnessed the commission of the crime charged. The defense then offered to show that in laying the case before the prosecuting officer, the prosecutor stated that on the day and at the place specified he witnessed nothing wrong between the parties. If he did so state at that time, when he was laying before the public authorities the very case they were to prosecute, and if he now swears to a case altogether different, it may well

be argued that he is unworthy of belief; and the state has no interest in interposing any obstacle to the disclosure of the facts, unless it is interested in convicting accused parties on the testimony of untrustworthy persons. But surely the state has no such interest; its interest is that accused parties shall be acquitted unless, upon all the facts, they are seen to be guilty, and if there shall be in the possession of any of its officers information that can legitimately tend to overthrow the case made for the prosecution, or to show that it is unworthy of credence, the defense should be given the benefit of it. There was, therefore, no privilege to preclude the giving of the testimony for which the defense called."

Communications by a special deputy sheriff to an attorney who is employed by a county were held not privileged in *People v. Roach* (1915) 215 N. Y. 592, 109 N. E. 618, Ann. Cas. 1917A, 410, because made in the presence of other persons.

There is, according to the cases which hold such communications not privileged, no relation of attorney and client between the informer and the prosecuting attorney. In holding that there was no relation of attorney and client, the court, in *Granger v. Warrington* (1846) 8 Ill. 299, states: "Did, then, Granger employ Curtiss as an attorney either to investigate a question of law in which his private interests were concerned or to commence or defend a suit in which he was a party? He clearly had no such object. He had no personal interest in the result at which Curtiss should arrive, and he did not expect to compensate him for his advice. Consequently, the relation of client and attorney did not arise, and consequently the conversation was not privileged from being disclosed by Curtiss as a witness." After discussing the question of waiver and holding that the privilege had been waived by the informer, who testified to what he told the county attorney, the court, in *Cole v. Andrews* (1898) 74 Minn. 93, 76 N. W. 962, states that the evidence is admissible on the broader ground that

"the confidential relation of attorney and client did not exist between the defendant and the county attorney. The former consulted the latter in his official capacity as public prosecutor for the purpose of having instituted a prosecution for a public offense, or to ascertain whether the facts made a case for such a prosecution. The defendant in making these communications was acting merely as a citizen, in theory, at least, in the interests of public justice, and in receiving these communications and giving advice upon them the county attorney must be deemed to have been acting solely in his official capacity. This did not constitute the relation of attorney and client within the meaning of the statute." In holding that there was no error in permitting an attorney who represented the state in a prosecution to testify in a subsequent action for malicious prosecution as to communications which had passed between him and the defendant touching the criminal prosecution against the plaintiff, the court, in *Meysenberg v. Engelke* (1885) 18 Mo. App. 346, states that he never was an attorney of the defendant touching it, and any communications which may have passed between him and the defendant with reference to it were not within the rule of privilege which protects communications between attorney and client. In holding that there is no relation of attorney and client between the prosecuting witness and the state's attorney, the court in *People v. Davis* (1884) 52 Mich. 569, 18 N. W. 362, states that the prosecuting witness "was not, as to this prosecution, the client of the prosecuting attorney, nor was that officer in any sense his counsel. He was, on the other hand, a sworn minister of justice, whose duty it was, while endeavoring to bring the guilty to punishment, to take care that the innocent should be protected. . . . Communications made to him for the purpose of invoking official action are supposed to be made for the purposes of public justice, and the party making them can assume no control as to the use that shall be made of them subsequently."

Nor is there, according to these cases, any public policy requiring that communications to public officers relating to crime be treated as confidential. The court in *Granger v. Warrington* (1846) 8 Ill. 299, states that the informer can be considered in no other light than a witness on the part of the people, communicating to the law officer of the government his knowledge in relation to the commission of disclosed crime, and inquiring of that officer whether the fact thus communicated amounted to an offense. The court continues: "We think that no considerations of public policy require that the conversations between Granger [the informer] and the state's attorney should be regarded as confidential and privileged. It would be an unnecessary extension of the rule in relation to confidential communications and ought not therefore to be allowed."

Communications by an informer to a public prosecutor are not privileged and therefore excluded from evidence under the provisions of the statute "that a public officer cannot be examined as to communications made to him in official confidence when the public interest would suffer by the disclosure." *Cole v. Andrews* (1898) 74 Minn. 93, 76 N. W. 962. The court states that "there are, no doubt, cases where communications made in confidence to a public prosecutor in relation to the commission of a crime would fall within this provision. But this is not such a case. In the first place the communications to the county attorney were not made in confidence. Further, the defendant testified fully as to all the facts, first, before the grand jury, and next, on the trial of the indictment, and the prosecution has terminated. And lastly, the defendant has voluntarily disclosed in his answer in this case that he did communicate the facts to the county attorney, and he set up that fact as a defense. How the public interest would now suffer or how it would be any breach of confidence towards the defendant to permit the county attorney to disclose what those communications were is not apparent

to us." An opinion was expressed in *State v. Hoben* (1909) 36 Utah, 186, 102 Pac. 1000, that communications to a state's attorney by the prosecuting witness in an action for statutory rape are not privileged under a statute providing that "a public officer cannot be examined as to the communication made to him in official confidence where the public interest would suffer by the disclosure." The privilege, however, if any existed, was held to be waived by the prosecuting witness in the case.

c. By the accused.

Testimony of the state's attorney of disclosures by the accused to him has been rejected. In *State v. Phelps* (1787) Kirby (Conn.) 282, on a criminal prosecution, it was moved that the state's attorney might testify what the prisoner had disclosed to him, upon an application to be admitted a witness for the state, but the court refused, saying that "disclosures under such circumstances to the attorney ought to be considered as confidential, and it would tend to defeat the benefits the public may derive from them, should they be made use of to the prejudice of those from whom they come."

On the contrary, an admission of guilt made by the defendant in a prosecution, to an assistant state's attorney, in giving his reasons why the state should dismiss the action, was

held not to be privileged, in *State v. Schumacher* (1911) 21 N. D. 591, 132 N. W. 143. The evidence of the assistant state's attorney was objected to on the ground that it was a privileged communication as a communication between attorney and client. In holding this objection not well taken the court states that the "facts conclusively disprove such relationship. The defendant, so far as the record discloses, appeared at the office of the state's attorney and sought to have the prosecution against him abandoned, and apparently, in giving his reasons why the state should dismiss the action, confessed his guilt. That the state's attorney could not be induced to drop prosecution because the defendant voluntarily appeared and confessed the crime, as a supposed inducement to procure such dismissal, offers no ground upon which to assume any relationship of attorney and client, upon which to base the objection urged." Accordingly the evidence of the district attorney was admitted in the prosecution.

In *Itow v. United States* (1915) 138 C. C. A. 439, 223 Fed. 25, the court states, with reference to an objection on behalf of one accused of crime to the admission of a statement made by him after the alleged crime, to the district attorney, on the ground that it was privileged, that the objection is untenable, and was not presented in the court of appeals. W. A. E.

CHARLOTTE WEYANT et al., Respts.,

v.

UTAH SAVINGS & TRUST COMPANY, Appt.

Utah Supreme Court — March 27, 1919.

(— Utah, —, 182 Pac. 189.)

Principal and surety — liability for fraud of administratrix.

1. The surety on the bond of an administratrix is answerable for loss caused to nonresident heirs by the fraud of the administratrix in falsely representing herself to be next of kin, and publishing notice of probate in a fictitious name, and securing a decree enabling her to appropriate the estate to her own use.

[See note on this question beginning on page 1138.]

Judgment — in probate proceedings — binding effect.

2. Where the statutory notice has been given in probate proceedings, all who are interested in the estate are bound by all orders and decrees duly entered in a particular case.

[See 15 R. C. L. 996.]

— direct attack — what is.

3. A proceeding in equity to set aside a probate decree for fraud in procuring it is a direct as contradistinguished from a collateral attack.

[See 15 R. C. L. 729, 873.]

Fraud — character — extrinsic or intrinsic.

4. The fraud of one in securing administration of an estate and a decree distributing the estate to her, by misrepresenting her relationship to deceased, is extrinsic as contradistinguished from intrinsic fraud in its effect upon the decree.

[See 15 R. C. L. 762-764.]

Executor and administrator — notice of probate — fictitious name.

5. Notice to heirs of a decedent of application to probate his estate is without effect if he is described by a fictitious name, by which he was never known to the heirs.

Action — fraud — materiality.

6. The facts alleged and established at the trial, when applied to the law, determine the nature and extent of relief that a court may grant, and not the form of action.

[See 1 R. C. L. 331-333.]

— abolition of form.

7. In Utah there is no such thing as a particular form of action or a court in which particular forms of action can be prosecuted or special remedies obtained.

Judgment — distribution of estate — attack on decree — liability of bond.

8. Nonresident heirs of a person living under a fictitious name, whose estate is administered and appropriated without actual notice to the heirs, by one who fraudulently represents herself to be next of kin, may, if the right of appeal from the decree of distribution has been lost, attack the decree for fraud, and hold the surety on the bond of the administratrix for the property misappropriated by her.

[See 15 R. C. L. 704.]

Principal and surety — administrator's bond — conversion of property — liability.

9. The conversion by an administra-

tor of property belonging to the estate without making inventory of it or disclosing its existence renders his bond liable for its value.

[See 11 R. C. L. 306.]

Evidence — judgment against principal — action against surety.

10. Evidence of a judgment against an administratrix establishing the amount of her liability to the estate is admissible in evidence in an action to hold the surety on her bond liable for defalcation.

[See 11 R. C. L. 315.]

Judgment — against principal — how far binding on surety.

11. A surety on an administrator's bond is bound by a judgment against the administrator in which it is adjudicated that he failed to discharge his duty and breached the conditions of his bond, unless the judgment is shown to have been obtained through fraud or collusion.

[See 11 R. C. L. 315.]

— attack upon, for fraud — necessity of setting aside.

12. A decree of final distribution of an estate and discharge of the administrator need not be expressly set aside when found to have been obtained by extrinsic fraud, before the surety on the administrator's bond can be held liable for the defalcation.

— effect of subsequent inconsistent decree.

13. A decree distributing an estate and discharging the administrator fails when a decree is entered in a subsequent action finding that the former decree was obtained by extrinsic fraud, and charging the administrator with the value of the property as for breach of trust.

— scope — implied effect.

14. Courts must give effect to that which is unavoidably and necessarily implied in a judgment or decree, as well as that which is expressed in the most appropriate language.

Principal and surety — judgment against principal — effect.

15. The mere fact that, in an action establishing the defalcation of an administrator, he is declared a trustee for the heirs, and a portion of the misappropriated property recovered, does not prevent the maintenance of an action upon his bond to hold the surety liable for the defalcation.

[See 11 R. C. L. 309.]

Laches — what is — acting promptly upon notice.

16. Heirs cannot be charged with laches in failing promptly to take steps to invoke the fraud of the administrator of their ancestor in misrepresenting himself as next of kin and misappropriating the estate to his own use, if they act as soon as they discover the fact of the ancestor's death and the perpetration of a fraud in administering the estate.

[See 10 R. C. L. 405.]

Estoppel — act of ancestor — effect on heirs.

17. Nonresident heirs are not precluded from holding the surety on the bond of their ancestor's administrator liable for the latter's fraud in misrepresenting himself to be next of kin, and obtaining possession of, and dissipating, the property, by the fact that the ancestor was living under a fictitious name, and had concealed his whereabouts from the heirs.

Subrogation — right of surety — satisfying claim.

18. A surety held liable for the property of an estate fraudulently misappropriated by the administrator is subrogated to the rights of the heirs with respect to any property which may be discovered in possession of the administrator.

[See 25 R. C. L. 1332.]

On Petition for Rehearing.

Writ — publication of notice of action — fictitious name.

19. The publication of a notice of administration of the estate of a decedent who was living under a fictitious name, unknown to his nonresident heirs, in such fictitious name, is insufficient to bring such heirs before the court, although it may be sufficient so far as those with whom he transacted business and who knew him by the fictitious name are concerned.

APPEAL by defendant from a judgment of the District Court for Salt Lake County (Bramel, J.) in favor of plaintiffs in an action on an administrator's bond. *Affirmed*.

The facts are stated in the opinion of the court.

Messrs. James Ingebretsen and Ashby Snow, for appellant:

The probate proceedings and the decree rendered therein are in rem, and are conclusive against the whole world, and cannot be impeached or opened by another court, or in or by any other action, but only by appropriate application in the same proceeding, or upon appeal.

Sohler v. Sohler, 135 Cal. 323, 87 Am. St. Rep. 98, 67 Pac. 282; *Strauss v. State*, 36 N. D. 594, L.R.A.1917E, 909, 162 N. W. 908; 23 Cyc. 1408, 1411; *Black*, Judgm. §§ 245, 246; *Schouler*, *Wills*, 5th ed. § 1528; 18 Cyc. 628, 642; *Snyder v. Murdock*, 26 Utah, 233, 73 Pac. 22; *Toland v. Earl*, 129 Cal. 148, 79 Am. St. Rep. 100, 61 Pac. 914; *Williams v. Williams*, 73 Cal. 99, 14 Pac. 394; *Rosenberg v. Frank*, 58 Cal. 387; *State v. McGlynn*, 20 Cal. 233, 81 Am. Dec. 118; *Tracy v. Muir*, 151 Cal. 363, 121 Am. St. Rep. 117, 90 Pac. 832; *State v. Blake*, 69 Conn. 64, 36 Atl. 1019; *Grignon v. Astor*, 2 How. 319, 11 L. ed. 283; *Wilson v. Hartford F. Ins. Co.* 19 L.R.A.(N.S.) 553, 90 C. C. A. 593, 164 Fed. 817; *Kearney v. Kearney*, 72 Cal. 591, 15 Pac. 769; *Mohr v. Manierre*, 101 U. S. 417, 25 L. ed. 1052; *Simmons v. Saul*, 138 U. S. 453, 34 L. ed. 1060, 11 9 A.L.R.—71.

Sup. Ct. Rep. 369; *Benson v. Anderson*, 10 Utah, 135, 37 Pac. 256; *Pom. Eq. Jur.* § 919; *William Hill Co. v. Lawler*, 116 Cal. 359, 48 Pac. 323; *Goad v. Montgomery*, 119 Cal. 552, 63 Am. St. Rep. 145, 51 Pac. 681; *Garr v. Davidson*, 25 Utah, 335, 71 Pac. 481; *Smith v. Westerfield*, 88 Cal. 374, 26 Pac. 206; *Barrette v. Whitney*, 36 Utah, 574, 37 L.R.A.(N.S.) 368, 106 Pac. 522.

The probate decrees operated as a complete and final discharge of and bar in favor of the surety.

Freeman, Judgm. 3d ed. 660; *Evans v. Evans*, 200 Ala. 329, 76 So. 95; *Turner v. Cole*, 24 Ala. 364; *Smith v. Eureka Bank*, 24 Kan. 528; *Woodworth v. Woodworth*, 70 Mo. 601; *State use of Kitchell v. Anthony*, 30 Mo. App. 638.

The appropriate and exclusive remedy applied in a court of equity against probate decrees, where grounds for relief exist, is to charge the property with a trust, and to hold the beneficiary as a trustee for the original owner.

Silva v. Santos, 138 Cal. 536, 71 Pac. 703; *Sohler v. Sohler*, 135 Cal. 323, 87 Am. St. Rep. 98, 67 Pac. 282; *Curtis v. Schell*, 129 Cal. 208, 79 Am. St. Rep. 107, 61 Pac. 951; *Barnesly v. Powell*, 1 Ves. Sr. 284, 27 Eng. Reprint, 1034; *Kerrich v. Bransby*, 7 Bro. P. C. 437, 3

Eng. Reprint, 284; *Andrews v. Powys*, 2 Bro. P. C. 504, 1 Eng. Reprint, 1094; *Mason v. Hawkins*, 4 Bro. P. C. 7, 2 Eng. Reprint, 5; *Stead v. Curtis*, 123 C. C. A. 507, 205 Fed. 439; *State v. McGlynn*, 20 Cal. 233, 81 Am. Dec. 118; *Nicholson v. Leatham*, 28 Cal. App. 597, 153 Pac. 965, 155 Pac. 98; *Scoville v. Brock*, 79 Vt. 449, 118 Am. St. Rep. 975, 65 Atl. 577; *Hanley v. Hanley*, 114 Cal. 690, 46 Pac. 736; *Goodrich v. Ferris*, 145 Fed. 844; *Aldrich v. Barton*, 138 Cal. 220, 94 Am. St. Rep. 43, 71 Pac. 169; *Re Hudson*, 63 Cal. 454; *Exton v. Zule*, 14 N. J. Eq. 501; *Crew v. Pratt*, 119 Cal. 139, 51 Pac. 38; *William Hill Co. v. Lawler*, 116 Cal. 359, 48 Pac. 323; *Cunha v. Hughes*, 122 Cal. 111, 68 Am. St. Rep. 27, 54 Pac. 535; *Jewell v. Pierce*, 120 Cal. 79, 52 Pac. 132; *Turner v. Cole*, 24 Ala. 364; *Patterson v. Dickinson*, 113 C. C. A. 252, 193 Fed. 328; *Re Walker*, 160 Cal. 547, 36 L.R.A. (N.S.) 89, 117 Pac. 510.

The administrator's bond furnished by defendant was not broken.

Clinton v. Nelson, 2 Utah, 284; *Evans v. Evans*, 200 Ala. 329, 76 So. 95; *State use of Kitchell v. Anthony*, 30 Mo. App. 638; *Barker v. Stanford*, 53 Cal. 451; *Kirby v. State*, 51 Md. 383; *State use of Gable v. Cheston*, 51 Md. 352; *Neely v. Merritt*, 9 Bush, 346; *Perkins v. Lewis*, 41 Ala. 649, 94 Am. Dec. 616; *Carter Bros. v. Young*, 9 Lea, 210; *Hebert v. Hebert*, 22 La. Ann. 308; *People use of Brooks v. Petrie*, 191 Ill. 497, 85 Am. St. Rep. 268, 61 N. E. 499; *Bird v. Mitchell*, 101 Ga. 46, 28 S. E. 674; *People use of Sterling v. Huffman*, 182 Ill. 391, 55 N. E. 981; *Cluff v. Day*, 23 Jones & S. 460; *Hinds v. Hinds*, 85 Ind. 312; *Sims v. Lively*, 14 B. Mon. 433; *Warfield v. Brand*, 13 Bush, 77; *Brougham v. Poulett*, 19 Beav. 133, 52 Eng. Reprint, 299, 24 L. J. Ch. N. S. 233, 1 Jur. N. S. 151, 11 R. C. L. 305; 18 Cyc. 1264-1268, note 26; *Riggin v. Creath*, 60 Ohio St. 114, 53 N. E. 1100; *Young v. People*, 35 Ill. App. 363; *Loop v. Northup*, 59 Hun, 75, 13 N. Y. Supp. 144; *Ramsey v. Cole*, 84 Ga. 147, 10 S. E. 598; *Turner v. Cole*, 24 Ala. 364; *Hessey v. Hessey*, 1 Ky. L. Rep. 424; *Campbell v. American Bonding Co.* 172 Ala. 458, 55 So. 306; *Leavens's Estate*, 65 Wis. 440, 27 N. W. 324; *Bamka v. Chicago, St. P. M. & O. R. Co.* 61 Minn. 549, 52 Am. St. Rep. 618, 63 N. W. 1116; *Fisher v. Johnson*, 90 Misc. 46, 152 N. Y. Supp. 944; *Kager v. Brenne-man*, 47 App. Div. 63, 62 N. Y. Supp. 339.

A judgment against an administrator

is conclusive on his surety, but this must be a judgment (such as the decrees upon which we rely) rendered in the probate court or rather according to the probate procedure, and in the very proceeding in which the administrator and his surety are acting.

Com. use of Stub v. Stub, 11 Pa. 150, 51 Am. Dec. 515; *Reed v. Hume*, 25 Utah, 248, 70 Pac. 998; *Beall v. New Mexico*, 16 Wall. 535, 21 L. ed. 292; *Williams v. Kiernan*, 25 Hun, 355; *Greer v. McNeal*, 11 Okla. 526, 69 Pac. 893; *Treweek v. Howard*, 105 Cal. 434, 39 Pac. 20; *Bellinger v. Thompson*, 26 Or. 320, 37 Pac. 714, 40 Pac. 229; *Deobold v. Opperman*, 111 N. Y. 531, 2 L.R.A. 644, 7 Am. St. Rep. 760, 19 N. E. 94; *Nanz v. Oakley*, 120 N. Y. 84, 9 L.R.A. 223, 24 N. E. 306; *Stovall v. Banks*, 10 Wall. 583, 19 L. ed. 1036; *Jochumsen v. Suffolk Sav. Bank*, 3 Allen, 87; *State v. White*, 29 N. C. (7 Ired. L.) 116; *Wales v. Willard*, 2 Mass. 120; *London v. Wilmington & W. R. Co.* 88 N. C. 584; *Irwin v. Backus*, 25 Cal. 214, 85 Am. Dec. 125; *Salver v. State*, 5 Ind. 202; *Lamkin v. Heyer*, 19 Ala. 228; *McClellan v. Downey*, 68 Cal. 520; *Baggott v. Boulger*, 2 Duer, 160; *Jenkins v. State*, 76 Md. 255, 23 Atl. 608, 790; *Cleaves v. Dockray*, 67 Me. 118; *Frye v. Crockett*, 77 Me. 157; *State v. Connolly*, 75 N. J. Eq. 521, 138 Am. St. Rep. 577, 72 Atl. 363; *United States Fidelity & G. Co. v. People*, 159 Ill. App. 35; *O'Neil's Appeal*, 55 Conn. 409, 11 Atl. 857; *Fincke v. Bundrick*, 72 Kan. 182, 4 L.R.A. (N.S.) 820, 83 Pac. 403; *Leavens's Estate*, 65 Wis. 440, 27 N. W. 324.

Messrs. Charles H. Hart, H. Van Dam, Jr., and D. N. Straup, for respondents:

The district court had jurisdiction to entertain the suit of *Weyant v. Morgan*.

Burke v. Bladine, 99 Wash. 383, 169 Pac. 811; *Fincke v. Bundrick*, 72 Kan. 182, 4 L.R.A. (N.S.) 820, 83 Pac. 403; *Leslie v. Procter & G. Mfg. Co.* 102 Kan. 159, L.R.A. 1918C, 55, 169 Pac. 193; *Douglass v. Ferris*, 138 N. Y. 192, 34 Am. St. Rep. 435, 33 N. E. 1041; *Gillett v. Wiley*, 126 Ill. 310, 9 Am. St. Rep. 587, 19 N. E. 287; *Evans v. Evans*, 200 Ala. 329, 76 So. 95; *Allison v. Crummey*, — Okla. —, 166 Pac. 691; *Vanhorn v. Nestoss*, 99 Wash. 328, 169 Pac. 807; *Gafford v. Dickinson*, 37 Kan. 287, 15 Pac. 175; *McAdow v. Boten*, 67 Kan. 136, 72 Pac. 529; 18 Cyc. 908, and note; *Sohler v. Sohler*, 135 Cal. 323, 87 Am. St. Rep. 98, 67 Pac. 282; *Aldrich v. Barton*, 138 Cal. 220, 94 Am. St. Rep.

(— *Utah*, —, 182 Pac. 189.)

43, 71 Pac. 169; *Silva v. Santos*, 138 Cal. 536, 71 Pac. 703; *Re Bunting*, 30 Utah, 251, 84 Pac. 109.

A suit against Mrs. Morgan as administratrix (had she been administratrix at that time) could only bind the estate in her hands, and could not afford adequate remedy for her breaches of trust. It would be in sum and substance a suit against the property remaining in the estate at that time.

Asher v. Stull, — Okla. —, 161 Pac. 808; *Dennie v. Smith*, 129 Mass. 143; *Douglass v. Ferris*, 138 N. Y. 192, 34 Am. St. Rep. 435, 33 N. E. 1041; *Gillett v. Wiley*, 126 Ill. 310, 9 Am. St. Rep. 587, 19 N. E. 287; *Biggins v. Raisch*, 107 Cal. 210, 40 Pac. 333.

Generally speaking, a judgment against a principal is prima facie evidence, at least, against a surety.

Moses v. United States, 166 U. S. 571, 41 L. ed. 1119, 17 Sup. Ct. Rep. 682; *Beauchaine v. McKinnon*, 55 Minn. 318, 43 Am. St. Rep. 506, 56 N. W. 1065; *Stephens v. Shafer*, 48 Wis. 54, 33 Am. Rep. 793, 3 N. W. 835; *P. Ballantine & Sons v. Fenn*, 84 Vt. 117, 40 L.R.A.(N.S.) 698, 78 Atl. 713; *Treasurer v. Schapero*, 217 Mass. 71, 104 N. E. 440, Ann. Cas. 1915D, 399; *Com. v. Fidelity & D. Co.* 224 Pa. 95, 132 Am. St. Rep. 755, 73 Atl. 327; *Black, Judgm.* §§ 587-590; *Jones, Ev.* § 608; 32 Cyc. 135; *Mitchell v. Toole*, 63 Ga. 93; *Irwin v. Backus*, 25 Cal. 214, 85 Am. Dec. 125; *National Surety Co. v. Arterburn*, 110 Ky. 32, 62 S. W. 862; *Barker v. Wheeler*, 62 Neb. 470, 88 Am. St. Rep. 541, 83 N. W. 678; *State use of Whitelock v. Banks*, — Md. —, 24 Atl. 540; *Fire Asso. of Phila. v. Ruby*, 49 Neb. 584, 68 N. W. 939; *Douglass v. Ferris*, 138 N. Y. 192, 34 Am. St. Rep. 435, 33 N. E. 1041; *Hailey v. Boyd*, 64 Ala. 399.

Probate proceedings and a decree rendered in probate proceedings may be assailed in a direct proceeding in a court of equity of general jurisdiction on the ground of fraud, or other grounds of equitable cognizance, for the same reason that other decrees and judgments of nisi courts may be assailed in equity.

Benson v. Anderson, 10 Utah, 135, 37 Pac. 256; *Clarke v. Perry*, 5 Cal. 60, 63 Am. Dec. 82; *Sanford v. Head*, 5 Cal. 298; *Deck v. Gerke*, 73 Am. Dec. 558, note; *Hayden v. Hayden*, 46 Cal. 332; *Sohler v. Sohler*, 135 Cal. 323, 87 Am. St. Rep. 93, 67 Pac. 282; *Froebrich v. Lane*, 106 Am. St. Rep. 634, notes; *Dunlap v. Steere*, 16 L.R.A. 361, and

note, 92 Cal. 344, 27 Am. St. Rep. 143, 128 Pac. 563; *Hudson's Estate*, 63 Cal. 454; *Lataillade v. Orena*, 91 Cal. 565, 25 Am. St. Rep. 219, 27 Pac. 924; *Green v. Creighton*, 48 Am. Dec. 746, note; *Clarke v. Perry*, 63 Am. Dec. 83, note; *United States v. Throckmorton*, 98 U. S. 65, 25 L. ed. 95; *Bergin v. Haight*, 99 Cal. 52, 33 Pac. 760; *Ewing v. Lamphere*, 118 Am. St. Rep. 563, and note, 147 Mich. 659, 111 N. W. 187; *Bacon v. Bacon*, 150 Cal. 477, 89 Pac. 317; *Campbell-Kawannanakoia v. Campbell*, 152 Cal. 201, 92 Pac. 184; *Pasadena v. Superior Ct.* 157 Cal. 788, 109 Pac. 623, 21 Ann. Cas. 1355; *Delafield v. Illinois*, 2 Hill (N. Y.) 159; *Pom. Eq. Jur.* 2d ed. §§ 345-358, and notes; *Wingter v. Wingter*, 71 Cal. 105, 11 Pac. 853; *Parsons v. Weis*, 144 Cal. 410, 77 Pac. 1007; *Moore v. Crawford*, 180 U. S. 122, 32 L. ed. 878, 9 Sup. Ct. Rep. 447; *Henderson v. Adams*, 15 Utah, 30, 48 Pac. 398; *Schenck v. Wicks*, 23 Utah, 576, 65 Pac. 732; *Perry, Trusts*, § 520; *Blake v. O'Neal*, 16 L.R.A.(N.S.) 1148, and notes, 63 W. Va. 488, 61 S. E. 410; 39 Cyc. 222 et seq.; *Hill v. Hill*, 38 L.R.A.(N.S.) 198, and note, 90 Neb. 43, 132 N. W. 738.

An adjudication was had in the equity court against the administratrix, and the amount of her defalcation fixed and determined. Such proceedings were binding upon the surety, notwithstanding it was not a party thereto.

Greer v. McNeal, 11 Okla. 526, 69 Pac. 893; *Treweek v. Howard*, 105 Cal. 434, 39 Pac. 20; *Bellinger v. Thompson*, 26 Or. 320, 37 Pac. 714, 40 Pac. 229; *Deobold v. Oppermann*, 111 N. Y. 531, 2 L.R.A. 644, 7 Am. St. Rep. 760, 19 N. E. 94; *Nanz v. Oakley*, 9 L.R.A. 223, and note, 120 N. Y. 84, 24 N. E. 306; *Irwin v. Backus*, 25 Cal. 214, 85 Am. Dec. 125; *Meyer v. Barth*, 65 Am. St. Rep. 124, and note, 97 Wis. 352, 72 N. W. 748; *Stovall v. Banks*, 10 Wall. 582, 19 L. ed. 1036; *Williams v. Kiernan*, 25 Hun, 355.

The sureties of an administrator or guardian are not protected by a final settlement with and discharge of their principal, where it is made fraudulently and without notice to the parties in interest.

Brandt, Suretyship & Guaranty, 3d ed. § 712; *State ex rel. Goodhue v. Burkam*, 23 Ind. App. 271, 55 N. E. 237; *Pass v. Pass*, 98 Ga. 791, 25 S. E. 752; *Jacobs v. Pou*, 18 Ga. 346; *Potter v. Ogden*, 136 N. Y. 384, 33 N. E. 228;

Ingersoll v. Mangam, 84 N. Y. 622; Davis v. Crandall, 101 N. Y. 321, 4 N. E. 721; Crouter v. Crouter, 133 N. Y. 56, 30 N. E. 726; State ex rel. Lynch v. Whitehouse, 75 Conn. 410, 53 Atl. 897; Re Gall, 182 N. Y. 270, 74 N. E. 875; Canfield v. Canfield, 55 C. C. A. 169, 118 Fed. 1; Reilly v. American Bonding Co. 138 La. 315, 70 So. 237; Pierce v. Maetzold, 126 Minn. 445, 148 N. W. 302; Pollock v. Cox, 108 Ga. 430, 34 S. E. 213; Schouler, Wills, 5th ed. § 1143; Shalter's Appeal, 43 Pa. 83, 82 Am. Dec. 552; Cleaves v. Dockray, 67 Me. 118; Frye v. Crockett, 77 Me. 157; Mefford v. Lamkin, 38 Ind. App. 33, 76 N. E. 1024, 77 N. E. 960; American Surety Co. v. Piatt, 67 Kan. 294, 72 Pac. 775; Elizalde v. Murphy, 163 Cal. 681, 126 Pac. 978; State v. Connolly, 75 N. J. Eq. 521, 138 Am. St. Rep. 577, 72 Atl. 363; United States Fidelity & G. Co. v. People, 159 Ill. App. 35; 18 Cyc. 1275; O'Neill's Appeal, 55 Conn. 409, 11 Atl. 357.

The surety became liable upon the bond the moment the administratrix was guilty of a breach of an executorial duty.

Fincke v. Bundrick, 72 Kan. 182, 4 L.R.A.(N.S.) 820, 83 Pac. 403.

Frick, J., delivered the opinion of the court:

The plaintiffs named in the title, hereinafter called respondents, commenced this action in the district court of Salt Lake county as heirs at law of one Harvey Weyant, deceased. The action is predicated upon a statutory administrator's bond executed by one Rosella Fuller, as principal, and the appellant, as surety; said Rosella Fuller having been appointed the administratrix of the estate of said Harvey Weyant, deceased. Respondents obtained judgment on said bond against appellant, from which it prosecutes this appeal.

The pleadings, including the attached exhibits, findings of fact, conclusions of law, and judgments in the several proceedings hereinafter referred to, cover 157 pages of the printed abstract. It is impracticable to set forth the pleadings, etc., in this opinion, even in condensed form. It is not always an easy task to make a satisfactory statement of the contents of the pleadings and

findings of the court, where, as here, these things must be greatly abridged, and especially where the matters complained of are alleged to have been based upon fraud, misrepresentation, and deceit. In our judgment, however, the following statement fairly and sufficiently reflects the pleadings, the findings of the court, and the undisputed facts, together with the matters stated in the judgment:

One Harvey Weyant, whose estate constitutes the subject of this controversy, died intestate at Salt Lake City, Utah, on the 26th day of July, 1910. The respondent Charlotte Weyant, at the time of the death of said Weyant, was his lawful wife, and all the other respondents named in the title, except Carry Miller Clark, were his children and the issue of the marriage between the deceased and said Charlotte Weyant, while said Carry Miller Clark is a grandchild of said Weyant. Harvey Weyant had lived with his said wife and children at Springfield, Massachusetts, for many years, and until May, 1890, at which time he abandoned them and eloped with one Rosella McIntyre, a young girl about seventeen years of age, to parts unknown to his family. Said Weyant and said Rosella McIntyre, under the name of Rosella Fuller, in due time arrived at Salt Lake City, and from thenceforth until the death of said Weyant lived in said city as husband and wife under the name of Fuller; that is, said Weyant from thenceforth assumed and was known by the name of Harvey W. Fuller, and said Rosella McIntyre was known as Mrs. Fuller. He conducted business in that and in no other name during the twenty years that he lived in Salt Lake City. After the departure from his home at Springfield, said Weyant never returned thereto, and his place of residence or abode was unknown to his said wife and children, and although they expended considerable money searching for him, they did not learn of his abode or death until the month of September, 1915. The in-

ventory of his estate disclosed that Weyant, at the time of his death, was possessed of and owned real and personal property of the appraised value of \$29,296.92. The court also found that said Rosella McIntyre, on the 30th day of July, 1910, in order to cheat and defraud the respondents, and to convert to her own use the property belonging to the estate of said Weyant, and to which she knew she had no lawful right or claim, by the name of Rosella Fuller, and as the pretended wife of said Weyant, filed her petition in the probate division of the district court of Salt Lake county in said estate, in which petition she falsely and fraudulently alleged and represented that she was the lawful wife of said Weyant, deceased, and his only surviving heir at law, when, in truth and in fact, she well knew that the respondent Charlotte Weyant was the lawful wife of said decedent, and that the other respondents were his lawful heirs, and that she had no legal right or claim to any of the property of which said Weyant was possessed and owned at the time of his death; and she fraudulently and deceitfully withheld the truth from said court, and fraudulently induced it to believe that she was the wife of said decedent, and by reason thereof to appoint her as the administratrix of said estate; that she thereafter falsely, fraudulently, and deceitfully conducted all of the proceedings relating to the administration of the estate of said Weyant in the name of Harvey W. Fuller, instead of in his true name of Harvey Weyant; that said Rosella Fuller thereafter, in said name, and by virtue of her said deceit, and by said false and fraudulent representations obtained a family allowance for herself out of said estate amounting to the sum of \$1,650, all of which she wrongfully and unlawfully appropriated to her own use; that thereafter, on June 26, 1911, said Rosella Fuller filed her petition in said court for a final settlement and distribution of the estate of said Weyant, in which petition she de-

ceitfully, falsely, and fraudulently alleged and represented herself to be the only heir at law of said Weyant, deceased; that said court, by being deceived and misled by the representations aforesaid, on the 7th day of July, 1911, made and entered an order in said estate allowing and settling the final account of said Rosella Fuller as the administratrix thereof, and entered a decree distributing to her out of the property of said estate the sum of \$12,675.10 in cash, household goods and other property of the appraised value of \$3,410.50, together with certain real estate situate in Salt Lake City, which is particularly described in said decree of distribution, all of which property she, said Rosella Fuller, wrongfully and unlawfully appropriated and converted to her own use, and of which she has deprived the respondents; that in probating said estate no notice was ever published or given, except in the name of Harvey W. Fuller, and that all the proceedings relating to the administration of the estate of said Weyant were falsely, deceitfully, and fraudulently conducted in the false and fictitious name of Harvey W. Fuller by said Rosella Fuller, all of which was done by her for the purpose of cheating and defrauding the respondents; that the orders that were made by said court in said probate proceedings, and the approval and settlement of said final account, and the decree of distribution, were each and all based upon the false, fraudulent, and deceitful statements of said Rosella Fuller, and that she obtained the property of said estate through and by means of said deceit and fraud, and not otherwise; that neither of said respondents was ever in the state of Utah during the lifetime of said Weyant, nor at any time until the month of September, 1915, and that prior to said time they, nor either of them, had any notice or knowledge of the residence of said decedent, nor of his death, nor of any of the proceedings herein referred to; that upon learning the facts be-

fore stated the respondents, on or about September 30, 1915, commenced an action in equity in the district court of Salt Lake county against said Rosella Fuller, who at that time, by reason of her marriage to one Morgan, was known by the name of Rosella Morgan, in which last name said action was commenced and prosecuted; that such proceedings were had in said action that on August 12, 1916, said court made findings of fact and conclusions of law and entered judgment in said action in favor of the respondents.

In said action the court in substance found the facts hereinbefore stated, and in effect further found that said Rosella Fuller, alias Morgan, through deceit and fraud practised by her upon the court in the probate proceeding, had obtained the orders which were made during the administration of the estate of said Weyant, and that by means of deceit and fraud had also obtained the allowance and settlement of her final account as administratrix of said estate and a decree distributing said property to her, all of which she wrongfully and fraudulently has converted to her own use, and she has failed to account to the respondents for said property or any part thereof. The court also found that judgment was entered in said action against her for the sum of \$26,091.47. The court further found that prior to the issuance of letters of administration to said Rosella Fuller in the estate of said decedent she was required by said court to furnish a bond for the sum of \$37,000; that on the 20th day of August, 1910, she, as principal, and the appellant, as surety, executed, delivered, and filed in said court a bond for said sum, in which bond it is, among other things, provided that said Rosella Fuller, as principal, and the appellant, as surety, are jointly and severally "held and firmly bound unto the state of Utah, for the use of the heirs and creditors of Harvey W. Fuller, deceased, in the sum of \$37,000." One

of the conditions of said bond is that "if the said Rosella Fuller shall faithfully execute the duties of the trust according to law as such administratrix, then this obligation to be void; otherwise, to be and remain in full force and virtue."

The court also found that said Rosella Fuller, in furtherance of her deceitful and fraudulent purpose and design, had wrongfully and fraudulently converted money and property of said estate to her own use of the value of \$26,091.47, and that execution had been duly issued against her and returned unsatisfied, except for the sum of \$489.35. In addition to the foregoing, the court, in the equity proceeding aforesaid, upon a supplemental complaint and proper proceedings had thereon, also made supplemental findings of fact and conclusions of law, in which it is in substance found that, in addition to the property aforesaid, said Rosella Fuller, by virtue of her appointment as administratrix of said estate, also obtained possession of large sums of money and of a large amount of personal property belonging to said estate, which money and property was of the value of \$12,691.40, and which she had failed and neglected to inventory as a part of said estate, or to account therefor in the administration of said estate, all of which money and property, except the sum of \$1,000, she has converted to her own use and still retains; that she had wholly failed to inventory or to account to said estate and to the respondents for the money and property last above mentioned, amounting to the sum of \$11,691.40, besides interest and costs.

The conclusions of law are quite long. They, however, fairly reflect the findings of fact, and hence we need not repeat all of them here. In view of appellant's contention, however, as hereinafter disclosed, it becomes necessary to set forth here one of the conclusions of law in full. It reads: "That the value of the moneys and property so converted

by the said Rosella Fuller as administratrix, and while she was such administratrix, and which she in violation of the orders and judgments of the court in the premises has failed and refused to account for, in which, as heretofore found and adjudged, was a breach of her trust and duties as such administratrix of said estate, and a breach of the bond or undertaking sued on in this action, is the sum of \$38,414.07."

The court also found as a conclusion of law that respondents were entitled to judgment against the appellant for the sum of \$37,000, with legal interest on the sum of \$25,732.67 of said amount from a certain date, and with legal interest on the sum of \$11,277.33 (should be \$11,267.33) from a certain other date. Judgment was entered accordingly.

We deem it essential to further state here that in the probate proceedings, after the final account of Rosella Fuller as administratrix had been approved and allowed and the decree of distribution had been entered, the court also entered an order or judgment of discharge in the following words: "It is ordered, adjudged, and decreed that said Rosella Fuller, as aforesaid, has fully and faithfully discharged the duties of her trust; that she is hereby wholly and absolutely discharged from all further duties and responsibilities as such administratrix, and that her letters of administration are hereby vacated; that the said estate is declared fully distributed, and that trust settled and closed; and the said Rosella Fuller, administratrix, and her sureties, are hereby released from any liability to be hereafter incurred."

We remark that, while the judgments or decrees against Rosella Fuller, alias Morgan, go into great detail, and adjudicate that all of the orders, proceedings, and decrees that were entered in the matter of the administration of the estate of Harvey Weyant were obtained through and by means of the deceit-

ful and fraudulent acts and representations of said Rosella Fuller, alias Morgan, as administratrix of said estate, and that, so far as respondents are concerned, all of said orders, decrees, and proceedings were of no force or effect, and although the respondents prayed that the final settlement of the account of said administratrix and decree of distribution and the probate proceedings be vacated, and also prayed for general relief, yet the court did not in express terms set aside or vacate either of the orders aforesaid, nor did the court in express terms vacate the order or judgment of discharge. It further appears from the proceedings that the respondents instituted an action in Idaho against said Rosella Fuller, alias Morgan, for the purpose of charging certain real estate that she had purchased there with a trust, alleging and establishing that she had used the sum of \$1,000 which she obtained from the estate of said Weyant to pay for said real estate, and it was accordingly adjudged that the respondents have a lien upon said land for the amount of said \$1,000, which, it seems, they subsequently realized. It was also adjudged in said decree "that the defendant Rosella Morgan, alias Rosella Fuller, held the property described in paragraph 1 in trust for plaintiffs herein according to their rights."

While appellant's counsel have assigned a large number of errors, yet in their printed brief and in their oral argument they have condensed them into nine propositions, some of which, however, they themselves concede blend and overlap one another. We shall consider such propositions argued as we deem material, and we shall do so without following strictly the order in which they are presented in counsel's brief.

The first proposition contended for by appellant's counsel in their brief is stated thus: "The probate proceedings and the decree rendered therein are in rem, and are

conclusive against the whole world, and cannot be impeached or opened by another court in or by any other action, but only by proper application in the same proceeding or upon appeal."

Counsel have cited a large number of decisions and text-writers which, they contend, support the foregoing proposition. We shall not attempt to cite, much less review, all of the decisions cited by counsel, but shall cite only a few cases upon each proposition discussed, leaving it to the reporter to make a full citation of the cases and authorities referred to by counsel in their respective briefs.

Among the authorities cited and relied on by appellant's counsel are the following: 23 Cyc. 1407-1411; 18 Cyc. 628-642; 1 Black, Judgm. § 445; Toland v. Earl, 129 Cal. 148, 79 Am. St. Rep. 100, 61 Pac. 914; Sohler v. Sohler, 135 Cal. 323, 87 Am. St. Rep. 98, 67 Pac. 282; Tracy v. Muir, 151 Cal. 363, 121 Am. St. Rep. 117, 90 Pac. 832; Simmons v. Saul, 138 U. S. 453, 34 L. ed. 1060, 11 Sup. Ct. Rep. 369; State v. Blake, 69 Conn. 64, 36 Atl. 1019. Counsel, however, frankly concede that the territorial supreme court of Utah, in the case of Benson v. Anderson, 10 Utah, 135, 37 Pac. 256, held that courts of equity do possess power to grant relief against the orders and judgments entered in probate proceedings upon the same ground that such courts can grant relief against judgments entered in other actions or proceedings. It is also conceded that the foregoing decision is based upon practically the same statute on which the California decisions are based, which, they contend, hold to the contrary. It must be conceded that the supreme court of California has, in at least a number of cases, held that courts of equity may not interfere with the judgments entered in probate proceedings to the same extent that such may be done in other civil actions or proceedings. It is accordingly held in California that, although a court of equity may grant relief against

judgments and decrees obtained in probate proceedings for extrinsic fraud, yet such relief, ordinarily at least, cannot be extended beyond charging the administrator, or other person if there be such, who has obtained the property of the estate by fraud, as trustee and to require him to account to the person who has been so defrauded. Appellant's counsel very urgently insist that such is the great weight of authority and that this court should so hold.

Referring, now, to a somewhat later California decision, and to at least one emanating from another court which is based upon the California statute and procedure relating to the administration of estates, we find that in a quite recent case emanating from the district court of appeal of California, namely, Nicholson v. Leatham, 28 Cal. App. 597, 153 Pac. 965, 155 Pac. 98, it is held that the rule contended for by counsel does not apply with full force in cases "where there has been a breach of duty arising from a fiduciary relation" and extrinsic fraud has been established. In a recent case emanating from the United States circuit court for the northern district of California, namely, Goodrich v. Ferris, 145 Fed. 844, which decision is based upon the California statute and procedure relating to the administration of estates, it is held that "a court of equity is without jurisdiction of a suit to set aside a decree of a superior court of California, entered *after due notice given as required by statute*, distributing the estate of a testator in accordance with his will, which has been duly probated, and to have the will declared invalid, *unless under extraordinary circumstances where fraud or a breach of trust extrinsic to the proceedings is shown.*" (Italics ours.)

It would seem that even under the California rule, as construed by the more recent decisions, conditions may arise in probate proceedings

(— *Utah*, —, 182 Pac. 189.)

which, if established, will authorize a court of equity to grant relief in an independent action. It should be observed, however, that in the case last above quoted from it is expressly said, "After due notice given as required by statute." Undoubtedly, the giving of the statutory notice is always a prerequisite to the conferring of jurisdiction upon the court. This court is committed to the doctrine contended for by counsel for appellant, namely, that probate proceedings are

Judgment—in probate proceedings—binding effect.

in rem, and that where the statutory notice has been given, all who are interested in the estate are bound by all orders or decrees duly entered in a particular case, and that, ordinarily, the only remedy is by direct appeal. *Barrette v. Whitney*, 36 *Utah*, 574, 37 L.R.A.(N.S.) 368, 106 Pac. 522. This court has also held that judgments and decrees entered by courts of competent jurisdiction, where jurisdiction of the subject of the action and of the person has been legally acquired, can only be assailed on direct appeal or in equity for extrinsic as contradistinguished from intrinsic fraud. *Cantwell v. Thatcher Bros. Bkg. Co.* 47 *Utah*, 150, 151 Pac. 986. This court, therefore, is in harmony with counsel's contention respecting a part of the statement we have quoted above. This court, however, never held that where the statutory notice has not been given, or in case of extrinsic fraud, especially if practised upon the court as in this case, courts of equity are less potent to grant relief in probate proceedings than they are in other civil actions or proceedings. Nor has it been held by this court that appeal or a direct application is the only available remedy in probate proceedings, regardless of how the judgment or decree appealed from was obtained.

It may as well be stated here as anywhere else in this opinion that this court is also firmly committed

to the doctrine that attacks like the one made in this case in the equity action, to which reference is made in the statement of facts, is a direct as contradistinguished from a collateral attack. *Liebhart v. Lawrence*, 40 *Utah*, p. 243, 120 Pac. 215, and cases cited. To the same effect are *Bacon v. Bacon*, 150 Cal. 477, 89 Pac. 317; *Campbell-Kawannanako v. Campbell*, 152 Cal. 201, 92 Pac. 184, and *Parsons v. Weis*, 144 Cal. 410, 77 Pac. 1007.

The question as to what extent relief may be granted by courts of equity in probate proceedings under circumstances disclosed by this record is now presented for the first time since the creation of our courts by our Constitution. In this connection let it be remembered that the fraud alleged to have been practised by the administratrix of the Weyant estate, and the fraud found by the district court, is what is known as extrinsic as contradistinguished from intrinsic fraud. Indeed, if the fraud practised by the administratrix in the probate proceedings of Weyant's estate is not

Fraud—character—extrinsic or intrinsic.

extrinsic fraud, then it would be hard to conceive what constitutes such fraud. Practically all, if not all, of the cases cited and relied on by appellant's counsel characterize the fraud practised in the proceedings outlined above as extrinsic fraud. We are presented with a case, therefore, where the fraud is not only extrinsic, but where it operated directly upon the court as well as upon the respondents; that is, the administratrix merely used the court as an instrumentality by means of which she gained her end, namely, to acquire the property belonging to respondents through legal forms. Moreover, this case is unique, in that the notice required by our statute was given in form, but in a false and fictitious name.

In this connection counsel for appellant insist that the statutory

notice was in fact published in due form and for the time required by statute. As a matter of form that statement is undoubtedly correct. So far as the creditors of Weyant's estate were concerned, who dealt with him and knew him only by the name of Fuller, the notice referred to may be said to have been duly given. Can that, however, also truthfully be said with regard to the respondents? Was notice published in the name of Harvey W. Fuller notice to them? Would it not have had the same effect in law if the notice had been published in the name of Brown, or Jones, or Smith? Must it not be conceded, therefore, that, so far as respondents are concerned, the matter stands as though no

Executor and administrator— notice was given?
notice of probate Let us assume that
—fictitious name.

A prefers a claim against B; that B is absent from, but has property within, the state; that A, although he knows his claim is false, fraudulent, and fictitious, nevertheless causes B's property to be attached, and publishes notice, not in the name of B, but in a false and fictitious name, and gets judgment against B for the amount of his claim and an order for the sale of the attached property, which is accordingly sold. Let us further assume that the sale is reported to the court and is confirmed by it. Now, conceding the foregoing facts, is B bound by such a judgment, unless appealed from? It would seem that no one would seriously so contend. And yet wherein, in legal effect, does the supposed case differ from the case at bar? In the case just stated B is despoiled of his property by reason of the false and fraudulent statements of A, and by reason of the false and fictitious notice that was published. Yet no one would contend, even though the court had confirmed the sale, that B may not have complete redress in a court of equity, at least as against A and those in privity with him.

In this case it is also conceded that the respondents were absent from the state of Utah and did not

learn nor have any knowledge of the probate proceedings until long after the time for appeal had expired. The only court that was open to them was a court of equity. If equity, therefore, is powerless to grant relief, no relief is possible. Counsel for appellant concede that equity may grant relief, but they insist that, under the authorities, and especially under the California decisions, the only relief a court of equity can grant to the respondents is to charge the administratrix, and perhaps such other persons as may have obtained the property of the estate through fraud or with knowledge thereof, as trustees, and make them account to the respondents therefor, but cannot reach the sureties on the bond. The foregoing contention is, at least in part, based upon the theory that probate courts have exclusive jurisdiction of the administration of estates, and that courts of equity may not interfere with that jurisdiction except in exceptional cases, and then only to a limited extent. There is, however, no such court as a probate court in this state. The only courts having general—we may say universal—original jurisdiction are the district courts, all of which are created by our Constitution. Upon those courts, in the language of article 8, § 7, of our Constitution, is conferred "original jurisdiction in all matters civil and criminal, not excepted in this Constitution, and not prohibited by law." Neither the Constitution nor the laws of this state prohibit those courts from exercising original jurisdiction to any extent. Section 9 of the same article of the Constitution also provides: "Appeals shall also lie from the final orders and decrees of the court in the administration of decedents' estates, and in cases of guardianship, as shall be provided by law."

A reference to that section of the Constitution makes it manifest that, when it says that appeals shall lie from the final orders and decrees of the court, the district court, and no other court, is referred to. The dis-

strict courts of this state are therefore invested with jurisdiction in probate matters precisely the same as they are invested with all other civil and criminal jurisdiction. They transact probate business as they do all other civil business. True, in administering estates they follow the established law and rules of procedure applicable to those matters, the same as they follow the established law and rules of procedure applicable to so-called equity or law cases. Moreover, our Constitution provides that "there shall be but one form of action, and law and equity may be administered in the same action." We, therefore, have no courts which are known as probate courts, or as law courts, or as equity courts; but we have courts possessed of general original jurisdiction, which are known as district courts. The district courts of this state, therefore, administer the estates of decedents as a part of their original jurisdiction, the same as they hear and enter judgments on promissory notes, or enter decrees in equity, foreclosing mortgages or quieting titles. The Constitution of this state, however, also, in article 1, § 11, in which is contained the Declaration of Rights, provides: "All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay."

Counsel's theory respecting actions and remedies is well illustrated in their reply brief, where they insist that respondents could have availed themselves of at least four civil remedies. Strange enough they also insist that the remedy pursued by respondents is not the proper one. Such a position, therefore, assumes that forms of action still exist and that special relief may be granted in accordance with the particular form of the action. This is manifestly fallacious. The respondents had but one state of facts to present to the court, and

it is upon those facts that relief, if any is granted, must be based. It is the facts that are alleged and established at the trial, when applied to the law, that determine the nature and extent of the relief that a court may grant, and not the form of the action.

Action—fraud
—materiality.

From a consideration of all the foregoing provisions and statements, it necessarily follows that in this state there is no such a thing as a particular form

—abolition of
form.

of action, nor a court in which particular forms of actions can be prosecuted or special remedies obtained. In this state, every person who has suffered injury to his person, to his property, or to his reputation, may go into the district court, the court of original jurisdiction, and state the facts concerning his grievance, and if his statement of facts, when applied to the law, entitles him to relief, the court is bound to grant him the relief to which the established facts, when applied to the law, whether legal or equitable, or both, entitled him. True, the plaintiff's rights, and the relief ultimately granted, are based upon and measured by the established rules of law and procedure; but the court, in applying those rules, merely determines the nature and extent of the relief that shall be granted and enters judgment accordingly. When the respondents learned that they had been despoiled of their inheritance, and under the established rules of law and procedure they could obtain no redress by direct appeal from the decree of distribution in the probate proceeding, they were driven to seek redress in some other proceeding and by an attack upon the decree, provided they could establish the character of fraud which authorized such an attack, namely, extrinsic fraud. Under the authorities already referred to, such an attack, in this jurisdiction, is a direct attack. In our judgment the courts of this state — that is,

the courts of original jurisdiction—

**Judgment—
distribution of
estate—attack
on decree—li-
ability of bond.**

were open to respondents for the purpose above stated, provided they properly alleged sufficient facts to invoke action by the court.

The facts they did allege in the proceedings to which reference has hereinbefore been made, and as outlined in the statement of facts herein, in our judgment, are ample to entitle them to the relief prayed for in this action. We are also of the opinion that, for the reasons already advanced, the district court of Salt Lake county, in the proceeding commenced by respondents in September, 1915, when they first learned of the fraud practised upon them and on the court of Salt Lake county by the administratrix of the decedent's estate, was not limited to merely declaring her a trustee, and as such holding the property in trust for respondents. To thus limit respondents, in view of the facts established in this case, would amount to a denial of any substantial relief. True, as counsel for appellant contend, the facts developed in a particular case may nevertheless be such as to entitle the complaining party to limited relief only. The facts and circumstances might, doubtless, be such that an heir, though despoiled of his inheritance by the wrongful and fraudulent acts of the administrator, might nevertheless not be permitted to recover from the sureties on the administrator's bond.

In this case, however, the administratrix, so far as respondents are concerned, acted directly contrary to and in the very teeth of the duty imposed upon her by law and by the bond that is sued on. It was the duty of the administratrix, under the law, to publish proper notice, so as to apprise the heirs, and all others interested in the estate, of its true condition; and when she failed to do that, but published notice in a false and fictitious name, known to her to be so, she utterly

failed to "faithfully execute the duties of the trust according to law," as provided in the bond. Nor did she, as the bond provided, administer the estate "for the use of the heirs" of the deceased, as she was bound to do. Nor did the wrongs committed by her occur after the decree of distribution, nor when acting in a capacity other than that of administratrix. It is sometimes somewhat difficult to determine whether the wrongful acts complained of occurred at a time when the administrator was acting as such, or whether they occurred after he had ceased to so act and acted in a different capacity. Sometimes the administrator may act in a dual capacity, one as administrator and the other as trustee, etc. There may thus be circumstances, as is well stated in some of the cases, where an administrator may have defrauded an heir while acting as trustee, and after he had ceased to act as administrator.

In the probate proceeding here in question, however, the administratrix not only failed to publish proper notice, so far as respondents are concerned, but she utterly failed to make and return a true and complete inventory of the property belonging to the estate. Again, she converted to her own use about \$12,000 worth of property of the estate without making an inventory thereof, and without disclosing its existence.

That act alone constituted an insufferable fraud and manifestly constituted a breach of the bond. 18 Cyc. p. 1267. Moreover, all of her acts which resulted in despoiling respondents of their inheritance occurred during the administration of the estate, and not after the decree of distribution had been entered, and when the administratrix was acting in a private capacity, or in a capacity of trustee merely. True, she was awarded possession and control of the property which was inventoried, and which was left for

**Principal and
surety—ad-
ministratrix's
bond—conver-
sion of property
—liability.**

(— *Utah*, —, 182 Pac. 189.)

distribution, by the decree of distribution; but that decree was directly based upon extrinsic fraud

—liability for
fraud of
administratrix.

practised by her, which fraud likewise constituted a breach of the bond in question here. In *State v. Connolly*, 75 N. J. Eq. 521, 138 Am. St. Rep. 577, 72 Atl. 363, the law respecting the liability of a surety on an administrator's bond is stated thus: "The surety of an administrator is required to bear any injurious consequences arising from loss to the estate through the administrator's default or fraud, and has no right to any favor or immunity that would not be accorded to the administrator himself."

Without pursuing the subject further, we are clearly of the opinion that the fraudulent and deceitful acts of the administratrix in this case were, each and all, committed while she acted in the capacity of administratrix, and thus constituted breaches of the bond sued on.

Appellant, however, also insists that the district court erred in admitting in evidence against it the judgment that was entered against the administratrix in the action against her, and to which appellant was not a party, and in which the amount and value of the property converted by her was ascertained and adjudicated. This contention, in our judgment, is clearly untenable. The great—the overwhelming—weight of authority is to the contrary. Among the many cases

Evidence—
judgment
against principal—action
against surety.

that hold directly contrary to appellant's contention are the following:

Irwin v. Backus, 25 Cal. 214, 85 Am. Dec. 125; *Stovall v. Banks*, 10 Wall. 583, 19 L. ed. 1036; *Bellinger v. Thompson*, 26 Or. 320, 37 Pac. 714, 40 Pac. 229; *Deobold v. Oppermann*, 111 N. Y. 531, 2 L.R.A. 644, 7 Am. St. Rep. 760; 19 N. E. 94; *Meyer v. Barth*, 97 Wis. 352, 65 Am. St. Rep. 124, 72 N. E. 748; 2 Black, Judgm. § 589; *Jones*, Ev. 2d. ed. § 591; *Brandt*, Surety-

ship & Guaranty, § 712. In the annotator's note, Ann. Cas. 1915D, at page 402, it is said: "The majority of the cases hold that from the nature of the obligation entered into by the sureties on an executor's or administrator's bond, making them privy to the proceedings against their principal, they are bound and concluded, in the absence of fraud or collusion, by a judgment against their principal, even though they were not parties to the proceeding."

In support of the foregoing text cases are cited from twenty-two jurisdictions. We remark that in Nebraska, from which state a case is cited in the foregoing note, it is held that, while the judgment against the principal is always admissible in evidence against the surety, yet it is only prima facie evidence against him. In a great majority of the jurisdictions, however, it is squarely held that, in the absence of fraud or collusion, the judgment against the principal is conclusive against the surety.

In the section cited from Jones on Evidence the author, in referring to administrators' bonds, says: "In the opinion of the author the weight of authority sustains the view that in such cases the judgment is conclusive against the surety, on the principle that he has in effect contracted to be bound thereby."

In the note in 132 Am. St. Rep., commencing on page 764, in speaking of the rules that apply to sureties on administrators' bonds, it is said: "A careful search of the authorities will disclose that, mainly on the principles

Judgment—
against principal—how far
binding on
surety.

above quoted, practically the whole of the decisions under this head are that the sureties in probate matters are bound by the decree or judgment against their principals."

Many cases are cited in support of the text, which it is not necessary to refer to here.

It is not necessary to pursue this subject further. As we view it, in view that the sureties stand in priv-

ity with the administrator they necessarily must be held bound by the judgment again him in which it is adjudicated that he has failed to discharge his duty and has breached the conditions of the bond, unless they can show that the judgment was in truth and in fact obtained through fraud or collusion.

It is, however, also contended with much force and vigor by appellant's counsel that no judgment is permissible, indeed, that no action can successfully be maintained against a surety, so long as the judgment of discharge stands in favor of the principal and surety. That, it is contended, is the case here. In other words, counsel contend that neither the final settlement, nor the decree of distribution, nor the discharge of the administratrix and of their client, has ever been set aside or vacated by the court. As we pointed out in our statement of facts, the district court did not in express terms vacate or set aside either the decree of distribution or the judgment or order discharging the administratrix from further liability. It must be conceded that it is generally held by the courts that where a final allowance and settlement of the accounts of the administrator have been approved, and a final decree of distribution has been entered, which is followed by a discharge of the administrator and the sureties on the bond, those orders and decrees must be vacated before an action can successfully be maintained and a judgment entered against the sureties on the bond. But in *Brandt, Suretyship & Guaranty*, § 712, it is said: "The sureties of an administrator or guardian are not protected by a final settlement with, and discharge of, their principal, when it is made fraudulently and without notice to the parties in interest."

Let it be conceded, however, for the purposes of this decision, that where the final account of the administrator has been allowed and approved, and a final decree of distribution has been entered, which is

followed by a discharge, it is necessary to institute and prosecute an action in which it is found and adjudicated that the allowance and settlement of the final account, the decree of distribution, and the discharge, were each and all obtained through the extrinsic fraud of the administrator, and that the distributee of the estate has obtained the property by means of such fraud. Where, however, it is also found and adjudicated that all of the proceedings during the administration of the estate, and especially the allowance and approval of the final account, the distribution of the estate, and the discharge of the administrator and the sureties, were each and all based upon and obtained by means of the extrinsic and insufferable fraud of the administrator while acting as such, must it (when these things are found and adjudicated) also be followed by an express statement in the findings and judgment that the settlement and the decree of distribution and discharge, when thus obtained, are vacated and set aside? In such a case, and under such circumstances, but one legal effect or conclusion is permissible, namely, that the orders, decrees, and discharge, being based on and steeped in extrinsic fraud, can have no further force or effect. That is precisely what is accomplished, and all that is accomplished, by an express statement that the orders, decrees, and discharge are vacated and held for naught. It would be impossible to more completely hold for naught the allowance of the final account, the entry of the final decree of distribution, and the discharge by any statement which the court would be capable of making, than is the case by what is found and adjudicated in this case, and an outline of which we have given in the statement of facts.

In our judgment, it would be a mere play upon words, and a positive reproach to both the law and the courts, if, in the face of the findings and adjudication to which we

have repeatedly referred, it were held that the orders, final decree of distribution, and discharge, which were obtained by fraud, were not set aside, but still remain in full force and effect. As a matter of law it is just as impossible for the final settlement, the decree of distribution, and the discharge to stand and be in force at the same time that the findings, conclusions of law, and the decree in the Morgan Case or action are in force and effect, as it is impossible in physics to have two objects occupy the same place at the same time. Moreover, the principle may be applied here that where several contracts are entered into, or several statutes are passed, or different judgments have been entered covering the same subject, in which there are statements or provisions that are so repugnant to each other that both cannot stand, then the provision of the contract that was earliest in time, or of the statute that was first passed, or the judgment that was first entered, must give way to the conflicting provisions of the later contract, statute, or decree. In this case the findings and judgment in the Morgan Case, which are later in time, are utterly repugnant to the decree of distribution and the discharge, and for that reason the latter must fail, say nothing about the fact that both are based upon insufficient fraud and deceit, and for that reason are also utterly devoid of any force or effect.

—attack upon
for fraud—neces-
sity of setting
aside.

—effect of subse-
quent incon-
sistent decree.

We remark that by what we have here said upon the proposition just discussed no adverse criticism of counsel is intended. We are well aware that, in the presentation of causes, circumstances and conditions often arise which are well expressed by the Oriental poet in the statement that—

“A hair perhaps divides the false and true.”

While counsel may be justified in arguing that, in view that the decree of distribution and the dis-

charge of the administratrix have not in express terms been set aside, and therefore they are still in force and effect, yet a court would not be justified in holding that because a judgment or decree is not expressed in particular phraseology, or because a particular formula of words was not followed, therefore it is without force or effect. To do that would be to sacrifice substance for mere form, and refuse to give effect to the manifest purposes and intentions of both the court and the parties to the action. Courts must give effect to that which is unavoidably and necessarily implied in a judgment or decree, as well as to that which is expressed in the most appropriate language.

—scope—implied
effect.

It is, however, further contended that all that was accomplished by the action against the administratrix, and all that was intended therein, was to charge her with holding the property of the estate which she had obtained by means of her fraud and wrongdoing in trust for the respondents. If that had been the only purpose, it is not easy to perceive why the present action against the appellant was commenced. Before the appellant could be proceeded against on the bond on which it was surety, it was necessary to establish the default of the administratrix and the extent of her default. That was done in the action against her. The mere fact that in that action she was also declared trustee, and that certain property was recovered, in no way militates against respondents' rights to maintain this action against the appellant as surety on the bond. What property was obtained in the action against the administratrix was for the benefit of appellant, precisely the same as it was for the benefit of respondents, and the latter cannot again recover from the appellant what they recovered in that action against the administratrix. The fact, therefore, that the court, in the action against the

Principal and
surety—judg-
ment against
principal—effect.

administratrix, charged her as trustee, cannot affect respondents' rights to obtain judgment in this action on the bond for any amount which the administratrix as such converted to her own use and which was not accounted for in the action against her.

Appellant also contends that respondents were guilty of laches, etc. In the face of the undisputed facts, we cannot conceive how such a contention can prevail against them. They moved just as soon as they discovered the death of the husband and father and that fraud had been perpetrated in administering his estate. What more could they have done?

Something is also said about respondents being charged with Weyant's wrong in assuming and in living under a false and fictitious name. No doubt the sins of the parent are often visited upon his offspring, but we cannot see why, either in law or in justice, that burden should be placed upon the respondents under the circumstances of this case. True it is that sureties, ordinarily, are deemed the favorites of the law, and while their liability will not be extended beyond the ex-

Estoppel—act of ancestor—effect on heirs.

press terms of their obligations, yet, when the obligations assumed by the surety are clearly established courts will enforce them the same as other obligations. *Blyth-Farco Co. v. Free*, 46 Utah, 233, 148 Pac. 427; *Daly v. Old*, 35 Utah, 83, 28 L.R.A. (N.S.) 463, 99 Pac. 460. In this case the appellant, and not the respondents, vouched for the official acts and conduct of the administratrix. As we have seen, she violated her trust, not only by misrepresentation and deceit, but she converted a very large sum of money belonging to the estate to her own use without ever disclosing its existence, and she has either concealed or dissipated practically all of the estate, which probably amounted to upwards of \$40,000, all of which she did by means

of fraud and deceit practised by her while acting in her official capacity.

If appellant can find any property belonging to the estate, it, in case it satisfies the judgment in favor of respondents, will be subrogated to all of their rights with respect to that property, and may, for that purpose, charge the administratrix as a trustee for its benefit. Where one of two innocent parties must necessarily suffer, it is not always a matter of easy solution which of the two shall bear the burden. In this case, the appellant has, however, placed itself in privity with the administratrix, and has vouched for her official acts and conduct, and hence it should bear the loss rather than the respondents.

Subrogation—right of surety—satisfying claim.

After a careful consideration of the somewhat peculiar, if not unique, facts and circumstances of this case, and the law applicable, we have been forced to the conclusion that the judgment of the District Court is right and should prevail.

The judgment is therefore affirmed, at appellant's costs.

Corfman, Weber, Gideon, and Thurman, JJ., concur.

A petition for rehearing having been filed, Frick, J., on May 28, 1919, handed down the following additional opinion:

Mr. James Ingebreetsen, one of appellant's counsel, has filed a petition for rehearing, in which two grounds are stated why a rehearing should be granted; namely, "(1) That the court apparently failed to note the precise terms of the decree rendered by Judge Lewis in the *Weyant-Morgan* case; (2) that the court omitted to consider the authorities upon the legal effect of this decree."

In concluding a somewhat vigorous argument in support of his petition counsel says: "In view of our blamelessness, and that the Weyants have recovered a large part of the estate, and that part of this judgment is for items such as rent

for the property after distribution, and that we have parted with such security as we had and gained nothing for ourselves, and that no reserve or other precaution exists for such a liability, I had hoped and still hope that the court might kindly consider and follow the conclusion reached in the several similar cases we have cited, especially since there cannot be found in all the world a similar case in which the surety has been held."

In this connection he also complains that we did not refer to some of the cases cited by him, and for that reason seems persuaded that we did not consider them.

In the opinion the writer explicitly stated the reason why more of the numerous cases referred to by counsel were not reviewed. In a case like this, where so many cases are referred to which have only a remote bearing upon the principal question presented, and in which the controlling facts clearly differ from the facts stated in the cited cases, it is impracticable, if not impossible, to distinguish the numerous cases and set forth the reasons at length why they are not controlling. The writer took special pains to set forth at least the controlling facts in detail in the opinion. No fault is found with the statement as made. In formulating the conclusion he again attempted to state them as explicitly as possible under the circumstances. The facts and the reasons for the conclusion reached, as well as the law deemed applicable to the peculiar features of this case, were all thoroughly considered by all the members of this court, not only once, but several times, and, after doing so, the conclusion was, and still is, unanimous that no other result save the one announced in the opinion is permissible. In view, however, that counsel insists that our conclusion is contrary to the cases he cited in his original brief, we here cite all that he now relies on in his petition for rehearing; namely, *Silva v. Santos*, 138 Cal. 536, 71 Pac. 703; *Curtis v. Schell*, 129 Cal.

9 A.L.R.—72.

208, 79 Am. St. Rep. 107, 61 Pac. 951; *Hudson's Estate*, 63 Cal. 454; *Re Walker*, 160 Cal. 547, 36 L.R.A. (N.S.) 89, 117 Pac. 510; *Evans v. Evans*, 200 Ala. 329, 76 So. 95; *Sohler v. Sohler*, 135 Cal. 323, 87 Am. St. Rep. 98, 67 Pac. 282; *Leavens's Estate*, 65 Wis. 440, 27 N. W. 324; *Turner v. Cole*, 24 Ala. 364. We refer to those cases, however, only so that the reader may, if he so desires, examine them, and not for the purpose of now reviewing them.

In this connection it is, however, only fair to state that we cannot agree with counsel's contention that in the foregoing cases the law is stated that where a court adjudges that a defaulting administrator holds the property which is still in his possession, and which was wrongfully converted by him while acting as administrator, in trust for the heir or creditor of the estate, as the case may be, that, under facts and circumstances like those in the case at bar, the surety on his bond may not be held liable for the value of the property so wrongfully converted and which cannot be recovered from the administrator. That is the crux of this case. Counsel entirely ignores or overlooks the all-potent fact ever present in this case, that the respondents at no time were brought into court. He assumes that, because the notice published by the administratrix in the name of Fuller was sufficient to bring those who transacted business with the deceased and who knew him only by that name into court, therefore it was sufficient to bring in the respondents.

Write—publication of notice of action—fictitious name.

Not so. The respondents were never brought within the jurisdiction of the court, and hence not into the probate proceedings, and therefore any decree rendered in those proceedings, so far as they were concerned, was a mere nullity.

That proposition is illustrated in the case of *Re Killian*, 172 N. Y. 547, 63 L.R.A. 95, 65 N. E. 561, where a party interested in an estate was

not served with notice, and it was there held that the decree in the probate proceeding had no binding force as to him. The foregoing proposition is, however, so elementary that no citation of authority should be required. The following cases also clearly support the conclusion reached in the principal opinion; namely: *Fisher v. Wood*, 65 Tex. 199; *Maney v. Casserly*, 134 Mich. 252, 96 N. W. 478. In the Texas case it is expressly held that a defaulting executor may be charged as trustee, and after the property found in his hands is exhausted "the plaintiffs will have to look to the executor and his bondsmen." Why not? What is an administrator's bond given for, if it is not to protect the heir against the wrongful official acts of the administrator in administering the estate? In view that in this case the administratrix practised fraud upon the court, upon the surety on her bond, and upon the heirs alike, does not

change the rule, although her wrongful acts fall with peculiar severity upon the surety. The surety vouched for her official conduct, and, however innocent, must nevertheless bear the burden as against the heirs, who are likewise innocent, and for whose protection the law required the giving of a bond.

The contention that we quoted the conclusion of law found in the second case, instead of the one found in the first one, is too trivial to require special comment. The conclusion of law we quoted in the opinion was inevitable, in view of the facts found in both cases, and therefore, although counsel's contention be conceded to be correct, it has no bearing upon the result.

We are still of the opinion that the conclusion reached is sound, and hence should prevail. The petition for a rehearing is therefore denied.

Corfman, Weber, Gideon, and Thurman, JJ., concur.

ANNOTATION.

Liability of sureties on bond of administratrix who secures her appointment by misrepresenting the decedent's identity or her relationship to him.

The ultimate question, apart from the questions of practice and remedies, presented in the reported case (*WEY-ANT v. UTAH SAV. & T. CO.* ante, 1119) as to the liability of the sureties on the bond of an administratrix who secured her appointment by fraudulently misrepresenting the identity of the decedent and her relation to him, and under cover of the administration proceedings thus instituted wrongfully secured the property of the estate, is one of interest and difficulty, upon which there seem to be no precise precedents. It would seem that the case on its facts might reasonably admit of diverse conclusions. It will be observed, as stated in the rehearing opinion, that the court regarded as a potent fact in the situation that the published notice of the administration proceedings was insufficient to charge the heirs, because it was published under a false name. It is not alto-

gether clear, however, that the liability of the sureties is a logical sequence from that fact, since they were not in the position of distributees or even purchasers of the property whose possession or claim thereto must rest defensively upon the administration proceedings, and as against whom the heirs would not in the first instance be obliged to invoke those proceedings. It is further to be observed, that the administration of the estate, at least to the extent of a widow's share, was in harmony with the theory and finding of fact upon which the decree granting the letters of administration was rendered, and upon the basis of which the bond—which must be affirmatively invoked by the heirs—was executed. In this respect the case would seem to be distinguishable from a case where, an administrator having failed to administer the estate in harmony with the decree appointing him,

the sureties attempt to escape liability upon the ground that the appointment was invalid.

The unanimous decision of the court, in the reported case (WEYANT

v. UTAH SAV. & T. Co.), however, lends strong support to the view that the sureties are liable even in such circumstances of hardship as there appear.
G. H. P.

FIRST STATE BANK OF HILGER, Respt.,

v.

H. H. LANG, Appt.

Montana Supreme Court—July 9, 1918.

(55 Mont. 146, 174 Pac. 597.)

Bank — authority of president and cashier.

1. Neither the president, the cashier, nor both of them, could release a debtor of the bank from his liability without authority of the board of directors.

[See note on this question beginning on page 1146.]

Bills and notes — accommodation maker — liability.

2. One signing a note as a comaker is primarily liable thereon under a statute providing that the person primarily liable is the one who, by the terms of the instrument, is absolutely required to pay the same, and it is immaterial that he was a mere accommodation maker.

[See 3 R. C. L. 1276.]

— effect of renewal note as payment.

3. In the absence of express agreement to that effect, a renewal note does not extinguish the original one, although the latter is surrendered to the maker.

[See 3 R. C. L. 1217.]

— effect of stamping note paid.

4. That the cashier of a bank upon receiving a renewal note stamped the original one paid does not of itself extinguish the original obligation.

— authority of cashier.

5. The cashier of a bank has no implied authority to accept a renewal note in payment of the original so as to release the parties to the latter.

[See 3 R. C. L. 449.]

— effect of permitting cashier to manage bank.

6. The directors of a bank do not, by turning over to the cashier the entire management of the bank, impliedly confer upon him authority to release the liability of the president of

the bank upon commercial paper held by it.

[See 3 R. C. L. 444, 449.]

— ratification of single act — effect.

7. Ratification by the directors of a bank of the act of its cashier in renewing commercial paper held by the bank does not confer upon him ostensible authority to make such renewals so as to release persons liable on the paper.

Evidence — burden of proof — dealings of corporation director.

8. A director dealing with his corporation has the burden of showing that his dealings have been fair and honest.

Bank — authority of cashier in dealing with director.

9. The cashier of a bank has only such authority in dealing with a director as is conferred upon him by virtue of his office or by express grant of the board of directors.

[See 3 R. C. L. 444.]

Evidence — presumption of knowledge of directors.

10. Knowledge of the facts on the part of directors of a bank when ratifying the acts of its cashier cannot be presumed in favor of the president, who is himself a director.

[See 3 R. C. L. 456.]

Bank — ratification of act of cashier — necessity of knowledge.

11. Ratification by the directors of a bank of the renewal of a note by its cashier will not release the liability of

the bank president on the original note if the directors had no knowledge of such liability at the time of ratification.

[See 3 R. C. L. 455.]

Election of remedies — attempted enforcement of renewal note — effect.

12. The president of a bank cannot avoid liability on a note signed by him, which was subsequently renewed without his signature, by the fact that the directors attempted to enforce collection of the renewal note from its maker.

Laches — suit within limitation period — effect.

13. Laches is no defense to an action against one primarily liable on a promissory note which is brought within the statutory limitation period.

Trial — question of law — authority of bank cashier.

14. The question of the authority of a bank cashier to release the president from liability on a commercial paper held by the bank is one of law where the evidence is undisputed.

[See 16 R. C. L. 189.]

APPEAL by defendant from a judgment of the District Court for Fergus County (Ayers, J.) in favor of plaintiff and from an order denying a motion for new trial in an action brought to enforce payment of a certain promissory note and accumulated interest. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Belden & DeKalb, for appellant:

The management and control of the affairs of the bank having been turned over or abandoned to the cashier, he has all the power of the bank.

1 Morse, Banks, 343, ¶ 165; Wing v. Commercial & Sav. Bank, 103 Mich. 565, 61 N. W. 1009; Martin v. Webb, 110 U. S. 7, 28 L. ed. 49, 3 Sup. Ct. Rep. 423; 7 C. J. 540, 551, 544, 783, 784; Davenport v. Stone, 104 Mich. 521, 53 Am. St. Rep. 467, 62 N. W. 722; Tourtelot v. Whithed, 9 N. D. 467, 84 N. W. 8; Stebbins v. Lardner, 2 S. D. 127, 48 N. W. 847; Skillern v. Baker, 82 Ark. 86, 118 Am. St. Rep. 52, 12 Ann. Cas. 243, 100 S. W. 764; Merchants' Nat. Bank v. State Nat. Bank, 10 Wall. 604, 19 L. ed. 1008; Stapylton v. Stockton, 33 C. C. A. 542, 63 U. S. App. 412, 91 Fed. 326; Armstrong v. Chemical Nat. Bank, 27 C. C. A. 601, 54 U. S. App. 462, 83 Fed. 556; Bell v. Hanover Nat. Bank, 57 Fed. 821; L'Herbette v. Pittsfield Nat. Bank, 162 Mass. 137, 44 Am. St. Rep. 354, 38 N. E. 363; Iowa Nat. Bank v. Sherman, 17 S. D. 396, 106 Am. St. Rep. 778, 97 N. W. 12; Blanchard v. Commercial Bank, 21 C. C. A. 319, 44 U. S. App. 556, 75 Fed. 249; Cox v. Robinson, 27 C. C. A. 120, 48 U. S. App. 388, 82 Fed. 277; Carpy v. Dowdell, 115 Cal. 683, 47 Pac. 695; First Nat. Bank v. Shook, 100 Tenn. 444, 45 S. W. 340; Indianapolis Rolling Mills Co. v. St. Louis, Ft. S. & W. R. Co. 120 U. S. 256, 30 L. ed. 639, 7 Sup. Ct. Rep. 542; First Nat. Bank v. Stone, 106 Mich. 370, 64 N. W. 488; Leicester Piano Co. v. Ft. Royal & R. Improv.

Co. 5 C. C. A. 60, 8 U. S. App. 374, 55 Fed. 203; Washington Sav. Bank v. Butchers' & D. Bank, 107 Mo. 134, 17 S. W. 644; Kraniger v. People's Bldg. Soc. 60 Minn. 94, 61 N. W. 904; Calvert v. Idaho Stage Co. 25 Or. 412, 36 Pac. 24; Ceeder v. H. M. Loud & Sons Lumber Co. 86 Mich. 541, 24 Am. St. Rep. 134, 49 N. W. 575; Thomp. Corp. § 4883; United States Nat. Bank v. First Nat. Bank, 24 C. C. A. 597, 49 U. S. App. 67, 79 Fed. 296.

Where the principal attempts by suit to enforce the payment of notes received by the agent without authority, he thereby impliedly ratifies such act or contract.

Dick v. Flanagan, 122 Ind. 277, 7 L.R.A. 550, 23 N. E. 765; Dickinson v. Wright, 56 Mich. 42, 22 N. W. 312; Ingraham v. Barber, 72 Ga. 158; Beidman v. Goodell, 56 Iowa, 592, 9 N. W. 900; Eadie v. Ashbaugh, 44 Iowa, 519; West Boylston Mfg. Co. v. Searle, 15 Pick. 225; Sherrod v. Duffy, 160 Mich. 488, 136 Am. St. Rep. 451, 125 N. W. 366; D. M. Osborn Co. v. Jordan, 52 Neb. 465, 72 N. W. 479; Corser v. Paul, 41 N. H. 24, 77 Am. Dec. 753; Chamberlain v. Woodward, 22 Hun, 440; La Grande Nat. Bank v. Blum, 27 Or. 215, 41 Pac. 659; Twentieth Century Co. v. Quilling, 136 Wis. 481, 117 N. W. 1007.

The statement by the cashier that the note had been paid was binding upon the bank.

Grant v. Cropsey, 8 Neb. 205; Franklin Bank v. Steward, 37 Me. 519; Cochecho Nat. Bank v. Haskell, 51 N. H. 116, 12 Am. Rep. 67.

Defendant was disqualified in every sense of the word to pass upon or act upon the paper in question.

Chamberlain v. Pacific Wool Growing Co. 54 Cal. 103; Graves v. Mono Lake Hydraulic Min. Co. 81 Cal. 320, 22 Pac. 665; Wickersham v. Crittenden, 93 Cal. 32, 28 Pac. 788; Union Trust Co. v. Nevada & O. R. Co. 20 Fed. 86; Park Hotel Co. v. Fourth Nat. Bank, 30 C. C. A. 409, 58 U. S. App. 674, 86 Fed. 745; Smith v. Los Angeles Immigration & Land Co-op. Asso. 78 Cal. 289, 12 Am. St. Rep. 53, 20 Pac. 677; Curtin v. Salmon River Hydraulic Gold Min. & Ditch Co. 130 Cal. 345, 80 Am. St. Rep. 132, 62 Pac. 552; Star Mills v. Bailey, 140 Ky. 194, 140 Am. St. Rep. 370, 130 S. W. 1077; Miner v. Belle Isle Ice Co. 93 Mich. 97, 17 L.R.A. 412, 53 N. W. 218; McConnell v. Combination Min. & Mill. Co. 30 Mont. 239, 104 Am. St. Rep. 703, 76 Pac. 194; Haywood v. Lincoln Lumber Co. 64 Wis. 639, 26 N. W. 184; Garrett v. Burlington Plow Co. 59 Am. Rep. 466, note.

Messrs. Charles J. Marshall and Gunn, Rasch, & Hall, for respondent:

The cashier had no special or express authority to surrender the note signed by Lang and accept a new note without his signature.

Bank of Ravenswood v. Wetzell, 58 W. Va. 1, 70 L.R.A. 305, 50 S. E. 886, 6 Ann. Cas. 48; State Bank v. Forsyth, 28 L.R.A.(N.S.) 501, note; Bank of Commerce v. Hart, 37 Neb. 197, 20 L.R.A. 780, 40 Am. St. Rep. 479, 55 N. W. 631; First Nat. Bank v. Gunhus, 133 Iowa, 409, 9 L.R.A.(N.S.) 471, 110 N. W. 611; Cochecho Nat. Bank v. Haskell, 51 N. H. 116, 12 Am. Rep. 67; Dedham Inst. v. Slack, 6 Cush. 408; Hodge v. First Nat. Bank, 22 Gratt. 51; Daviess County Sav. Asso. v. Sailor, 63 Mo. 24.

The cashier's act was never ratified.

Sehart-Patterson Mill. Co. v. Hughes, 8 Kan. App. 514, 56 Pac. 143; 3 R. C. L. Banks, § 85; First Nat. Bank v. Drake, 29 Kan. 311, 44 Am. Rep. 646; Pacific Vinegar & Pickle Works v. Smith, 152 Cal. 507, 93 Pac. 85; Williams v. Broadwater County, 28 Mont. 360, 72 Pac. 755; Smith v. Zimmer, 45 Mont. 305, 125 Pac. 420; Goodyear Dental Vulcanite Co. v. Caduc, 144 Mass. 85, 10 N. E. 483. See also Triggs v. Jones, 46 Minn. 277, 48 N. W. 1113; East River Bank v. Kennedy, 9 Bosw. 543; Sohn v. Morton, 92 Ind. 170; Historical Pub. Co. v. Hartmanft, 3 Pa. Super. Ct. 59; Brown v.

Fowler, 133 Ala. 310, 32 So. 584; Gardner v. Pitcher, 109 App. Div. 106, 95 N. Y. Supp. 678; 31 Cyc. 1260.

The taking of a renewal note and returning the old note to the maker does not discharge the old debt and create a new one in the absence of express agreement to that effect, and such agreement must, of course, be made by one having authority to make it.

First Nat. Bank v. Cottonwood Land Co. 51 Mont. 544, 154 Pac. 582; First Nat. Bank v. White, 60 N. J. Eq. 487, 46 Atl. 1092; Welch v. Allington, 23 Cal. 322; State Bank v. Mutual Teleph. Co. 123 Minn. 314, 143 N. W. 912, Ann. Cas. 1915A, 1082; Gallery v. National Exch. Bank, 41 Mich. 169, 32 Am. Rep. 149, 2 N. W. 193; Fowler v. Walch, 119 App. Div. 542, 104 N. Y. Supp. 54; First Nat. Bank v. Gunhus, 133 Iowa, 409, 9 L.R.A.(N.S.) 471, 110 N. W. 611; Bridge v. Connecticut Mut. L. Ins. Co. 167 Cal. 774, 141 Pac. 875.

Defendant was primarily liable under the Negotiable Instruments Law.

3 R. C. L. § 506; Union Trust Co. v. McGinty, 28 Ann. Cas. 525, and note, 212 Mass. 205, 98 N. E. 679; Bradley Engineering & Mfg. Co. v. Heyburn, 56 Wash. 628, 134 Am. St. Rep. 1127, 106 Pac. 170; Cellers v. Meachem (Sellers v. Lyons) 49 Or. 186, 10 L.R.A.(N.S.) 133, 89 Pac. 426, 13 Ann. Cas. 997; Wolstenholme v. Smith, 34 Utah, 300, 97 Pac. 329; Rouse v. Wooten, 140 N. C. 557, 111 Am. St. Rep. 875, 53 S. E. 430, 6 Ann. Cas. 280; National Citizens' Bank v. Topplitz, 81 App. Div. 593, 84 N. Y. Supp. 422; Vanderford v. Farmers' & M. Nat. Bank, 105 Md. 164, 10 L.R.A.(N.S.) 129, 66 Atl. 47; 3 R. C. L. § 503; Carver v. Steele, 116 Cal. 116, 58 Am. St. Rep. 156, 47 Pac. 1007; Rogers v. Detroit Sav. Bank, 146 Mich. 639, 18 L.R.A.(N.S.) 531, 110 N. W. 74; Gray v. Farmers' Nat. Bank, 81 Md. 631, 32 Atl. 518; Carpenter v. McLaughlin, 12 R. I. 270, 34 Am. Rep. 638.

Defendant could not protect his private interests to the detriment of the bank's interests.

Gallery v. National Exch. Bank, 41 Mich. 169, 32 Am. Rep. 149, 2 N. W. 193; Bowles, Modern Law of Banking, p. 370; State Bank v. Mutual Teleph. Co. 123 Minn. 314, 143 N. W. 912, Ann. Cas. 1915A, 1082; Fowler v. Walch, 119 App. Div. 542, 104 N. Y. Supp. 54; First Nat. Bank v. Gunhus, 133 Iowa, 409, 9 L.R.A.(N.S.) 471, 110 N. W. 611; Wallace v. Oceanic Packing Co.

25 Wash. 143, 64 Pac. 938; *Smith v. Pacific Vinegar & Pickle Works*, 145 Cal. 352, 104 Am. St. Rep. 42, 78 Pac. 550; *Rhodes v. Webb*, 24 Minn. 292; *Findley v. Cowles*, 93 Iowa, 389, 61 N. W. 998; *Commercial Bank v. Chatfield*, 121 Mich. 641, 80 N. W. 712; *Lawrence v. Stearns*, 79 Fed. 878.

Defendant cannot take advantage of his own negligence, as an officer of the bank, in failing to do his duty as such officer.

State Bank v. Forsyth, 41 Mont. 249, 28 L.R.A.(N.S.) 501, 108 Pac. 914; *Campbell v. Watson*, 62 N. J. Eq. 396, 50 Atl. 120.

Holloway, J., delivered the opinion of the court:

In March, 1908, Charles W. Smith and H. H. Lang executed and delivered to the First State Bank of Kendall their promissory note of \$1,900, and, as additional security for the loan, Smith delivered to the bank 1,000 shares of the capital stock of the North Moccasin Mining Company. Although the note was not due until January, 1909, as early as April, 1908,—the month following its execution,—Lang importuned Smith to make payment on it, which Smith declined to do, and the like requests were repeated by Lang thereafter, but unsuccessfully. On November 8, 1908, Smith executed and delivered to the bank a new note for \$2,695, due in one year, in renewal of the Smith-Lang note and a balance due on another note of Smith's, and the original note was stamped "Paid," and delivered to Smith. This renewal note was not signed by Lang, but the collateral which secured the two notes was left with the bank as the only security for the new note. On April 2, 1909, this renewal note was taken up and a third note for \$3,612.87, signed by Smith and wife, was given in renewal of that note and for other advancements, and the second note was stamped "Paid" and delivered to Smith. In addition to the collateral which secured the second note, Smith and wife executed and delivered to the bank a mortgage upon some real property in Kendall. On March 12, 1912, suit was instituted to enforce collection of this third

note, and thereafter judgment was recovered and execution issued, but nothing was collected.

From the organization of the bank until November, 1912, Henderson was cashier and Lang was president of the bank, and each of them was a director. Plaintiff is the successor of the First State Bank of Kendall. This action was commenced against Lang to enforce payment of the Smith-Lang note for \$1,900 and accumulated interest. The defendant pleaded: (1) That he signed the note as accommodation for Smith, and that the bank extended the time of payment without his knowledge or consent; (2) that the bank was guilty of laches in prosecuting its claim against Smith; and (3) that the note was fully paid and discharged. Upon the trial and at the close of the testimony the court directed a verdict for the plaintiff, and defendant has appealed from an order denying him a new trial. There is not any conflict in the evidence except as to matters to which reference will be made hereafter.

Lang was general manager of the North Moccasin Mining Company, and owned considerable of its stock. The expenses of the company far exceeded its income, but notwithstanding this fact the stock had a market value of from \$1.90 to \$2 per share. Lang sold to Smith the 1,000 shares heretofore mentioned at \$1.90 per share. The money with which to pay for the stock was borrowed from the bank, and the Smith-Lang note executed and delivered, the money received and immediately passed to Lang's credit, and the certificate of stock delivered to the bank as collateral. On November 1, 1908, the mining company defaulted in the payment of interest on its bonded indebtedness. In April, 1909, mining operations ceased. In September, 1909, a suit to foreclose was brought and prosecuted to decree and sale, and the stock became worthless.

Prior to November, 1912, the board of directors of the bank, in disregard of its by-laws, held no meetings except to elect officers,

(55 Mont. 146, 174 Pac. 397.)

made no examinations of the bank's affairs, took no part in making or approving loans, but permitted Henderson to conduct the bank's business. The directors, other than Henderson and Lang, knew nothing of the Smith-Lang loan or of the renewals. In November, 1912, at a meeting of the board at which neither Henderson nor Lang was present, certain of the bank's loans, including the note for \$3,612.87, signed by Smith and wife, were approved. In January, 1914, the board discovered that Lang had signed the original note for \$1,900, and a demand was made upon him to pay it, and upon his refusal this action was brought.

1. Appellant contends that, having signed the Smith-Lang note as an accommodation party, he was liable only as a surety, and was discharged by the extension of time granted to Smith without his knowledge or consent. With this we do not agree. A surety is only liable secondarily. The note reads:

Jan. 10th, 1909, after date we or either of us promise to pay to the order of First State Bank of Kendall, nineteen hundred and no 100 dollars for value received, etc., and was signed,

Chas. W. Smith,
H. H. Lang.

Section 5844, Revised Codes, provides: "The person 'primarily' liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are 'secondarily' liable."

By virtue of this statute Lang was primarily liable, and his primary liability was not affected by the fact that he signed the note for the accommodation of Smith, and that this fact was known to the bank, a holder for value. Section 5877, Revised Codes, defines an accommodation party, and then proceeds: "Such a person is liable on the instrument to a holder for value

notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party."

The foregoing statutory provisions are portions of the Uniform Negotiable Instruments Act. They have been construed frequently, and the consensus of opinion is stated in 3 R. C. L. p. 1276, as follows: "Under the Negotiable Instruments Law it may be regarded as well settled that the accommodation maker or acceptor is primarily liable and is not discharged by an extension of time given to the indorser, drawer, or comaker, for whose benefit he became a party to the instrument, without regard to whether the party suing on the instrument is a party thereto as a payee, and had knowledge of the relation subsisting between the accommodation maker and the principal debtor."

2. A promissory note legally imports a promise to pay in money and nothing else. Unless there was an agreement between the bank and Smith that the re-
—effect of renewal note as payment.

newal note of November 8, 1908, was given by Smith and accepted by the bank in payment and discharge of the debt represented by the Smith-Lang note, the effect of the renewal was merely to extend the time of payment, and did not discharge the obligations. First Nat. Bank v. Cottonwood Land Co. 51 Mont. 544, 154 Pac. 582. The fact that the cashier stamped "Paid" up-
—effect of stamping note paid.

on the old note, and delivered it to Smith, did not operate to change the rule. Bridge v. Connecticut Mut. L. Ins. Co. 167 Cal. 774, 141 Pac. 375; Scott v. Gilkey, 153 Ill. 168, 39 N. E. 265; First Nat Bank v. White, 60 N. J. Eq. 487, 46 Atl. 1092; Lowther v. Lowther-Kaufmann Oil & Coal Co. 75 W. Va. 171, 83 S. E. 49; 8 C. J. 572; 1 Michie, Banks & Bkg. p. 739.

3. If the evidence is open to the inference that it was the intention of the cashier to accept the renewal note in payment, and to discharge

Bills and notes—
accommodation
maker—liability.

Lang, the inquiry arises, Had he any such authority? The cashier of a bank is its agent, and his conduct is governed by the general rule of agency. 1 Michie, Banks & Bkg. p.

712. It is elementary that, in the absence of special authority, an agent cannot accept payment in anything but money.

United States Nat. Bank v. Shupak, 54 Mont. 542, 172 Pac. 324. An agent has such authority as the principal actually or ostensibly confers upon him. Section 5430, Rev. Codes. It is not contended that by virtue of his office the cashier had authority to release Lang; neither is it urged that he had received express authority from the board of directors to do so; but it is insisted that, by turning over to the cashier the entire management of the bank, the board impliedly conferred upon him this extraordinary power, and 1 Morse on Banks and Banking, ¶ 165, is cited as authority to support this contention. But counsel misconceive the import of the author's language, for immediately following the rule it is said: "This doctrine is certainly a liberal one towards *innocent outsiders*."

The same general rule is adverted to by Michie (1 Michie, Banks & Bkg. p. 695), and concerning it that author says: "Nor is there any incongruity or departure from general principles in this, since it is merely the application of the very general principle that as regards third persons the officers and agents must be deemed clothed with whatever powers the bank has held them out as possessing in the same degree as if the authority had been expressly granted."

In other words, the rule embodies the general principle of ostensible authority, and those terms are defined in § 5432, Revised Codes, as follows: "Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or

allows a *third person* to believe the agent to possess."

If the directors, in disregard of their duties, permit the cashier to conduct the affairs of the bank for a period sufficiently long to establish a settled course of business, his authority to do anything which the board might have authorized him to do in the first instance will be implied in favor of an innocent third party, even though the bank is defrauded by his acts. 1 Michie, Banks & Bkg. p. 714. But the doctrine of ostensible authority cannot be extended in favor of one who is familiar with the facts and whose dereliction is relied upon to give color to the agent's unauthorized acts. Neither does it aid appellant to say that, being interested, he could not have participated as a member of the board in passing upon the application of Smith for the renewal on November 8, 1908. An isolated act of the board did not give the cashier ostensible authority. If he possessed any such power, he derived it from the long course of misconduct on the part of the board in which Lang participated.

In effect, appellant's position is this: For three years prior to November 8, 1908, the directors, including the cashier and myself, flagrantly disregarded the duties imposed upon us by law, and permitted the cashier to run the bank without let or hindrance. We held him out to the world as having authority to do anything and all things which the board of directors might have authorized him to do; and since the board might have authorized him to release security, it should be presumed from my misconduct and the misconduct of my associates that he had authority to release me from liability on the Smith-Lang note. Such a contention offends against every principle of law and morals. Campbell v. Watson, 62 N. J. Eq. 396, 50 Atl. 120. Neither the president, the cashier, nor both of them,

Bank-authority of cashier.

-effect of permitting cashier to manage bank.

-ratification of single act-effect.

could release a debtor of the bank from his liability, without authority from the

—authority of president and cashier.

board of directors (1 Michie, Banks & Bkg. p. 706), and the president will not be heard to say that he was released of his liability, in the absence of clear and convincing proof that the board intended to clothe the cashier with that extraordinary power. Whenever it appears that a

Evidence—burden of proof—dealings of corporation director.

director has been dealing with his corporation, the burden is at once upon him to show that his dealings have been fair and honest; in other words, that the corporation has not suffered as the result of his acts. Hanson Sheep Co. v. Farmers' & T. State Bank, 53 Mont. 324, 163 Pac. 1151.

If appellant should prevail in this instance, the result would be that the bank, of which he was president and a director, would lose \$1,900 and the interest thereon as the result of his transaction with it. Whatever ostensible authority the cashier had in dealing with strangers, he had

Bank—authority of cashier in dealing with director.

only such authority in dealing with a director as was conferred upon him by virtue of his office or by express grant from the board.

4. But it is insisted that the board ratified the act of the cashier in releasing Lang: (a) By bringing an action to enforce collection of the renewal note, and (b) by approving the renewal loan. The suit upon the renewal note was commenced on March 12, 1912, while Henderson was still cashier and Lang was president. The action of the board in ratifying the Smith loan for \$3,612.87 was taken in November, 1912. On neither date did any member of the board, other than Henderson and Lang, know that Lang had ever been liable for the payment of any portion of that debt. By the terms of § 5429, Revised Codes, it is essential, in order that the ratification of an unauthorized act of an agent be

valid, that the principal have full knowledge of all material facts relative to the transaction, at the time of the ratification. 31 Cyc. 1253.

While knowledge of the affairs of the bank by the directors will be presumed in favor of an innocent third party, no such presumption is indulged in favor of the president, who is himself a director. 3 R. C. L. p. 456. In the absence of any evidence that the members of the board had knowledge of Lang's liability, they cannot be held to have ratified the act of the cashier in attempting to release him. But aside from every other consideration, Lang cannot complain that the bank made an effort to collect this debt

Evidence—presumption of knowledge of directors.

Bank—ratification of act of cashier—necessity of knowledge.

from Smith and thereby lessen his liability, and this is the legal effect of bringing the action upon the renewal note. Goodyear Dental Vulcanite Co. v. Caduc, 144 Mass. 85, 10 N. E. 483.

Election of remedies—attempted enforcement of renewal note—effect.

5. There is no merit in the defense of laches. Appellant was primarily liable on the Smith-Lang note, and this action was commenced within the period of the Statute of Limitations. United States Nat. Bank v. Shupak, 54 Mont. 542, 172 Pac. 324, above.

Laches—suit within limitation period—effect.

6. Finally, it is contended that the trial court erred in directing a verdict for plaintiff because there were material issues of fact for determination by the jury, but with this we do not agree. Whether Henderson had authority to release Lang was a question of law.

Trial—question of law—authority of bank cashier.

The evidence touching his actual and ostensible powers is undisputed. Henderson testified that he took the renewal note without Lang's signature, at Lang's suggestion and request. This Lang denies, but if Henderson had no au-

thority to release him, it is immaterial upon whose suggestion he acted.

The determination that Lang was primarily liable upon the Smith-

Lang note disposes of the other contentions urged by appellant.

The order is affirmed.

Brantly, Ch. J., and Sanner, J., concur.

ANNOTATION.

Powers of bank president or vice president.

- I. Introductory, 1146.
- II. Using bank's funds for personal ends; adverse interest, 1146.
- III. Admissions and representations, 1146.
- IV. Compromising, waiving, or surrendering corporate rights, 1146.
- V. Litigation, and employment of attorneys, 1146.
- VI. Miscellaneous acts and contracts, 1147.
- VII. Vice president, 1147.

I. Introductory.

It is the purpose of the present annotation to review the recent cases discussing the powers of the president or vice president of a bank. The earlier cases are collected in the annotation in 1 A.L.R. 693.

II. Using bank's funds for personal ends; adverse interest.

(Supplementing annotation in 1 A.L.R. p. 699.)

The rule laid down in the original annotation, that the president of a bank may not bind it by an agreement in which he has an interest adverse to the bank, has been reaffirmed in *First Nat. Bank v. Rust* (1919) 168 C. C. A. 241, 257 Fed. 29, wherein the court held that the issuance of a certificate of deposit by the president of a bank in payment of an individual debt would not, in the absence of a contemporaneous deposit therefor, bind the bank.

But see *Abmeyer v. German-American State Bank* (1918) 103 Kan. 356, 179 Pac. 368, wherein the court said that even though the president of a bank was acting in his own interest in inducing a customer by false representations to invest money in an insolvent business, if he was at the same time acting in the interest of the bank, his knowledge of the fraud might be such

as would make his act binding on the bank.

III. Admissions and representations.

(Supplementing annotation in 1 A.L.R. p. 700.)

The view illustrated in the original annotation, that a bank may be liable for the fraudulent representations of its president, is sustained in *Abmeyer v. German-American State Bank* (Kan.) *supra*. In that case it appeared that the president of a bank induced a customer, through false representations, to purchase an interest in an insolvent business. The court held that the retention by the bank of part of the proceeds of the fraud, with knowledge thereof, was a ratification of his acts as its agent.

IV. Compromising, waiving, or surrendering corporate rights.

(Supplementing annotation in 1 A.L.R. p. 702.)

The power of the president of a bank to release a debtor of the bank from his liability without authority from the board of directors is denied in the reported case (*FIRST STATE BANK v. LANG*, ante, 1139).

So, an agreement by the president and cashier of a bank to release the promisors of notes acquired by the bank for value has been held not to be binding on the bank, and especially so when there was no consideration for the release. *Bank of Dexter v. Simmons* (1918) — Mo. App. —, 204 S. W. 837.

V. Litigation, and employment of attorneys.

(Supplementing annotation in 1 A.L.R. p. 704.)

Recent cases reveal additional powers of a bank president relative to legal proceedings. Thus, in *Old*

Dominion Trust Co. v. First Nat. Bank (1919) — C. C. A. —, 260 Fed. 22, the court said that the authority of a bank president to submit claims against a decedent's estate in the proper court in a foreign jurisdiction, and to bind the bank by such action, was beyond question.

So, in *North Georgia Bkg. Co. v. Fancher* (1919) 23 Ga. App. 683, 99 S. E. 229, involving the application of § 527 of the Georgia Civil Code of 1910, relative to service on corporations in garnishment proceedings, it was held that the president of a chartered bank was in law the person in charge of its office and business, and authorized to accept service in its behalf.

VI. Miscellaneous acts and contracts.

(Supplementing annotation in 1 A.L.R. p. 706.)

In *People's Nat. Bank v. Magruder* (1919) — Fla. —, 81 So. 440, the court holds that where the board of directors of a banking institution authorizes the president to arrange for certain alterations to a building in which the bank carries on its business, a contract made by him for such work is within his authority and binding on the bank.

The execution of a deed of land by the president and cashier of a bank, without any special authority from the directors of the bank, who had at all times acquiesced in the acts of the president and cashier, has been held to be within the scope of their appar-

ent authority. *Farmers & M. Bank v. Western Loan & Bldg. Co.* (1918) 103 Wash. 349, 174 Pac. 1.

VII. Vice president.

(Supplementing annotation in 1 A.L.R. p. 710.)

The indorsement of his personal note by the vice president of a bank in the bank's name, and its acceptance by another bank on his false representation, and under circumstances sufficient to put the second bank on notice that the vice president was acting beyond his authority, has been held in a recent case to be an unauthorized act, in the performance of which he was stripped of his representative capacity. *Drovers' & M. Nat. Bank v. First Nat. Bank* (1919) — C. C. A. —, 260 Fed. 9.

In *Goldstein v. Union Nat. Bank* (1919) — Tex. —, 213 S. W. 584, the agreement of the vice president of a bank, in its behalf, to apply future deposits of a debtor of the bank to the payment of a note executed by himself and another, and discounted by the bank, was held not to evince such an adverse interest as to destroy the relation of agency; and the act of the bank in making the discount with notice of the agreement in its behalf was held to prevent the bank from repudiating the provision requiring it to apply future deposits to the payment of the note, and from applying such deposits to its own debt.

R. E. B.

VIRGINIA-WESTERN POWER COMPANY, Appt.,

v.

COMMONWEALTH OF VIRGINIA EX REL. CITY OF CLIFTON
FORGE.—
SAME, Appt.,

v.

COMMONWEALTH OF VIRGINIA EX REL. TOWN OF LEXINGTON.

—
SAME, Appt.,

v.

COMMONWEALTH OF VIRGINIA EX REL. CITY OF BUENA VISTA.

—
SAME, Appt.,

v.

COMMONWEALTH OF VIRGINIA EX REL. TOWN OF COVINGTON.

Virginia Supreme Court of Appeals—June 12, 1919.

(— Va. —, 99 S. E. 723.)

Public service corporation — franchise contract — revocability.

1. Contracts made by municipal corporations, under statutory authority fixing rates to be charged by public service corporations for services rendered within their limits, are, in view of the contract clause of the Federal Constitution, not subject to change by the Public Service Commission against the protest of either party during the term fixed by them.

[See note on this question beginning on page 1165.]

Municipal corporation — power to fix rates for public service.

2. Municipal corporations have no inherent power to fix and regulate rates of charges for public service within their limits.

[See 19 R. C. L. 859, 1159.]

Public service corporation — presumption of abrogation of power over.

3. Abrogation of a continuing power to regulate rates of public service corporations is never presumed.

— power of municipality to contract for rates.

4. While a constitutional provision that no public service corporation shall be permitted to use the streets of a city without consent of the municipal authorities confers power to stipulate as to what the rates shall be during the whole franchise period, it does not authorize a contract binding upon the municipality during such period.

Municipal corporation — authority to fix rates.

5. A proviso in a constitutional provision conferring authority over rates

upon a Public Service Commission, that nothing therein shall impair the rights which may theretofore have been or might thereafter be conferred upon the authorities of any municipality to prescribe rates to be observed by public service corporations, refers to the power to regulate rates, not the power to fix rates by contract.

— constitutional power to contract for rates.

6. A constitutional provision that every franchise granted by a municipal corporation for public service within its limits shall make provisions to secure efficiency of service at reasonable rates intends that municipalities shall be clothed with power to contract for rates for the franchise period.

Public Service Commission — power to change rates — change of economic conditions.

7. Change of economic conditions, which renders franchise rates of a public service corporation insufficient to enable it to render efficient service, does not justify an increase of rates

by the Public Service Commission, if the corporation had entered into a binding contract to render the service for the rates named.

[See note in 6 A.L.R. 1659.]

Contract — for public service — police power — right to annul.

8. The state cannot revoke the police power of regulating rates of public service corporations, which it has conferred on a municipality, so as to nullify contracts which the municipality has made fixing such rates for a series of years.

[See 19 R. C. L. 1159.]

Municipal corporation — power to contract for rates to consuming public.

9. A municipal corporation may con-

tract for rates to be charged the consuming public by a public service corporation within its limits, as well as for rates to be charged itself for such service.

[See 12 R. C. L. 189; 19 R. C. L. 1159.]

Constitutional law — conflict — construction.

10. A constitutional provision that the right of the state to regulate public service corporations and fix and limit their charges shall never be surrendered or abrogated does not prevent the conferring of the right to contract for such rates upon municipal corporations as authorized by another section of the Constitution.

SEPARATE appeals by defendant from orders of the State Corporation Commission refusing to approve a certain schedule of rates so far as they apply to services within the corporate limits of the complainant municipalities, on the ground that the rates are in excess of those agreed upon in their franchises. *Affirmed.*

Statement by Sims, J.;

The above-entitled cases are separate appeals from a similar order of the State Corporation Commission, in each case refusing to approve the schedule of rates hereinafter mentioned so far as they apply to services within the corporate limits of the cities and towns which are the defendants in error before us, on the ground that, such rates being in excess of those agreed upon in the franchises hereinafter mentioned, the Commission is without authority or jurisdiction to approve of them.

The plaintiff in error, the Virginia-Western Power Company (hereinafter designated as such, or as the Company), is a public service corporation, and operates a public utility, as defined by statute, and, in the operation of such utility, the Company generates and furnishes electric current to its customers for light, power, and heating purposes. It has for some years been furnishing electric current to the public as its customers, within the corporate limits of the defendant in error cities and towns, at rates of charges fixed for the respective franchise periods by the respective franchises

giving the authority to do such business in such municipalities to the extent that such rates of charges are fixed at all by such franchises. None of such franchises fixes any rates of charges for such current for heating purposes. In Clifton Forge the maximum rates of charges to the customers aforesaid therein, other than the municipality, for said current, are fixed by the franchise for lighting purposes only. In Buena Vista, Covington, and Lexington the rates of charges to said customers, other than the municipalities, for such current, are fixed by the franchises for lighting and power purposes only, maximum rates being so fixed in Buena Vista, maximum and minimum rates in Lexington, and specific and minimum rates in Covington. Such rates of charges as are fixed by the franchises purport to be irrevocably fixed thereby for the whole period of the respective franchises, and none of such periods have yet expired.

None of the defendants in error have any provisions in their charters which are claimed to give any municipal authority on the subject of irrevocably fixing the rates aforesaid during the whole franchise pe-

riod, except the town of Lexington. That has in its charter the following provision: " . . . But no company shall occupy, with its works or any appurtenances thereof, the streets, sidewalks, or alleys of the town, without the consent of the mayor and council, duly entered upon its records."

The franchises aforesaid were all granted after the sections of the Constitution of Virginia of 1902 and the statutes presently to be referred to and quoted went into effect.

Sections 124 and 125 of said Constitution, so far as material, provide as follows:

"Sec. 124. Consent of corporate authorities necessary to use of streets, alleys, or public grounds by certain companies or persons.—No . . . electric heating, electric light or power . . . company, nor any corporation, association, person or partnership, engaged in these or like enterprises, shall be permitted to use the streets, alleys, or public grounds of a city or town without the previous consent of the corporate authorities of such city or town.

"Sec. 125. Sale of corporate property and granting of franchises by cities and towns.—The rights of no city or town in and to its . . . streets, avenues, parks, bridges, and other public places, and its gas, . . . and electric works shall be sold except by an ordinance or resolution passed by a recorded affirmative vote of three fourths of all the members elected to the council, or to each branch thereof where there are two, and under such other restrictions as may be imposed by law . . . no franchise . . . shall be granted for a longer period than thirty years. Before granting any such franchise or privilege for a term of years, except for a trunk railway, the municipality shall first, after due advertisement, receive bids therefor publicly, in such manner as may be provided by law, and shall then act as may be required by law. . . . Every such grant shall . . . make adequate provision by

way of forfeiture of the grant, or otherwise, to secure efficiency of public service at reasonable rates, and the maintenance of the property in good order throughout the term of the grant. Nothing herein contained shall be construed as preventing the general assembly from prescribing additional restrictions on the powers of cities and towns in granting franchises . . . or as repealing any additional restriction now required in relation thereto in any existing municipal charter." (Italics supplied in the body of the last section quoted.)

Section 156 (b) of said Constitution confers upon the State Corporation Commission the power and duty of supervising, regulating, and controlling certain corporations, as to which it is provided that "the authority of the Commission . . . shall be paramount," but electric light and power companies are not among such corporations. As to such last-named companies, however, it is provided in this section of the Constitution that the authority of the State Corporation Commission "to prescribe any other rules, regulations, or requirements . . . shall be subject to the superior authority of the general assembly to legislate thereon by general laws: Provided, however, that nothing in this section shall impair the right which has heretofore been, or may hereafter be, conferred by law upon the authorities of any city, town or county to prescribe rules, regulations or rates of charge to be observed by any public service corporation in connection with any services performed by it under a municipal or county franchise granted by such city, town or county, so far as such service, may be wholly within the limits of the city, town or county granting the franchise. . . ." (Italics supplied.)

Section 156 (c) of the said Constitution, so far as material, provides in respect to the State Corporation Commission as follows: " . . . The Commission may be vested with such additional powers

and charged with such other duties (not inconsistent with this Constitution) as may be prescribed by law, in connection with the visitation, regulation or control of corporations, or with the prescribing and enforcing of rates and charges to be observed in the conduct of any business where the state has the right to prescribe the rates and charges in connection therewith." (Italics supplied.)

Subsequent to the going into effect of the Constitution the statutes contained in 1 Pollard's Code Va. 1904, §§ 1033d, 1033e, and 1033f, were enacted.

Section 1033d is precisely in the same language as § 124 of the Constitution, above quoted.

Section 1033e is precisely in the same language as § 125 of the Constitution, above quoted, except that the words "by the following section" are substituted for the words "by law," in that part of such section of the Constitution which has reference to the manner in which the bids for the franchise shall be received, and the following sentence is substituted for the last sentence of such section of the Constitution, namely: "Nothing herein contained shall be construed as repealing any additional restriction now required in any existing municipal charter, in relation to the powers of cities and towns in granting franchises."

Section 1033f provides that the ordinance proposing to make the grant of the franchise, after its terms have been fixed upon, shall be advertised. It also provides for the manner of advertising, receiving, and acting on the bids for the franchise, and that "the highest and best bid" shall be accepted, and that the ordinance granting the franchise shall be enacted "as advertised, without substantial variation, except as to the insertion of the name of the accepted bidder," with the power in the municipal authorities, however, "to reject a higher and accept a lower bid" if of opinion that "some reason affecting the interest of the city or town makes it

advisable so to do." Such statute also provides that "no amendment that releases the grantee, or his assignee, from the performance of any duty required by the ordinance granting the franchise, or that authorizes an increase in the charges to be made by such grantee or assignee, for the use by the public of the benefits of such franchise, shall be granted unless and until notice of such proposed amendment shall be given to the public" by certain advertisement prescribed in the statute. (Italics supplied.)

Such statute also contains the following provisions to secure the compliance both of the grantor and the grantee of the franchise with their obligations in the premises, namely: The grantee is required to "execute a bond with good and sufficient security, in favor of the city or town, in such sum as said city or town shall determine, conditioned upon the constructing and putting into operation and maintaining the plant or plants provided for in the franchise, right, or privilege granted."

And it is further provided that "the corporation courts of the cities and the circuit courts of the counties in which the towns may be situated shall have jurisdiction by mandamus . . . to enforce compliance by said cities or towns and by all grantees of franchises, . . . with all the terms and contracts and obligations of either party, as contained in franchises." (Italics supplied.)

Such was the constitutional and statute law of the state when the franchises in question were granted. And such is the authority upon which is based the action of the municipalities aforesaid on the subject of fixing irrevocably during the whole periods covered by said franchises the rates of charges aforesaid.

The franchises were granted in accordance with said constitutional and statute law. They contained provisions purporting to fix said rates of charges as aforesaid irrev-

ocably during the whole periods covered by the franchises respectively. The franchises with such provisions therein were accepted and acted upon by the grantees thereof, the said plaintiff in error company and its predecessors, for a number of years.

Subsequently the general assembly (by Acts 1914, pp. 673 et seq.) enacted a statute which purports to confer upon the State Corporation Commission the authority, as it is claimed by the plaintiff in error, to regulate and change such rates of charges or those above mentioned, although purporting to be irrevocably fixed by the franchises aforesaid during the respective periods covered by such franchises. The Commission is given no jurisdiction, however, over rates charged the municipalities themselves for electric current. Such statute, among other things, provides that every such corporation as the plaintiff in error shall file with the State Corporation Commission schedules showing rates and charges made by it, and further, among other things, provides, so far as material, in § 7 thereof, as follows: "7. Commission to fix rates and regulations.—If upon investigation the rates . . . charges, schedules . . . of any public utility operating in this state shall be found to be unjust, unreasonable, insufficient . . . the State Corporation Commission shall have power to fix and order substituted therefor such rate or rates . . . charges or schedules as shall be just and reasonable. . . ."

And § 8 of such statute, so far as material, provides as follows: ". . . The provisions of the Code of Virginia shall apply to the companies included herein, and whenever the two are inconsistent, the law as embraced in the Code shall prevail."

The above-mentioned statutes, §§ 1033d, 1033e, and 1033f, were provisions of Pollard's Code of Virginia of 1904, as aforesaid, when said act of 1914 was passed, and also when it went into effect.

Subsequently, to wit, on March 18, 1918, the said Company filed with the State Corporation Commission a schedule showing the rates of charges proposed to be made by it for furnishing electric current to the public, its customers, in all municipalities and rural sections served by it in Virginia (which municipalities include the cities and towns which are the defendants in error), such rates to be effective April 1, 1918, and superseding all rates theretofore in effect.

Such schedule contains uniform rates of charges for electric current for heating, lighting, and power in municipalities. Such rates for lighting are in excess of the rates therefor allowed by the charters granted by all of the defendants in error. Such rates for power are in excess of the rates allowed by the charters granted by Buena Vista, Covington, and Lexington. The other rates named in such schedule are not in conflict with the franchises aforesaid.

The issues in the case before us arose upon separate petitions, filed by the defendants in error in the name of the commonwealth at their relation on and before April 1, 1918, and before the State Corporation Commission made any investigation or took any action on said schedule, and upon the separate answers of the said company to such petitions. The answers raise no issues of fact except in the Clifton Forge case. In that case the answer alleges that the company is not furnishing electric current to the public throughout the corporate limits under the franchise granted by the city, but that in about one half of such territory it is furnishing such current in the exercise of another right so to do. That issue of fact was not passed upon by the State Corporation Commission and is not involved before us on appeal.

Messrs. J. M. Perry and F. W. King, for appellant:

A municipal corporation is a mere department of government; any acts done by it, and even its corporate ex-

istence, may be revoked by the general assembly, its creator, at will.

Richmond v. Richmond & D. R. Co. 21 Gratt. 604; Stafford County v. Luck, 80 Va. 223.

If a municipality has been clothed with authority to "regulate" the rates of a utility operating under a franchise from such municipality, for the service wholly within the corporate limits, then this power to "regulate" cannot be destroyed by a contract making regulation impossible during the term.

Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S. 271, 53 L. ed. 182, 29 Sup. Ct. Rep. 50.

Unless the state actually divested itself of the right to exercise its police power, the agreement by which the city and company specified the rates was subject to the right of the state to change them.

Woodburn v. Public Service Commission, 82 Or. 114, L.R.A.1917C, 98, P.U.R.1917B, 967, 161 Pac. 591, Ann. Cas. 1917E, 996; Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 58 L. ed. 297, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 285; Union Dry Goods Co. v. Georgia Public Service Corp. 142 Ga. 841, L.R.A.1916E, 358, 83 S. E. 946; Yeatman v. Towers, 126 Md. 513, P.U.R. 1915E, 811, 95 Atl. 158; Minneapolis, St. P. & S. Ste. M. R. Co. v. Menasha Wooden Ware Co. 159 Wis. 180, L.R.A. 1915F, 311, 150 N. W. 411; Benwood v. Public Service Commission, 75 W. Va. 127, L.R.A.1915C, 261, 83 S. E. 295; State ex rel. Webster v. Superior Ct. 67 Wash. 37, L.R.A.1915C, 287, 120 Pac. 861, Ann. Cas. 1913D, 78.

Messrs. O. B. Harvey and John W. Bear for appellee City of Clifton Forge.

Messrs. O. C. Jackson and Frank Moore, for appellee town of Lexington:

A franchise is a grant by or under the authority of government, conferring a special and usually a permanent right to do an act or series of acts of public concern; and when accepted, it becomes a contract, and is irrevocable, unless the right to revoke it is expressly reserved.

Southampton v. Jessup, 162 N. Y. 122, 56 N. E. 538; People ex rel. Atty. Gen. v. Utica Ins. Co. 15 Johns. 358, 8 Am. Dec. 243; Bank of Augusta v. Earle, 13 Pet. 519, 595, 10 L. ed. 274, 311; California v. Central P. R. Co. 9 A.L.R.—73.

127 U. S. 1, 32 L. ed. 150, 2 Inters. Com. Rep. 158, 8 Sup. Ct. Rep. 1073.

Franchises, having been granted, when accepted, are binding contracts between the parties, irrevocable, and cannot be impaired.

Richmond v. Virginia R. & P. Co. 120 Va. 802, 92 S. E. 898; Com. ex rel. Dowden v. Richmond & R. River R. Co. 115 Va. 756, 80 S. E. 796; Louisville Home Teleph. Co. v. Louisville, 130 Ky. 611, 113 S. W. 855; 2 Words & Phrases, 2d series, p. 627; Quinby v. Public Service Commission, 223 N. Y. 244, 3 A.L.R. 685, P.U.R.1918D, 30, 119 N. E. 433; People v. O'Brien, 111 N. Y. 1, 2 L.R.A. 258, 7 Am. St. Rep. 684, 18 N. E. 692; People v. Gillson, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343.

The town of Lexington is trustee for its citizens and acts for their benefit.

12 R. C. L. 189, § 15; State ex rel. Milwaukee v. Milwaukee Electric R. & Light Co. 151 Wis. 520, 139 N. W. 399, Ann. Cas. 1914B, 123; McKennie v. Charlottesville & A. R. Co. 110 Va. 77, 65 S. E. 503, 18 Ann. Cas. 1027.

Mr. H. S. Rucker for appellee city of Buena Vista.

Mr. R. C. Stokes for appellee town of Covington.

Sims, J., delivered the opinion of the court:

The assignments of error raise the questions which will be passed upon in their order as considered below.

The controlling question in the cases before us is this:

1. Were the municipalities (the defendants in error), in the granting of the franchises involved in these cases, expressly vested at the time of the granting thereof with unlimited authority to contract with the grantee of such franchises on the subject of fixing the rates which might be charged for the services rendered the public thereunder during the whole of the franchise periods?

If so, because of article 1, § 10, of the Constitution of the United States, which prevents the impairment of the obligation of contracts, it is firmly settled that the rates as fixed in the franchises are irrevocable during the

Public service corporation—franchise contract—revocability.

franchise periods, without the consent of the municipality, as well as of the holder of the franchise, to a change. *Detroit v. Detroit Citizens' Street R. Co.* 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410; *New Orleans Gaslight Co. v. Louisiana Light, & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 29 L. ed. 525, 6 Sup. Ct. Rep. 273; *St. Tammany Waterworks Co. v. New Orleans Waterworks Co.* 120 U. S. 64, 30 L. ed. 563, 7 Sup. Ct. Rep. 405; *Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77; *Cleveland v. Cleveland City Electric R. Co.* 194 U. S. 517, 48 L. ed. 1102, 24 Sup. Ct. Rep. 756; *Cleveland v. Cleveland City Electric R. Co.* 201 U. S. 529, 50 L. ed. 854, 26 Sup. Ct. Rep. 513; *Los Angeles v. Los Angeles City Water Co.* 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. Rep. 736; *Omaha Water Co. v. Omaha*, 12 L.R.A. (N.S.) 736, 77 C. C. A. 267, 147 Fed. 1, 8 Ann. Cas. 614; *Boerth v. Detroit City Gas Co.* 152 Mich. 654, 18 L.R.A. (N.S.) 1197, 116 N. W. 628; *Pacific R. Co. v. Leavenworth*, 1 Dill. 393, Fed. Cas. No. 10,649; *Northern C. R. Co. v. Baltimore*, 21 Md. 93; *Clarksburg Electric Light Co. v. Clarksburg*, 50 L.R.A. 142, and note (47 W. Va. 739, 35 S. E. 994); *Louisville Home Teleph. Co. v. Louisville*, 130 Ky. 611, 113 S. W. 855; *Southampton v. Jessup*, 162 N. Y. 122, 56 N. E. 538; *McQuillin, Mun. Corp.* §§ 1733, 1738, 1739; *Columbus R. & Light Co. v. Columbus*, 249 U. S. 399, 63 L. ed. 669, 6 A.L.R. 1648, P.U.R.1919D, 239, 39 Sup. Ct. Rep. 349.

As said by the Supreme Court in the case of *Detroit v. Detroit Citizens' Street R. Co.* supra, 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410, on the subject of the authority of municipalities to make an irrevocable franchise contract fixing rates of charges of a street railway company: "There can be no question in this court as to the competency of a state legislature,

unless prohibited by constitutional provisions, to authorize a municipal corporation to contract with a street railway company as to the rates of fare, and so to bind during the specified period any future common council from altering or in any way interfering with such contract"—citing a number of the above-cited Supreme Court cases.

In *New Orleans Waterworks Co. v. Rivers*, supra, 115 U. S. 674, 29 L. ed. 525, 6 Sup. Ct. Rep. 273, it was held that a franchise allowing the company to fix water rates, but subject to the condition that its net profits should not exceed a certain per cent, was a contract protected by the Federal Constitution, which the state itself could not impair by revoking it, even though the revocation was attempted by the state Constitution adopted after the grant of the franchise and its acceptance by the grantee of it and action by the latter thereunder in performance of the contract. To the same effect are the cases of *St. Tammany Waterworks Co. v. New Orleans Waterworks Co.* supra, 120 U. S. 64, 30 L. ed. 563, 7 Sup. Ct. Rep. 405, and *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* supra, 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252.

As said in *Walla Walla v. Walla Walla Waterworks Co.* supra, 172 U. S. 1, 43 L. ed. at page 345, 19 Sup. Ct. Rep. 77: "This court has too often decided for the rule to be now questioned that the grant of a right to supply gas or water to a municipality and its inhabitants through pipes and mains laid in the streets, upon condition of the performance of its service by the grantee, is the grant of a franchise vested in the state, in consideration of the performance of a public service, and, after performance by the grantee, is a contract protected by the Constitution of the United States against state legislation to impair it,"—citing a number of cases.

And it is true, as also said in substance in the case last cited, that

the principle involved is the same whether the franchise is granted directly by the state or by a municipality authorized by the state to do so, provided the authority is expressly conferred upon the municipality.

It is said, in substance, in *Los Angeles v. Los Angeles City Water Co.* supra, 77 U. S. 558, 44 L. ed. at page 892, 20 Sup. Ct. Rep. 736: It cannot be contended that it is not competent for the state to give municipalities the power to bind the state, so that such a contract cannot be revoked by the state after it has been entered into by the municipality by granting the franchise, and the grantee thereof has accepted and entered upon the part performance of the contract under the franchise.

As said by the Supreme Court in the very recent case of *Columbus R. & Light Co. v. Columbus*, 249 U. S. 407, 63 L. ed. 675, 6 A.L.R. 1648, P.U.R.1919D, 239, 39 Sup. Ct. Rep. 349: "That a city, acting under state authority, may in matters of proprietary right, make binding contracts of the nature contained in these ordinances, is well established by the adjudications of this court."

And, as is said by the Supreme Court in *Home Teleph. & Teleg. Co. v. Los Angeles*, 211 U. S. 265, 53 L. ed. 176, 29 Sup. Ct. Rep. 50: "It has been settled by this court that the state may authorize one of its municipal corporations to establish by an inviolable contract the rates to be charged by a public service corporation (or natural person) for a definite term, . . . and that the effect of such a contract is to suspend, during the life of the contract, the governmental power of fixing and regulating the rates,"—citing cases.

It is true that the power to fix and regulate rates of charges for a public service, just as is the power to tax or to exempt from taxation, is a police power, which is an attribute of sovereignty inherent in

the state. And the rule is inflexible that municipalities have no inherent powers in such matters. In matters

Municipal corporation—power to fix rates for public service.

concerning the police power municipalities cannot exceed the authority delegated to them. They can exercise such power only when they have been authorized so to do by the state, by constitutional ordinance, or statutory enactment, and even then only to the extent they may be thus expressly authorized. Especially is the power to regulate such rates considered, normally, to be continuing power to meet changing conditions of the future which cannot be foreseen. A wise public policy requires that such power should, as a rule, be reserved unfettered that it may be exercised in adjusting rates from time to time as may be fair and reasonable in the interest of the public amidst varying conditions as they arise. The longer the future period to be covered, the more imperative the need for such a safeguard; for the human vision of coming events is not far-reaching. For short periods the fixing of rates by contract may be for the best interest of the public, but that method is not favored in the law. For this reason the abrogation of such continuing power is never to be presumed. The purpose on the part of the state to abrogate it or to authorize a municipality to abrogate it, even for a limited time, as for a term of years which may be covered by a franchise, is never to be assumed; for that is an extinguishment pro tanto of such continuing power of government. A franchise contract which fixes irrevocably such rates as we are considering for the period covered by the franchise, unless a change thereof is consented to both by the grantor and grantee or holder of the franchise, does extinguish such governmental power pro tanto. And, as is said by the

Public service corporation—presumption of abrogation of power over.

Supreme Court in *Home Teleph. & Teleg. Co. v. Los Angeles*, supra: "For the very reason that such a contract has the effect of extinguishing pro tanto an undoubted power of government, both its existence and the authority to make it must clearly and unmistakably appear, and all doubts must be resolved in favor of the continuance of the power,"—citing numerous cases.

The authorities cited and relied on by the plaintiff in error, the said Company, are very numerous, but they have all been carefully considered, and the holding of none of them goes beyond what is said in the next preceding paragraph. They cover cases arising under many different statutory provisions, so many indeed as to render it impracticable to discuss such cases in detail in this opinion with any profit, since the distinguishing features of the various statutes would have to be developed in order to render such discussion at all helpful to a clearer view of the issues involved. Those authorities are as follows: *Milwaukee Electric R. & Light Co. v. Railroad Commission*, 238 U. S. 179, 180, 59 L. ed. 1259, 1260, P.U.R.1915D, 591, 35 Sup. Ct. Rep. 820; *Woodburn v. Public Service Commission*, 82 Or. 114, L.R.A.1917C, 98, P.U.R.1917B, 967, 161 Pac. 393, Ann. Cas. 1917E, 996; *Benwood v. Public Service Commission*, 75 W. Va. 127, L.R.A. 1915C, 261, 83 S. E. 295; *Home Teleph. & Teleg. Co. v. Los Angeles*, supra, 211 U. S. 271, 273, 53 L. ed. 181, 182, 29 Sup. Ct. Rep. 50; *Manitowoc v. Manitowoc & N. Traction Co.* 145 Wis. 13, 140 Am. St. Rep. 1056, 129 N. W. 930; *Louisville & N. R. Co. v. Mottley*, 219 U. S. 467, 55 L. ed. 297, 34 L.R.A. (N.S.) 671, 31 Sup. Ct. Rep. 265; *Union Dry Goods Co. v. Georgia Public Service Corp.* 142 Ga. 841, L.R.A.1916E, 358, 83 S. E. 946; *Yeatman v. Towers*, 126 Md. 513, P.U.R.1915E, 811, 95 Atl. 158; *Minneapolis, St. P. & S. Ste. M. R. Co. v. Menasha Wooden Ware Co.* 159 Wis. 130, L.R.A. 1915F, 732, 150 N. W. 411; *State v.*

Superior Ct. 67 Wash. 37, L.R.A. 1915C, 287, 120 Pac. 861, Ann. Cas. 1913D, 78; *Union Dry Goods Co. v. Georgia Public Service Corp.* 248 U. S. 372, 63 L. ed. 309, post, 1420, P.U.R.1917C, 60, 39 Sup. Ct. Rep. 117; *Atlantic Coast Electric R. Co. v. Public Utility Comrs.* 92 N. J. L. 168, — A.L.R. —, P.U.R.1919C, 489, 104 Atl. 218; *Portland v. Public Service Commission*, 89 Or. 325, P.U.R.1919A, 127, 173 Pac. 1178; *State ex rel. Seattle v. Public Service Commission*, 103 Wash. 72, P.U.R. 1918F, 810, 173 Pac. 737; *Monroe v. Detroit M. & T. Short Line R. Co.* 187 Mich. 364, P.U.R.1915E, 235, 153 N. W. 669; *Traverse City v. Michigan R. Commission*, 202 Mich. 575, P.U.R.1918F, 752, 168 N. W. 481; *Sandpoint Water & Light Co. v. Sandpoint*, 31 Idaho, 498, L.R.A.1918F, 1106, P.U.R.1918F, 737, 173 Pac. 972; *State ex rel. Billings v. Billings Gas. Co.* 55 Mont. 102, P.U.R.1918F, 768, 173 Pac. 799; *State ex rel. M. O. Dancigeo & Co. v. Public Service Commission*, 275 Mo. 483, — A.L.R. —, P.U.R.1919A, 353, 205 S. W. 36; *Salt Lake City v. Utah Light & Traction Co.* — Utah, —, 3 A.L.R. 715, P.U.R.1918F, 377, 173 Pac. 556; and *People ex rel. South Glen Falls v. Public Service Commission*, 225 N. Y. 216, P.U.R.1919C, 374, 121 N. E. 777. It appears in various ways in these causes that the municipalities either were not vested with the power to contract, or, if so, were not vested with that power unlimited. And in the cases of the latter character the limitation on such power, consisting in the reservation of the right of future exercise of the power of regulation, is disclosed in various ways, as where a general state statute providing for the exercise of the continuing power of regulation was in force at the time of the grant of the municipal power in question, or where it otherwise appears that such reservation of such continuing power was made. None of these cases controvert the well-established rule of law above adverted to,

namely, that if the municipality which grants a franchise, such as those involved in the cases before us, has expressly conferred upon it by statute the unlimited power to contract with the grantee of the franchise on the subject of fixing the rates which may be charged for public service rendered thereunder during the franchise period, and the municipality does so contract, and the franchise is accepted by the grantee of it, and the grantee acts under it, the contract is irrevocable during its life without the assent of the municipality, as well as of the holder of the franchise, to a change in rates, and the rates cannot be changed in violation of the franchise provisions by the consent of only one party to the franchise contract.

Most of the cases last above cited involve merely the construction of municipal charters or other statutory authority of the municipalities to make the contract as to rates in question; and in them the contract as made is either in terms not irrevocable during its life, or the municipality has not been plainly authorized to make such a contract. Another circumstance may be mentioned in connection with these cases, namely: All of them deal with statutory authority where there is no constitutional provision expressly authorizing municipal action or expressly contemplating legislative enactment authorizing municipal action in the premises.

In the cases before us there is no question but that the contracts as to rates as made by the franchises mentioned in the statement preceding this opinion are in their terms irrevocable during the life of such franchises respectively.

We come then to consider whether the constitutional and statutory provisions quoted in the statement preceding this opinion expressly conferred upon the municipalities which are the defendants in error the authority to make the contracts involved in these cases as binding

contracts during the periods in which they purport to be binding.

Since there is no conflict between the statutes, §§ 1033d, 1033e, and 1033f, above cited and quoted, and §§ 124 and 125 of the Constitution of this state, it is unnecessary for us to determine whether such constitutional provisions alone are sufficient to expressly confer the authority in question. We, in truth, have merely to consider whether such statutes expressly confer such authority. But in construing such statutes the fact that such constitutional provisions not only permit, but in effect are mandatory in their requirement that the legislature must enact said §§ 1033e and 1033f, or at least some statute on the subject, so as to carry § 125 of the Constitution into effect, is illuminating upon the question we have under consideration. For we have here not merely legislative expression on the subject, but also constitutional expression.

Now § 124 of the Constitution, and the statute (§ 1033d) in the same language, undoubtedly confer upon municipalities the absolute power to prevent public utility corporations, such as the plaintiff in error company, from doing business within the municipality, by refusal of the consent mentioned therein. This power is absolute because no limitation is imposed upon it. Consequently the municipality may impose any condition it chooses upon its consent aforesaid, however unreasonable. It results from this that such power includes the power in municipalities to make a stipulation as to what the rate charges of the utility corporation shall be during the whole franchise period, as a condition upon which the consent aforesaid is given. *Manitowoc v. Manitowoc & N. Traction Co.* 145 Wis. 13, 140 Am. St. Rep. 1056, 129 N. W. 925; *Salt Lake City v. Utah Light & Traction Co.* — Utah, —, 3 A.L.R. 715, P.U.R.1918F, 377, 173 Pac. 556; *Detroit v. Ft. Wayne & B. Q. R. Co.* 95 Mich. 456, 20 L.R.A. 79, 35 Am. St. Rep. 580, 54 N. W. 958; *Galveston & W. R. Co. v. Gal-*

veston, 90 Tex. 398, 36 L.R.A. 38, 29 S. W. 96; Pacific R. Co. v. Leavenworth, supra, 1 Dill. 393, Fed. Cas. No. 10,649; Atchison Street R. Co. v. Nave, 38 Kan. 744, 5 Am. St. Rep. 800, 17 Pac. 587; Northern C. R. Co. v. Baltimore, supra, 21 Md. 93; Indianapolis & C. R. Co. v. Lawrenceburg, 34 Ind. 304; Indianola v. Gulf W. T. & P. R. Co. 56 Tex. 594; Monroe v. Detroit, M. & T. Short Line R. Co. 143 Mich. 315, 106 N. W. 704; People ex rel. West Side Street R. Co. v. Barnard, 110 N. Y. 548, 18 N. E. 354; Clinton v. Worcester Consol. Street R. Co. 199 Mass. 279, 85 N. E. 507; Omaha Water Co. v. Omaha, supra, 12 L.R.A. (N.S.) 736, 77 C. C. A. 267, 147 Fed. 1, 8 Ann. Cas. 614; Walla Walla v. Walla Walla Water Co. supra, 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77; Vicksburg v. Vicksburg Waterworks Co. 202 U. S. 453, 50 L. ed. 1102, 26 Sup. Ct. Rep. 660, 6 Ann. Cas. 253. That this was the intended effect of § 124 of our Constitution is placed beyond all question by a reading of the debates on such section in the constitutional convention prior to its adoption. 2 Debates Const. Convention 1901-02, pp. 1960-1985. And such section of the Constitution is self-executory and needed no subsequent legislation to put it into effect. Moreover, it constitutes a limitation upon the legislative power, and no subsequent legislation could take away or impair the absolute power aforesaid thus vested in municipalities. But such a power is not necessarily to be regarded as a power of contract. It is a power to impose conditions upon a consent of municipalities which they have the absolute right to withhold altogether or to grant subject to such conditions as they may arbitrarily impose, but it is not, strictly speaking, a power to contract. And, in view of the fundamental considerations aforesaid, involved whenever the police power of the state is being surrendered, on principle, and in accordance with the greater weight of authority (Pond, Public Utilities, §§ 510 to 523, citing Manitowoc v.

Manitowoc & N. Traction Co. supra, 145 Wis. 13, 140 Am. St. Rep. 1056, 129 N. W. 925), it does not follow that, because the power aforesaid has been thus conferred upon municipalities to make a stipulation as to what the rate charges aforesaid shall be as a condition upon which its consent aforesaid is given, such stipulation shall be regarded as a contract which shall as such control the amount of such charges for the future after the consent aforesaid is given and the public service is being performed. The contrary seems to be the prevailing view taken by the best-considered authorities, and that we think is the true view, unless a municipal power to contract is plainly expressed as conferred by some other constitutional ordinance or legislative enactment on the subject. And, in the absence of such other plain expression, the continuing power of the state to supervise and regulate such rate charges for the future, to the end that they may be kept reasonable and just under changing conditions, will not be held to have been surrendered. Such continuing power, in such case, will be held to be reserved by the state; whether dormant or already conferred for its exercise upon some governmental agency of the state is immaterial. If dormant, it may nevertheless be infused with life by appropriate legislation and put into operation at any time in the future. And in such case the initial rates fixed by the franchise as a condition upon the municipal consent aforesaid will be taken to have been fixed subject to the reserved power of the state to regulate the rates in the future as the public welfare may demand, and that status will be taken to have been so understood by the grantee as well as the grantor of the franchise. Therefore, upon the question before us of whether the state irrevocably surrendered its power of future regulation of the rates named in the particular franchises involved, we must look to con-

-power of
municipality
to contract for
rates.

stitutional and legislative expressions on the subject other than those above considered.

The provision of the charter of the town of Lexington quoted in the statement preceding this opinion goes no farther than § 124 of the Constitution and § 1033d of the statute law aforesaid.

Section 156 (b) of the Constitution, referred to and in part quoted from in the statement preceding this opinion, does not ex proprio vigore have the effect of conferring on municipalities the authority to fix rates by contract. And the saving provision therein to the effect that nothing in such section shall impair the right which may theretofore have been or might thereafter be "conferred by law upon the authorities of any city, town or county to prescribe rules, regulations or rates of charge to be observed by any public service corporation in connection with any services performed by it under a municipal or county franchise, . . ." has reference,

**Municipal
corporation—
authority to
fix rates.**

we think, to the authority to regulate rates, etc., and not to the fixing of rates

irrevocably by contract.

The general power of regulating rates of public utility companies was dormant in this state (Com. ex rel. State Corp. Commission v. Virginia Pass. & Power Co. 11 Va. L. Reg. 744, State Corp. Com. Rep. for 1905, p. 152) until the Act of 1914 (Acts 1914, p. 673) above mentioned. There may be some charters of municipalities in the state granting such supervisory power or restricting the municipal power to contract aforesaid. If so, the charters of the defendants in error are not among them. There has been no general statute enacted conferring such supervisory power upon municipalities, or restricting the municipal power to contract aforesaid.

So we see that neither under § 156 (b) nor under any statute enacted in pursuance thereof was the contract power conferred upon the

municipalities (the defendants in error) of which we are in search.

We come next to consider § 156 (c) of the Constitution, which is quoted in the statement preceding this opinion. That section merely authorizes the legislature to confer upon the State Corporation Commission the jurisdiction to regulate such rates as aforesaid (along with other powers of regulation not material to be mentioned) "which the state has the right to prescribe," i. e., to regulate such rates.

It was under this section of the Constitution that said Statute of 1914 was enacted. When the state first undertook to put into active effect its dormant power of regulation of rates aforesaid, it imposed the duty of its exercise upon the State Corporation Commission. And the Commission has undoubted jurisdiction and authority under such constitutional and statutory provisions to exercise such supervisory power of regulation as to all such rates as have not been irrevocably fixed by franchise contracts such as aforesaid. But we do not find that such section of the Constitution or statute law confers the municipal power of contract of which we are in quest.

We have now, however, to consider § 125 of the Constitution quoted in the statement preceding this opinion. We see that that section of the Constitution expressly provides that, while nothing therein "contained shall be construed as preventing the general assembly from prescribing *additional restrictions on the powers of cities and towns in granting franchises* . . ." (italics supplied), every franchise, such as those involved in the cases before us, "shall . . . make . . . provision to secure efficiency of public service at *reasonable rates*; . . ." and we see that that is a power to contract as to the rates during the whole franchise period. And no limitation whatever is placed on such power to contract, except that the franchise period is limited so that it may not exceed

thirty years, and that the franchise shall be offered for sale after due advertisement; bids therefor to be received publicly in a manner to be provided for by law. There is no question raised in the cases before us but that such requirements were all fulfilled in the granting of the franchises in question. And we see from the reading of the whole of this section that it plainly expresses the intention that, in the absence of such "other restrictions (on their powers) as may be imposed by law," municipalities are intended by this section to be clothed by the legislature with the unlimited power to contract by the franchise with the grantee thereof on the subject of fixing the rates which may be charged for services rendered the public thereunder during the whole franchise period.

It is true that this section of the Constitution is not self-executory. It needs subsequent legislation to put into effect the power conferred upon municipalities of making the franchise contract. Such legislation might, prior to the action of the municipalities, which are the defendants in error, in granting the franchises in question before us, have prescribed some limitations on the aforesaid power to contract, consisting of restrictions upon their power to make the franchise contracts binding during the whole franchise period, as is in effect provided in the section of the Constitution under consideration might be done; but we see, when we examine the statutes, that they did not impose any such limitation. On the contrary, §§ 1033e and 1033f in their provisions, quoted in the statement preceding this opinion, make it plain that the unlimited power to make such binding contracts during the whole franchise period is thereby expressly conferred upon the municipalities. So expressly are they authorized to make unlimited contracts, and so binding are the contracts as such, that the courts mentioned in § 1033f are given jurisdic-

tion by mandamus "to enforce compliance by said cities or towns and by all grantees of franchises . . . with all the terms and contracts and obligations of either party, as contained in franchises." (Italics supplied.) The latter section of the statute further recognizes the binding nature of the franchise contract aforesaid, especially as to rates, during the whole of the franchise period, unless, of course, it is modified by the consent of both parties thereto, of the municipality as well as of the grantee or holder of the franchise, but puts a restriction even upon the exercise on the part of the municipality of its consent to a modification of the terms of the contract by making the provision quoted in the statement preceding this opinion, to the effect that no such consent as may result in allowing "an increase in the charge to be made . . . for the use by the public of the benefits of such franchise" shall be given until after certain public advertisement is made.

The case of *Com. ex rel. Dowden v. Richmond & R. River R. Co.* 115 Va. 756, 80 S. E. 796, involved such a modification of the original franchise provisions, and this court regarded the franchise as a contract with respect to the street railway rates. It is true that the question we have under consideration was not directly involved in that case, but it is mentioned because much discussed in argument before us in the instant cases. Further: As the Constitution and statute law stood at the time the franchise contracts in question were entered into, the provisions of such contract and the bond required, as set forth in the statement preceding this opinion, were alone relied upon to fix during the life of the franchises the rates aforesaid. No provision was made by law restricting the power of the municipalities to an initial fixing of such rates subject to future regulation thereof. And no such provision even yet exists in our statute law, although it might be enacted as aforesaid. The power is still left vested

—constitutional
power to con-
tract for rates.

in municipalities to irrevocably fix such rates by franchise contract during the life of the contract.

We conclude, therefore, that the statute law in existence when and under which the franchises involved in the cases before us were granted expressly delegated to the municipalities the unlimited authority to contract with the grantee of such franchises on the subject of fixing the rates of charges aforesaid thereunder during the whole of the franchise periods.

This conclusion is controlling of our decision of the cases before us for the reasons which are expressed by the Supreme Court in the case of *Columbus R. Power & Light Co. v. Columbus*, 249 U. S. 412, 63 L. ed. 677, 6 A.L.R. 1648, P.U.R.1919D, 239, 39 Sup. Ct. Rep. 349, as follows: "If a party charge himself with an obligation possible to be performed, he must abide by it unless performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties will not excuse performance. Where the parties have made no provision for a dispensation, the terms of the contract must prevail,"—citing numerous cases.

In the cases before us inadequacy of the rates to enable appellant to render efficient service, due to unforeseen change in economic conditions, is urged in argument as the gravamen of the appellant's complaint upon the facts. Such precisely was the case last cited; and the court in that case said: "It may be, and, taking the allegations of the bill to be true, it undoubtedly is, a case of a hard bargain. But equity does not relieve from hard bargains simply because they are such."

That statement is equally true of the jurisdiction of the State Corporation Commission in the cases before us. The franchises involved in the cases before us being contracts duly authorized as aforesaid, their provisions fixing the rates are

binding during the franchise periods, unless and until they are modified by consent of both parties, the municipalities and the holder of the franchises; the former acting in that behalf in accordance with the permissive provisions of the statute on the subject aforesaid.

2. It is urged, however, for the plaintiff in error, that any police power delegated to municipal corporations may be revoked at pleasure by the legislature, although the power be no longer executory, and that acts done thereunder by the municipality may be set aside or confirmed at will; and the cases of *Richmond v. Richmond & D. R. Co.* 21 Gratt. 604, 617, and *Stafford County v. Luck*, 80 Va. 223, are cited in support of such position. In the former case the power in question was the power to tax, which was delegated to the city in its charter, and such power, as involved in that case, was revoked before it was exercised. In the latter case the power in question was that of bridge commissioners and a board of supervisors to continue to exercise powers conferred by a statute after it was amended and virtually repealed by a subsequent statute. The only question involved was the authority for future action. This authority was held to have been revoked by the later statute. This also is a case, therefore, where the power or authority in question was revoked before it was exercised. The validity of no contract made under the prior existing authority was involved.

There is, of course, no question but that powers which are conferred upon municipalities by the legislature may be by the legislature revoked at any time; but such revocation can affect only the validity of future action of the municipalities under the revoked authority.

On principle, contracts made by municipalities under delegated authority cannot differ from contracts

Public Service Commission—power to change rates—change of economic conditions.

Contract—for public service—police power—right to annul.

made by any other agent upon the question of the effect of the revocation of the authority of the agent. The revocation of the authority comes too late to affect contracts previously made in accordance with the authority. The revocation can affect only the authority of the agent to make contracts thereafter as binding on the principal. And so we find the authorities hold. *Pond, on Public Utilities*, § 512.

3. In the case of *People ex rel. West Side Street R. Co. v. Barnard* (1888) 110 N. Y. 548, 18 N. E. 354, the conclusion was reached that the general statute law of the state on the subject of the granting and sale of franchises by municipalities to street railway companies conferred on the municipalities the power of making contracts in the granting of such franchises. That conclusion was there reached by a consideration of the general statute law in the light of the constitutional provision on the subject. However, the constitutional provision involved in that case was confined to a prohibition of the legislature from granting the right to lay down railroad tracks without the consent of the local authorities and certain landowners; and the general statute law involved, while similar in some respects to the Virginia statute law on the subject, nowhere contained any express mention of rates of charges, except in the provision that "the legislature expressly reserves the right to regulate and reduce the rate of fare on such railroad or railway." N. Y. Laws 1886, chap. 642, § 1.

The case does not involve the question of whether the rate contract was irrevocable during the life of the franchise. Therefore we do not consider that case as an authority to support the conclusion we have reached above, but we mention it as it has been much discussed in the briefs before us. Indeed, if the statute law of Virginia were no more specific on the subject in the direction of an express grant of the power of irrevocable contract

by the municipality than is the statute law of New York involved in the case mentioned, we would have come to a different conclusion from that which we have reached. See also *Quinby v. Public Service Commission* (1918) 223 N. Y. 244, 3 A.L.R. 685, P.U.R.1918D, 30, 119 N. E. 433, and *People ex rel. South Glens Falls v. Public Service Commission* (1919) 225 N. Y. 216, P.U.R.1919C, 374, 121 N. E. 777.

4. We should perhaps especially mention the case of *Freeport Water Co. v. Freeport*, 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. Rep. 493, which is not cited or relied on by counsel for the plaintiff in error, but which is frequently referred to in the authorities which are above cited as relied on by the plaintiff in error company. As that case is sometimes quoted from, it would seem as if it were in conflict with the other Supreme Court cases cited above and with our conclusion on the subject of when a municipality is authorized to make by the grant of a franchise an irrevocable contract during the life of the franchise. In that case the charter of the city authorized it "to contract for a supply of water for public use for a period not exceeding thirty years," and it was held that such language did not in that case confer the unlimited power to make an irrevocable contract during such period; but such holding was reached by the majority opinion on the ground that the city was incorporated under the general incorporation act of Illinois, of which § 9 Hurd's Rev. Stat. (Ill.) 1917, chap. 32, provided that "the general assembly shall, at all times, have power to prescribe such regulations and provisions as it may deem advisable, which regulations and provisions shall be binding on any and all corporations formed under the provisions of this act."

And the supreme court of the state had decided that the provisions of such § 9 entered into and formed a part of the charter of the city, and that the continuing power

of regulation was thereby reserved to the legislature of the state. There is nothing in the holding of the majority opinion in that case, therefore, which is in conflict with the settled rule on the subject or with our conclusion thereon aforesaid. There was also a minority opinion delivered in that case by Mr. Justice White (afterwards and now the Chief Justice), in which Justices Brewer, Brown, and Peckham concurred, taking the view that said § 9 applied only to private, not to municipal, corporations, and hence that the unlimited power to contract with respect to rates was conferred on the city by its charter. Thus the minority opinion makes it still more clear that our conclusion aforesaid is sound.

5. The authorities recognize no difference in the power of a municipality by franchise provisions to make a contract binding on public

Municipal corporation—power to contract for rates to consuming public.

utility companies with respect to rates to be charged the consuming public within the municipal

limits from those with respect to rates to be charged the municipality itself for light or water service to it, or the like, for its streets, public buildings, etc. The municipality is regarded, for the most part, as acting in the exercise of its business powers in making both of such character of contracts. As said in *Illinois Trust & Sav. Bank v. Arkansas City*, 34 L.R.A. 518, 22 C. C. A. 171, 40 U. S. App. 257, 76 Fed. 271: "A city has two classes of powers—the one legislative, public, governmental, in the exercise of which it is a sovereignty and governs its people; the other proprietary, quasi private, conferred upon it, not for the purpose of governing its people, but for the private advantage of the inhabitants of the city and of the city itself as a legal personality. In the exercise of the powers of the former class . . . it is ruling its people and is bound to transmit its powers of government to its successive sets of officers unimpaired.

But in the exercise of the powers of the latter class it is controlled by no such rule, because it is acting and contracting for the private benefit of itself and its inhabitants, and it may exercise the business powers conferred upon it in the same way, and in their exercise it is to be governed by the same rules that govern a private individual or corporation [citing authorities]. In contracting for waterworks to supply itself and its inhabitants with water, the city is not exercising its governmental or legislative powers, but its business or proprietary powers. The purpose of such a contract is not to govern its inhabitants, but to obtain a private benefit for the city itself and its denizens [citing authorities]."

See, to same effect, 4 McQuillin, Mun. Corp. § 1738.

So far as the public within its limits are concerned, in making such business contracts as to rates of charges to them for public service, municipalities act as trustees for the public. 12 R. C. L. § 15, pp. 189, 190.

6. However, this must not be taken to mean that municipalities exercise any inherent powers in such matters. For the fundamental, far-reaching, and important reasons of public policy above indicated, the municipal authority to make such contracts as are under consideration, although they are business contracts, must be expressly conferred by constitutional or legislative authority; otherwise they will not have the irrevocable feature aforesaid. But, as we have seen, such municipal authority was expressly conferred, in the cases before us, by the legislative enactment aforesaid.

7. The plaintiff in error company, however, earnestly relies upon § 164 of the Virginia Constitution of 1902 to sustain its position that the police power of the state to regulate the rates in question was not, and could not have been, vested in municipalities by the statute law of Virginia aforesaid, so as to authorize them to make contracts sur-

rendering such continuing dormant power residing in the state in its sovereign capacity, without violation of such constitutional provision. Such section of the Constitution is as follows: "Sec. 164. Right of regulation and control of common carriers and public service corporations never surrendered or abridged.—The right of the commonwealth, through such instrumentalities as it may select, to prescribe and define the public duties of all common carriers and public service corporations, to regulate and control them in the performance of their public duties, and to fix and limit their charges therefor, shall never be surrendered nor abridged."

As above seen, by the Constitution of 1902 and the legislation up to that time, and indeed since, until the Statute of 1914 aforesaid, no provision was made for the exercise of the power of regulation of rates of charges of such corporations as is the plaintiff in error. Section 164 of the Constitution, therefore, has reference to the theretofore unexercised and dormant power of the state to regulate rates. But the surrender or abridgment of the power to which it refers is, of course, not such a surrender or abridgment thereof as was expressly

**Constitutional
law—conflict—
construction.**

permitted and contemplated by other sections of the same Constitution. And § 125 of the same Constitution, as we have seen, expressly permits and contemplates that the legislature, until such time as it shall itself curtail the powers of municipalities to make the binding contracts aforesaid in granting franchises, should enact the statute law aforesaid, which, to the extent that the authority thereby conferred upon municipalities may have been exercised prior to such curtailment of municipal powers, did result in a surrender and abridgment of the police power in question pro tanto. Such abridgment and surrender of such power, being so expressly permitted and contemplated by the last-named section of

the Constitution, cannot be considered as prohibited by said § 164 thereof. Both sections must be construed together, and, when so construed, § 164 cannot be held to prohibit what the preceding § 125 expressly permits to be and expressly contemplates may be done.

8. It is contended by the defendants in error that it appears from the concluding provision of § 8 of the Statute of 1914 aforesaid, which is quoted in the statement preceding this opinion, that said §§ 1033e and 1033f of Pollard's Code of Virginia are therein referred to, and that the 1914 Statute was not intended to, and does not in fact, confer jurisdiction upon the State Corporation Commission to regulate rates which have been fixed by the provisions of charters granted under such sections of Pollard's Code.

The question is not free from difficulty. In view, however, of the conclusions above reached, we shall not enter upon a consideration of that question.

For the foregoing reasons, we find no error in the orders of the State Corporation Commission under review, save to the extent that they, without any investigation or consideration thereof, refuse approval of the rates filed with the Commission by the plaintiff in error which apply to services within the respective corporate limits of the defendants in error which are not attempted to be fixed or affected by the franchises involved in these cases. As to the latter rates, the Commission has jurisdiction under the Statute of 1914 aforesaid, and it should assume such jurisdiction, making the investigation, and otherwise act with respect thereto in accordance with the provisions of the 1914 Statute. With a provision in our order to such effect, the orders of the Commission under review will be affirmed.

Prentiss and Burks, JJ., absent.

Petition for rehearing denied, September 23, 1919.

ANNOTATION.

Power of Public Service Commission to increase franchise rates.

As to power of state to change private contract rates for public utilities, see note appended to *Union Dry Goods Co. v. Georgia Pub. Service Corp.* post, 1420.

The subject indicated by the title of the present note is fully treated in annotation appended to *Salt Lake City v. Utah Light & P. Co.* 3 A.L.R. 730. Only cases decided since the preparation of that note are included herein.

As to right of public service corporations to judicial relief from contract rates which have become inadequate, see note to *Columbus R. Power & Light Co. v. Columbus*, 6 A.L.R. 1659.

Because of the fact that many of the recent decisions are based merely on earlier cases which are cited under various divisions of the note referred to, without a statement in the later cases of the grounds of the decisions, no attempt is made to classify the cases herein according to the outline of the earlier annotation, but the decisions are grouped by jurisdictions, so as to show readily the power of the Commission in any particular jurisdiction.

It may be stated generally that, so far as shown by the decisions, the utility commissions in the various states, except in Ohio and Virginia, and in the case of street railways in New York, and in a few other exceptional cases, as certain home-rule cities in Colorado, have power to increase franchise utility rates. These decisions do not in general necessarily determine whether the state may confer on municipalities power to contract with utilities for rates which cannot, during the period of the contract, be increased by the state without the municipality's consent, although some of the theories on which the decisions are sometimes based seem opposed to the view that power to make irrevocable contracts may be so delegated. The decisions hold, except in Ohio and Virginia, that at least such power has not been conferred on the municipal-

ities, or that the Commissions have not been delegated the power to increase the rates. This is true of the more recent decisions, and it does not appear that the earlier cases take any different view. The question whether municipalities may be given power to make irrevocable contracts should be clearly distinguished from the question whether they have been given such power. On the ultimate question, however, whether utility commissions may, under existing constitutional and statutory provisions, increase or approve increases in franchise rates, the authorities, as stated, with a few exceptions, seem to leave no doubt that the power exists.

In *Mobile v. Mobile Electric Co.* (1919) 203 Ala. 574, 84 So. 816, the court said: "It is unquestionably the law that a state has authority to fix reasonable rates to be charged by corporations for supplying electricity to the inhabitants of a city, which supersede other rates agreed on in an existing contract made previously between the company and the consumer, and that a legitimate use of this police power does not impair the obligation of a contract or deprive the consumer of property without due process under the state or Federal Constitutions. But in this case the statute did not confer on the Public Service Commission the general and unqualified power to fix rates of public service corporations, it being said that by the statute the right to fix rates was specifically limited so as not to affect any subsisting or future rate agreed upon between a municipality and a public service corporation."

The doctrine of the right of the Commission to increase franchise rates, as decided in *Denver & S. P. R. Co. v. Englewood* (1916) 62 Colo. 229, 4 A.L.R. 956, P.U.R.1916E, 134, 161 Pac. 151, cited in the earlier note on the present question in 3 A.L.R. on p. 732, is approved by the same court in the recent case of *Ohio & C. Smelting & Ref. Co. v. Public Utilities Com-*

mission (1920) — Colo. —, P.U.R. 1920D, 197, 187 Pac. 1082, where the court, citing the former decision, applied the rule therein to a case of a contract between a public utility and a private corporation.

In *Denver v. Mountain States Teleph. & Teleg. Co.* (1919) — Colo. —, P.U.R.1920A, 238, 184 Pac. 604, the decision in which is broader than the scope of the present annotation, it was held that the Colorado Public Utilities Act of 1913, giving the Commission jurisdiction over public utility rates, is not applicable to the rates of a telephone company for local service within the city and county of Denver, jurisdiction over such rates, under the Colorado Constitution, being vested in the local authorities. This decision was followed in *Pueblo v. Public Utilities Commission* (1920) — Colo. —, 187 Pac. 1026, where the Public Service Commission of Colorado attempted to increase the rates of a gas company in Pueblo above those fixed by ordinance under which the company was operating. The power of the Commission over the rates was denied, the court stating that the Commission was without jurisdiction to fix rates in home-rule cities. And it was held that jurisdiction was not given the Commission by a provision of the city charter that the council should have power to fix rates of public service corporations and to change the same every five years, since if the council fixed rates which became confiscatory relief within the five-year term might be obtained through the courts.

The jurisdiction of the railroad commissioners of Florida to increase street railway franchise rates was sustained in *State ex rel. Triay v. Burr* (1920) — Fla. —, 84 So. 61, it being said in the syllabus by the court: "All regulations and contracts relative to transportation rates for common carriers, whether made by legislative authority or otherwise, are subject to a proper exercise of the police power of the state, under which power such rates may from time to time be increased or reduced or otherwise regulated as the interests of the

public and the organic property rights of the carriers may require."

In the syllabus by the court in *State ex rel. Swearingen v. Railroad Comrs.* (1920) — Fla. —, 84 So. 444, it is said that even if authority is by statute given to a municipality to fix rates for a public service corporation operating therein, such authority is subject to legislative control; that any contract ordinance passed by a city with statutory authority fixing by agreement street car fares, as an incident to the granting of franchises to a street railroad company, is subject to legislative control; and that the charter of the city in question did not clearly and plainly give to it the power to prescribe rates to the exclusion of state authority.

In *Georgia R. & P. Co. v. Railroad Commission* (1919) — Ga. —, 5 A.L.R. 1, P.U.R.1919D, 546, 98 S. E. 696, it was held that the legislature might at any time extend the power of the Railroad Commission over street railway fares in a municipality, regardless of existing contracts between the municipality and the railway company, that the grant to a municipality of the power to make contracts as to rates charged by a public utility, such as a street railway, must clearly appear from the powers granted, and will not be implied, and that the right to fix such rates does not arise from provisions of a city charter authorizing it to prescribe reasonable charges for hacks, cabs, drays "or other licensed vehicles for the transportation of persons," nor from that part of the charter authorizing the city to pass ordinances generally for a municipal purpose not in conflict with the charter nor the constitutional laws of the state or of the United States. In this case the statute conferring power on the Railroad Commission to regulate street railway rates contained an express proviso denying the power to the Commission to impair any valid subsisting contracts between a municipality and a street railway company. On application by the railway company to the Commission for an increase in street railway fares, it was held that the Commission properly held that it

had no jurisdiction to grant increased fares in certain cities which were held to have made valid contracts with the railway company, but that the Commission had jurisdiction in other cases where the contracts were invalid because the city had no charter authority to enter into such contracts.

The fact that the Railroad Commission assented to rates fixed in a contract between a municipality and an electric corporation was held in *Atlanta v. Georgia R. & P. Co.* (1919) — Ga. —, P.U.R.1920A, 734, 100 S. E. 442, not to prevent the Commission's forbidding an increase of rates to meet increased cost of operation. A statute provided that the power to determine just and reasonable rates was vested exclusively in the Commission. But it was contended that a provision that the statute should not impair or invalidate any future contracts or ordinance of any municipality as to the "public uses" of the company that should receive the assent of the Railroad Commission protected from change by the Commission rates fixed in such an ordinance. Assuming that the words "public uses" comprehended rates charged by a utility, the court said that the statute, properly construed, left it to the municipality by contract to specify rates, not unconditionally, but subject to the assent of the Commission; that the rates which might be so fixed would be subject to the continued approval of the Commission, and to its authority to revise them, since otherwise the Commission, by assenting to rates reasonable at one time under existing conditions, would be without power to revise them at other times, however unreasonable they might become; and that this view made the proviso harmonize with the Code provision that the commissioners should from time to time, as often as the circumstances required, change and revise the schedule of rates.

The Illinois Commission in *Re East St. Louis & S. R. Co.* (1919; Ill.) P.U.R. 1919E, 916, held that while a rate limitation in a franchise did not deprive it of jurisdiction to increase the rates, the fact that the rates were so

limited would nevertheless be taken into consideration in determining whether the company was receiving a fair return.

It was held in *State Public Utilities Commission ex rel. Quincy R. Co. v. Quincy* (1919) 290 Ill. 360, P.U.R. 1920B, 313, 125 N. E. 374, that the Public Utilities Commission had jurisdiction to approve and authorize street railway fares in excess of those provided by an ordinance under which a city granted the right to operate the railway on the public streets, and that this was true notwithstanding the provisions of the Illinois Constitution of 1870 forbidding the passage of laws granting the right to construct and operate railroads within municipalities without local consent.

State Public Utilities Commission ex rel. Quincy R. Co. v. Quincy (Ill.) supra, was approved and followed in *Chicago R. Co. v. Chicago* (1920) 292 Ill. 190, 126 N. E. 585, holding that a contract between a municipality and a street railway company fixing street car fares was subject to legislative control, and the Utilities Commission might increase the rates. Regarding the Quincy Case, the court said: "It was there determined that the power to regulate rates to be charged by a public utility is vested in the general assembly; that the general assembly has never conferred upon any municipality power to make inviolable contracts for rates for a public utility; that such power of a municipality is not to be implied from authority granted to control streets and regulate the use thereof by public utilities; that § 4 of article 11 of the Constitution, providing that no law shall be passed by the general assembly granting the right to construct and operate a street railroad within any city, town, or incorporated village without requiring the consent of the local authorities having the control of the street or highway, is, like all other provisions of the Constitution concerning legislative power, a mere limitation upon the power of the legislature, and does not imply authority to bind the general assembly by a contract regulating rates of fare; and that the general

assembly has never abdicated or renounced in favor of any municipality its legislative power in respect to regulating public utilities." The court in the Chicago R. Co. Case particularly considered the question whether the statutory provision following § 4, *supra*, of the state Constitution, and prohibiting the location of a street railway along any city street without the consent of the municipality, but authorizing consent for any period not exceeding twenty years on such terms and conditions as the corporate authorities deemed for the best interest of the public, gave municipalities the right to contract for rates to be charged by street railway companies beyond the power of the legislature to alter without the municipality's consent. The court said it was perfectly clear that the statute did not clearly and unmistakably confer on the corporate authorities the right to contract with the street railway company for rates of fare for the period mentioned, free from legislative control; that as the streets were for the use of all citizens of the state, the question of rates of fare was not one of local concern merely; and that it would not only be a strained and unreasonable construction to say that the statute was intended to give the corporate authorities the right to fix rates under varying conditions, for a period of twenty years, but in the judgment of the court it would be grossly unreasonable in point of time.

Notwithstanding maximum rates fixed in franchises, the Indiana Commission has the authority temporarily to increase rates to meet an emergency situation. *Re Northern Indiana Gas & E. Co.* (1920; Ind.) P.U.R.1920D, 470.

The principle that the municipality, in contracting with a public utility, exercises a delegated power which the state may withdraw, and that the state may modify the contract so far as the municipality is concerned, is recognized in *Central U. Teleph. Co. v. Indianapolis Teleph. Co.* (1920) — Ind. —, 126 N. E. 628, but the facts in this case do not bring it within the scope of the annotation.

On facts beyond the scope of the note, the power of the state to modify contracts between public utilities and municipalities was recognized in *Black v. New Orleans R. & Light Co.* (1919) 145 La. 180, 82 So. 81, the question being as to the authority of the city, which had contracted with the street railway company for 5-cent fares, to give its consent to a higher fare.

In overruling exceptions by towns from an order of the Public Utility Commission increasing water rates over those fixed in contracts between the towns and the water companies for the supply of water for municipal and domestic purposes, the court in *Re Searsport Water Co.* (1919) — Me. —, P.U.R.1920C, 347, 108 Atl. 452, took the view that the surrender of the power of the state to fix rates for public utilities should not be inferred from provisions in the charters of the water companies, and in a statute, authorizing the making of contracts between the towns and the companies for the supply of water on such terms and conditions as the parties might agree; but that the contracts should be regarded as entered into in contemplation of the state's authority to regulate all rates for public service, and that such regulation did not constitute an unconstitutional impairment of contracts. It was held also that the legislature had delegated to the Public Utilities Commission the power to change unreasonable rates existing under prior contracts, by a provision in the statute expressly authorizing the Commission to inquire into the management of the business of all public utilities, which by express terms of the statute were made subject to the jurisdiction and control of the Commission, prohibiting every unjust and unreasonable charge for service by such utility, and providing that whenever, upon hearing, any rate or charge was found to be unjust, unreasonable, insufficient, or unjustly discriminatory, or otherwise in violation of the act, the Commission should have full power to substitute therefor such rates as should be just and reasonable.

To a similar effect is *Re Guilford*

Water Co. (1919) — Me. —, P.U.R. 1920C, 363, 108 Atl. 446. It was held also in this and the preceding case that the power of the Maine Commission to increase rates, under the Utilities Act of 1913, notwithstanding a prior rate contract between a municipality and a public utility, was not affected by a provision of the act declaring that the furnishing of public utility service at rates provided for in any contract in existence on January 1, 1913, should not be construed as constituting a discrimination.

The above Maine cases were followed in *Re Island Falls Water Co.* (1919) — Me. —, 108 Atl. 459, where the court, in sustaining the authority of the Utilities Commission to increase water rates for public and private purposes above those stipulated in a contract between a water company and a municipality, stated that the fixing of rates by the Commission did not impair the obligation of the contract, nor deprive individual inhabitants of the town, or the town itself, of property without due process of law, but was a legitimate result of a valid exercise of the police power.

It was held in *Fall River v. Public Service Comrs.* (1917) 228 Mass. 575, P.U.R.1918B, 141, 117 N. E. 915, that the Massachusetts Public Service Commission had power under the Statute of 1913 to regulate and establish such rates for a street railway company as would allow it reasonable compensation for the service rendered, independently of any conditions relative to fares fixed in antecedent grants of location to such utility by a municipality acting under legislative authorization. It was held accordingly that it was within the power of the Commission to allow a railway to discontinue the sale of six-for-a-quarter tickets, provided for in the original grant.

On the authority of *Traverse City v. Michigan R. Commission* (1918) 202 Mich. 575, P.U.R.1918F, 752, 168 N. W. 481, which is cited in the earlier note on this question, the Michigan court in *Detroit v. Michigan R. Commission* (1920) — Mich. —, 177 N. W. 306, where an application had been made
9 A.L.R.—74.

to the Michigan Railroad Commission by a telephone company for permission to establish a new schedule of rates and a new basis for charges, so as to yield greater revenue, denied the contention that because of its so-called home-rule charter the city of Detroit had the sole power to fix telephone rates therein.

The Michigan Statute of 1919 abolishing the Railroad Commission and creating a Public Utilities Commission, in conferring on the latter the power to fix rates of public utilities, provides that in no case shall the Commission have power to change the rates fixed by any franchise or agreement theretofore or thereafter granted or made by any city; with a proviso that by mutual consent a municipality and public utility operating therein may join in submitting rate questions to the Commission, which then shall have power to determine the same. *Lenawee County Gas & E. Co. v. Adrian* (1920) — Mich. —, — A.L.R. —, 176 N. W. 590.

As involving the same principles as many of the cases in the note, though not a case presenting the question of the power of a Public Service Commission to increase franchise rates, attention is called to *Groesbeck v. Detroit United R. Co.* (1920) — Mich. —, 177 N. W. 726, in which it was held that the legislature might, by statute, without the consent of a municipality, increase franchise rates charged by a street railway company, the court saying: "There remains for consideration the question of the legislative right to increase the franchise rates of a public service corporation with the consent of such corporation, but without the consent of the municipality, an original party to the contract. I think it is clear from the authorities that the legislature cannot, by a grant of power to the several municipalities of the state, divest itself of the right to reassume and itself exercise such powers as are granted it in that behalf under the Constitution, among which is this power to fix reasonable rates."

Power to raise rates of a street railway company fixed by franchise agree-

ments, so as to permit the company to pay operating expenses and fixed charges increased by war conditions, was held in *Kansas City v. Public Service Commission* (1919) 276 Mo. 539, P.U.R.1919D, 422, 210 S. W. 381, writ of error dismissed in (1919) 250 U. S. 652, 63 L. ed. 1190, 40 Sup. Ct. Rep. 54, to be conferred on the Public Service Commission of Missouri by the Statute of 1913, empowering the Commission, whenever it found rates chargeable by a common carrier to be unjust and unreasonable, and insufficient to yield a reasonable compensation for the service rendered, to determine just and reasonable rates. It was held also that a constitutional provision requiring local consent to the construction of a street railway did not divest the legislature or its agencies of the power to regulate street railway fares.

The Missouri Commission in *Re Butler-Rich Hill Teleph. Co.* (1920; Mo.) P.U.R.1920B, 604, stated that the rule that a city cannot fix by contract rates unalterable by the rate-making power of the state to be charged by a public service company for service within the city has been settled beyond debate, the decisions in that state so holding being based on the provision of the state Constitution that the exercise of the police power can never be abridged, and on the judicial determination that the power to fix rates arises from the police power.

And statements in advertisements prior to the ratification of a new franchise, that there would be no increase in the rates specified therein, were held in *Re Independent Waterworks Co.* (1919; Mo.) P.U.R.1919E, 599, not to affect the power of the Missouri Commission to authorize an increase in rates of the utility.

Writs of error in the cases of *Fulton v. Public Service Commission* (1918) 275 Mo. 67, 204 S. W. 386, and *State ex rel. Sedalia v. Public Service Commission* (1918) 275 Mo. 201, P.U.R.1919C, 507, 204 S. W. 497, which are cited in the earlier note on this question in 3 A.L.R. on page 738, were dismissed by the United States Supreme Court in (U. S. Adv. Ops. 1919-

20, p. 405) 251 U. S. 547, 64 L. ed. —, 40 Sup. Ct. Rep. 342.

The power of the state through the board of public utility commissioners to increase rates of a street railway company over those fixed by agreement between the company and a municipality, in order to meet the increased expense of operation, is affirmed in *O'Brien v. Public Utilities Comrs.* (1918) 92 N. J. L. 587, P.U.R.1919D, 774, 106 Atl. 414, affirming (1918) 92 N. J. L. 44, P.U.R.1919B, 865, 105 Atl. 132. And in this case it was held that where the increase made in the rates, over what was formerly a reasonable charge, was only sufficient to prevent a deficit in operation because of new and extraordinary conditions, the board might order the increase in rates without making a valuation of all the property of the utility.

As respects rates for street railways fixed in franchises granted before the amendment in 1911 of the Public Service Commission Law so as to empower the Public Service Commission to increase franchise rates (as to the power to increase rates fixed in subsequent franchises, see *People ex rel. New York v. Nixon* (N. Y.) *infra*) it will be observed from examination of the New York cases set out in the annotation in 3 A.L.R. on pages 744-746, that the New York court has taken the position that the legislature has not delegated power to the Public Service Commission to increase rates of fare agreed upon by the railway company and the local authorities. Whether the legislature has the power to delegate to the Commission authority to increase street railway franchise rates, against the consent of the municipality, where the contract between the railway company and the city makes no reservation in this respect, seems still to be an open question. *International R. Co. v. Public Service Commission* (1919) 226 N. Y. 474, P.U.R. 1919F, 355, 124 N. E. 123. In this case the court, referring to the decision in *Quinby v. Public Service Commission* (1918) 223 N. Y. 244, 3 A.L.R. 685, P.U.R.1918D, 30, 119 N. E. 433, said that the court there held that "in the absence of 'clear and definite lan-

guage,' it would not be assumed that the legislature had authorized the Public Service Commission to nullify conditions imposed by local authorities whose consent to the construction and operation of a street railroad was required by the Constitution. . . .

The Constitution says that 'no law shall authorize the construction or operation of a street railroad' unless the consent 'of the local authorities having the control of that portion of a street or highway upon which it is proposed to construct or operate such railroad be first obtained.' Const. art. 8, § 18. This consent may be absolute, or it may be subject to a condition.

. . . The condition, if it touches the future operation of the road, has the force of a condition subsequent, and if its terms are not fulfilled, the consent may be revoked. . . . It is one thing to annul an independent covenant, which, though part of the consideration for the grant, does not condition the grant itself. It is another thing to annul a condition which operates, by way of defeasance of the franchise, to terminate the grant. Our decision in the Quinby Case must be read in the light of that distinction. A municipality may be willing to have an electric railroad in its streets; it may be unwilling to have a railroad run by steam. It may be willing to have a railroad that can furnish cheap transportation; it may be unwilling to have another. No contract can withdraw from the legislature the power of regulation while the consent of the municipality to the presence of the road continues. That is settled beyond doubt. . . . The legislature may say that, subject to the condition subsequent annexed to the consent of the locality, there shall be a change of motive power or an increase of the rates. It may say that if the local authorities do not promptly manifest the election to revoke, the condition will be waived. The doubt is whether, going farther, it may wipe out the condition altogether, and transform a consent that was qualified into one that is absolute. . . . In deciding the Quinby Case, we left that question open, as we leave it open now.

. . . We found a limitation of the rate of carriage lawfully imposed by a municipality as one of the conditions of its consent. Railroad Law, § 173. We found nothing in the statute expressly authorizing its annulment. We saw that the effect of the annulment would be to abrogate a defeasance, and impose upon the streets of the city a burden in perpetuity. In default of 'clear and definite language,' we followed the settled rule that 'a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score.'"

This interpretation of the Quinby Case (N. Y.) *supra*, apparently lends force to the distinction pointed out in the annotation in 3 A.L.R. on page 745, in the New York decisions between street railway cases and gas or other utility cases, in view of the constitutional provision requiring consent of the local authorities to the construction or operation of a street railway.

That the New York Commission has no power to increase street railway franchise rates in Rochester is assumed in *Re New York State R. Co.* (1920; N. Y.) P.U.R.1920D, 48, the Commission holding that in view of this lack of power it would not require the street railway company to improve its service, although concededly inadequate, where such increased service would increase the expense of the company, and it appeared that the service was already noncompensatory.

An appeal from the decision in *Westinghouse Electric & Mfg. Co. v. Binghamton R. Co.* (1919) P.U.R. 1919C, 780, 255 Fed. 378, which is cited in the note in 3 A.L.R. on p. 746, and which recognizes the New York rule with respect to the lack of power of the Public Service Commission of New York to increase street railway fares, was dismissed in (1919) 169 C. C. A. 14, 257 Fed. 726.

The power of the Public Service Commission to increase street railway fares beyond the amount specified in a contract with the municipality, it was held in *People ex rel. New York v. Nixon* (1919) 109 Misc. 7, P.U.R.

1920B, 368, 179 N. Y. Supp. 82, affirmed in (1920) 190 App. Div. 612, P.U.R. 1920C, 396, 180 N. Y. Supp. 130, was not to be inferred from the facts that the Railroad Law permitted an increase of fares by the legislature and by the Public Service Commission, and that the contract contained a condition that "the provisions of the Railroad Law pertaining thereto shall be strictly complied with by the company." A conclusion contrary to the above was reached by the New York Commission in *Goshen v. Wallkill Transit Co.* (1919; N. Y.) P.U.R.1920A, 309.

The decision in *People ex rel. New York v. Nixon* (N. Y.) supra, was reversed, however, in (1920) 229 N. Y. 356, 128 N. E. 245, on the ground that since, at the date the franchise fixing maximum street railway rates was granted, the Public Service Commission was empowered by statute to increase the maximum rates chargeable by any street railroad corporation when found inadequate to yield a fair return, and the statute entered into and became a part of the contract, the Commission had the power to increase the rates. The court said: "Contracts fixing rates, if made before the enactment of these statutes, were subject at the utmost to the possibility of the exercise by the state of its police power in the future. Contracts made thereafter were subject to a possibility which had become merged in a reality. It was no longer a question of what the state might do at some indefinite and unknowable time. It was a question of what the state had already done, drawing upon sources of energy reserves of power, till then latent and potential, and manifesting its will in law. A new public policy had been initiated. A new right had been declared. Rates were thereafter to be just and reasonable alike for carriers on the one side and for passengers or shippers on the other. Neither class would be permitted for its own benefit to set the rule at naught. The state through its delegate, the Commission, would lower the charges if too high. It would raise them if too low."

And, referring to the *Quinby Case* (N. Y.) supra, as explained in subsequent decisions, the court of appeals in *People ex rel. New York v. Nixon* (N. Y.) supra, said: "We held . . . that the legislature did not intend to clothe the Commission with the power to release the obligation of then-existing contracts between railroads and municipalities when the contracts established rates as conditions of a franchise. We did not hold that there was any constitutional restraint upon the grant of such a power. Restraint under the Federal Constitution there certainly was none. . . . We left open the question whether there was any under the Constitution of the state. . . . Limiting our ruling strictly to the necessities of the case, we held that where the consent of the municipality had been granted upon conditions, an intent to permit the Commission to impair the obligation of such conditions or of the contract which embodied them was not to be imputed to the legislature as the result of doubtful inference. . . . On the other hand, we expressly conceded, as we had often before held, that there was plenary power in the legislature to determine the conditions that might be attached by municipalities to consents to be given in the future. . . . It was the 'annulment' of a condition already imposed, the 'abrogation of a defeasance' already attached, the impairment of an obligation already created, . . . which we refused to bring within the jurisdiction of the Commission through words of doubtful import. . . . A different problem confronts us here. Here the statute was in existence when the municipal consent was given. Recognition in such circumstances of the power of the Commission involves no interference with a grant already executed. No condition is annulled; no defeasance is abrogated; no obligation of contract is nullified or impaired. The obligation of a contract is determined by the law in force when it is made. . . . There are times when, in the exercise of the police power, an obligation, once attaching, may be modified or destroyed. . . . That problem

never arises when the power has been exerted before the contract has been made. Impairment is conceivable as the result of a statute passed thereafter. Impairment is inconceivable when, at the time of the contract, the statute is in force. . . . Statutes then existing are read into the contract. They enter by implication into its terms. They do not change the obligation. They make it what it is. The statute which clothed the Commission with jurisdiction to increase charges, if found to be inadequate, was notice to municipalities that franchises thereafter granted must be coupled with no conditions inconsistent with the jurisdiction thus conferred. The Commission is now holding the city to terms which were accepted by implication when the conditions were imposed. This is not to 'transform a consent that was qualified into one that is absolute' . . . as the result of retroactive legislation. This is merely to give effect to the settled rule that contracts are made in submission to existing legislation. . . . We have held, in view of the constitutional provisions requiring the consent of municipalities to the construction and operation of railroads in their streets, that the statutes ought not to be interpreted as permitting the Public Service Commission in such circumstances to nullify existing contracts. We are now asked to hold that the municipalities by their contracts may nullify existing statutes. We will not go so far. . . . In thus holding, it may be prudent, even though unnecessary, to say that we decide the case before us, and no other. The conditions of other franchises may supply elements of distinction which cannot be foreseen. Contracts made after the passage of the statute . . . may conceivably be so related to earlier contracts, either by words of reference or otherwise, as to be subject to the same restrictions. We express no opinion upon these and like questions. They are mentioned only to exclude them from the scope of our decision. In deciding this case, we put our ruling upon the single ground that the franchise contract of October, 1912,

was subject to the statute, and by the statute may now be changed."

The power of the New York Public Service Commission to increase rates of fare established by agreement between the city of Buffalo and certain street railway companies, known as the Milburn Agreement, was sustained in *International R. Co. v. Public Service Commission* (N. Y.) supra, affirming (1919) 188 App. Div. 944, 175 N. Y. Supp. 906, which affirms (1919) 106 Misc. 293, P.U.R.1919C, 390, 174 N. Y. Supp. 403. But in this case the agreement, which was ratified by the legislature, expressly provided that nothing therein should be construed to prevent the legislature from regulating fares of the companies; and the court said that this was not a case where demand was made on the Commission to abrogate a defeasance reserved by the local authorities as one of the conditions of a franchise, but a case where the local authorities, in imposing a condition, had consented that the legislature might change it, and thus had renounced the right of forfeiture or revocation that might otherwise be theirs; and that in the light of this provision amendment by legislation must be held to have been as much within the contemplation of the parties as amendment by agreement.

And the Public Service Commission was held in *Niagara Falls v. Public Service Commission* (1919) 108 Misc. 567, P.U.R.1920A, 175, 177 N. Y. Supp. 861, to have power to authorize an increase of fares of a street railway company in Niagara Falls, which it appeared was not receiving income sufficient to meet actual expenses of operation, notwithstanding limitation of fares in the railway franchise. The court said: "The municipal consent granted to the International Railway Company did not impose the fare provision as a condition. The charter of Niagara Falls does not limit street railroad fares. There is no special contract fixing the rate of fare recognized by the legislature, and no consent was granted for construction and operation within the city of Niagara Falls, which was required by the state

Constitution. It is quite apparent that the Public Service Commission has the delegated legislative power to regulate fares and to grant such a rate as will enable the carrier to live and to furnish transportation to the people of a community, except and unless the circumstances and conditions are extraordinary. . . . We gather that the doctrine of the Quinby Case is not to be extended to cover local consents or franchises which are based upon legislative enactment."

Also the jurisdiction of the New York Commission over rates of inter-urban railroads constructed on private rights of way, but across streets of municipalities, was sustained in *Koehn v. Public Service Commission* (1919) 107 Misc. 151, P.U.R.1919D, 953, 176 N. Y. Supp. 147, notwithstanding maximum rate provisions in the municipal consents accepted by the company, where the consents had been obtained since the passage of the Public Service Commission Law, and power to fix rates in and outside of the limits of such municipalities had not been conferred on them. •

The position that the New York legislature, at least prior to the enactment of the constitutional provision requiring the consent of local authorities to the establishment of street railway lines, might have increased street railway franchise rates, was taken by the New York Public Service Commission in *Re Van Brunt Street & E. B. R. Co.* (1919; N. Y.) P.U.R.1919E, 723. And it is intimated that even since that time the legislature probably had such power.

That the Public Service Commission had the power to regulate gas rates, notwithstanding franchise provisions limiting the rate, was conceded in *Warsaw v. Pavilion Natural Gas Co.* (1920) 111 Misc. 565, 182 N. Y. Supp. 73, where the question was whether, by filing a new rate schedule with the Commission, the rate could be changed by the utility in advance of an order of the Commission authorizing the change.

The Railroad Commission of North Carolina, it was held in *Southern Public Utilities Co. v. Charlotte* (1919) —

N. C. —, P.U.R.1920C, 907, 101 S. E. 619, has been granted power to increase or lower rates of street railways, although fixed by the terms of the franchise by virtue of which the company is occupying the streets of a municipality.

The North Dakota Commission held in *Re Bismarck Gas Co.* (1919; N. D.) P.U.R.1920A, 877, that it had jurisdiction to increase gas rates notwithstanding a rate limitation in the franchise of the gas company, which had been construed by the supreme court of the state as a contract. Express power in this regard was apparently conferred on the Commission by a statute enacted in 1919 granting authority to the board of railroad commissioners on applications for increases in rates over the maximum rates prescribed by franchise.

In the earlier note on this question in 3 A.L.R. on page 736, it is said that the rule in Ohio seems to be definitely settled that the municipalities in that state have the power, both constitutional and statutory, to make inviolable contracts as to rates. In accord with this rule is the recent case of *Lima v. Public Utilities Commission* (1919) — Ohio St. —, 126 N. E. 319, holding that the Constitution of Ohio authorizes municipalities to contract with public utilities for their product or service to be furnished to the municipality or its inhabitants, and that when such contract, duly executed, fixes the rate for furnishing such product, the Public Utilities Commission is not empowered to authorize the utility to exact payment of a rate in excess of that agreed upon.

The Ohio Commission held in *United Fuel Gas Co. v. Ironton* (1920; Ohio) F.U.R.1920C, 553, that a contract between a municipality and a gas company limiting the rate for gas might be enforced by the municipality whether the rate was adequate or otherwise, and the Commission had no jurisdiction to hear and determine the question whether it was just and reasonable.

The decision in *Pawhuska v. Pawhuska Oil & Gas Co.* (1917) — Okla. —, P.U.R.1917F, 226, 166 Pac. 1058,

which is cited in the earlier note on the present question, was affirmed by the United States Supreme Court in (1919) 250 U. S. 394, 63 L. ed. 1054, P.U.R.1919E, 178, 39 Sup. Ct. Rep. 526, the court taking the view that the municipality was a mere agent of the state in contracting with a gas utility for the furnishing of gas at specified rates, and that where the state subsequently empowered the State Corporation Commission to fix rates of such utilities, and the municipality objected to a higher rate fixed by the Commission, no Federal question as to impairment of contracts was presented. In this case the power of rate regulation was expressly reserved, the state Constitution at the time the franchise was granted providing that no grant of any franchise or other use of the streets of any municipality should divest the state or any of its subordinate subdivisions of their control and regulation of such use; nor should the power to regulate charges for public services be surrendered.

In *Hillsboro v. Public Service Commission* (1920) — Or. —, P.U.R.1920C, 817, 187 Pac. 617, a franchise providing for free hydrants to a municipality after a term of years was held to be a rate-making contract, and subject to modification by the Public Service Commission on application by the utility, so as to require the payment of a specified rate in lieu of the free hydrants. The court followed the case of *Woodburn v. Public Service Commission* (1916) 82 Or. 114, L.R.A. 1917C, 98, P.U.R.1917B, 967, 161 Pac. 391, Ann. Cas. 1917E, 996, which is cited in the earlier note on the present question, and which, the court said, conclusively determines that whenever a city enters into a franchise agreement with a public utility involving rates for service, the law reads into such a contract a stipulation by the city that the state may at any time exercise its police power and change the rates.

The validity of a statute empowering the Public Utilities Commission to hear complaints and to fix just and reasonable rates whenever it should determine that any existing rate or

fare was unjust or unreasonable, however the same might have been originally established, was sustained in *Memphis v. Enloe* (1919) 141 Tenn. 618, P.U.R.1919F, 508, 214 S. W. 71, where a municipality which had an ordinance forbidding street railway companies from charging more than 5-cent fares sought to enjoin the Commission from hearing an application filed by a street railway company asking authority to charge a higher fare. The court, it seems, took the view that the state, even if it has delegated to a municipality the rate-fixing power, can thereafter change the rate, so far as the municipality is concerned, since the latter is merely an agent of the state.

It is pointed out in the note in 3 A.L.R. on pp. 736-8, that under the Constitutions and statutes of Ohio and Virginia municipalities have been held to have power to make inviolable contracts with public utilities as to rates. The decision of the Virginia supreme court in the reported case (*VIRGINIA-WESTERN POWER Co. v. COM. ante*, 1148), in holding that municipalities have power to make franchise-rate agreements beyond the power of the state to alter against the consent of the municipality, is in accord with the decisions in these two states cited in the above note. The decision is also in accord with the rules laid down in the above note, that the grant by the state of power to make irrevocable rate contracts must be in clear and unequivocal terms, and the intent to make such a delegation of power must clearly and unmistakably appear, and will not be implied; and that the power of a municipality to make an inviolable contract as to rates is not to be inferred or implied from the power granted to a municipality to control its streets and regulate the use thereof by the public utility. It is stated in the opinion in the *VIRGINIA-WESTERN POWER Co. CASE* that the authorities recognize no difference in the power of a municipality by a franchise provision to make a contract binding on public utility companies with respect to rates to be charged the consuming public within the municipal

limits and with respect to rates to be charged the municipality itself. This point is treated in subdivision II. a, 4, of the note referred to, from which it appears that some authorities have noted a distinction in this regard.

The power of the Washington Commission to fix reasonable and sufficient rates at the request of the carrier, notwithstanding a franchise contract fixing rates, was sustained in *State ex rel. Seattle v. Public Service Commission* (1918) 103 Wash. 72, P.U.R.1918F, 810, 173 Pac. 737, where it was held that the Commission had power to authorize the discontinuance of the sale of commutation tickets by a street railway company, provided for in the franchise.

Without setting out more particularly the holdings in the various decisions, which, for the most part, are of cumulative weight only, as precedents on the present question, in addition to the cases cited above and in the earlier note on this question, attention is called to the following recent decisions, among possibly others, by the utilities commissions of the various states, which expressly or by implication sustain the power of the Commission to increase franchise or municipal contract rates:

Arkansas.—*Re Arkansas Light & P. Co.* (1920) P.U.R.1920D, 775; see also *Stuttgart v. Arkansas Light & P. Co.* (1920) P.U.R.1920D, 763.

Colorado.—*Re Denver Gas & E. L. Co.* Decision No. 216, I. & S. Docket No. 30, Nov. 9, 1918, cited in note P.U.R.1919D, 139.

Idaho.—*Re Adams County Light & P. Co.* Case F-232, Order No. 541, Dec. 26, 1918, cited in note in P.U.R.1919D, 139.

Illinois.—*Re Spring Valley Utilities Co.* (1919) P.U.R.1919C, 839; *Re Chicago R. Co.* (1919) P.U.R.1919D, 573; *Re Quincy R. Co.* (1919) P.U.R.1919E, 390; *Re Tri-City R. Co.* (1919) P.U.R.1919E, 836; *Re Chicago, L. S. & S. B. R. Co.* No. 7328, June 16, 1919, cited in note in P.U.R.1919F, 178 (power to fix reasonable rates notwithstanding ordinance prescribing rates); *Re Mt. Carmel Public Utilities & S. Co.* No.

7356, May 7, 1919, cited in note in P.U.R.1919F, 178.

Indiana.—*Re Northern Indiana Gas & E. Co.* No. 4227, Feb. 21, 1919, cited in note in P.U.R.1919D, 139; *Re Northern Indiana Gas & E. Co.* (1919) P.U.R.1919F, 567.

Kansas.—*Re Kansas City R. Co.* (1919) P.U.R.1919E, 132; *Re Topeka, R. Co.* Docket No. 2914, June 24, 1919, cited in note in P.U.R.1919F, 177.

Maine.—*Biddeford & S. Water Co. v. Itself* (1920) P.U.R.1920B, 580; *Lincoln County Power Co. v. Itself* (1919) P.U.R.1919C, 862; *Re Presque Isle Water Co.* (1920) P.U.R.1920C, 976.

Maryland.—*Warfield v. Cumberland & W. Electric R. Co.* Case No. 1603, Order No. 4977, June 5, 1919, cited in note P.U.R.1919F, 178 (utility has right to file with Commission schedule of rates in excess of franchise rates).

Massachusetts.—*Re Scituate Water Co.* (1919) P.U.R.1919D, 844.

Missouri.—*Re Edina Light Co.* (1919) P.U.R.1919C, 515; *Springfield City Water Co. v. Springfield* (1919) P.U.R.1919D, 858; *Re Joplin & P. R. Co.* (1919) P.U.R.1919F, 171; *Re United R. Co.* (1919) P.U.R.1919F, 264; *Re Missouri Gas & E. Service Co.* Case No. 1548, April 28, 1919, cited in note in P.U.R.1919F, 177; *Re Missouri Gas & E. Service Co.* Case Nos. 1546, 1547, April 28, 1919, cited in note in P.U.R.1919F, 177; *Re Lafayette Teleph. Co.* (1919) P.U.R.1920A, 169; *Kansas City R. Co. v. Kansas City* (1919) P.U.R.1920A, 926.

Montana.—*Re Mission Range Power Co.* (1920) P.U.R.1920C, 56.

New Jersey.—*Re Hackensack Water Co.* (1920) P.U.R.1920C, 160.

New York.—*Granville v. Granville Electric & G. Co.* (1919) P.U.R.1919C, 540 (gas and electric rates); *Sag Harbor v. Long Island Gas Corp.* (1919) P.U.R.1919E, 163 (gas rates).

Pennsylvania.—*Chamber of Commerce v. West Chester Street R. Co.* (1919) P.U.R.1919D, 130; *Allied Printing Trades Council v. Scranton R. Co.* (1919) P.U.R.1919D, 133; *New Castle v. Mahoning & S. R. & Light Co.* (1919) P.U.R.1919D, 783; *Beaver v. Beaver County Light Co.* (1919) P.U.R.1919D, 894; *Spencer v. Waverly, S. & A. Trac-*

tion Co. (1919) P.U.R.1919E, 559; Moore v. Valleys R. Co. (1919) P.U.R. 1919F, 493; East Pittsburgh v. Pennsylvania Water Co. (1919) P.U.R. 1919F, 631; Meadville v. Northwestern Pennsylvania R. Co. (1919) P.U.R. 1919F, 637; Tamaqua v. Eastern Pennsylvania Light, Heat & P. Co. (1919) P.U.R.1919F, 712; Sellersville v. Highland Gas Co. (1919) P.U.R.1920A, 321; Fox v. Pine Grove Electric Light, Heat & P. Co. (1919) P.U.R.1920B, 380; Re Lehigh Valley Transit Co. (1920) P.U.R.1920D, 584.

Utah.—Re Brigham City Municipal Corp. (1919) P.U.R.1919E, 339.

West Virginia.—Re West Virginia Traction & E. Co. (1919) P.U.R.1919E, 95.

Wisconsin.—Milwaukee v. Railroad Commission (1920) P.U.R.1920B, 976.

The note does not cover the question as to the conditions under which franchise rate increases will be granted by utility commissions, assuming that the power exists to authorize the increase. See, for example, Re St. Joseph

Transmission Co. (1920; Mo.) P.U.R. 1920C, 670, where the Missouri Commission denied an application for increase in rates for electricity, although holding that it had authority to grant the increase, where the rates were fixed in a franchise which had been entered into in January, 1918, during disturbed economic conditions incident to the World War, the contract providing that it should be in force for ten years, and that the rates during this period should not be modified or changed. The view was taken that the rate increase should not be permitted in this instance, in view of the fact that the utility had only recently entered into the franchise contract, and had done so at a time when conditions were abnormal, that the Commission in any case would proceed with caution in interfering with this class of contracts, and only do so for the public interest where emergency conditions arose after the contract was made.

R. E. H.

I. SILVERSTIN et al., Respts.,

v.

KOHLER & CHASE et al., Appts.

California Supreme Court (Dept. No. 2)—August 18, 1919.

(— Cal. —, 183 Pac. 451.)

Trover — conversion — taking possession under conditional sale.

1. Taking forcible possession of property under a conditional sale after default in instalments of purchase money is not a conversion of the property.

[See note on this question beginning on page 1180.]

Sale — condition — instrument in form of lease.

2. An agreement by which one undertakes to lease a piano at a specified rental per month, and at the termination of a certain number of months pay \$1, when the title shall vest in him, is a conditional sale, and not a lease.

[See 24 R. C. L. 449.]

— taking judgment for instalments — effect.

3. Taking judgments for the instalments of purchase price due under a

conditional sale, which are less than the whole purchase price, does not vest title in the vendee.

[See 24 R. C. L. 483.]

Assault — attempt to secure possession under conditional sale.

4. One attempting to secure possession of property sold under conditional sale, on default in instalments of purchase price, is liable in damages for assault committed upon the one in possession.

[See 24 R. C. L. 486; see note in 6 A.L.R. 1004.]

Appeal — questions not properly presented.

5. The appellate court cannot con-

sider questions not presented in the briefs as required by statute.

[See 2 R. C. L. 177.]

APPEAL by defendants from a judgment of the Superior Court for Los Angeles County (Hewitt, J.) in favor of plaintiffs in an action brought to recover the value of a piano belonging to them, alleged to have been converted by defendant, and for damages for personal injuries to the plaintiff wife at the time of the forcible taking of the piano. *Modified and affirmed.*

The facts are stated in the opinion of the court.

Messrs. Lewis Sherman Jones, Henry Wetherhorn, G. C. Ringolsky, and H. A. I. Wolch for appellants.

Messrs. Drew Pruitt and John Denison for respondents.

Wilbur, J., delivered the opinion of the court:

Plaintiffs, husband and wife, brought this action to recover from defendants the value of a certain piano belonging to the plaintiffs, alleged to have been converted by the defendant, and for damages for personal injuries suffered by the plaintiff Ida Silverstin at the time of the forcible taking of such piano, and for punitive damages. The court rendered judgment for \$350, the value of the piano, and for \$150 actual damages for personal injuries suffered by the plaintiff Ida Silverstin. The controversy between the parties grows out of an agreement entered into between defendants' assignor, S. Borax & Company and I. Silverstin, relating to said piano, dated October 10, 1913. This contract purports to lease the piano in question for \$500, \$110 of which is acknowledged to have been received, and the balance of \$390 agreed to be paid in monthly instalments of \$10, commencing on the 1st day of November, 1913. The contract also provides:

"Third. When all of said rental with interest thereon as aforesaid is paid, then upon the payment by me of \$1, as consideration therefor, the title of said instrument is to be vested in me, and S. Borax & Company is to give me a bill of sale of the same.

"Fourth. It is also agreed that in the event that I shall refuse to

accept delivery of said instrument, or fail to pay either of said monthly instalments, or interest thereon at maturity, or violate any provision of this lease, then at the option of S. Borax & Company all of said rental, together with interest thereon as aforesaid, shall in either of said cases immediately become due and payable, and S. Borax & Company may at its option upon such default enforce payment of the entire sum then unpaid and interest thereon, or S. Borax & Company may, at its option, take possession of said instrument and cancel this lease, and in that event I hereby agree to surrender and return said instrument to it in as good condition as when received, customary wear by careful usage excepted."

S. Borax & Company assigned their interest in the contract and in the piano to the defendants Kohler & Chase. The plaintiffs paid \$20 and no more. In June, 1915, defendants sued I. Silverstin for the monthly payments then due, amounting to \$140 principal and \$27.30 interest, obtaining a judgment therefor, which judgment has never been paid. Plaintiffs failed to pay any subsequently accruing instalments, and on July 19, 1916, defendants took possession of the piano.

It is asserted that the trial court decided the case on the theory that the contract in question was a conditional sale; that the sellers, by bringing suit for the instalments of the purchase price, elected to recover the purchase price, thereby confirming title in the plaintiffs, and thereafter had no right to re-

(— Cal. —, 183 Pac. 451.)

cover possession of the property, and that their act in taking possession thereof was a conversion of

**Sale-condition—
instrument in
form of lease.** the property. This agreement is a conditional sale of the

piano, although in form a lease. Van Allen v. Francis, 123 Cal. 474, 56 Pac. 339; Perkins v. Mettler, 126 Cal. 100, 58 Pac. 384; Lundy Furniture Co. v. White, 128 Cal. 170, 79 Am. St. Rep. 41, 60 Pac. 759; Muncy v. Brain, 158 Cal. 307, 110 Pac. 945; Wiley B. Allen Co. v. Wood, 32 Cal. App. 76, 162 Pac. 121; Adams v. Anthony, 178 Cal. 158, 172 Pac. 593; American Can Co. v. White, 130 Ark. 381, 197 S. W. 695; Young v. Phillips, 203 Mich. 566, 169 N. W. 822. The authorities throughout the United States are not uniform on the question as to when a vendor in a conditional sale must be held to have elected to pursue the remedy of collecting the purchase money rather than the recovery of the property itself. In many states it is held that where the full amount of the purchase price is due, and the seller brings an action to recover the same, he thereby confirms the title in the purchaser. This rule has been recognized in this state. Parke & L. Co. v. White River Lumber Co. 101 Cal. 37, 35 Pac. 442; Holt Mfg. Co. v. Ewing, 109 Cal. 357, 42 Pac. 435; Bailey v. Hervey, 135 Mass. 172; Frisch v. Wells, 200 Mass. 429, 23 L.R.A. (N.S.) 144, 86 N. E. 775; Galbraith v. Mayo, — Okla. —, 174 Pac. 517, and cases cited; Jordan v. Peek, 103 Wash. 94, 173 Pac. 726. In Parke, & L. Co. v. White River Lumber Co. supra, we followed the Massachusetts rule as announced in Bailey v. Hervey, 135 Mass. 172. That court in a recent case has clearly indicated the difference between a suit for the whole purchase price under such a contract after the entire purchase price has become due and such an action for a part of the purchase price where some of the instalments alone are due. Russell v. Martin, 232 Mass. 379, 122 N. E. 447. In that case it was said: "The

plaintiff [vendor] undoubtedly could have sued on each note as it fell due, and still retained title."

It was expressly so held in Haynes v. Temple, 198 Mass. 372, 84 N. E. 467. The recovery of possession of the property and of the purchase price thereof are not always inconsistent remedies under such contracts. In recent decisions of this court we have pointed out that the retaking of possession by a seller under a conditional sale, for default of the purchaser, is not always to be considered an election to waive pursuit of the purchase price, and may be entirely consistent with the rights of the purchaser to recover such price. Matteson v. Equitable Min. & Mill. Co. 143 Cal. 436, 77 Pac. 144. See also Muncy v. Brain, 158 Cal. 307, 110 Pac. 945; Adams v. Anthony, 178 Cal. 158, 172 Pac. 593.

In the case at bar the seller sued for instalments of the purchase price which were due under the terms of the contract, and allowed the purchaser to remain in possession according to the contract. There was nothing in this inconsistent with the terms of the contract.

**—taking judgment for
instalments—
effect.** The money was due, by its terms, and the seller had a right to recover the same. Civ. Code, § 1047. Such recovery was not inconsistent with a continuing contract between the parties. Peurrung v. Carter-Crume Co. (C. C. S. D. Ohio) 110 Fed. 107. There is no difference in principle, in favor of the purchaser, between such recovery of the instalments due and the payment of those instalments by the purchaser without suit. The seller was not therefore put to his election between two inconsistent remedies. If he had exercised the option given him under the contract to declare the whole of the purchase price due, and sued for the amount, the situation would have been entirely different, under the authorities cited. Here he acted in accordance with the contract. When, therefore, the pur-

chaser subsequently defaulted in the payment of other instalments, defendants had a right, under the

Trover—conversion—taking possession under conditional sale.

terms of the contract, to retake possession, and such taking, even though forcible, did not

amount to a conversion of the property. 38 Cyc. 2021, note 10. Plaintiff's judgment, therefore, for the value of the piano, upon the theory that the title thereto had passed to the purchaser by reason of the seller's suit to recover instalments of the purchase price, is erroneous. Defendants are only liable for the assault upon the person of the plaintiff

Assault—attempt to secure possession under conditional sale.

Ida Silverstin, as they were only justified in taking possession of the property without

process of law, where such posses-

sion could be secured peaceably. *Rosenthal v. McMann*, 98 Cal. 505, 29 Pac. 121.

The judgment for the personal injuries suffered by the plaintiff Ida Silverstin is attacked because of an alleged failure of the evidence to support the finding. This point

cannot be considered for the reason that the appeal is based on a type-written transcript, and the evidence on that subject is not printed in the brief, as required by law. Code Civ. Proc. § 953c.

Appeal—questions not properly presented.

The judgment is modified by reducing the amount thereof to \$150, with interest from the date of the judgment, and is affirmed as modified, appellant to recover costs of appeal.

We concur: Lennon, J.; Melvin, J.

ANNOTATION.

Liability for assault or trespass in forcibly retaking property sold conditionally.

- I. General rule, 1180.
- II. Facts showing assault and battery or trespass, 1182.
- III. Liability of seller for act of employee, 1182.

I. General rule.

By the great weight of authority it is held that where the buyer of property upon conditional sale makes default in his payments and by the terms of the agreement the seller is authorized in such event, to retake the property, he is entitled under this power to repossess himself of the property if he can do so peaceably, but if the buyer objects and protests against the seller's retaking the property, and obstructs him in so doing, it is the duty of the seller to resort to legal process to enforce his rights to repossession. He is not entitled to use force, and he is guilty of an assault and battery or of trespass, as the case may be, if he does so.

Alabama.—*Stowers Furniture Co. v. Brake* (1908) 158 Ala. 639, 48 So. 89; *Singer Sewing Mach. Co. v. Methvin* (1913) 184 Ala. 554, 63 So. 997; *Crews*

v. Parker (1915) 192 Ala. 383, 68 So. 287.

California.—*SILVERSTIN v. KOHLER* (reported herewith) ante, 1177.

Indiana.—*Singer Sewing Mach. Co. v. Phipps* (1911) 49 Ind. App. 116, 94 N. E. 793.

Iowa.—*Biggs v. Seufferlein* (1914) 164 Iowa, 241, L.R.A.1915F, 673, 145 N. W. 507.

Kentucky.—*White Sewing Mach. Co. v. Connor* (1901) 111 Ky. 827, 64 S. W. 841.

Massachusetts.—*Levi v. Brooks* (1877) 121 Mass. 501; *Drury v. Hervey* (1879) 126 Mass. 519.

Minnesota.—*Fredericksen v. Singer Mfg. Co.* (1888) 38 Minn. 356, 37 N. W. 453.

New York.—*O'Connell v. Samuel* (1894) 81 Hun, 357, 30 N. Y. Supp. 889; *Peddie v. Gally* (1905) 109 App. Div. 178, 95 N. Y. Supp. 652; *Regg v. Butler-Newhall Co.* (1911) 72 Misc. 387, 130 N. Y. Supp. 172.

South Carolina.—*Pagan v. Drake Furniture Co.* (1905) 73 S. C. 364, 53 S. E. 542.

Texas.—*Culver v. State* (1901) 42 Tex. Crim. Rep. 645, 62 S. W. 922.

Washington.—*Geissler v. Geissler* (1917) 96 Wash. 150, 164 Pac. 746, 166 Pac. 1119.

Wisconsin.—*Gerstein v. C. F. Adams Co.* (1919) 169 Wis. 504, 173 N. W. 209.

In *Biggs v. Seufferlein* (1914) 164 Iowa, 241, L.R.A.1915F, 673, 145 N. W. 507, it is said to be well settled "that the mere right to the possession of property does not entitle the party to take the same from the one in the actual, rightful possession by force or violence. But to recover possession, under such circumstances, resort must be had to legal proceedings. But where one has the actual right to the possession and obtains possession of the property to which he had the right of possession, from the one actually in possession, with his consent, he may thereafter maintain his possession by the use of force. . . . If one attempts to take, or takes, another's property from his possession, without right and against his will, the owner or person in charge may protect his possession; or retake the property, by the use of necessary force. He is not bound to stand by and submit to wrongful dispossession when he can stop it, and he is not guilty of assault, in thus defending his right, by using force sufficient to prevent the property from being carried away."

In the foregoing case, according to the seller's claim, when he called upon the buyer of a range for the payment of the balance due, the buyer told him to take the range, which he proceeded to do; before he had removed the range from the buyer's residence, however, the buyer changed her mind and told him he could not move it. It was held that under these circumstances, if the seller's claim was true, he had the right to use necessary force to remove the property. The buyer, however, denied ever having authorized the seller to take possession of the property, and claimed that she at all times objected thereto, as regards this claim, it was held that if it was believed by the jury, then the seller was guilty of assault and bat-

tery if he used any force to remove the property.

In *Singer Sewing Mach. Co. v. Phipps* (Ind.) supra, it is held that while the seller of an article upon an instalment contract may be the lawful owner thereof, and may have the right to retake the property upon default of payment, yet, since the possession of the buyer is lawful in its inception, the seller will be guilty of an assault and battery if he forcibly removes the property against the objection of the buyer.

But, in *Lambert v. Robinson* (1894) 162 Mass. 34, 44 Am. St. Rep. 326, 37 N. E. 753, construing a contract for the sale of chattels in the form of a lease, giving the lessor, upon the default of the lessee, the right to enter upon the premises and retake the property, it was held upon the assumption that the right of entry had arisen because of default in the rent, that this license authorized the lessor to use such force as might be necessary to retake the chattels.

And in *Wilmerding v. Rhodes Haverly Furniture Co.* (1905) 122 Ga. 312, 50 S. E. 100, according to the headnotes, the vendor in a conditional sale of chattels, by the terms of which he is given a right, upon default of the buyer, to take possession without legal process, etc., is not guilty of a trespass where he exercises the right thus given, by seizing and removing the property from the possession of the personal representative of the deceased buyer.

So, in *W. T. Walker Furniture Co. v. Dyson* (1908) 32 App. D. C. 90, 19 L.R.A. (N.S.) 606, it is held that where the purchaser of property by conditional sale fails to make the requisite payments, and the seller takes possession of the property and removes the same, using no more force than necessary to overcome resistance wrongfully interposed to prevent his retaking the property, the buyer cannot recover in trespass for the act of the seller in using such force. The court said that the contract authorized the seller to retake the goods upon a breach of the conditions thereof, and if he used only such force as was rea-

sonably necessary in overcoming the resistance the buyer wrongfully interposed, he is not guilty of a trespass. If, on the other hand, he used excess force he was guilty.

II. Facts showing assault and battery or trespass.

In *Crews v. Parker* (1916) 192 Ala. 383, 68 So. 287, *supra*, the court said that "any act or action manifesting force or violence, or naturally calculated to provoke a breach of the peace, in the recaption of property, renders the actor a trespasser, and precludes him from availing of his right to retake the property. To enter one's premises, and notwithstanding the possessor's protest, and in a rude and rough manner, to take chattels against his will, is, we think, clearly not an assertion of a right in a peaceable manner."

Where the purchaser of a sewing machine upon conditional sale, in order to prevent the seller from removing the property from the premises, sat upon the machine, and the agent of the seller tipped the machine sufficiently to cause the buyer to slide off, causing her personal injuries, the seller is liable for damages for an assault and battery. *Singer Sewing Mach. Co. v. Phipps* (1911) 49 Ind. App. 116, 94 N. E. 793, *supra*.

In *Drury v. Hervey* (1879) 126 Mass. 519, it appeared that property conditionally sold was in the possession of a third person. The seller was held guilty of an assault and battery where he entered upon the premises where this property was located, and, in order to secure the property, pushed the wife of the third person in whose possession the property was aside, she objecting to his taking the property until the buyer thereof had returned, which would be in a short time.

In *Pagan v. Drake Furniture Co.* (1906) 73 S. C. 364, 53 S. E. 542, it was held proper to instruct the jury that if the condition upon which property had been sold was broken, the seller would have the right to take it peaceably and quietly, but if he took it in a reckless, high-handed manner, and in taking it injured the buyer, he was liable for an assault and battery,

and punitive damages might be awarded against him.

In *Gerstein v. C. F. Adams Co.* (1919) 169 Wis. 504, 178 N. W. 209, a corporation was held liable for the act of its agent in forcibly taking property from the buyer, tearing her waist, and punching her in the abdomen.

In *Culver v. State* (1901) 42 Tex. Crim. Rep. 645, 62 S. W. 922, it appeared that the purchaser of rugs upon which she had given a mortgage in partial payment of the purchase price stood upon the rugs in order to prevent the seller from retaking the same for default in payments. He was held guilty of aggravated assault by striking and, knocking her off the rugs, and taking them away. The court said that, conceding that the mortgage gave full authority to appellant, upon default in payment by the prosecutrix for the rugs, to take peaceable possession of the same, still he had no right to go to the home of prosecutrix and enter the same and take possession of the goods against her consent, the evidence showing there was a controversy as to the balance due, which she insisted was only 50 cents, while he insisted the amount was \$1.

In *Peddie v. Gally* (1905) 109 App. Div. 178, 95 N. Y. Supp. 652, *supra*, it is held that where the servant of the seller forced his way into the rooms of the buyer, seized the latter, threw her down and kicked her, the employer was liable for the assault and battery thus committed.

In *O'Connell v. Samuels* (1894) 81 Hun, 357, 30 N. Y. Supp. 889, it appeared that the agent of the seller overcame the resistance of the buyer to his entrance into her home, and in doing so he tore her dress and inflicted upon her some bodily injuries; this was held to constitute an assault and battery by the seller.

III. Liability of seller for act of employee.

It has been held that although the agent is not instructed to use forcible means to enter the house of the buyer or to do acts of personal violence to get possession of goods sold on conditional sale, nevertheless, when he proceeds to take the property in a vio-

lent manner, acting in the business of his employer, he is acting within the scope of his employment in the sense that his employer is liable for his violence. *O'Connell v. Samuels* (1894) 81 Hun, 357, 30 N. Y. Supp. 889, *supra*.

A corporation is liable in the same manner as an individual to respond to damages for an assault committed by its agent in retaking property sold conditionally, where the retaking of the property was within the range of the agent's employment. The authority of the agent to enter the home of the buyer and take possession of the property is sufficient to render the principal liable, since he thereby vests the agent with a discretion in determining the manner and method of obtaining possession. *Singer Sewing Mach. Co. v. Phipps* (1911) 49 Ind. App. 116, 94 N. E. 793.

In *Peddie v. Gally* (1905) 109 App. Div. 178, 95 N. Y. Supp. 652, *supra*, it is also held that authority to remove property conditionally sold is sufficient to render the employer responsible for an assault and battery committed by his employees in removing the property.

The fact that the seller, in the authority given to the agent to take possession of goods sold conditionally, upon default of the buyer, expressly forbade him using force or making an assault upon the buyer, does not relieve the seller from liability for the tort of his agent in forcibly retaking the property. *Regg v. Buckley-Newhall Co.* (1911) 72 Misc. 387, 130 N. Y. Supp. 172. The foregoing decision is based upon the fact that the principal authorized his agent to retake the goods from the possession of the buyer, thereby vesting in the agent a discretion in determining for himself whether the means by which he repossessed himself of the property were lawful.

In *Gerstein v. C. F. Adams Co.* (1919) 169 Wis. 504, 173 N. W. 209, it is held that the employer is liable for the act of his servant in assaulting the buyer of goods purchased conditionally, while he is attempting to retake the goods, notwithstanding the method adopted by the servant to get

possession is not authorized by the employer, and even may have been prohibited by him.

In *Singer Sewing Mach. Co. v. Methvin* (1913) 184 Ala. 554, 63 So. 997, *supra*, the facts are not stated, but they are held to be sufficient to make a case for the jury as to the liability of the seller of goods upon conditional sale for the acts of its agents in attempting to retake the property.

In *Lambert v. Robinson* (1894) 162 Mass. 34, 44 Am. St. Rep. 326, 37 N. E. 753, it is held that the seller is liable for the use by his servants of excess force in retaking goods sold under a contract of lease, and it was further held that a sufficient showing of excess force was made by evidence that when the servants knocked at the door of the lessee's home and it was opened by one of his daughters, that they rushed into the house in a violent and rude manner, throwing the girl back upon the stairs and frightening her, and that afterwards one of the servants went around to the rear of the house and opened the window, jumped through it into the house, and pushed the plaintiff's wife violently against the side of the house.

In *Levi v. Brooks* (1877) 121 Mass. 501, it is held that where the servants of the seller of goods by way of a lease commit an assault in retaking the goods for default of the buyer or lessee, and the assault is committed in the execution of authority given the servants by the lessor to retake the property, and is also committed for the purpose and as a means of securing the goods, the lessor is liable for the assault. The court said that the ground taken by the defendant that the master was not liable for a wilful trespass committed by a servant could not be sustained. The test of the liability of the master is that the act of the servant is done in the course of doing the master's work and for the purpose of accomplishing it. If so done, it is the act of the master, and he is responsible whether the wrong done be occasioned by negligence or by the wanton and reckless purpose to accomplish the master's business in an unlawful manner.

In *Stowers Furniture Co. v. Brake* (1908) 158 Ala. 639, 48 So. 89, supra, it was held that where the seller was notified that his servants, aiding an officer acting under an invalid writ, had taken goods sold conditionally through the exercise of force, and he thereafter retained the goods, although the buyer had demanded the same, it was a question for the jury as to whether or not the seller thus ratified the acts of his servants, thereby rendering him liable in an action for assault and trespass.

But it has been held that the prin-

cipal is not liable where the act of the agent is unauthorized. As, for example, where the authority of an agent is limited to the collection of instalments due for property conditionally sold, and he is expressly forbidden to seize the property sold. If in this regard he violates his instructions by attempting to remove the property from the buyer's possession, and in doing so he commits an assault and battery, the principal is not liable therefor. *Feneran v. Singer Mfg. Co.* (1897) 20 App. Div. 574, 47 N. Y. Supp. 284. A. G. S.

CHARLES S. OWENS, Plff. in Err.,

v.

LOUIS C. GREENLEE et al.

Colorado Supreme Court — January 5, 1920.

(— Colo. —, 188 Pac. 721.)

Contribution — coindorsers of negotiable paper — absence of notice of dishonor.

1. Absence of protest and notice of dishonor is not a defense to an action by one joint indorser of negotiable paper to compel contribution by his coindorsers to the amount paid by him upon the paper.

[See note on this question beginning on page 1188.]

— right of accommodation indorser.

2. One joint accommodation indorser of commercial paper may, upon paying the amount due, have ratable contribution from his coindorsers.

[See 6 R. C. L. 1036.]

Joint debtors — effect of extra security to one.

3. Joint indorsers upon commercial paper are not relieved from liability because one of their number obtains extra security from the principal debtor, if the proceeds of such security are credited upon the debt, so that all are placed on an equal footing.

[See 21 R. C. L. 1138.]

Contribution — insolvent joint debtor — proportion.

4. Contribution among joint indorsers of commercial paper must be in proportion to the number of solvent sureties.

[See 6 R. C. L. 1037.]

Appeal — direction of judgment.

5. Where, upon appeal from a judgment for defendant in an action for contribution, the parties have fully testified and the right to contribution is clearly manifest, the court will, upon reversal, direct entry of the proper judgment.

ERROR to the District Court for the City and County of Denver (Perry, J.) to review a judgment in favor of defendants in an action for contribution. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Frederick T. Henry, Carlisle Ferguson, and George Marrs for plaintiff in error.

Mr. George P. Steele for defendants in error.

Bailey, J., delivered the opinion of the court:

Plaintiff brought this action in equity for contribution. At the close of his testimony an order of nonsuit was entered. This order, and a judgment of dismissal entered in pursuance thereof, are now here for review.

It appears that plaintiff and defendants were joint accommodation indorsers of drafts aggregating \$10,000, drawn at various times during the year 1913, by the Colorado-Wyoming Power & Reclamation Company upon Westling, Emmet, & Company, of Philadelphia. The amount thereof the plaintiff ultimately had to pay to the Colorado National Bank of Denver, in whose favor the drafts were drawn.

Plaintiff and his coindorsers were stockholders in the Routt County Development Company. Greenlee, Heberton, and Given were respectively president, vice president, and secretary thereof, and each had a salary as such officers. The Colorado-Wyoming Power & Reclamation Company was organized to take over the business of the Routt County Development Company, but, owing to financial troubles, the actual transfer never took place.

The first draft for \$10,000 was drawn April 1st, 1913, and was payable to the order of the Colorado National Bank of Denver, July 1st, 1913. Prior to the delivery to the bank, the draft was duly indorsed by the defendants and the plaintiff. There appears to have been no direct communication between plaintiff and Greenlee and Heberton in reference to the conditions under which the parties were to indorse, the defendant Given having acted as intermediary in all negotiations; each one consented, however, as the proofs show, to indorse only if the others did. Such was the agreement and understanding; that is, common

indorsement by all, and mutual liability.

It is shown conclusively that it was necessary to promptly raise money to save the company, and that the amount of the draft in question could be secured from the Colorado National Bank, if Owens indorsed. There is abundant testimony to establish that the defendants knew that Owens would not lend his signature to the paper unless the defendants also indorsed. Later it appears that Owens demanded additional security, and received a deed to certain land from the Reclamation Company for the purpose.

When this draft became due it was renewed by two others, each for \$5,000, indorsed as before. One of them was again renewed on September 1st, 1913, this renewal being indorsed only by Owens and the defendant Given. The other became due in October and was protested and notice given to Owens, Given, and the Colorado National Bank.

The other renewal, which bore the indorsement of Owens and Given only, was likewise dishonored at maturity and protested, and notice given as before. Both drafts were thereafter paid by Owens with interest. The land deeded to Owens was foreclosed, and after deducting the amount expended in clearing off an encumbrance thereon, and in discharging other necessary expenses, the balance of the sale price was credited on account of the drafts. By this suit plaintiff seeks to recover ratable contribution for the balance of his outlay, after giving credit for the net amount realized from the sale of the land security.

It is not denied that defendants and plaintiff were joint accommodation indorsers of the paper in question, but the defendants contend that they were entitled to notice of dishonor and protest under § 4552, the Negotiable Instruments Act, Rev. Stat. 1908. There is no merit in this claim, because this action is not brought upon the drafts themselves, but is strictly a suit in

equity, for reimbursement to plaintiff for his payment of a joint liability. If it were a suit between a third party, a holder for value in due course, and the indorsers, then a different rule would prevail; but as this is distinctively an equitable action, between coindorsers only, to

**Contribution—
coindorsers of
negotiable paper
—absence of
notice of
dishonor.**

such action the provisions of the Negotiable Instruments Act, as to notice of dishonor and protest, have no application whatever, because no question concerning the negotiation of or liability upon commercial paper is involved. *Sloan v. Gibbs*, 56 S. C. 480, 76 Am. St. Rep. 559, 35 S. E. 408; *Mercantile Bank v. Busby*, 120 Tenn. 652, 113 S. W. 390; *Hunter v. Harris*, 63 Or. 505, 127 Pac. 786. It is clearly manifest from his written opinion, brought up in the record, that the learned trial judge fell into the error of holding that the case is controlled by the provisions of the Negotiable Instruments Act, and that for lack of notice of dishonor and protest required thereby, and for that reason alone, he erroneously concluded that the defendants were not liable.

It is admitted that Owens paid the drafts, and the testimony of the defendants themselves shows that they received substantial benefit from such indorsement. The parties, as joint accommodation indorsers, were alike liable, and since one

**—right of accom-
modation
indorser.**

of them has paid the debt, he should, in equity and good conscience, have ratable contribution from his coindorsers. The rule, as stated in 6 R. C. L. ¶ 2, page 1036, is as follows: "It is a familiar principle that, when several parties are equally liable for the same debt and one is compelled to pay the whole of it, he may have contribution against the others to obtain from them payment of their respective shares. It is almost universally conceded that this doctrine is not founded on contract, but on an acknowledged principle of equity, which requires that

those who voluntarily assume a common burden should bear it in equal proportions. And when any burden ought, from the relation of the parties, or in respect of property held by them, to be equally borne, and each party is an *aequali jure*, contribution is due."

In *Hagerthy v. Phillips*, 83 Me. 336, 22 Atl. 223, it was sought to recover contribution for having paid a note upon which, with two others, the plaintiff was an indorser. The court, in holding that plaintiff had a right to contribution, said (83 Me. at page 339): "Does the evidence justify the conclusion? Not a word was spoken by one indorser to another during the negotiation. The facts were communicated through Mason. Each promised to sign if others would. If the act done was the act promised to be done, the order of signing was immaterial, because it was not a qualification of the promise. Each indorser made precisely the same promise. Each was as much entitled to sign last as the other. The first and second signers required assurance that the third would sign,—a useless formality if their risk was not lessened thereby. They understood that the indorsers were to be holden alike, basing their conclusion on precisely the same facts that were presented to the defendant to induce him to sign. The request of Mason was that the defendant would indorse for him, not for others. The idea was to divide the risk among his friends. The defendant's promise was not to indorse last, but to indorse. He was not to do an act alone—the three were to do the act. The three did it, sharing obligation and risk alike."

In *Hunter v. Harris*, *supra*, the court, in holding that failure to give notice of dishonor to a cosurety will not defeat contribution as between cosureties, said, in 63 Or. at page 509: "According to the evidence in the record, Hunter and Harris each proposed that he would sign the note in question if the other would. Each accepted the other's proposition by signing the same. It is not material

by what medium this proposal was conveyed from one to the other, whether by letter, wire, or through Mr. Hulse, the accommodated party. As between these two parties to the note they were cosureties. According to this construction of the evidence the defendant would be liable to plaintiff upon the theory of law conceded by counsel for defendant. In other words, we think there was a contract, understanding, or agreement between plaintiff and defendant by which they were to be cosureties on the note. Under these circumstances defendant, Harris, in so far as this plaintiff is concerned, was not entitled to notice of dishonor as an indorser under the provisions of § 5922, L. O. L., and was not released by want of such notice."

Discussing the nature of the suit, the court continues: "It should be borne in mind that this is an action between the parties to the note, for contribution as cosureties. . . .

Strictly speaking, it is not based upon the note, which had run its course and been paid before suit. In the examination of this question it is worthy of note that a surety on a negotiable instrument is not mentioned in the Negotiable Instruments Law. This law provides that, in any case not provided for in the act, the rules of the Law Merchant shall govern."

It is admitted that all of the indorsements were placed upon the draft before it was negotiated, to make it acceptable to the bank, and from the evidence it is plain that this was done chiefly for the advantage of the defendants, and it is apparent that they in fact did receive substantial benefits from the transaction. The judgment rendered in this case must, therefore, be reversed under the settled rule that where several persons are liable for the same debt, and one of them pays it, he has an action in equity for contribution against his codebtors.

Nor is there any merit in the claim that because certain land was conveyed to plaintiff as partial security the parties were not placed

upon an equal footing. Since the net proceeds from the sale of the land were credited upon the joint liability, it is clear that the defendants have and can have no ground of complaint on that score. The fact that a cosecurity Joint debtors—
effect of extra
security to one. may have in his possession securities to indemnify him against the default of his principal in no sense prejudices his right to contribution. 2 Dan. Neg. Inst. 6th ed. § 1341; Elliott, Contr. § 3983; Crayton v. Johnson, 27 Ala. 503, 506. The situation of the parties is equal when they are under a common burden or liability, whether their respective liabilities are in the same or different amounts. 13 C. J. 822.

Upon principle and authority plaintiff has a plain right to the relief prayed. The whole purpose of the Law Merchant prior to the adoption of the uniform Negotiable Instruments Act was to make bills of exchange and checks, when put into circulation, to that extent take the place of money. The rules by statutes and decisions were so adopted for the protection of the purchaser for value in due course, and the makers and indorsers in relation to third persons. That act simply endeavors to codify these rules, and to adopt what seemed to be the best and most uniform for given cases. Neither the Law Merchant nor the Negotiable Instruments Act attempted or attempts to prescribe or determine the rights of joint indorsers or joint makers as between themselves. These rights are left to be settled according to the principles of the common law and the equities between the parties. 2 R. C. L. 1123; 8 C. J. 291; Sloan v. Gibbes, 56 S. C. 480, 76 Am. St. Rep. 559, 35 S. E. 408; Hunter v. Harris, 63 Or. 505, 127 Pac. 786, supra.

It is not questioned that Given is insolvent, and plaintiff prays judgment, by way of contribution, against each of the defendants Greenlee and Heberton for one third of the amount which he has been compelled to pay. The meas-

ure of liability for contribution is a Contribution—insolvent joint debtor—proportion. ratable apportionment among the solvent joint co-debtors. In *Sloan v. Gibbes*, supra, in speaking to this point, that court said: "The next matter we notice is the measure of the liability for contribution. The circuit court has found that the third indorser, Arthur, was dead and insolvent, and this fact is not now questioned. In case any surety liable for contribution is insolvent, the rule is that contribution must be in proportion to the number of solvent sureties. *Harris v. Ferguson*, 18 S. C. L. (2 Bail. 401); *McKenna v. George*, 19 S. C. Eq. (2 Rich. 22); 1 Story's Eq. ¶ 496; 7 Am. & Eng. Enc. Law, 2d ed. 341."

It appears from the record that the parties to this action have testified at length, and the case is now, therefore, before the court upon a full record. No valid defense, either at law or in equity, has been pleaded

or proved, and the right of plaintiff, as a matter of fair dealing and common justice, to have contribution, is clearly manifest. The judgment below, therefore, is reversed and the cause remanded, with instructions to the trial court, in view of the undisputed insolvency of Given, to enter judgment for the plaintiff against each of the defendants *Greenlee* and *Herberton*, for one third of the amount paid out by *Owens* in discharge of the joint debt, with continuing interest thereon from the date of such outlay, at the rate of 8 per cent per annum, to the entry of the judgment hereby directed.

Judgment reversed and cause remanded, with instructions.

Garrigues, Ch. J., and *Allen*, J., concur.

Petition for rehearing denied April 5, 1920.

ANNOTATION.

Necessity of protest and notice as between coindorsers of negotiable paper.

There is very little authority upon the necessity of protest and notice as between coindorsers of negotiable paper. In *Hunter v. Harris* (1912) 63 Or. 505, 127 Pac. 786, cited in the reported case (*OWENS v. GREENLEE*, ante, 1184), one who signed as an indorser of a note under an agreement with another, who signed on the face of the note with the principal debtor, that the two parties should be cosureties on the note for the principal debtor, was held not entitled to notice of dishonor as an indorser, in an action against him by the party who signed on the face of the note with the principal debtor. That there must be notice of protest to a coindorser is assumed, but not expressly held, in *Higgins v. Morrison* (1836) 4 Dana (Ky.) 100,—an action by one indorser against his coindorser for contribution. It has been held that a coindorser need not wait for the note to be protested and notice given, but may, at the ma-

turity thereof, pay the same and recover of his coindorser in an action for contribution; especially where the coindorser knew of the failure of the maker to pay the note shortly before its maturity, and refused to make any provision to assist in its payment. *Kerr's Estate* (1895) 17 Pa. Co. Ct. 193, 4 Pa. Dist. R. 696.

Where the joint indorsers of a note have been discharged by failure to give notice of dishonor, one of them cannot pay the note and recover, in an action for contribution, from the other coindorser, in the absence of consent to the payment. *Gantt v. Jones* (1804) 1 Cranch, C. C. 210, Fed. Cas. No. 5,213.

It has been urged in actions against a joint indorser who alone has been given notice of dishonor that he is discharged by failure to notify his coindorsers. In sustaining such a defense, the court, in *Bowie v. Hume* (1898) 13 App. D. C. 286, says that

notice of dishonor to each indorser is required, in order to preserve the right of contribution as between them. But this rule is held to be changed by the Negotiable Instruments Act in *Williams v. Paintsville Nat. Bank* (1911) 143 Ky. 781, 137 S. W. 535, Ann. Cas. 1912D, 350, and it is there held that, under that act, a joint indorser to whom alone notice of dishonor is given is not discharged by failure to give notice to the other indorsers, and the court says that if he would hold his coindorsers, he must give notice to them. The Kentucky case is approved and followed in *Eaves v. Keeton* (1917) 196 Mo. App. 424, 193 S. W. 629, where the court, although not mentioning the right of contribution as between the coindorsers, says, in a

case involving joint indorsers, that any indorser to whom notice of dishonor is not given by the holder is discharged so far as such holder is concerned, but the party who is notified is thereby made liable to the holder, "and is given the right to protect himself by giving notice to those parties to the note from whom, on his paying the instrument, he is entitled to reimbursement."

The theory of these cases, that an indorser who has received notice of dishonor must notify his coindorser, who is not given notice by the holder of the instrument, if he would preserve his right of contribution, is contrary to the holding in the reported case (*OWENS v. GREENLEE*, ante, 1184).

W. A. E.

MAX ROSENFELD

v.

JAMES J. WALL, Impleaded, etc., Appt.

Connecticut Supreme Court of Errors — March 5, 1920.

(— Conn. —, 109 Atl. 409.)

Broker — what shows procuring cause of sale.

1. That a broker was the procuring cause for a sale of real estate is not shown by the fact that he introduced the purchaser to the owner, who, at a subsequent time, sold the property to such purchaser at a price in advance of that offered when the broker presented him.

[See note on this question beginning on page 1194.]

— when entitled to commission.

2. To entitle a broker to a commission for securing a customer for real estate he must have been employed by the owner to sell the property upon certain named terms, and must have procured a customer willing, ready, and able to purchase upon those terms.

[See 4 R. C. L. 297, 307; see note 1 A.L.R. 528.]

Appeal — finding that broker was procuring cause of sale — effect.

3. A finding that a broker was the procuring cause of a sale is one of fact, and binding on appeal, unless contrary to or unsupported by the subordinate facts, or in conflict with the settled rules of logic and reason, or found in violation of some rule or principle of law.

[See 2 R. C. L. 203.]

(Gager and Case, JJ., dissent.)

Broker — right to discharge.

4. An owner may, while negotiations for sale of his property remain unsuccessful, and before the broker has produced a customer able, ready, and willing to buy on the owner's terms, in good faith discharge his broker, and a subsequent sale of the property to a customer produced by the broker does not entitle the broker to a commission.

[See 4 R. C. L. 253, 416.]

Trial — question of fact — procuring cause of sale.

5. Which of two brokers expending effort in attempting to sell a parcel of real estate was the procuring cause of sale is a question of fact for the jury.

APPEAL by defendant Wall from a judgment of the City Court of Hartford (Bullard, J.) in favor of plaintiff in an action brought to recover a real estate broker's commission. *Reversed.*

Statement by Wheeler, J.:

On March 5, 1918, defendant James J. Wall owned the premises known as 68-70 Pliny street, Hartford, and employed plaintiff, Max Rosenfield, as his agent to find a purchaser for this property.

Plaintiff in April and May, 1918, secured from Mrs. Brody successive offers, the last for \$16,200, and submitted these to Wall, who rejected all of them.

On June 15th, Mrs. Brody called to her assistance a broker named Pierson, and through him offered Wall \$16,300 for the property, which offer Wall accepted, and the sale was subsequently consummated.

The customary commission for real estate brokers for the sale of real property is 2 per centum of the purchase price, in the absence of an agreement for a specific compensation, or a special custom in modifying it.

Wall was a real estate broker and paid Pierson \$200 as compensation for his services in the sale of this property. Brokers frequently charge but one half the usual commission when the vendor is a broker.

The trial court found that the plaintiff was the procuring cause of this sale, and rendered judgment for plaintiff for \$326, being 2 per cent of the selling price of \$16,300.

Messrs. Joseph P. Tuttle and Henry J. Marks, for appellant:

Plaintiff was not the procuring cause of the sale.

19 Cyc. 261; Butler v. Ouwelant, 90 Conn. 434, 97 Atl. 310.

The court erred in holding that, "as a custom must be certain, uniform, and generally understood, and as the several brokers who testified were far from unanimous as to the existence of the custom claimed, namely, that brokers charge or receive but one half the usual commission when the vendor is also a broker, the undersigned is unable to find such a custom."

Hichhorn v. Bradley, 117 Iowa, 130, 90 N. W. 592; Dickinson v. Poughkeepsie, 75 N. Y. 65; Milroy v. Chicago, M.

& St. P. R. Co. 98 Iowa, 188, 67 N. W. 276; Woldert v. Arledge, 11 Tex. Civ. App. 484, 33 S. W. 372; Farnsworth v. Chase, 19 N. H. 534, 51 Am. Dec. 206; Hill v. Morris, 21 Mo. App. 256.

Mr. A. B. Wilson, for appellee:

The broker Pierson was the agent of Mrs. Brody, the purchaser, and was not engaged by the owner of the premises, and was not entitled to a commission.

Summa v. Dereskiawicz, 82 Conn. 547, 74 Atl. 906; Zimmerman v. Garvey, 81 Conn. 570, 71 Atl. 780; Weinhouse v. Cronin, 68 Conn. 250, 36 Atl. 45.

The finding of the court as to custom was not error.

Crosby v. Fitch, 12 Conn. 410, 31 Am. Dec. 745; Leach v. Beardslee, 22 Conn. 404; Smith v. Phipps, 65 Conn. 302, 32 Atl. 367; Beach v. Travelers' Ins. Co. 73 Conn. 118, 46 Atl. 867.

Claims that the court erred or was wrong in weighing the evidence supporting the facts on which its judgment is based ought not to be and cannot be considered on appeal.

Bridgeport v. Bridgeport Hydraulic Co. 81 Conn. 84, 70 Atl. 650; Hourigan v. Norwich, 77 Conn. 358, 59 Atl. 487, 17 Am. Neg. Rep. 445; Russell Electric Co. v. Bassett, 79 Conn. 709, 66 Atl. 531.

Wheeler, J., delivered the opinion of the court:

The essentials of an action such as this, to recover a broker's commission for the sale of real estate, are the employment of the broker by the owner to sell his real estate, upon certain named terms, and the procurement by the broker of a customer willing, ready, and able to purchase upon these terms. Abbott v. Lee, 86 Conn. 392, 85 Atl. 526; Home Bkg. & Realty Co. v. Baum, 85 Conn. 383, 387, 82 Atl. 970. The difficulty in supporting the judgment is that the facts found upon which the appeal must be determined do not disclose the cause of action of the complaint, nor, indeed, any cause of action.

One ground of error, and the only one which we shall discuss, is in the holding of the court that the plain-

Broker—when
entitled to com-
mission.

tiff was the procuring cause of the sale.

Such a finding is to be regarded as one of fact and conclusive "unless contrary to or unsupported by the subordinate facts, or in conflict with the settled rules of logic and reason, or found in violation of some rule or principle of law." *Seward v. M. Seward & Son Co.* 91 Conn. 190, 193, 99 Atl. 888.

Appeal—finding that broker was procuring cause of sale—effect.

The conclusion of the trial court that the plaintiff was the procuring cause of this sale rests on the allegation that he found a purchaser for the property, Mrs. Brody, and gave the defendant Wall the name and address of this purchaser, and subsequently, upward of two months later, Wall sold the property to Mrs. Brody for the purchase price of \$16,300.

It is not alleged that this price was a part of the terms of sale, for which the plaintiff was employed to sell. It is not alleged that Mrs. Brody ever accepted these terms of sale, or was ever ready, willing, and able to buy on these terms. There is no express allegation and no facts from which could be inferred that the plaintiff was the procuring cause of the sale. What occurred between the time when the plaintiff found Mrs. Brody and June 20th, which induced or may have induced Mrs. Brody to make this definite offer, does not appear. How the defendant came to sell to Mrs. Brody does not appear.

The mere fact that the plaintiff brought the purchase of this property to the attention of Mrs. Brody, and that, over two months later, she purchased it, does not of itself furnish a sufficient basis from which the inference must necessarily follow that the plaintiff was the procuring cause of the sale.

Broker—what shows procuring cause of sale.

The finding of facts does state that the plaintiff was the procuring cause of the sale, but this is not supported by the subordinate facts, and

this conclusion is not consistent with the facts found.

The facts found do not show that the employment of the plaintiff covered the sale of this property upon any stated terms or for any stated price. They do not show that the plaintiff ever accepted any terms or price for which the plaintiff was authorized to effect the sale. They do not show that the plaintiff interested Mrs. Brody to the point that she accepted, or was ready to accept, the terms of sale which the plaintiff was authorized to make.

They merely show that during April and May the plaintiff secured from Mrs. Brody successive offers, the last one being \$16,200, and submitted all of these offers to Wall and he rejected them; and that, on or about the following June 15th, Mrs. Brody called to her assistance another broker, and through him offered \$16,300 for the property, which offer Wall accepted and subsequently consummated the sale.

The finding of a prospective purchaser is not the only service of the broker; a large part of his effort, perhaps the greater part, is in inducing, either the purchaser to meet the seller's terms and price, or the seller to make concessions in the terms to meet the purchaser's wishes.

In this case, so far as the finding discloses, Mrs. Brody did not purchase or offer to purchase upon terms satisfactory to the defendant as the result of the effort or service of the plaintiff. On the contrary, it is found that another broker, at the instance of the purchaser, induced the defendant to sell the property to Mrs. Brody for \$100 more than Mrs. Brody had offered him through the plaintiff.

No question of bad faith on the part of the seller, or of Mrs. Brody, arises on the record.

The fact that the plaintiff first called Mrs. Brody's attention to this property is not of controlling significance. Who was the procuring cause of the sale is the controlling factor. And it may or may not be

the one who first called the purchaser's attention to the purchase of the property.

If the prospective purchaser whom a broker introduces to the owner is not able, ready, and willing to buy on the owner's terms, or his decision is not reported to the owner, and thereafter another broker procures this same purchaser to accept the owner's terms, or to make an offer which the owner accepts, the first broker is not entitled to recover a commission, since he cannot be said to be the procuring cause of the sale. The broker's services are not the test, but rather the success of his effort in effecting a sale or in producing a customer ready, able, and willing to buy on the owner's terms.

The employment of a broker without naming a price of sale places it in the power of the owner to reject any offer brought to him. *Cadigan v. Crabtree*, 179 Mass. 474, 480, 481, 55 L.R.A. 77, 88 Am. St. Rep. 397, 61 N. E. 37.

An owner may, while negotiations remain unsuccessful, and before the broker has produced the customer able, ready, and willing to buy on the owner's terms, discharge the broker, and, if the owner subsequently sell to the customer with whom the broker has unsuccessfully negotiated, the owner will not be liable to the broker for his commissions, provided he be acting in good faith, and not seeking to escape payment of the commission by making the sale himself. *Leonard v. Eldridge*, 184 Mass. 594, 595, 69 N. E. 337.

"A broker who does not have the exclusive sale of real estate does not become entitled to a commission merely by bringing the property to the attention of the person who finally buys it, but he must also show that his services were the efficient or effective means of bringing about the actual sale. . . . One may have found the customer who otherwise would not have been found, and yet the customer may re-

fuse to conclude the bargain through his agency; and another broker may succeed where the first has failed." *Whitcomb v. Bacon*, 170 Mass. 479, 481, 64 Am. St. Rep. 317, 49 N. E. 742.

The situation presented in *Earp v. Cummins*, 54 Pa. 394, 397, 93 Am. Dec. 719, is that here, and the supreme court of Pennsylvania thus states the rule governing that situation: "But if the services of the broker, whatever they be, fail to accomplish a sale, and several months after the proposed purchaser has decided not to buy, he is induced by other persons to reconsider his resolution, and then makes the purchase as the consequence of such secondary or supervening influence, the broker has no right to a commission."

See *Higgins v. Miller*, 109 Ky. 209, 213, 58 S. W. 580; *Carper v. Sweet*, 26 Colo. 547, 548, 59 Pac. 45; 9 C. J. vol. 9, pp. 599, 611, 618; 19 Cyc. 261.

The plaintiff did not have the exclusive sale of this property, and upon the facts found cannot be held to be the procuring cause of the sale. If his bringing of Mrs. Brody to the attention of the owner may be said to be one of the causes leading to the sale, Pierson's services must also be said to be one of the causes. And between these two causes it would be the duty of the trier to say which was the efficient or effective one,—which the procuring cause of the sale.

Trial—question of fact—procuring cause of sale.

The facts, so far as they appear, show that the plaintiff was not, but Pierson was, the procuring cause of the sale.

There is error; the judgment is set aside and new trial ordered.

The other judges concur, except Gager and Case, JJ., who dissent.

Gager, J., dissenting:

During April and May the plaintiff secured successive offers for the property from Mrs. Brody, not accepted by the defendant. Mrs. Brody

—right to discharge.

did not abandon her desire to purchase, but employed a broker, Pierson, to assist her in the purchase. Through him she offered directly to the defendant \$100 more than her last offer, made through the plaintiff, which the defendant accepted. No other person than the plaintiff acted for the defendant, either by employment or as a volunteer, and the plaintiff was not discharged by the defendant. The case, put baldly, is: Pierson was Mrs. Brody's agent alone, and therefore his acts were hers. She then comes up \$100 more, and reports over the head of the plaintiff, defendant's agent, to the defendant, who immediately accepts, and the majority opinion holds that the plaintiff was not the procuring cause of the sale. If this is so, the case of the broker is hazardous indeed. He must isolate the intending vendee so that he cannot procure advice in determining how high a price to offer, and so that the intending vendee cannot report directly to the owner. Suppose Mrs. Brody, after her last offer to the plaintiff, had thought the matter over entirely by herself, and then had gone directly to the defendant with a higher offer, which was accepted. Could it reasonably be said that the broker was not the procuring cause? And does it alter the case that she employs someone to aid her in coming to a conclusion? It seems to me that the opinion from which I dissent either overlooks the decisive fact that Pierson was the purchaser's agent alone, and in no sense represented the owner, or else holds that reporting the final offer directly to the owner over the broker's head is effective to defeat the claims of the broker. Neither of these alternatives seems to me good law or good business sense.

It is sought to fortify the results reached by two citations which I concede to be good law, but quite irrelevant to the facts of this case. In *Earp v. Cummins*, 54 Pa. 394, 93 Am. Dec. 718, the question was upon the correctness of a charge to the jury that "it is the sole business of

the real estate broker to bring buyer and seller together." Of course, this charge was held incorrect. But the facts as stated in the opinion were: "Although the property was advertised by the broker, and the attention of the purchaser was first called to it in that way, yet the evidence was that he declined to purchase, and all negotiations for a sale were abandoned for several months, nor was the purchase finally made until other parties again brought the property to his notice, and then Young, the purchaser, says he bought it, not in consequence of Cummins's advertisement, but by reason of this renewed recommendation by other parties. If anybody could tell how he bought, in consequence of what cause, Young himself was the proper witness, and he swore, 'I was not influenced by Mr. Cummins at all in making this purchase. I did not know him in the transaction; he had nothing to do with the purchase so far as I know.'"

Undoubtedly, with the evidence as stated, the charge was erroneous, and the jury should have passed upon the claims of the purchaser that the original negotiations had been abandoned.

In the present case there was no abandonment of negotiations, no declination to purchase for several months, and no calling the attention of the purchaser after several months, by other parties, for Pierson, by reason of his employment by Mrs. Brody, was in legal effect Mrs. Brody herself.

The other case cited is *Whitcomb v. Bacon*, 170 Mass. 479, 64 Am. St. Rep. 317, 49 N. E. 742. This was a case of two independent brokers, each acting for the owner of the property. One of them, the plaintiff, had been employed, but not exclusively, and had not effected a sale, and the proposed purchaser had testified that he never made an offer to the plaintiff, but had told him he was done with the matter. Later, another broker, learning the property was for sale, first saw the

owner and then opened negotiations with the first proposed purchaser, and finally effected a sale. Here again the broker effecting the sale

was in no sense the purchaser's agent.

I think there was no error.

In this opinion Case, J., concurs.

ANNOTATION.

Right of real estate broker to commissions where he was unable to procure an offer of the owner's price from one whom he interested, and who subsequently, without his intervention, purchased at that price.

As is indicated by the title, the present annotation excludes cases in which the owner, to effect the purchase, has subsequently made some concession as to price or terms upon which he insisted at the time the broker was negotiating with the purchaser.

One general principle is well settled relating to the right of a real estate broker with whom property is listed to recover a commission upon a sale of the property, viz., that, in the absence of a special contract, he must be the procuring cause of the sale. When a real estate broker is the procuring cause of a sale is a question of considerable difficulty; in the main, it is a question of fact. This being true, while it may be found, upon the showing of some act by the broker, that he was the procuring cause of the sale, it does not follow that the doing of such thing by the broker invariably entitles him to his commission. For example, a broker may be found to have been the procuring cause of a sale where the only act done by him was to show the property to the purchaser, or even to call his attention to it, the sale being completed by the owner. But it does not follow in every instance that the showing of the property or calling attention to it entitles the broker to commission. The present discussion assumes that the broker has been unable to obtain an offer of the owner's price from the prospective purchaser obtained by him. Where there is no agency for a definite time, with an agreement to pay commissions if the property is sold within this time, no matter by whom, and the broker's failure results in an abandonment of his efforts, the cases within the scope of this note adhere uniformly to the prin-

ciple that the broker does not, by the mere fact that he had shown the property to a prospective customer, or interested a customer therein, preclude the owner, either by himself or through another broker, from selling the property to such customer without liability for commissions.

Colorado.—*Carper v. Sweet* (1899) 26 Colo. 547, 59 Pac. 45; *Babcock v. Merritt* (1891) 1 Colo. App. 84, 27 Pac. 882.

Connecticut.—*ROSENFELD v. WALL* (reported herewith) ante, 1189; *Murphy v. Linsky* (1920) — Conn. —, 109 Atl. 412.

Illinois.—*Lipe v. Ludewick* (1883) 14 Ill. App. 372; *Carlson v. Nathan* (1892) 43 Ill. App. 364; *Clark v. Nessler* (1893) 50 Ill. App. 550.

Massachusetts.—*Smith v. Kimball* (1907) 193 Mass. 582, 79 N. E. 800.

Minnesota.—*Armstrong v. Wann* (1882) 29 Minn. 126, 12 N. W. 345. See *Fairchild v. Cunningham* (1901) 84 Minn. 521, 88 N. W. 15, *infra*.

New York.—*Wylie v. Marine Nat. Bank* (1875) 61 N. Y. 415; *White v. Twitchings* (1882) 26 Hun, 503; *Hay v. Platt* (1892) 66 Hun, 488, 21 N. Y. Supp. 362; *Meyer v. Straus* (1899) 42 App. Div. 613, 58 N. Y. Supp. 904; *Raynor v. Reinhard* (1920) 110 Misc. 674, 180 N. Y. Supp. 690; *Chandler v. Sutton* (1874) 5 Daly, 112; *Harris v. Burtnett* (1867) 2 Daly, 189; *Goldstein v. Walters* (1889) 15 Daly, 397, 7 N. Y. Supp. 756, 8 N. Y. Supp. 957.

Pennsylvania.—*Earp v. Cummins* (1867) 54 Pa. 394, 93 Am. Dec. 718.

A case which quite clearly illustrates the application of these principles is *Wylie v. Marine Nat. Bank* (1875) 61 N. Y. 415. In that case the broker was authorized to sell the prop-

erty for \$80,000; he showed the property to a prospective purchaser, who offered \$75,000,—an offer which was communicated to the owner, with a request for an interview, which was declined by the owner for a reason stated, and the additional reason that he would rather put it off until later; the broker did not say that he would call upon the owner again, or that an interview would be had at the future time indicated by the owner; he reported to the prospective customer that \$80,000 was the least that would buy the property, that the owner would do nothing about it that day, and that it was of no consequence or use, or something to that effect; on the same day the prospective purchaser, having heard that other parties were trying to purchase the property, procured a third person to go to the owner to see how the matter stood; after some negotiations, the third person was authorized to offer \$80,000, that offer was accepted, and the sale was made. In denying a recovery of commission to the first broker, the court said: "Upon these facts I am of opinion that plaintiff did not earn his commissions. He was authorized to find a purchaser at \$80,000, and was informed that that was the least sum the bank [the owner] would take. He had tried for several days to find a purchaser at that sum; and after he was informed that that was the least sum the bank would take, he made an offer of only \$75,000 on behalf of parties then unknown to Elwell [the bank president]. When that offer was declined he gave no intimation that he could probably get a better offer, and made no request that the bank should hold the property for further negotiation with his parties. It is true that he requested that the parties should then be brought together; but when Elwell declined this, and stated he would rather put off the meeting until Monday, there was no intimation that he would continue the negotiations, nor that he had any hopes that his parties would be willing to pay the \$80,000. He was never, in fact, authorized by Seirck and Muller [the prospective purchasers] to offer more than \$75,000; and,

so far as appears in the evidence, had no reason to suppose that they would pay any more. He seems to have regarded the consummation of a contract between the parties as hopeless, for, when he reported to Seirck and Muller his last interview with Elwell, and informed them that \$80,000 was the least the bank would take, he said to them that it was of no consequence or of no use. He made no arrangement or request that Seirck and Muller should raise their offer or meet Elwell on Monday. Under these circumstances the bank violated none of his rights by selling to the first party who would offer their price; and it matters not that they sold to the very party with whom plaintiff had been negotiating. He failed to find or produce a purchaser upon the terms prescribed in his employment, and the bank was under no obligation to wait any longer, that he might make further efforts."

See discussion in *Sibbald v. Bethlehem Iron Co.* (1880) 83 N. Y. 378, 38 Am. Rep. 441, *infra*.

The facts on which the broker has been denied recovery have been varied. Where an owner of property had openly listed it with two real estate brokers, one of the brokers, who was unable to effect a sale to a customer with whom he negotiated, and who made no report to the owner of the result of his efforts, but showed such customer other and cheaper property, indicating an abandonment of his efforts to sell the property in question, cannot recover commissions, although, about two months thereafter, the other agent with whom the property was listed, through his own efforts, succeeded in selling to the person to whom the plaintiff had shown the property. *Carper v. Sweet* (1899) 26 Colo. 547, 59 Pac. 45. A broker employed to make a cash sale for \$7,500,—or, within a short, definite, and limited time, at \$7,000 net,—who, being unable to procure an offer from a person to whom he showed the property, abandoned all effort to make the sale, cannot recover upon a subsequent sale by the owner to such person at the price of \$7,000. *Babcock v.*

Merritt (1891) 1 Colo. App. 84, 27 Pac. 882. The broker rented the property to the purchaser, and, with the renting of the property, seems to have abandoned all effort to make a sale. Upon a request by an agent of the owner, the broker disclosed to the owner the name of the prospective purchaser. It was held that disclosure of the name of the purchaser created no legal liability to pay the broker a commission, but at most created only a moral obligation to pay for the information received, if beneficial. Speaking of the right of the broker to recover commission, the court said that "they had failed to find and produce a purchaser under the terms of their employment, and the owner was under no obligation to wait longer or indefinitely, and they having failed to negotiate a sale or exchange with Mr. Tompkins, or even get an offer from him, the fact that the owner subsequently sold to the same party to whom they had ineffectually attempted to sell has no legal significance. . . . I cannot indorse the proposition that the placing by the owner in the hands of brokers, perhaps two or three different firms, of property for sale for an indefinite time, creates a lien on the property in favor of the broker for commissions in case the owner sells, himself, at some subsequent time." The court in this case relies upon a statement by Daly, Chief Justice, in *Chandler v. Sutton* (1874) 5 Daly (N. Y.) 112, in which the proposition is emphatically denied that a broker employed to sell real estate, who undertook to sell to a particular person and could not, is entitled to his commission upon a subsequent sale made to that person thereafter no matter how changed the fact may have been. In the *Chandler Case*, the owner offered to sell the property for \$60,000, subject to a lease; the prospective purchaser refused to buy, and nothing further was done; subsequently, through another broker, the sale was effected for \$61,000, the lessee surrendering the lease. A broker authorized to sell property and receive for his commissions all he could obtain over a stipulated price, who,

being unable to obtain any offer satisfactory to himself, did nothing further in regard to selling the property for six months, is not entitled to commissions upon a sale by the owner directly to the customer with whom the broker had negotiated, at the net price which the owner had fixed to the broker, plus an additional amount on account of some improvements which had been placed upon the property. *Lipe v. Ludewick* (1883) 14 Ill. App. 372. In *Carlson v. Nathan* (1892) 43 Ill. App. 364, commissions were denied, where a broker was unable to secure from a prospective purchaser—who then desired to make an exchange of properties—an offer which the owner was willing to accept, whereupon all negotiations ceased, although, about a month thereafter, the owner and the prospective purchaser, being introduced by a third person, agreed upon a trade on a basis more favorable to the owner than any that the broker had been able to obtain. The court said that the broker's efforts to procure terms which his employer would accept failed; that the trade finally made was brought about by other influence after he had abandoned the business. A broker who had negotiated with two prospective purchasers looking toward a joint purchase by them, but who had not persuaded them to buy, and who thereupon ceased the negotiations, is not entitled to commissions upon a sale by the owner directly to one of the prospective purchasers between two and three months after the close of the broker's negotiations. *Armstrong v. Wann* (1882) 29 Minn. 126, 12 N. W. 345. It is stated by the court that, in order to permit a recovery of commission, the broker must have been the procuring cause of the sale. Speaking particularly with reference to the facts above stated, the court says that "as plaintiff made no bargain with King, and did not, in the negotiation he had with him and Keigher, bring him to consent to buy, and was not, during the four months after that negotiation ended, carrying on any negotiations with him, nor using any efforts with him to induce him to buy,

he was not the procuring cause of the sale, unless it can be assumed that, because of what occurred in the unsuccessful negotiation, King made defendant the offer which was accepted. This cannot be assumed; it is not indicated by the evidence. The fair inference is that, after the failure of that negotiation, King, either from something subsequently occurring, or from something occurring between him and defendant, concluded to buy." The sale in this case was made at the price at which the broker was authorized to sell, and at which he had offered it to the two persons with whom he was negotiating. A broker who offered the property to a prospective purchaser at the stipulated price, an offer which was rejected by the prospective purchaser, is not entitled to a commission upon a sale two years later at a higher price to such person, where, after the rejection of the first offer, the negotiations had been dropped and ended by the broker, and he did nothing toward bringing about the sale. *Meyer v. Straus* (1899) 42 App. Div. 613, 58 N. Y. Supp. 904. A broker who was unable to induce a person interested by him to pay the price demanded by the owner is not entitled to a commission upon a subsequent sale to such person at the price fixed, through other brokers, and the mere fact that the first broker prophesied that the person thus interested by him would, at some future time, come to the owner's terms, does not aid his case. *Goldstein v. Walters* (1889) 15 Daly, 397, 7 N. Y. Supp. 756, 8 N. Y. Supp. 957. There was a further fact, however, in this case, that the owner did not know the sale was made to the purchaser interested by the first broker, but believed that the sale was made to a member of the second brokerage firm. Where a real estate broker directed the attention of a prospective purchaser to the property, but the latter declined to purchase, and all negotiations were abandoned for several months, such broker is not entitled to commission upon a sale finally made to such purchaser through other parties, who again brought the property to his notice.

Earp v. Cummins (1867) 54 Pa. 394, 93 Am. Dec. 718. A real estate broker who never succeeded in securing a definite offer, at least one that was acceptable to the owner, and who, therefore, allowed negotiations to come to an end, cannot recover commission upon the subsequent sale of the property by the owner directly to a person who had originally been interested by the efforts of the broker, although the owner was not aware of the fact, the sale having taken place through the efforts of the purchaser himself, who sought an introduction to the owner, and negotiated directly with him. *Smith v. Kimball* (1907) 193 Mass. 582, 79 N. E. 800. A broker who merely calls the attention of a prospective purchaser to the property and price asked therefor, without obtaining any offer from him, is not entitled to commissions upon a sale to such person at the stipulated price, two years later, through independent sources. *Hay v. Platt* (1892) 66 Hun, 488, 21 N. Y. Supp. 362. The broker here claimed that negotiations between the prospective purchaser and the owner were merely held in abeyance until negotiations then being conducted by the prospective purchaser with relation to other property were determined. But this was denied by the court, which states that the suggestion that during the two years of nonaction, the owner was waiting for the prospective purchaser to close a southern negotiation, and that in fact both companies were abiding the result of these other negotiations, was entirely without support in the evidence. A broker who secured an offer of \$5,000 for property, which he advised the owner not to accept, is not entitled to commissions upon a subsequent sale negotiated by the owner directly, at an advanced price, to the person who made the offer. *White v. Twitchings* (1882) 26 Hun (N. Y.) 503.

A broker authorized to sell a store for \$2,000, and the building in which the store was located for \$7,000, who procures two persons willing to pay \$8,500 for the store and building, an offer that is refused, cannot recover commissions, where, after the broker

has remained inactive for weeks, the owner in good faith has sold to one of the persons making the above offer through the broker, for \$9,000. *Re Nielson* (1920) — Mass. —, 127 N. E. 514.

A broker who introduced a prospective purchaser, but failed to interest him in the property, is not entitled to his commission where the owner, through her husband, ten months thereafter, sold the property to the purchaser thus introduced, the sale having resulted not from the efforts of the broker, but because of some road improvements leading to the property. *Ford v. Shaffer* (1918) 143 La. 635, 79 So. 172. Some change in the terms of sale was made, the purchaser not taking cattle which were to be sold with the place when offered by the broker, thus obtaining the property at a less price.

While this note does not deal generally with cases in which the sale is made to a person other than the one interested by the broker, some cases of this class have been included for the reason that the broker's efforts were indirectly the cause of interesting the person to whom the sale was finally made. A real estate broker employed to sell city property at \$100 per front foot, who obtained an offer of \$95, which was refused by the owner, who said the price had reached \$125, and that there was no use bringing any lower offer, whereupon the real estate broker did nothing more about the transaction, is not entitled to commissions upon a sale thereafter to a person other than the one with whom the broker was negotiating, at \$100 per front foot. *Clark v. Nessler* (1893) 50 Ill. App. 550. In this case an offer was made jointly by the person to whom the sale was finally made, and persons with whom the broker had been negotiating. The owner refused this, but did sell to the person other than the one with whom the broker was negotiating. The court states that the broker never found a customer, then willing to buy on the terms which the owner afterwards accepted, and apparently gave up the attempt to sell at all; that the business as to

all parties concerned was at an end; and had no sale afterwards been made, it is not probable that the broker would ever have claimed any commission; and further states that the sale that was made was brought about through other influences, and therefore the broker was not entitled to commission. The offer at \$95 per front foot was obtained in July. The sale was made by the owner in October. A broker employed to sell property, who found a prospective purchaser who was willing to take the property in part payment for other property, a proposition which the broker's employer rejected, is not entitled to commissions upon a sale of the property about a year and a half later, to the prospective purchaser, as agent for his wife, the broker, after the rejection of the first proposition, having done nothing looking toward the confirmation of the exchange. *Harris v. Burtnett* (1867) 2 Daly (N. Y.) 189.

When the broker will be deemed to have abandoned his efforts to sell is a question which depends upon the facts of the individual case. In the foregoing cases those facts, so far as they appear in the reports, have been shown. In few of the cases has there been any discussion of what amounts to an abandonment. In *Lipe v. Ludewick* (1883) 14 Ill. App. 372, the facts in which are set forth above, the broker had removed from the vicinity shortly after his efforts at a sale had failed, and for more than six months neither the owner nor the prospective purchaser had heard from him. Upon these facts the court states that the owner was fully justified in treating all negotiations for a sale as abandoned, and in making sale himself to the prospective purchaser. See *Wylie v. Marine Nat. Bank* (1875) 61 N. Y. 415, *supra*.

Where the owner has rightfully revoked the broker's authority after unsuccessful efforts by the broker, the owner may sell to the person with whom the broker was negotiating, without liability for commission. It is stated in *Fairchild v. Cunningham* (1901) 84 Minn. 521, 88 N. W. 15,

that "where an agent opens negotiations for such a sale, fails to bring the intending purchaser to definite terms, and the negotiations are abandoned, he is not entitled to a commission, even though the owner of the property subsequently sells the same to the person with whom the agent previously negotiated." It appears, however, in this case, that, subsequently to the failure to obtain an offer from the purchaser, the broker's authority to sell was revoked, and the exclusive agency given by the owner to another broker. The court states that after the revocation of his authority, whatever was done by the broker was wholly voluntary on his part. That after the termination of the agency his authority to act for defendants could be renewed only by new arrangement with them. It appeared that after the revocation of his authority, a purchaser with whom he had previously negotiated for the sale of the property inquired of him as to whether the property was still for sale, whereupon the broker inquired of the defendants whether the property was still for sale, and they informed him that it was not, for the reason that the exclusive agency of the sale had been given to the other broker. Here the matter dropped as between the broker and the owner, but about a month later, the prospective purchaser made an application to the owner personally, and negotiations between them resulted in the sale of the property. In *Sibbald v. Bethlehem Iron Co.* (1881) 83 N. Y. 378, 38 Am. Rep. 441, the agency of a broker for the sale of steel rails was terminated by the manufacturer after several unsuccessful efforts on the former's part to sell to a certain company; subsequently a sale of iron rails was effected to this company, whereupon the broker claimed commission. This case contains a very excellent general discussion of the right of a broker to commission, as follows: "It follows as a necessary deduction from the established rule, that a broker is never entitled to commissions for unsuccessful efforts. The risk of failure is wholly his. The reward comes only with his success.

That is the plain contract and contemplation of the parties. The broker may devote his time and labor and expend his money with ever so much of devotion to the interests of his employer, and yet, if he fails,—if, without effecting an agreement or accomplishing a bargain, he abandons the effort, or his authority is fairly and in good faith terminated,—he gains no right to commissions. He loses the labor and effort which were staked upon success. And in such event it matters not that, after his failure and the termination of his agency, what he has done proves of use and benefit to the principal, in a multitude of cases that must necessarily result. He may have introduced to each other parties who otherwise would have never met; he may have created impressions which, under later and more favorable circumstances, naturally lead to, and materially assist in the consummation of, a sale; he may have planted the very seeds from which others reap the harvest; but all that gives him no claim. It was part of his risk that, failing himself,—not successful in fulfilling his obligation,—others might be left to some extent to avail themselves of the fruit of his labors." And summing up the law as applied to the facts of the case at bar, the court states that "if, after the broker had been allowed a reasonable time within which to produce a buyer and effect a sale, he has failed to do so, and the seller in good faith and fairly has terminated the agency and sought other assistance, by the aid of which a sale is consummated, it does not give the original broker a right to commission, because the purchaser is one whom he introduced, and the final sale is, in some degree, aided or helped forward by his previous unsuccessful effort."

Where the agency has not been revoked, or the negotiations abandoned by the broker, although he has been unable to effect a sale, the broker's right to commission is a question of more difficulty. In *E. S. Truitt & Co. v. Gardner* (1918) — Mo. App. —, 203 S. W. 638, there was held to be a question for the jury whether the broker

was the procuring cause of the sale, where he was conducting negotiations for an exchange of property between two owners, but was unable to obtain a definite proposition from either, when a second broker intervened and obtained a proposition upon which the trade was consummated. In sustaining a finding that the broker was the procuring cause of the sale, the court states that it was apparent that the trade was not "consummated while the matter was left in plaintiff's hands, on account of the act of defendant in refusing to make a propo-

sition. But even if this were not true, plaintiffs worked up the deal to a point where it required little else to consummate it than that defendants make a proposition; for, when the trade was put into the hands of Woods, and defendants consented to make a proposition, the trade was soon consummated. Under all these facts, it was for the jury to say whether or not plaintiffs were the procuring cause of its consummation, even though they secured no offer from either side before defendants 'took the deal over' to another agent." W. A. E.

SAN GABRIEL VALLEY COUNTRY CLUB

v.

LOS ANGELES COUNTY.

California Supreme Court (In Banc) — March 12, 1920.

(— Cal. —, 188 Pac. 554.)

Water — right to prevent hastening of flow.

1. A riparian owner has no right to complain of the construction along the bed of the stream above his land of an impervious channel to carry the water, although the effect is to prevent its spreading outside its channel and percolating through the bed and sides and thereby to hasten the flow through his land to its injury, if the improvement is reasonably necessary to protect the property past which the water flows.

[See note on this question beginning on page 1211.]

— artificial channel — effect of lapse of time.

2. A channel formed across one's land by water concentrated by improvements by settlers along its course may ripen into a natural watercourse by lapse of time.

— channel dry at certain seasons.

3. A channel with definite beds and banks, carrying water in the winter and spring, may be a watercourse, although dry at other seasons of the year.

Parties — effect of absence.

4. No relief can be afforded in an action against a county for wrongfully casting water upon one's property for water drained into the channel by a city which is not a party to the action.

Definition — surface waters.

5. Surface waters are such as fall on the land by precipitation from the skies or arise in springs and spread

over the surface of the ground without being collected into a definite body.

Water — right to discharge surface water in mass.

6. A landowner must not gather surface water together on his land by artificial means, and discharge it onto lower land in greater volume or in different manner than it would naturally be discharged.

— effect of exceeding capacity of stream.

7. The right to hasten the drainage along a watercourse is not limited to the natural capacity of the stream so as to entitle a lower riparian owner to damages in case his land is flooded by the increased flow of the water.

Constitutional law — public improvement — compensation for property injured.

8. Injury to riparian land by the in-

creased flow of the stream due to public improvements is not within a constitutional provision requiring com-

pensation for property taken or damaged for public use.

[See 9 R. C. L. 684.]

CROSS APPEALS from a judgment of the Superior Court for Los Angeles County (Works, J.) in favor of plaintiff in part only, in an action brought to recover damages for injuries to his land, alleged to have been caused by the construction of certain storm drains by the defendant county, and to enjoin the further use of said drains; plaintiff appealing from the refusal to grant an injunction, and defendant appealing from the judgment awarding damages to plaintiff. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Hickcox & Crenshaw, for plaintiff:

Where property is taken or damaged for a public use without compensation being made or tendered, according to the law providing therefor, the person who is thus wronged has a right to have the taking or damaging restrained until such compensation is made.

Lewis, Em. Dom. §§ 883, 902; Rudel v. Los Angeles County, 118 Cal. 281, 50 Pac. 400.

Plaintiff was entitled to its injunction.

Learned v. Castle, 78 Cal. 454, 18 Pac. 872, 21 Pac. 11; Mendelson v. McCabe, 144 Cal. 230, 103 Am. St. Rep. 78, 77 Pac. 915; Allen v. Stowell, 145 Cal. 666, 68 L.R.A. 223, 104 Am. St. Rep. 80, 79 Pac. 371; Nicholson v. Getchell, 96 Cal. 394, 31 Pac. 265; Connor v. Southern P. R. Co. 122 Cal. 681, 55 Pac. 688; Geurkink v. Petaluma, 112 Cal. 306, 44 Pac. 570; Shaw v. Sebastopol, 159 Cal. 623, 115 Pac. 213; Sievers v. Root, 10 Cal. App. 337, 101 Pac. 925; Galbreath v. Hopkins, 159 Cal. 297, 113 Pac. 174; Ryan v. Weiser Valley Land & Water Co. 20 Idaho, 288, 118 Pac. 769; Weiser Valley Land & Water Co. v. Ryan, 111 C. C. A. 221, 190 Fed. 425; Holmes v. Calhoun County, 97 Iowa, 360, 66 N. W. 145; Bass v. Metropolitan West Side Elev. R. Co. 39 L.R.A. 711, 27 C. C. A. 147, 53 U. S. App. 542, 82 Fed. 857; Spring Valley Waterworks v. San Francisco, 124 Fed. 574.

An action lies against a county for damages caused by the construction, maintenance, and operation of improvements under the Protection District Act of 1895 and amendments.

Rudel v. Los Angeles County, 118 Cal. 281, 50 Pac. 400; Perkins v. Blauth, 163 Cal. 782, 127 Pac. 50; Hopkins v. Clemson Agri. College, 221 U. S. 636, 55 L. ed. 890, 35 L.R.A. (N.S.)

9 A.L.R.—76.

243, 31 Sup. Ct. Rep. 654; Barnes v. District of Columbia, 91 U. S. 540, 23 L. ed. 440; Davenport v. Dodge County, 105 U. S. 237, 26 L. ed. 1018.

Plaintiff's amended complaint did not set up a different cause of action from that stated in its original complaint, and is not barred by the Statute of Limitations.

Rauer's Law & Collection Co. v. Lefingwell, 11 Cal. App. 495, 105 Pac. 427; Ruiz v. Santa Barbara Gas & E. Co. 164 Cal. 188, 128 Pac. 330; Frost v. Witter, 132 Cal. 421, 84 Am. St. Rep. 53, 64 Pac. 705; Merchants Collection Agency v. Gopcevic, 23 Cal. App. 216, 137 Pac. 609; Barr v. Southern California Edison Co. 24 Cal. App. 22, 140 Pac. 47.

The rains of January and February, 1914, were not of that unprecedented character that brings them within the definition of "act of God."

Oroville v. Indiana Gold-Dredging Co. 165 Fed. 550; Gulf Red Cedar Co. v. Walker, 132 Ala. 553, 31 So. 374, 11 Am. Neg. Rep. 179; Willson v. Boise City, 20 Idaho, 183, 36 L.R.A. (N.S.) 1158, 117 Pac. 115, 1 N. C. C. A. 203; Ohio & M. R. Co. v. Ramey, 139 Ill. 9, 32 Am. St. Rep. 176, 28 N. E. 1087; Polack v. Pioche, 35 Cal. 422, 95 Am. Dec. 115; Chidester v. Consolidated Ditch Co. 59 Cal. 197; Purcell v. Stubblefield, 41 Okla. 562, 51 L.R.A. (N.S.) 1077, 139 Pac. 290; Mesa De Mayo Land & Live Stock Co. v. Hoyt, 24 Colo. App. 279, 133 Pac. 471, 8 N. C. C. A. 1058; New Haven & N. R. Co. v. Quintard, 6 Abb. Pr. N. S. 128; Pengra v. Wheeler, 24 Okla. 532, 21 L.R.A. 726, 34 Pac. 354; Chicago, R. I. & P. R. Co. v. Shaw, 63 Neb. 380, 56 L.R.A. 341, 88 N. W. 508.

That the storm drains were constructed for the beneficial purpose of protecting from the flood waters the lands over which the waters would have meandered if the storm drains

had not been built does not relieve the defendant from compensating the plaintiff for the damage caused to it by the burden imposed upon its land by said drains.

Conniff v. San Francisco, 67 Cal. 45, 7 Pac. 41; *Spangler v. San Francisco*, 84 Cal. 12, 18 Am. St. Rep. 158, 23 Pac. 1091; *Los Angeles Cemetery Asso. v. Los Angeles*, 103 Cal. 461, 37 Pac. 375; *Reardon v. San Francisco*, 66 Cal. 492, 56 Am. Rep. 109, 6 Pac. 317; *Stanford v. San Francisco*, 111 Cal. 198, 43 Pac. 605; *Perkins v. Blauth*, 163 Cal. 782, 127 Pac. 50.

The flow of storm waters may not be increased upon the lands of a lower proprietor by anyone above him, whether by diversion, combination, acceleration, or augmentation, even though it may be for the increase of the beneficial use of the upper proprietor.

Lambert v. Alcorn, 144 Ill. 313, 21 L.R.A. 611, 33 N. E. 53; *Peck v. Herrington*, 109 Ill. 611, 50 Am. Rep. 627; *Todd v. York County*, 72 Neb. 207, 66 L.R.A. 561, 100 N. W. 299; *Dorr v. Simmerson*, 127 Iowa, 551, 103 N. W. 806.

A lower proprietor has a right of action against those who, by interfering with natural conditions, cause such flood waters to be discharged upon his land in greater quantities or in a different manner than would occur under natural conditions.

Heier v. Krull, 160 Cal. 441, 117 Pac. 530; *Ogburn v. Connor*, 46 Cal. 346, 13 Am. Rep. 213; *Conniff v. San Francisco*, 67 Cal. 45, 7 Pac. 41; *McDaniel v. Cummings*, 83 Cal. 515, 8 L.R.A. 575, 23 Pac. 795; *Stanford v. San Francisco*, 111 Cal. 198, 43 Pac. 605; *Rudel v. Los Angeles County*, 118 Cal. 281, 50 Pac. 400; *Wood v. Moulton*, 146 Cal. 319, 80 Pac. 92; *Cushing v. Pires*, 124 Cal. 663, 57 Pac. 572; *Shaw v. Sebastopol*, 159 Cal. 623, 115 Pac. 213; *Cox v. Odell*, 1 Cal. App. 682, 82 Pac. 1086; *Humphreys v. Moulton*, 1 Cal. App. 257, 81 Pac. 1085; *Peck v. Peterson*, 15 Cal. App. 543, 115 Pac. 327.

The lands of the plaintiff are not now and never have been riparian to the Rubio wash.

Bathgate v. Irvine, 126 Cal. 143, 77 Am. St. Rep. 158, 58 Pac. 442; *Rudel v. Los Angeles County*, 118 Cal. 281, 50 Pac. 400; *Galbreath v. Hopkins*, 159 Cal. 303, 113 Pac. 174.

The California rule is that of the civil law and the lower proprietor is thereby protected from such change in drainage as will damage him.

McDaniel v. Cummings, 83 Cal. 515, 8 L.R.A. 575, 23 Pac. 795; *Wood v. Moulton*, 146 Cal. 317, 80 Pac. 92; *Leland Stanford Junior University v. Rodley*, 38 Cal. App. 563, 177 Pac. 175; *Heier v. Krull*, 160 Cal. 441, 117 Pac. 530; *Merritt Twp. v. Harp*, 141 Mich. 233, 104 N. W. 587, 108 N. W. 746; *Ogburn v. Connor*, 46 Cal. 346, 13 Am. Rep. 213; *Gray v. McWilliams*, 98 Cal. 157, 21 L.R.A. 593, 35 Am. St. Rep. 163, 32 Pac. 976; *Larrabee v. Cloverdale*, 131 Cal. 96, 63 Pac. 143; *Sanguinetti v. Pock*, 136 Cal. 466, 89 Am. St. Rep. 169, 69 Pac. 98.

The rule of reasonable use of riparian rights, even if the rule of law heretofore established by court as to storm waters is discarded, will protect the plaintiff.

Ferrea v. Knipe, 28 Cal. 340, 87 Am. Dec. 128; *Lux v. Haggin*, 69 Cal. 255, 10 Pac. 674; *Gould v. Eaton*, 117 Cal. 539, 38 L.R.A. 181, 49 Pac. 577; *McClintock v. Hudson*, 141 Cal. 275, 74 Pac. 849; *Rosa v. Mesmer*, 142 Cal. 322, 75 Pac. 905; *Turner v. James Canal Co.* 155 Cal. 82, 22 L.R.A. (N.S.) 401, 132 Am. St. Rep. 59, 99 Pac. 520, 17 Ann. Cas. 823; *Mentone Irrig. Co. v. Redlands Electric Light & P. Co.* 155 Cal. 323, 22 L.R.A. (N.S.) 382, 100 Pac. 1082, 17 Ann. Cas. 1222; *Gulf, C. & S. F. R. Co. v. Richardson*, 42 Okla. 457, 141 Pac. 1107; *Thompson v. Andrews*, 39 S. D. 477, 165 N. W. 9; *Stanchfield v. Newton*, 142 Mass. 110, 7 N. E. 703; *Trigg v. Timmerman*, 90 Wash. 678, L.R.A. 1916F, 424, 156 Pac. 846; *Kansas City v. Slangstrom*, 53 Kan. 431, 36 Pac. 706; *Trullinger v. Howe*, 53 Or. 219, 22 L.R.A. (N.S.) 545, 97 Pac. 549, 99 Pac. 880; *Jackman v. Arlington Mills*, 137 Mass. 277; *Frisbie v. Cowen*, 18 App. D. C. 381.

Even under the common-law rule, plaintiff is entitled to damages, for the reason that defendant discharged more water into a natural watercourse than it was capable of carrying in its natural condition.

Noonan v. Albany, 79 N. Y. 470, 35 Am. Rep. 540; *Farnham, Waters, & 488*; 6 McQuillin, Mun. Corp. § 2705; *Gould, Waters, & 274*; *Baldwin v. Ohio Twp.* 70 Kan. 102, 67 L.R.A. 642, 109 Am. St. Rep. 414, 78 Pac. 424.

Messrs. A. J. Hill, Roy V. Reppy, and Salisbury & North for defendant.

Olney, J., delivered the opinion of the court:

This is an action by the plaintiff, the San Gabriel Valley Country

Club, against the county of Los Angeles to recover damages for injury alleged to have been done the plaintiff's land by the construction of certain storm drains by the defendant county, and to enjoin the further use of those drains. The trial court found that the plaintiff's land had, in fact, been damaged by the construction and the use of the drains, and awarded the plaintiff damages, but refused an injunction. From this result both sides appeal. The trial court made detailed findings of facts, the correctness of which neither side disputes, the contention of the plaintiff being that upon the findings it is entitled to the injunction sought, as well as to damages, and the contention of the defendant being that, upon the findings, the injury done the plaintiff's land was *damnum absque injuria* and the plaintiff is entitled to neither damages nor injunction.

The material facts as they appear from the findings are not particularly complicated. The plaintiff's land is situate about 6 miles south of the base of the Sierra Madre mountains. From the land to the base of the mountains the country rises on a gradual slope, and is occupied in large part by the city of Pasadena. Back of the city there debouch from the mountains, with their mouths close together, two cañons known as Las Flores and Rubio. From the mouths of these cañons there extends fanlike over the plain for 2 or 3 miles, a *débris* cone, made up of material washed down by the cañon streams. These streams are dry except during and immediately after the rainy season—that is, except during the winter and spring. During the rainy season, however, they, at times of storm, discharge onto the plain a very large volume of water. Prior to the building up of the locality these waters, on emerging from the cañons, spread out over the *débris* cone mentioned, and were dissipated without reaching the plaintiff's land.

Between 1870 and 1880 the locality became somewhat settled, and

the waters coming from the two cañons were confined and together formed a channel known as the Rubio Cañon wash, in which they flowed from 1881 until the construction in 1913 of the storm drains here complained of. This channel, as it proceeds down, joins other washes and ultimately passes through the plaintiff's land. The channels run through a porous and sandy soil, and much of the water passing down them was absorbed, prior to 1913, before reaching the plaintiff's land. In times of heavy storm also the channels would overflow and a portion of their waters be lost in that manner without reaching the plaintiff's land.

In 1913, the defendant county, through the instrumentality of two so-called protection districts, constructed the drains, two in number, in question here. They really are but a single drain, since the second is but a continuation of the first. They, or rather it, is a concrete box, of a capacity to carry all the waters of the Rubio wash, which it picks up by means of an intake dam near the head of the wash, and empties into it again about a mile above the plaintiff's land. It follows the general direction of the wash, and for some of the distance is laid in it, but for some of the distance departs from it.

In the same year the city of Pasadena constructed a drain which apparently, although the findings are not entirely clear upon the point, picked up in similar fashion the waters of East Pasadena wash, one of the tributaries, so to speak, of the wash passing through the plaintiff's land, and emptied such waters into the county drain at or near the point of junction of the Rubio and East Pasadena washes, with the result that from there on the county drain carried the water of both washes, just as the wash below that point had previously done.

Following the construction of these drains, in January and February, 1914, extraordinary and unusual rains occurred in the region,

and a great volume of water was passed through the drain and emptied into the wash below, and, continuing down it, very substantially damaged the plaintiff's land. The plaintiff thereupon brought this action, because of the injury so done it and the danger of similar injury being done again.

The court further finds, in effect, that the action of the county drains is solely upon the water in the washes; in other words, the drains are substitute conduits for the washes. It follows at once, and the court so finds, that, so far as augmenting the volume of the stream in the wash below and passing the plaintiff's land, the action of the drains is twofold, and twofold only: First, they prevent any water escaping from the channel above in time of flood and overflowing the surrounding country, and thereby being in large measure dissipated and lost; second, they act as an impervious and direct, smooth and unobstructed, and therefore speedier, conduit in place of the washes with their pervious bottoms and sides, and indirect, broken, and obstructed, and therefore slower, channels. The amount of the absorption by the porous bottoms and sides of the washes must have been considerable, and the court so finds, and it is plain that to the full extent of this the volume of water in the stream below the drains is increased. The speedier passage of the water through the drains would also of itself augment the volume below in times of storm, at least to the extent to which it brings more nearly together at one time in the channel the storm waters from the mountains and those from the plain immediately about. But the whole effect of the drains, so far as increasing the volume in the stream is concerned, may be summed up by saying that they add no water to that already in the channel and that which would come to it on the way, but merely serve to pass such waters more completely and more speedily from one point in the channel to an-

other, all entirely above the plaintiff's land.

So far as the velocity of the water in the wash as it passes the plaintiff's land is concerned, it is apparent that the drains do not affect it otherwise than to the extent to which the velocity is increased by an increased volume of water. The plaintiff's land is a mile or more below the lower end of the drains, and any impetus the water may have as it emerges from the drains must be lost long before reaching the plaintiff's land. There is no increase in velocity, in other words, except such as is a necessary incident of an increased volume.

The case presented by the findings is therefore simply one where a public authority has constructed an artificial conduit which, to the extent of its length, but no further, acts as, and only as, a substitute for a natural channel, which continues on down to and through the plaintiff's land a mile or so below. It should also be noted that there is no finding, and there is nothing to indicate, that this artificial conduit was not a reasonable improvement for the benefit and protection of the territory through which the natural channel for which it was a substitute ran, or that it was constructed in a manner more burdensome to the plaintiff than was required for the purpose for which it was constructed. The question presented may be thus stated: Has the owner of land through which a natural water channel runs a right to complain of an improvement of that channel above his land? For the substitute conduit is but that, and has no other effect, when the improvement is a reasonable one for the benefit of the upper land through which the channel runs, and is not constructed in an unreasonable manner.

Before discussing this question, there are certain matters which should be disposed of preliminarily. We have referred to the Rubio Cañon wash and the continuation of it through the plaintiff's land as a

natural water channel. In one sense it is not that. It did not exist as a definite watercourse, at least as far as the plaintiff's land, before the region was settled up, but was created as the result of settlement. Nevertheless it is natural in the sense that it was originally made by the waters themselves, and not by man, although it is possible that except for the acts of man the waters would not have been kept together so as to make a channel. In any event it has now existed for such a length of time as the channel for the natural drainage of the watershed tributary to it that the manner of its creation is not material, and it has all the attributes of a water channel wholly natural in origin. Reading v. Althouse, 93 Pa. 400.

Likewise, it is a watercourse in the legal sense, although dry except in the winter and spring, and very possibly at intervals even in these seasons. It is a channel with defined bed and banks, made and habitually used by water passing down as a collected body or stream in those seasons of the year and at those times when the streams in the region are accustomed to flow. It is wholly different from a swale, hollow, or depression through which may pass surface waters in time of storm, not collected into a defined stream. Conniff v. San Francisco, 67 Cal. 45, 7 Pac. 41; Spangler v. San Francisco, 84 Cal. 12, 18 Am. St. Rep. 158, 23 Pac. 1091; Los Angeles Cemetery Asso. v. Los Angeles, 103 Cal. 461, 37 Pac. 375.

Mention should also be made of the East Pasadena drain, constructed by the city of Pasadena. Apparently, from the findings, it is of the same character as the drains constructed by the county; that is, it serves only to carry waters already collected in the East Pasadena wash, and does not serve to collect other waters and add them to those already there. But, however this may be, the drain was not constructed by

the county, and no relief in regard to it can be given in this action, which is against the county alone. While it discharges into the county drains, this fact is not material, since, if the latter were not there, it would discharge into the wash, and its waters would then, as now, pass down the wash to the plaintiff's land.

It should also be observed at the outset that the present case is not concerned with surface waters. Such waters, in the legal sense, are those which fall on the land by precipitation from the skies, or arise in springs and spread over the surface of the ground without being collected into a definite body. McDaniel v. Cummings, 83 Cal. 515, 8 L.R.A. 575, 23 Pac. 795; 3 Farnham, Waters, § 278. As to such waters the rule has been established by numerous decisions in this state that a landowner may not gather them together on his land by artificial means and discharge them onto lower-lying land in greater volume or in a different manner than they would naturally be discharged. Of this character are the following decisions cited on behalf of the plaintiff: Conniff v. San Francisco, supra; Stanford v. San Francisco, 111 Cal. 198, 43 Pac. 605; Cushing v. Pires, 124 Cal. 663, 57 Pac. 572; Galbreath v. Hopkins, 159 Cal. 297, 113 Pac. 174; Shaw v. Sebastopol, 159 Cal. 623, 115 Pac. 213; Heier v. Krull, 160 Cal. 441, 117 Pac. 530; Cox v. Odell, 1 Cal. App. 682, 82 Pac. 1086; Peck v. Peterson, 15 Cal. App. 543, 115 Pac. 327; and Leland Stanford Junior University v. Rodley, 38 Cal. App. 563, 177 Pac. 175. But the present case is not concerned with surface waters, and the foregoing decisions are not in point. The waters upon which the drains here in question act have lost their character as surface waters before they reach the drains, and have already been gathered into a definite body

Parties—effect of absence.

Definition—surface waters.

Water—artificial channel—effect of lapse of time.

—channel dry at certain seasons.

Water—right to discharge surface water in mass.

flowing as a stream in a watercourse. The difference between surface waters and those collected and flowing in a watercourse is well recognized, and the same rules by no means apply to one as to the other.

Likewise, the distinction should be observed at the outset, between the present case and such decisions as *Rudel v. Los Angeles County*, 118 Cal. 281, 50 Pac. 400, *Larrabee v. Cloverdale*, 131 Cal. 96, 63 Pac. 143, *Wood v. Moulton*, 146 Cal. 317, 80 Pac. 92, and *Humphreys v. Moulton*, 1 Cal. App. 257, 81 Pac. 1085, which are also cited on behalf of the plaintiff. These cases were all concerned with water in watercourses, and with improvements or changes in drainage. So far, they resemble the case at bar. But in all of them, unlike the present case, the improvement or change did not have the effect merely of passing down the water in a stream more completely and speedily from one point in its channel to another, but of diverting it entirely from its channel and discharging it either into a different channel in which it did not naturally flow, or upon neighboring land where there was no channel.

Of these cases *Rudel v. Los Angeles County* is particularly relied upon, and we are referred so strongly to it as determinative here that a statement of it may not be amiss. It involved an earlier attempt by the county to dispose of the same waters as those which are now disposed of by the present drains. Instead, however, of passing these waters down to a lower point in their channel, as it is now attempted to do, it was planned to divert them entirely, and to discharge them into another watercourse to the east, in which they did not normally flow. So to do was to impose upon such other channel the burden of carrying the drainage of a watershed not tributary to it. Upon this ground the carrying out of the improvement was enjoined, at the instance of a landowner through whose property the second channel ran. The question so presented and determined is manifestly

different from the question here, where the channel involved is the natural drainage outlet for the water involved, and the improvement complained of is one which, as we have said, merely passes the water more completely and more speedily from one point in the channel to another, both points being entirely above the plaintiff's land.

Passing now to this question, the ultimate one in the case, it cannot be said that there is any decision in this state dealing with just such facts, or which seems on a first reading to be directly in point. But when the plaintiff's position is analyzed, and the rule is ascertained upon which the plaintiff must depend as the law, in order to have a cause of action, it appears clearly that such rule is opposed to previous decisions by this court, and is not the law. The plaintiff's complaint is solely that the drains increase the volume and speed of the water in passing its land. No complaint is made of the manner in which the drains are constructed, or that they are not reasonable improvements for the district they are designed to protect, or that they are unnecessarily injurious to the plaintiff, or that they bring into the channel water for which it is not the natural drainage outlet, or, in a word, that there has been any wrong committed into which there enters any factor other than simply an increase in the volume of the stream, and consequent increase of speed and height produced by artificial means. The plaintiff's position is, and must necessarily be, that the owner of land through which a watercourse passes has the right to have the stream flow by, exactly as it would naturally flow, and may complain of any increase of volume, no matter how caused, providing only it be caused by artificial means. But this position is directly opposed to the decisions of this court that a riparian owner may construct embankments or levees along the bank of the stream to prevent the overflow and erosion of his land. *Barnes v.*

Marshall, 68 Cal. 569, 10 Pac. 115; Lamb v. Reclamation Dist. 73 Cal. 125, 2 Am. St. Rep. 775, 14 Pac. 625; De Baker v. Southern California R. Co. 106 Cal. 257, 46 Am. St. Rep. 237, 39 Pac. 610.

The inevitable effect of such an embankment, which holds the waters of the stream within its channel and prevents them from widening the channel by erosion, is to increase the volume and speed of the stream at times of high water, both in front of and below the embankment. Such increased volume and speed may damage lands below, and yet the decisions mentioned hold that

—right to prevent hastening of flow. such damage is damnum absque injuria. There is no

essential difference between these cases and the present. Under them the county, without any liability to the plaintiff, could unquestionably have constructed dikes along the banks of the Rubio wash, which would have held within them all overflow waters and prevented seepage through the banks. Such dikes would have increased the volume of water below, and consequently its rate of flow, and would also have passed the water along more rapidly from one point in the channel to another. But the drains here complained of serve exactly the same purpose—that of protecting the lands on each side of the stream—and have identically the same effect and no other. The only difference between the drains and such embankments is that the former accomplish their purpose somewhat more completely and effectively than the latter would. But the purpose is the same, the manner of accomplishing it—that of restraining the waters—is the same, and the results are the same except for some difference in degree. Nor is this difference in degree material, since, to repeat, there is no contention that the drains are an unreasonable means of accomplishing the purpose for which they were built. The complaint is not against the means adopted, but against the

necessary incidents of the purpose itself. But the purpose is a lawful one, and the decisions mentioned determine that no cause of action arises merely because of what is a necessary incident of the accomplishment of this purpose.

The plaintiff's position is based on the much-quoted maxim, "*aqua currit et debere currere ut currere solebat.*" But there are many departures from this rule, of which the right to a reasonable use of the water in the stream by an upper riparian owner is perhaps the most familiar. The exercise of this right in most cases diminishes the flow. But there are uses which at times increase it, as, for example, where dams are put in for the use of mills, and the water is allowed to escape at times in greater volume than the stream would then otherwise carry. In such a case no right of action by a landowner below exists, because of the increase of volume and consequent acceleration of flow, provided the use is a reasonable one and exercised in a reasonable manner. The reason for permitting such departure from the maxim quoted is that not to do so would be largely to destroy the usefulness of the stream. 2 Farnham, Waters, §§ 475, 476.

The present case is not wholly analogous to those just mentioned, but the reason for it is much the same, and is indeed stronger. Not to permit an upper landowner to protect his land against the stream would be in many instances to destroy the possibility of making the land available for improvement or settlement, and condemn it to sterility and vacancy. Such a rule would seriously interfere with the development of the country. Because of this, and because of the necessity of permitting the utilization for drainage of the means afforded by nature for the purpose, a very great preponderance of the decisions in other states go further than it is necessary to go in this case, and hold that a riparian owner has no right to complain because the volume of water in the

stream is increased by artificially draining surface waters into it above, provided only the stream is the natural drainage channel for the lands so drained. Furthermore, this rule is adopted regardless of whether the so-called common-law rule concerning surface waters prevails in the particular jurisdiction, or, as here, the civil-law rule, which forbids the gathering together of surface waters and discharging them as a stream upon adjoining lands. If the surface waters are gathered and discharged into the stream which is their natural means of drainage, so that they come to the land below only as a part of the stream, it is held that no action lies because of their being added. *Kauffman v. Griese-mer*, 26 Pa. 407, 67 Am. Dec. 437; *Ludeling v. Stubbs*, 34 La. Ann. 935; *Hughes v. Anderson*, 68 Ala. 280, 44 Am. Rep. 147; *Shaw v. Ward*, 131 Wis. 646, 111 N. W. 671, 11 Ann. Cas. 1139; *Peck v. Herring-ton*, 109 Ill. 611, 50 Am. Rep. 627; *Vannest v. Fleming*, 79 Iowa, 638, 8 L.R.A. 277, 18 Am. St. Rep. 387, 44 N. W. 906; *Thompson v. Andrews*, 39 S. D. 477, 165 N. W. 9; *Mizzell v. McGowan*, 125 N. C. 439, 34 S. E. 538; *id.*, 129 N. C. 93, 85 Am. St. Rep. 705, 39 S. E. 729; *Waffle v. New York C. R. Co.* 53 N. Y. 11, 13 Am. Rep. 467. Mr. Freeman, in his note in 85 Am. St. Rep. 727, reviews very thoroughly the authorities dealing with the right to accelerate or diminish the flow of water, and upon the particular point under discussion says (page 733): "We have just noticed the difference between merely draining onto another's land, and draining into a natural channel, or watercourse, which flows across such land. So far as streams or natural watercourses are concerned, there can be no doubt that one may drain into them, and thereby increase their volume, without subjecting himself to liability for any damage suffered by a lower owner."

If a riparian owner cannot complain if surface waters be actually

added by artificial drainage above to the volume of the stream, it must certainly be that he cannot complain of a drainage improvement which adds no water to the stream, but merely protects the adjoining lands against the water already in it. The cases in which this exact question is presented are not many, but so far as we have been cited to them, they all, with one possible exception, so hold. *Daum v. Cooper*, 103 Ill. App. 4; *Fenton & T. R. Co. v. Adams*, 221 Ill. 201, 112 Am. St. Rep. 171, 77 N. E. 531; *Dorr v. Simmerson*, 127 Iowa, 551, 103 N. W. 806; *Manteufel v. Wetzel*, 133 Wis. 619, 19 L.R.A.(N.S.) 167, 114 N. W. 91; *Steiner v. Steiner*, 97 Neb. 449, 150 N. W. 205.

Of these cases, *Fenton & T. R. Co. v. Adams* is perhaps the strongest. There a stream came onto the land of the defendants and spread out into a marsh, where its waters were delayed and the debris they carried in time of storm deposited, and thence continued on down to the plaintiff's railroad tracks, beneath which it passed by a culvert. The defendants constructed a ditch which diverted the stream from its channel above the marsh and conveyed it by a more direct route with a higher gradient, avoiding the marsh, to a point in the channel below the marsh, but still upon the defendant's land. The railroad company sought to enjoin the maintenance of the ditch on the ground that it would largely increase the amount of water coming to its culvert in time of storm, and would also bring to the culvert a large amount of debris which would otherwise be deposited above. It was held, however, that the defendants had the right to improve the course of the stream through their land; that the ditch, although it diverted the stream from its channel for a portion of its distance on the defendants' land, was nothing more than such an improvement, and that the railroad company had no cause of action. There is no material dif-

ference whatever between such facts and those of the case at bar.

The possible exception mentioned to these decisions is *Grant v. Kuglar*, 81 Ga. 637, 3 L.R.A. 606, 12 Am. St. Rep. 348, 8 S. E. 878. It is, however, not possible to ascertain just what the facts of this case were, and certainly the statement of Judge Freeman concerning it in 85 Am. St. Rep. 725, that the broad proposition it lays down is not universally true, is correct. If it is to be considered as in point here, it is opposed to the whole drift of the decisions generally, and to the weight of authority upon the particular point.

When we say that the decisions upon the exact question here presented are not many, we are not unaware of the fact that there are a very large number of decisions in which a change in natural conditions increasing the volume or accelerating the flow of a stream has been enjoined. But in these cases there entered factors other than those merely of a change reasonably made for the protection of land above, and having the effect, only, of increasing the volume and to that extent the speed and height of the water in the channel, when it reached the plaintiff's land. There was an unlawful encroachment upon the channel, or a diverting of the course or direction of the current, or a pollution of the stream, as where the drainage was of sewage as well as of water, or some other factor which imposed upon the plaintiff a burden other than merely that the channel should serve in an increased degree as the drainage outlet for the waters which would naturally drain to and through it. Our conclusion is that an improvement for the purposes of drainage of lands above does not give a lower riparian owner on the stream a cause of action, merely because the improvement increases the volume of water coming to his land in the stream, with the incidents necessarily accompanying such increase of volume, but without affecting the stream in any other manner. Such is the present case.

There remains, however, one point which should be discussed. It is frequently stated, and some decisions perhaps hold, that the rule that no action lies simply because of an increase in the volume of a stream caused by improvements for drainage above is subject to the limitation that thereby the natural capacity of the channel be not exceeded,—that is, that the lands below be not flooded. It does not appear from the findings in the present case whether the plaintiff's land was flooded or not. What does appear is that a considerable portion of it was washed away. This may well have happened without the land being actually overflowed. —effect of exceeding capacity of stream.

But, however this may be, we are of the opinion that no such limitation should be adopted. On the one hand, the authority for it consists largely of dicta and casual statements, and, on the other hand, it is wholly impracticable, and in many cases destructive of the rule on which it is supposed to be only a limitation. This is very clearly pointed out and the limitation rejected in *Mizell v. McGowan*, 129 N. C. 93, 85 Am. St. Rep. 705, 39 S. E. 729. As is there said:

"Suppose the natural capacity of the watercourse was made the test of the rule; it would be so extremely difficult of application as practically to destroy its value. What is the natural capacity of a stream? Is it measured at low water or at high water? Almost any stream can carry off whatever water may be made to flow into it in dry weather, or perhaps even in ordinary times. On the contrary, the clearing up of our lands is having the double effect of greatly accelerating the flow of water, and at the same time filling up our streams with sand, so that very few of them can now carry the water naturally flowing into them after heavy rains.

"Again, suppose the upper tenant were compelled to regard the natural capacity of the stream; how far down would this limitation ex-

tend? Naturally, many others would drain into the same stream, so that the landowner near its mouth would get the accumulated waters of all those above him. In case of injury, how would he apportion his damages, and where would the liability of each tort-feasor begin and end? These questions, it seems to us, would severely tax the utmost ingenuity of the courts, and leave the jury in such a state of perplexity as to seriously endanger their intelligent determination of the issues."

The reasons so stated may be multiplied many fold. To them also may be added the query: Why should there be any difference between injury done by flooding, and injury done in any other manner by an increase in the volume of the stream. If it be the injury alone which constitutes the wrong, why should a recovery not be permitted whatever form the injury takes. On the other hand, if it be not the injury alone which constitutes the wrong, why permit a recovery because of it when it takes the form of flooding? The injury done by erosion, for example, is frequently much more serious than that done by flooding. It was undoubtedly so in the present case. No reason can be seen why, if injury by flooding is actionable in such a case as the present, injury by erosion should not be so likewise. Yet, if the rule stated, established by the great weight of authority and based on strong considerations of public good, be subject to the limitation that the increased volume of the stream caused by drainage improvements above, otherwise lawful, do not cause injury by erosion, the rule does not in reality exist, since there can be no increase in the volume of the stream without increasing its speed, and consequently its erosive effect, and the doing of a theoretical injury, at

least, to the banks past which it flows.

Summing up the discussion, our conclusion, as we have stated, is that an improvement for the purposes of the drainage and protection of lands above does not give a lower riparian owner on the stream a cause of action, merely because such improvement increases the volume of water in the stream as it comes to his land, even though the burden he is necessarily under of protecting his land against the stream is thereby increased, and his land is injured because of his failure to meet such increased burden, and further, that the rule is not subject to the limitation that the increased volume must not be such as to make the stream exceed the capacity of its channel. The injury to the plaintiff's land comes directly within this rule, and is, therefore, not actionable.

It is apparently contended on behalf of the plaintiff that, even if the injury be *damnum absque injuria* as between private parties, yet, when the injury is inflicted by an improvement made by public authority, it must be compensated for under the provision of our Constitution (art. 1, § 14) that private property shall not be taken or damaged for a public use without just compensation. But the contrary has been directly

Constitutional law—public improvement—compensation for property injured.

decided since the filing of the original briefs in this case, in *Gray v. Reclamation* Dist. 174 Cal. 622, 163 Pac. 1024.

It follows that the plaintiff was not entitled, upon the findings, either to an injunction or to damages.

Judgment reversed, with directions to the trial court to enter judgment for the defendant with costs.

We concur: Angellotti, Ch. J.; Shaw, J.; Wilbur, J.; Lennon, J.; Kerrigan, Judge pro tem.; Lawler, J.

ANNOTATION.

Right to hasten the flow and increase the volume of water in a stream by alterations or improvements in the bed.

It is a general principle, well sustained by authority, that a riparian owner has a right to have a stream flow in its natural condition. The maxim, "*aqua currit et debit currere ut currere solebat*," controls the rights in a watercourse at common law. 2 Farnham, Waters, p. 1608, § 475; 1 Kinney, Irrig. p. 947, § 546.

This principle applies to prevent the acceleration of the flow of water in a stream to the injury of a lower proprietor. 2 Farnham, Waters, p. 1632, § 487; 1 Kinney, Irrig. p. 947, § 546.

These general principles are admitted by the court in the reported case (*SAN GABRIEL VALLEY COUNTRY CLUB v. LOS ANGELES COUNTY*, ante, 1200), but it is there stated, what is supported by a number of authorities, that some modifications or alterations of the natural flow of the stream are permissible, the right to a reasonable use of the water in the stream by an upper riparian owner being stated to be the most familiar. The court also refers to the increase in the flow of water by the construction of dams, and concludes that there is no right of action by a lower riparian owner because of the increase of volume and consequent acceleration of flow, provided the use is a reasonable one and exercised in a reasonable manner. Under this view, the question is one which must be determined from the facts of the individual case.

The cases on the question under consideration have not reached a uniform result.

In *Dorr v. Simmerson* (1905) 127 Iowa, 551, 103 N. W. 806, a landowner who improved a natural watercourse by placing a tile drain therein, which to some extent accelerated the flow of water, but did not unduly increase it, nor cast upon the lower land more than would naturally have gone upon such land had there been no tile drain, was held not liable for damages to the lower owner. The court approved of

the rule that the owner of the dominant estate has the right, by ditches or drains, to drain his own land into the natural and usual channels, even though the quantity of water cast upon the servient estate may be somewhat increased.

It has been held that an owner of land has the right to clean out and tube, or wall up, a natural spring upon his own land, for his own use and convenience, when he does not thereby change the natural course of the flow of the water therefrom, and makes no change to the injury of another except what may result from an increased flow of water in the natural channel and outlet of such spring. *Waffle v. Porter* (1871) 61 Barb. (N. Y.) 130.

The right to increase the volume of water in a stream, within limits, is undoubtedly supported by cases beyond the scope of the present note, dealing with the right to accumulate, in the drainage of lands, surface waters falling in lands adjacent to a stream, and cast them into the stream. 2 Farnham, Waters, p. 1633, § 488.

Under certain circumstances, the right to hasten or increase the flow of water in a stream has been denied. Thus, an upper riparian owner who removed a ledge of rocks which operated as a dam to keep back the waters of a stream, thereby increasing the volume of water so that it overflowed the banks at points below where the ledge was removed, was held liable for the damage caused thereby, in *Grant v. Kuglar* (1888) 81 Ga. 637, 3 L.R.A. 606, 12 Am. St. Rep. 348, 8 S. E. 878.

It has been held that a manufacturing company which acquired by prescription the right to cast polluted water into a stream which, by reason of sluggish current and numerous ponds, was largely precipitated before it reached the lower owner, could not clean out the channel in such a way as to hasten the flow and cast the polluted water onto the land of the lower

owner. *Mississippi Mills Co. v. Smith* (1891) 69 Miss. 299, 30 Am. St. Rep. 546, 11 So. 26.

If the channel of a stream has been gradually filled so that the natural flow has been altered, a riparian owner cannot, by removing the accretions, restore the same to its ancient course and velocity, to the injury of an upper proprietor who has made improvements on the faith of the changed con-

ditions. *Withers v. Purchase* (1889) 60 L. T. N. S. (Eng.) 819. But in an earlier case it was held that a riparian owner might remove shoals from the stream without liability to a lower owner for overflow of the stream by the hastening of the flow. *Rhodes v. Airedale Drainage Comrs.* (1876) L. R. 1 C. P. Div. (Eng.) 402, 45 L. J. C. P. N. S. 861, 35 L. T. N. S. 46, 24 Week. Rep. 1053. W. A. E.

STATE OF MONTANA EX REL. CHARLES F. WOOTEN
v.
DISTRICT COURT OF SILVER BOW COUNTY et al.

Montana Supreme Court — April 8, 1920.

(— Mont. —, 189 Pac. 233.)

Marriage — annulment — power to award alimony.

1. Courts having jurisdiction to annul a marriage have inherent power to award temporary alimony and counsel fees in a suit by the husband for that purpose, where the power is not conferred by statute.

[See note on this question beginning on page 1222.]

Prohibition — to prevent allowance of alimony and counsel fees.

2. Prohibition lies to restrain the wrongful allowance of alimony, suit money, and counsel fees in a divorce proceeding, since appeal does not furnish an adequate remedy.

[See 22 R. C. L. 9-11.]

— what may be considered.

3. To determine whether or not the lower court is about to exceed its ju-

risdiction so as to justify the issuance of a writ of prohibition, the supreme court may examine not only the pleadings but the evidence before the court. [See 22 R. C. L. 32, 33.]

Courts — jurisdiction — authority to dissolve marriage.

4. Courts have no inherent power to dissolve a marriage.

[See 9 R. C. L. 396.]

APPLICATION by relator for a writ of prohibition to prohibit the enforcement by respondents of an order allowing defendant, in an action by relator for an annulment of his marriage, alimony, suit money, and attorney's fees. *Dismissed.*

The facts are stated in the opinion of the court.

Messrs. Nolan & Donovan for relator.

Messrs. William Meyer and M. J. English for respondents.

Matthews, J., delivered the opinion of the court:

Relator brought action in the district court of Silver Bow county for the annulment of his marriage under § 3636, Revised Codes, on the grounds that: (a) His consent was obtained by the fraud of the defend-

ant; and (b) that the defendant was physically incapable of entering into the marriage relation. Having denied generally the allegations of fraud and incapacity, the defendant applied for and was allowed alimony pendente lite, attorney's fees, and suit money, and from the order relator appealed; whereupon defendant made application for and was allowed further alimony, suit money, and attorney's fees, over the objec-

tion of relator, to enable her to defend against the appeal. Relator then instituted this proceeding for a writ of prohibition against the enforcement of the order last mentioned, and the making of any further orders of a similar character. Respondents moved to quash on the ground that the relator is not entitled to the relief demanded, for the reason that his petition does not state facts sufficient to warrant this court in granting him such relief and that he has a plain, speedy, and adequate remedy at law, citing § 7228, Revised Codes; State ex rel. Browne v. Booher, 43 Mont. 569, 118 Pac. 271; State ex rel. Topley v. District Ct. 54 Mont. 461, 171 Pac. 273, and Poupert v. District Ct. 34 Nev. 336, 123 Pac. 769.

While an appeal lies from an order allowing alimony (State ex rel. Nixon v. District Ct. 14 Mont. 396, 40 Pac. 66; Bordeaux v. Bordeaux, 32 Mont. 159, 80 Pac. 6), it is obvious that an appeal is not adequate in this

Prohibition—
to prevent
allowance of
alimony and
counsel fees.

case, for each successive appeal taken would be the basis for a new application and a further

order for alimony pendente lite, attorney's fees, and suit money to defend on such appeal. Neither would the appeal be speedy, since the action is not one calling for advancement on the calendar, and the case would be disposed of on its merits long before the appeal could be heard.

Section 7227, Revised Codes, provides: "The writ of prohibition . . . arrests the proceedings of any tribunal, corporation, board or person, whether exercising functions judicial or ministerial, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person."

In the case of State ex rel. Scharnikow v. Hogan, 24 Mont. 379, 51 L.R.A. 958, 62 Pac. 493, this court held that, under article 8, § 3, of the Constitution, the foregoing section could not confer on the supreme

court the power to issue the writ of prohibition to arrest proceedings not of a judicial nature; but this ruling does not affect the question before us, as we are here dealing with a judicial function.

Under § 7228, the writ may be issued "in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law." State ex rel. Lane v. District Ct. 51 Mont. 503, L.R.A. 1916E, 1079, 154 Pac. 200. If, then, under the facts above stated, it appears that the district court was without jurisdiction to make the order complained of, the writ of prohibition is the proper remedy. In considering the question this court may examine not only —what may be considered.

the pleadings, but the evidence before the lower court, in order to determine whether the lower court is about to exceed its jurisdiction. State ex rel. Boston & M. Consol. Copper & S. Min. Co. v. Second Judicial Dist. Ct. 22 Mont. 220, 56 Pac. 219.

The complaint alleges that the plaintiff and defendant intermarried in June of 1919, and "ever since have been and are now husband and wife," and then alleges fraud on the part of the defendant, and that at the time of the marriage she was afflicted with a contagious and infectious disease of a deadly character, which appears to be incurable; that the plaintiff was induced to enter into marriage relations by false representations; and that, if it had not been for such false representations and concealment practised upon him, he would never have consented to such marriage. He further avers that as soon as he discovered the true conditions he left the defendant, and has not since cohabited with her. All these allegations are denied by defendant's answer, except as to the marriage, and that plaintiff and defendant "ever since have been and are now husband and wife."

The defendant was placed on the stand and established the fact of the marriage, and, on cross-examination,

admitted that, just prior to the time plaintiff left her, she was advised by a physician that she was afflicted as charged, and that she told her husband what the doctor had said. A card or chart from the state department of health, showing the result of a "Wasserman test" as "4 plus," which indicates, according to the chart, "very strongly positive," or the highest reaction for syphilitic infection, was admitted in evidence, and defendant admitted that she was shown the card just prior to the time her husband left her. She further admitted that, if she was so infected, the infection dated from the time of cohabitation with her former husband, and antedated her marriage to plaintiff. She testified further, however, that she had never shown external evidence of such infection, and that she was twice thereafter examined by other physicians who also had such a test made, and that the result of such test was negative. There was no attempt made on the part of the plaintiff to establish fraud or misrepresentations prior to her marriage, or that, if infected, defendant knew of her condition prior thereto; on the contrary the defendant testified that she was in good health and sound bodily condition at that time. She further testified that she was five months along with child, and that she is without means of support or for the defense of the action.

It is contended that the court is without jurisdiction to grant temporary alimony, suit money, or counsel fees in an action to annul a marriage, for the following reasons: (1) The statutes of the state confer no authority upon the court to grant the same in such an action. (2) The provisions of the statutes are exclusive, and are the measure of the court's authority in matrimonial actions.

1. Taking up the reasons assigned in the order stated, we will first consider the history of this legislation in Montana.

That the courts of this state have

no inherent power, either as courts of law or equity, to dissolve marriage, and that the power to decree a divorce is purely statutory, has been determined by this court. *Rumping v. Rumping*, 36 Mont. 39, 12 L.R.A. (N.S.) 1197, 91 Pac. 1057, 12 Ann. Cas. 1090. This is so because of the fact that, at the time our forefathers brought with them the common law of England, neither courts of law nor equity had jurisdiction in such matters; they being handled exclusively by the ecclesiastical courts. 2 Bishop, *Marr. & Div.* 431. The first legislative assembly of the territory, therefore, provided for actions for divorce, on grounds which are now recognized as applying only to annulment proceedings, as well as those for divorce proper, and provided for the granting of alimony, both permanent and temporary, in all such actions. *Laws of Montana*, First Sess. 1864-65, p. 430. These provisions were carried forward to the Acts of the Seventh Session, 1871-72, p. 457, and were later included in the Revised Statutes of 1879, pp. 513, 514, and thereafter incorporated in the Compiled Statutes of 1887, as §§ 999 to 1006, inclusive.

Although it thus appears that up to 1895 the successive legislative assemblies of this state did not recognize the fact, there is a clear distinction between actions for the annulment of a marriage on pre-existing grounds, and those for the dissolution of such a contract for acts committed after its solemnization. The first recognizes but a ceremonial or formal contract and repudiates the idea that there ever was in fact a marriage between the parties, and the decree of the court, when made, declares the marriage null and void ab initio; while the latter recognizes the validity of the marriage, and seeks a decree dissolving the bonds because of the wrongful act of one of the parties during the existence of the marriage relation.

"While a suit for nullity follows

Courts—
Jurisdiction—
authority to
dissolve
marriage.

substantially the same rules as a suit for divorce, yet it cuts deeper into the soil of consequences than the divorce suit, because the interests and rights of third persons are more affected by it. The children especially have their legitimacy or illegitimacy irrevocably established by this suit, while they do not by a suit for divorce. Therefore it has been said to be a more privileged suit, and it excites to even greater degree the vigilance and caution of the courts." 2 Bishop, Marr. & Div. 294.

In codifying the laws of the state in 1895, the legislature recognized the error made theretofore and separated the two classes of causes of action. Codes of 1895, §§ 110 to 203, inclusive. These sections are found in chapter 2 of title 1 of the Civil Code. The chapter is entitled "Divorce," and is subdivided as follows: Article 1. Nullity. Article 2. Dissolution of marriage. Article 3. Causes for denying divorce. Article 4. General provisions. This chapter was carried forward to the Revised Codes of 1907, with but one minor amendment, and the only changes made therein are that the title to article 1 now reads "Annulment of marriage," instead of "Nullity," and the sections are given different numbers in accordance with the new arrangement of the Codes. Rev. Codes, §§ 3636 to 3689. Section 3677 (191) of article 4 of the chapter provides: "While an action for divorce is pending the court or judge may, in its or his discretion, require the husband to pay as alimony any money necessary to enable the wife to support herself or her children, or to prosecute or defend the action." It also provides for actions for support and maintenance, and that "during the pendency of such action the court, or judge, may, in its or his discretion, require the husband to pay as alimony any money necessary for the prosecution of the action and for support and maintenance," etc.

It will be noted that the foregoing provisions—and they are the only

provisions in the Codes on the subject of alimony—make no reference to actions for the annulment of a marriage.

While it is true that, from 1865 to 1895, the laws of this state specifically empowered the court to grant temporary alimony in this class of cases, as well as actions for divorce, by including both classes of actions in one section, as we have heretofore seen, on the adoption of the Codes with its new classification of these two subjects, all the laws on the subject then in effect (Comp. Stat. 1887, §§ 999–1006) were specifically repealed by § 4673 of the Codes of 1895, now § 6235 of the Revised Codes. And, if there still remained any doubt as to whether such sections remained in force, it was further provided that "the Code establishes the law of this state respecting the subjects to which it relates." Rev. Codes, § 6214. And: "No statute, law, or rule, is continued in force because it is consistent with the provisions of this Code on the same subject; but in all cases provided for by this Code, all statutes, laws, and rules heretofore in force in this state, whether consistent or not with the provisions of this Code, unless expressly continued in force by it, are repealed or abrogated." Rev. Codes, § 6234.

It is therefore evident that whatever statutory authority the court now has in awarding alimony must be found in said § 3677, Revised Codes.

It is urged by respondents' counsel that, as said section is found in "General provisions" at the end of chapter 2 of the Civil Code, which chapter is entitled "Divorce," and article 1, on "Nullity" or "Annulment of marriage," being a part of that chapter, it was intended that such general provisions should apply generally to all actions provided for in the chapter. The chapter was, undoubtedly, taken bodily from the California Code, including its arrangement and titles, and, while ordinarily the arrangement and titles in the Codes are given no weight in

construing statutes, for the reason that they are usually the work of codifiers rather than that of the legislative assembly, the fact that the chapter was so adopted by the legislative body itself might have some persuasive force, were it not for the provisions of § 3562 of our Codes, which reads as follows: "(3) The arrangement and classification of the several parts of said Codes have been made for the purpose of convenience and orderly arrangement, and therefore no implication or presumption of a legislative construction is to be drawn therefrom, nor shall annotations be deemed any part of the statutes."

It would therefore seem that no presumption in favor of the court's authority can arise from the fact that this proceeding was brought under article 1 of the chapter entitled "Divorce;" the article might be taken from the chapter and placed in any other part of the Code "for the purpose of convenience and orderly arrangement," and would then have not the remotest connection with those sections contained in the article on "General provisions."

Section 3677 authorizes the court to grant temporary alimony in but two classes of cases, to wit, "while an action for divorce is pending," and "during the pendency of" actions for support and maintenance. We are impelled, therefore, to the conclusion that there is no statutory authority in this state for the making of such an award as that complained of.

2. Are the statutory provisions the exclusive measure of the court's jurisdiction in cases involving the marital relation?

The overwhelming weight of authority answers the question in the negative and holds that the right to award alimony in matrimonial cases

is a part of the fundamental jurisdiction of courts of equity in all cases where authority is granted to the courts to hear and determine such causes, and this court has, to some

extent at least, recognized such a rule. Thus, in the case of *Edgerton v. Edgerton*, 12 Mont. 122, 16 L.R.A. 94, 33 Am. St. Rep. 557, 29 Pac. 966, decided in 1892 and prior to the enactment of the statute permitting the court to award alimony, etc., in separate maintenance actions, apart from divorce, and before, by statute, such an action was maintainable, this court held that "an action of this character, if maintainable at all, would naturally lie within the equitable jurisdiction of the district court."

After quoting the statutes heretofore cited, the court said: "It is contended that these provisions of the statute as to the decree for alimony and maintenance 'when divorce is granted,' by implication, exclude from the courts the jurisdiction to enforce the maintenance, except in an action where divorce is decreed. Some have so held, but upon this phase of the question, as upon nearly all aspects of it, eminent authorities are opposed to one another in the views entertained. Our own conclusion upon this particular feature of the question is that the great weight of reason is against the idea that the legislature, in adopting the statute referred to, intended any regulation of the right of the wife to maintenance."

After discussing the history of equitable jurisdiction, and particularly that concerning actions as between husband and wife, the court concludes: "We will close the inquiry upon this branch of the case by bringing to view certain statutory and constitutional provisions of this state, which to some extent, we think, should influence our determination. The statute provides that 'women shall retain the same legal existence and legal personality after marriage as before marriage, and shall receive the same protection of all her rights as a woman which her husband does as a man. . . . Comp. Stat. § 1439, div. 5. Our Constitution provides that 'the district courts shall have original jurisdiction in all cases at law and in

Marriage—
annulment
—power to
award alimony.

equity, . . . and for such special actions and proceedings as are not otherwise provided for.' § 11, art. 8. And further, that 'there shall be but one form of civil action, and that law and equity may be administered in the same action.' § 28 art. 8. And further, that 'courts of justice shall be open to every person, and a speedy remedy afforded for every injury of person, property, or character, and that right and justice shall be administered without sale, denial, or delay.' § 6, art. 3. . . . The court is then confronted with the question whether there shall be a denial of enforcement of this right, except where absolute divorce is granted. We think the intentment of our Constitution and statutes is to negative that proposition."

In the case of *Finkelstein v. Finkelstein*, 14 Mont. 1, 34 Pac. 1090, the court recognized the distinction between an action for divorce and annulment, and, although the statute then permitted the granting of alimony in all actions for "divorce" on the grounds mentioned in the Compiled Statutes of 1878, then in force, determined the question here before us on fundamental grounds, regardless of the statute, when it said: "Of course, one of the essential facts to plaintiff's cause of action is that she is the wife of defendant. If that fact is not present, plaintiff has no case. But on the hearing of a motion for alimony pendente lite, it is not for the district court to finally determine that fact. The question is whether there is a sufficient prima facie showing of the alleged fact of marriage. . . . It may be true that, if, on a motion for alimony pendente lite, the defendant shows facts and conditions which absolutely establish that there is no marriage, and that plaintiff is not the wife of defendant, it would not be proper to grant such alimony. But there is no such showing in this case. To recapitulate, the district court had before it this situation: A direct allegation of marriage by the plaintiff, which the defendant denied." Again the court said:

9 A.L.R.—77.

"The plaintiff alleges marriage and the present existence of the relation of husband and wife. The defendant sets up facts which he claims, if true, show that there was no marriage and no relation of husband and wife. In our opinion this leaves the matter of marriage simply in the condition of a contention between the parties."

The court held in effect that, where there are an allegation of marriage and a denial thereof, the facts so alleged present a sufficient prima facie case for the award of temporary alimony, suit money, etc., and this prima facie case must be thoroughly defeated and the defense fully established by the husband, before he will be relieved. Cases in support of the rule are cited in plaintiff's brief in that case.

In the case of *Twell v. Twell*, 6 Mont. 19, 9 Pac. 537, this court held that proceedings for divorce and alimony are of chancery jurisdiction, and that the power to decree alimony falls within the general powers of a court of equity.

In the case of *Galland v. Galland*, 38 Cal. 265, the supreme court of California said: "There is no provision of the statute which authorizes an application for alimony, except in connection with a prayer for divorce; and it is claimed on behalf of the defendant that, inasmuch as provision is made for the allowance of alimony only on an application for divorce, it was the intention of the legislature to limit the power of the court to grant alimony to that class of cases. The maxim 'expressio unius est exclusio alterius' is invoked as applicable to this proposition. But, in my opinion, it has no application to the case. The main subject-matter of the statute was the regulation of divorce; and only as incidental to that subject the statute prescribes the power of the court in respect to alimony in that class of cases. The legislature was not dealing with the general subject of alimony, as an independent subject-matter of legislation, but only

as one of the incidents of an application for divorce."

The court concludes that the power to award alimony falls within the general powers of a court of equity, and exists independently of statutory authority.

As we have heretofore stated, chapter 2 of the Code of 1895 is identical with the laws of California on the subject, and, under such identical provisions, the court there held that, in an action by the husband to annul the marriage on the ground of fraud, the superior court had authority to award the defendant such an amount as was necessary to enable her to present her defense, the court saying: "Until her alleged fraud is established, she remains the lawful wife of the petitioner, and has the same right to defend the action to annul the marriage that he has to prosecute it, and until she is provided with the means . . . to make her defense, she ought not to be forced into a trial." *Allen v. Superior Ct.* 133 Cal. 504, 65 Pac. 977.

And later, in construing these provisions, in a case on all fours with this, that court said: "For all the purposes of the annulment action, so long as the action is pending, to use the language of *Brinkley v. Brinkley*, 50 N. Y. 186, 10 Am. Rep. 460, 'the relation actually exists upon which the right to alimony depends.' So that even if § 137 of the Civil Code, providing for alimony and cost money in an 'action for divorce' does not by its terms include actions for annulment, the weight of authority is in favor of the existence of the power as to cost money, notwithstanding the absence of express statutory authority, and by reason of the general jurisdiction expressly conferred to entertain such actions; and *Allen v. Superior Ct.* 133 Cal. 504, 65 Pac. 977, must be taken as deciding that such power exists in this state. In view of what we have said, it must also be held that such power exists as long as the annulment action is pending. But there is much force in the claim

that the term 'action for divorce,' in § 137, Civil Code, includes such actions for annulment as are provided for in §§ 81 and 82 of the Civil Code. Section 137 is a part of article 4 of chapter 2, title 1, part 3 of the Civil Code, an article entitled 'General provisions.' Chapter 2 is entitled 'Divorce,' and contains four articles; article 1 being entitled 'Nullity' . . . [being the same arrangement as ours]. It is apparent that the term 'Divorce,' constituting the title of chapter 2, was used as including annulment proceedings, as well as divorce proceedings, for causes occurring after marriage; and it may well be argued that such provisions in the subdivision entitled 'General provisions' are appropriate in actions for annulment are applicable thereto. However, it is not necessary to definitely decide this question here, in view of what we have already said." *Dunphy v. Dunphy*, 161 Cal. 92, 118 Pac. 447.

The New York court of appeals, in the case of *Higgins v. Sharp*, 164 N. Y. 8, 58 N. E. 10, laid down the rule that "the general jurisdiction conferred by the statute to entertain such actions carries with it, by implication, every incidental power necessary for its proper exercise. . . . The power to allow alimony and counsel fees to the wife in order to enable her to live pending the action, and to present her defense, if she has one, must be regarded as incidental and necessary in all matrimonial actions. Without such power the rights of the woman, in many cases, could not be adequately protected. It seems to us, therefore, that actions to annul a marriage are governed, with respect to alimony and counsel fees, by the same principles as all other actions for divorce. When the court was vested with the jurisdiction in such cases, the incidental power to guard and protect the rights of the wife, which had always been regarded as a part of the jurisdiction, necessarily followed and attached,

upon the plainest principles of reason and justice."

In that case, as here, it was argued that the jurisdiction of the court in matrimonial cases is derived solely from statutes, and that, in the absence of statutory authority, the court was without jurisdiction to award alimony in such cases. The case of *Higgins v. Sharp*, above, was approved and followed in *Hunt v. Hunt*, 23 Okla. 490, 22 L.R.A. (N.S.) 1202, 100 Pac. 541, and in *Willits v. Willits*, 76 Neb. 228, 5 L.R.A. (N.S.) 767, 107 N. W. 379, 14 Ann. Cas. 883, and a similar rule announced in *Bird v. Bird*, 1 Lee, Eccl. Rep. 621; *Miles v. Chilton*, 1 Rob. Eccl. Rep. 684; *Vandegrift v. Vandegrift*, 30 N. J. Eq. 76; *Griffin v. Griffin*, 47 N. Y. 134; *North v. North*, 1 Barb. Ch. 241, 43 Am. Dec. 778; *Smith v. Smith*, 1 Edw. Ch. 255; *Ricard v. Ricard*, 143 Iowa, 182, 26 L.R.A. (N.S.) 500, 136 Am. St. Rep. 762, 121 N. W. 525, 20 Ann. Cas. 1346; *Poupart v. District Ct.* 34 Nev. 336, 123 Pac. 769; *Stapleberg v. Stapleberg*, 77 Conn. 31, 58 Atl. 233.

While there are cases—some of them well reasoned and logical—to the contrary, all the modern writers on the subject agree that, where there has been a marriage ceremony performed the validity of which is denied by the husband and asserted by the wife, the latter is entitled to alimony pendente lite, suit money, and attorney's fees; for the validity of the marriage is the subject in controversy, and the court cannot decide the merits of such a controversy on such preliminary application, with the exception that where, on the preliminary hearing, it clearly appears that there was no marriage and that the wife cannot prevail in the action, the court will refuse to grant the application. Thus, in 26 Cyc. 917, 918, the rule is laid down as follows:

"As a general rule the right to alimony depends on a valid and subsisting marriage, since without this there is no obligation for the support of the alleged wife, and before it can be claimed or allowed, the

marriage must be proved or admitted, or, if it is contested, there must appear to the court a fair probability that it will be established [citing cases]. Hence, where a wife brings suit for the annulment of the marriage, thereby denying the fundamental fact on which a claim for alimony should be based, no allowance can be made for her support pending the action, or for suit money [citing a large number of cases], unless it be authorized by statute [citing cases].

"On the other hand, where the husband brings the suit and the wife defends, asserting the validity of the marriage, she is in a position to claim alimony pendente lite and an allowance for the expenses of the suit and for counsel fees, and it will be granted to her on a proper showing [citing cases]. But of course, it is otherwise if the wife as defendant admits that the marriage was null and void. Permanent alimony cannot be granted in cases of this kind for, if a decree is made in accordance with the prayer of the petition, it must adjudge the pretended marriage void ab initio, and consequently that the parties never sustained the relation of husband and wife."

Where an actual marriage is . . . shown, and its existence in law is sought to be avoided by some fact set up by the husband, unless he proves that fact, the alleged wife is entitled to temporary alimony. Where the husband denies in his answer that a valid marriage ever existed, the court still has jurisdiction to allow temporary alimony, but it will not be allowed until some evidence of a valid marriage is shown." 19 C. J. 213, 214, and cases cited.

And in 1 Am. & Eng. Enc. Law, 472, we find the statement: "As regards the marriage which must exist to entitle the wife to a decree for temporary alimony—as the merits are not gone into, the court will be justified in granting the decree if the parties had lived together, and adjusted their property rights on the basis of the validity of

the marriage. So alimony pendente lite has been allowed in nullity suits [citing cases]."

Under the heading "Annulment suit by husband," the author, in 1 R. C. L. p. 905, declares:

"An action to annul a marriage brought by the husband stands on an entirely different footing from such an action brought by the wife, so far as the right to alimony pendente lite is concerned. When she is in the position of asserting and defending the validity of her marriage, she may consistently invoke the power of the court to compel a provision for her maintenance until the action has determined the relation of the parties. Her marriage to the plaintiff is presumed to be legal until the contrary is shown, and there is no sound reason in law or in morals why a wife who has had a serious charge made against her should not have the same right of assistance from her husband in defending against his charge that she would have were he asking a divorce [citing cases]."

"The authorities, therefore, almost unanimously hold, even in the absence of express statutory authorization, that where a husband seeks an annulment of the marriage on grounds the existence of which is denied by the wife under oath, she is entitled to an allowance during the pendency of the suit. The fact that the husband thereby admits the existence of a marriage relation de facto, taken with the wife's denial of its invalidity, is sufficient to sustain the application, for, as has been shown, the court will not go into the merits of the action at that stage." The question should be governed by the circumstances of the case, and rests in the sound discretion of the court, and "will not be disturbed on appeal unless that discretion has been abused." 19 C. J. 228.

On the question as to whether the court has authority to make an award in the absence of statutory provision therefor, Mr. Bishop has this to say: "Let us consider the question sometimes arising in our

courts, whether, when a statute gives the tribunal jurisdiction over a specific cause of divorce, but is silent concerning alimony, or provides only for permanent alimony, the temporary can then be awarded; and whether costs, as they are termed in England, or money to defray the expenses of the suit, can also be given. This question seems plain on principle; first, the authority to make the order belongs to the court under the law imported by our forefathers to this country; secondly, if this were not so, still it springs up necessarily out of the legal relation of the parties, and the condition of facts appearing from the record before the court to which the application is made. And if any one principle of our jurisprudence is more worthy of commendation than another, it is that a judicial tribunal may always be pressed to action when a case is presented which comes within established legal rule, though not within precedent." 2 Bishop, Marr. & Div. § 338.

In § 402 of the same work, it is said: "The allowance cannot be made until the fact of marriage has been either admitted or proved. But the marriage need not be valid. . . . Where the man seeks to establish the nullity of his marriage on the allegation that the woman has a former husband living, she may have alimony pending the suit, and money to defend. This question having arisen before Sir George Lee, he observed: 'The man by his suit admitted that he was married to her de facto; . . . I must presume, till the contrary appears in evidence, that she was his wife de jure as well as de facto, for otherwise she must be guilty of bigamy, and is a felon; but the law presumes, on the contrary, everybody to be innocent till they are proved guilty.' The practice here indicated has prevailed ever since this decision."

Here the plaintiff himself sets up the marriage, and alleges that "ever since said date plaintiff and defendant have been and are now husband and wife." He then alleges facts

(— *Mont.* —, 189 *Pac.* 233.)

which, if true, would render the marriage null and void. The evidence heretofore set out, taken before the district court on the hearing, did not establish the truth of such allegations conclusively, and the court, in the exercise of its discretion, allowed the application of the wife. The testimony so taken left the question of the validity of the marriage a debatable question, and we cannot say on the record that there was any abuse of that discretion. To have decided otherwise would have been tantamount to a declaration that plaintiff and defendant never had been husband and wife, in disregard of her denials, under oath, of the allegations of the complaint, and of her assertion that her marriage is valid and existing; it would be to prejudge the case on its merits.

It is true that, if on a final hearing the court finds that the allegations are true, the defendant will not be entitled to alimony, for it will then appear that she never was the wife of the plaintiff, and consequently he was never under legal obligation to her. But on the other hand, if the plaintiff fails in his proof, the defendant will be declared to be his lawful wife, and consequently to have been entitled to support from him from the beginning of the action, yet if she, without means as she has testified, be denied the order prayed for, how is she to combat this most grave charge against her, and who is to support her while the court awaits the final presentation of the case? Until she is adjudged not to be the wife of the plaintiff, he is bound to support her, and, having deserted her, she might, under the statute, bring an action for separate maintenance and in that connection apply for and receive alimony. Why, then, should not a court of equity decree her such alimony

pending this action, rather than force her to a multiplicity of suits? She is presumed to be innocent, as quoted from Sir George Lee above, until she is proved guilty, and until such presumption is overcome by competent evidence she is, as to all the world, the lawful wife of plaintiff, and entitled not only to support but to the means necessary to properly meet a charge which will, if proven, deprive her not only of her position as wife, but to a great extent destroy her reputation as a woman, and it would seem that the reasons for awarding a woman, under such circumstances, the means to defend, are more cogent than in the ordinary case of divorce and appeal more strongly to justice and equity.

We are, therefore, of the opinion that the court, vested with authority to hear and determine actions for the annulment of marriage, has fundamental jurisdiction to grant temporary alimony, suit money, and attorney's fees to the wife in a suit by her husband, on a proper showing, as a power incidental to the major jurisdiction, though that power does not extend to the granting of permanent alimony on a final disposition of the case in favor of the husband. And that power exists so long as the annulment suit is pending, whether in the district court, or in this court on appeal. Under this view of the matter, the lower court had jurisdiction to make the order complained of, and acted within such jurisdiction, and still has jurisdiction to make like orders, if the necessity therefor arises.

The motion to quash the alternative writ will therefore be sustained and the application dismissed. It is so ordered.

Brantly, Ch. J., and Holloway, Hurly, and Cooper, JJ., concur.

ANNOTATION.

Right to alimony, counsel fees, or suit money in case of invalid marriage.

An exhaustive discussion of the right to alimony, counsel fees, or suit money, in the case of an invalid marriage, will be found in the annotation in 4 A.L.R., at page 926. There appear to be but few recent cases on the subject.

In the reported case (*STATE EX REL. WOOTEN v. DISTRICT CT.* ante, 1212), the court holds that while there is no statutory authority in Montana for the allowance to a wife of alimony pendente lite, attorney's fees, and suit money, in an action by the husband to annul the marriage on the grounds of fraud and physical incapacity, yet a court vested with authority to hear and determine actions for the annulment of marriage has fundamental jurisdiction to make such an allowance where the wife denies the allegations of the husband's complaint, though such power does not extend to the granting of permanent alimony on a final disposition of the case in favor of the husband.

In *Ascher v. Ascher* (1919) — Mo. App. —, 216 S. W. 576, an action by a wife for a divorce, the court on the plaintiff's motion entered an order providing for alimony pendente lite and counsel fees. The husband offered in defense evidence which tended to prove the invalidity of the marriage. Under a statute (Rev. Stat. 1909, § 2375), providing that the court might decree alimony pending the suit, in all cases where such an allowance was just, it was held that the wife in the case at bar was entitled to the alimony. The court said: "Notwithstanding the fact that the matter offered by the defendant in defense might make out a prima facie case against the wife, going to the validity of the marriage of the parties, yet the wife was entitled to be heard in court, to be allowed the assistance of counsel, and a reasonable counsel fee, as well

as alimony pendente lite in such sum as the court might deem proper."

In *Farnham v. Farnham* (1919) 227 N. Y. 155, 124 N. E. 894, an action brought after the death of a husband by his relatives, for the purpose of procuring a judgment annulling the marriage, the defendant widow was allowed alimony and counsel fees by the trial court. On appeal, the order of allowance was reversed, the court stating that after the husband's death a court had no power to grant alimony. It was said: "There is no authority, so far as I am aware, justifying the making of such allowance, nor do I believe the court had power to make it. Alimony and counsel fee can only be allowed when the relation of husband and wife exists. The defendant has no husband. He died in June, 1917, and after his death the court had no power to make an order allowing alimony and counsel fee in an action brought to annul the marriage. If the marriage were a valid one, then the statute defines what interest the widow takes in the husband's estate, and that interest is substituted for and takes the place of the obligation resting upon him, prior to his death, to support her. The obligation to support and maintain is the underlying principle which justifies the granting of alimony and counsel fee, when the marriage relation is attacked. The plaintiffs, however, stand in no such position to the defendant. They are strangers to her. The statute clothes them with authority, as interested parties, to maintain an action to test the validity of the marriage, and they are under no more obligation to furnish her with means to defend the action than they are to support her. She is not a privileged suitor against them, but only against her husband while he lived."

E. C. B.

HAMMOND LUMBER COMPANY et al., Appts.,
v.
PUBLIC SERVICE COMMISSION OF OREGON, Respt.

Oregon Supreme Court (Dept. No. 2)—May 11, 1920.

(— Or. —, 189 Pac. 639.)

Rates — replacement of plant.

1. A public carrier is entitled to earn enough not only to meet the expense of repairs, but also to provide means for replacing the parts of the plant when they can no longer be used.

[See note on this question beginning on page 1232.]

Courts — power to compel carriers to render service.

2. The power to compel railroads to render adequate service and charge reasonable rates for such service is legislative, and not judicial, in its nature.

[See 4 R. C. L. 606 et seq.]

— power to set aside finding of Commission.

3. A court will set aside a finding of the Public Service Commission fixing rates to be charged by a carrier, which is without evidence to support it, or against the evidence.

[See 4 R. C. L. 629.]

— wisdom of ruling.

4. Courts will not set aside a finding of a Public Service Commission fixing the rates to be charged by a carrier, merely upon their conception of the wisdom of the ruling.

[See 4 R. C. L. 629.]

Rates — charge for amortization.

5. A railroad whose sole use is to remove the timber to be cut from a tract

of land is entitled to charge rates which will yield not only a return on the value of the property, but also provide for absorbing its depreciation.

— interest on investment.

6. A rate to be charged by a public carrier should include a reasonable rate of interest on the investment from the beginning of the undertaking.

[See 4 R. C. L. 641.]

Public Service Commission — ruling based on personal inspection — validity.

7. A ruling of a Public Service Commission fixing rates to be charged by a railroad cannot be set aside because it is based in part upon a personal inspection of the road by a member of the Commission.

Rates — mathematical correctness.

8. It is impossible to fix rates for a public carrier which will be mathematically correct and exactly applicable to all the new conditions that may arise even in the immediate future.

APPEAL by plaintiffs from a decree of the Circuit Court for Marion County (Bingham, J.), affirming an order of the defendant Commission in a suit brought to set aside the rates fixed by it. *Affirmed.*

Statement by Burnett, J.:

The plaintiffs are owners of large tracts of timber in Columbia county in a region served by the Columbia & Nehalem River Railroad Company, which owns and operates a railroad about 27 miles in length in that county, mainly for the purpose of hauling logs to the Columbia river. The railroad company filed with the Public Service Commission of Oregon its schedule of freight rates, which was contested before the Commission by the plaintiffs

here, as to the rate to be charged on logs. After a hearing before the Commission, in which the plaintiffs and the railroad company were both represented, the Commission made an order fixing the rate on logs at certain figures. Dissatisfied with this order, the plaintiffs instituted this suit against the Commission to set aside the rates fixed by it. The circuit court affirmed the order of the Commission, and the plaintiffs have appealed.

Messrs. Joseph N. Teal and William C. McCulloch, for appellants:

A suit in equity is an appropriate remedy to test the lawfulness of an order of a Railroad Commission.

Mississippi R. Commission v. Mobile & O. R. Co. 244 U. S. 388, 61 L. ed. 1216, 37 Sup. Ct. Rep. 602; Interstate Commerce Commission v. Dittenbaugh, 222 U. S. 42, 56 L. ed. 83, 32 Sup. Ct. Rep. 22; Skinner & E. Corp. v. United States, 249 U. S. 557, 63 L. ed. 772, 39 Sup. Ct. Rep. 375.

A shipper's right to have his property carried at a reasonable rate in the transaction of his business is a right of property, to enforce which he may seek in a court of equity injunctive relief against an unwarranted order of a Commission.

McLean Lumber Co. v. United States, 237 Fed. 460.

The Railroad Commission Act of Oregon does not empower the Commission to authorize the creation of a fund to amortize or replace the capital investment of a railroad at the end of any stated period of time, on the theory that the traffic possibilities of the road then will have been exhausted.

People ex rel. New York R. Co. v. Public Service Commission, 223 N. Y. 373, P.U.R.1918F, 125, 119 N. E. 848.

The Commission is a creature of statute, and possesses no power except what the statute expressly confers upon it.

State v. Corvallis & E. R. Co. 59 Or. 450, 117 Pac. 980.

In making an allowance for amortization in the rates prescribed the Commission exceeded its jurisdiction and went beyond its power to fix just and reasonable rates, and assumed to enforce its conceptions of a wise and fair legislative policy, and its order to that extent was therefore unlawful and unreasonable, and ought to be vacated and set aside.

Darnell v. Edwards, 209 Fed. 99, affirmed in 244 U. S. 564, 61 L. ed. 1317, P.U.R.1917F, 64, 37 Sup. Ct. Rep. 701; Southern P. Co. v. Interstate Commerce Commission, 219 U. S. 433, 55 L. ed. 283, 31 Sup. Ct. Rep. 288; Northern P. R. Co. v. North Dakota, 236 U. S. 585, 59 L. ed. 735, L.R.A.1917F, 1148, P.U.R.1915C, 277, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1.

The cost of original construction and of making subsequent betterments or improvements of a permanent character is not a lawful charge to operating expense.

Darnell v. Edwards, 244 U. S. 564, 61 L. ed. 1317, P.U.R.1917F, 64, 37 Sup. Ct. Rep. 701; Receivers & S. Asso. v. Cincinnati, N. O. & T. P. R. Co. 18 Inters. Com. Rep. 440; Re Advances in Rates, 20 Inters. Com. Rep. 243.

Expenditures for permanent improvements and equipment should not be charged to the operating expenses of a single year, for the purpose of testing the reasonableness of an increased freight rate.

Illinois C. R. Co. v. Interstate Commerce Commission, 206 U. S. 441, 51 L. ed. 1128, 27 Sup. Ct. Rep. 700.

Carriers have no right to advance a rate which is already reasonably high, and which yields an adequate return for the service rendered, solely because additional revenue is needed.

Tift v. Southern R. Co. 10 Inters. Com. Rep. 548; Ladd v. Gould Southwestern R. Co. 36 Inters. Com. Rep. 179; Boice Lumber Co. v. Pacific & I. N. R. Co. 33 Inters. Com. Rep. 109.

Interest on bonds and dividends on stock may not be included properly in operating expenses.

Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900; State ex rel. Railroad Comrs. v. Florida East Coast R. Co. 72 Fla. 379, P.U.R.1917B, 1023, 73 So. 171, Ann. Cas. 1918E, 1206.

If an order is unlawful only in part, its enforcement to that extent may be restrained by an injunction.

Ireland v. Portland, 91 Or. 471, 179 Pac. 286.

What a common carrier by railroad is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being used for the public.

Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18; Darnell v. Edwards, 244 U. S. 564, 61 L. ed. 1317, P.U.R.1917F, 64, 37 Sup. Ct. Rep. 701; Southern P. Co. v. Campbell, 189 Fed. 182.

The aggregate amount of outstanding stock and bonds of a railroad company is not a proper measure of the value of its property for rate-fixing purposes.

Texas & P. R. Co. v. Railroad Commission, 112 C. C. A. 538, 192 Fed. 280; State v. Southern P. Co. 23 Or. 424, 31 Pac. 960; Interstate Commerce Commission v. Louisville & N. R. Co. 118 Fed. 613.

No allowance should be made for financing, discount, or brokerage.

Kane v. Spring Water Co. P.U.R. 1919C, 404; Lima Teleph. & Teleg. Co. v. Public Utilities Commission, 98 Ohio St. 110, P.U.R.1919A, 888, 120 N. E. 330.

The test of the reasonableness of a rate is not the amount of the profit in the business of a shipper, but whether the rate yields a reasonable compensation for the service rendered.

Central Yellow Pine Asso. v. Illinois C. R. Co. 10 Inters. Com. Rep. 505; Oregon & W. Lumber Manufacturers' Asso. v. Union P. R. Co. 14 Inters. Com. Rep. 1; Re Advances in Rates, 20 Inters. Com. Rep. 307.

Messrs. George M. Brown, Attorney General, J. O. Bailey, Assistant Attorney General, and Veazie & Veazie, for respondent:

Control of the rates of carriers is confided to the Public Service Commission, and not to the courts, and there is a strong presumption that the Commission has acted lawfully and justly.

Pennsylvania Co. v. United States, 236 U. S. 351, 59 L. ed. 616, P.U.R. 1915B, 261, 35 Sup. Ct. Rep. 370; McGrew v. Missouri P. R. Co. 230 Mo. 496, 132 S. W. 1076; Atchison, T. & S. F. R. Co. v. State, 28 Okla. 476, 114 Pac. 721; State ex rel. Great Northern R. Co. v. Public Service Commission, 81 Wash. 275, 142 Pac. 684; State ex rel. Railroad Comrs. v. Louisville & N. R. Co. 62 Fla. 315, 57 So. 175; Bluefield v. Bluefield Waterworks & Improv. Co. 81 W. Va. 201, P.U.R.1918B, 25, 94 S. E. 121; Fall River v. Public Service Comrs. 228 Mass. 575, P.U.R.1918B, 141, 117 N. E. 915.

It is not the province of the courts to review the decisions of the Commission upon disputed questions of fact, or upon questions of business judgment, expediency, or public policy.

Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155; Interstate Commerce Commission v. Delaware, L. & W. R. Co. 220 U. S. 235, 55 L. ed. 448, 31 Sup. Ct. Rep. 392; Portland R. Light & P. Co. v. Portland, 200 Fed. 890; Detroit & M. R. Co. v. Michigan Railroad Commission, 203 Fed. 864; Central of Georgia R. Co. v. Railroad Commission, 209 Fed. 75; Pennsylvania R. Co. v. Towers, 126 Md. 59, P.U.R.1915D, 398, 94 Atl. 330, Ann. Cas. 1917B, 1144; Minneapolis, St. P. & S. Ste. M. R. Co. v. Railroad Commis-

sion, 136 Wis. 146, 17 L.R.A.(N.S.) 821, 116 N. W. 905.

Errors in the admission of evidence, or other mistakes in procedure, do not invalidate the result if the rate fixed is in fact supported by competent evidence.

Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 88, 57 L. ed. 431, 33 Sup. Ct. Rep. 185; Lincoln Gas & E. L. Co. v. Lincoln, 250 U. S. 256, 63 L. ed. 968, 39 Sup. Ct. Rep. 454; Chicago & N. W. R. Co. v. Railroad Commission, 156 Wis. 47, 145 N. W. 216, 974; State ex rel. Seattle v. Public Service Commission, 76 Wash. 492, 136 Pac. 850; State ex rel. Northern P. R. Co. v. Public Service Commission, 95 Wash. 376, P.U.R.1917E, 87, 163 Pac. 1143, 166 Pac. 793; State ex rel. Tacoma Eastern R. Co. v. Northern P. R. Co. 104 Wash. 405, P.U.R.1919B, 924, 176 Pac. 539.

The scope of judicial review of the orders of the Commission is limited.

Hocking Valley R. Co. v. Public Utilities Commission, 92 Ohio St. 362, P.U.R.1916B, 406, 110 N. E. 952; Politz v. Public Utilities Commission, 96 Ohio St. 560, P.U.R.1918B, 262, 118 N. E. 107; State v. Great Northern R. Co. 130 Minn. 57, P.U.R.1915D, 467, 153 N. W. 247, Ann. Cas. 1917B, 1201; State v. Great Northern R. Co. 135 Minn. 19, P.U.R.1917B, 413, 159 N. W. 1089; Grand Rapids & I. R. Co. v. Michigan R. Commission, 188 Mich. 108, P.U.R.1915F, 805, 154 N. W. 15; Chicago, B. & Q. R. Co. v. Railroad Commission, 152 Wis. 654, 140 N. W. 296; Public Service Commission v. Northern C. R. Co. 122 Md. 355, 90 Atl. 105; Michigan C. R. Co. v. Michigan R. Commission, 160 Mich. 355, 125 N. W. 549; Brogger v. Chicago, St. P. M. & O. R. Co. 137 Minn. 338, 163 N. W. 662, 164 N. W. 368; United Fuel Gas Co. v. Public Service Commission, 73 W. Va. 571, 80 S. E. 931.

The traffic of logging railroads must often be limited by the existing stand of timber, and they are in many other characteristics radically different from ordinary commercial railroads.

Consumers' League v. Colorado & S. R. Co. 53 Colo. 54, 125 Pac. 577, Ann. Cas. 1914A, 1158.

It is a fundamental rule, limiting public control of rates, that a rate which does not give the carrier or utility more than a fair return upon the value of its property devoted to public use is not unreasonable.

Northern Pac. R. Co. v. North Da-

kota, 236 U. S. 585, 59 L. ed. 735, L.R.A. 1917F, 1148, P.U.R.1915C, 277, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1; Shepard v. Northern P. R. Co. 184 Fed. 765; State Public Utilities Commission ex rel. Mitchell v. Chicago & W. T. R. Co. 275 Ill. 555, P.U.R.1917B, 1046, 114 N. E. 325, Ann. Cas. 1917C, 50.

As a necessary consequence of this rule, a carrier or utility having limited duration should be allowed such earnings as will enable it to replace, through a depreciation or amortization account, so much of its capital investment as is necessarily lost or consumed in its operations.

Kansas City Southern R. Co. v. United States, 231 U. S. 423, 58 L. ed. 296, 52 L.R.A. (N.S.) 1, 34 Sup. Ct. Rep. 125; Milwaukee Elec. R. & Light Co. v. Milwaukee, 87 Fed. 577; Logansport & W. V. Gas Co. v. Peru, 89 Fed. 185; Ft. Smith Light & Traction Co. v. Ft. Smith, 202 Fed. 581; Landon v. Public Utilities Commission, P.U.R.1917A, 120, 234 Fed. 152; Bellamy v. Missouri & N. A. R. Co. L.R.A.1915A, 1, 131 C. C. A. 326, 215 Fed. 18; Re Advances in Rates, 20 Inters. Com. Rep. 243; State Journal Printing Co. v. Madison Gas & E. Co. 4 Wis. R. C. 501; Re New York & N. S. Traction Co. 3 P. S. C. (1st Dist. N. Y.) 63; Fuhrmann v. Cataract Power & Conduit Co. 3 P. S. C. 2d Dist. (N. Y.) 6.6; Re Charges for Natural Gas, Cal. R. C. Dec. 1145; Re Third Ave. Bridge Co. 3 P. S. C. (1st Dist. N. Y.) 209; Milwaukee v. Milwaukee Electric R. & Light Co. 10 Wis. R. C. 1.

The Commission was amply warranted in fixing a value approximately equal to its actual cost, less normal depreciation.

Rowland v. Boyle, 244 U. S. 106, 61 L. ed. 1022, P.U.R.1917C, 685, 37 Sup. Ct. Rep. 577; Southern P. Co. v. Bartine, 170 Fed. 725; Missouri, K. & T. R. Co. v. Public Utilities Commission, 103 Kan. 111, 172 Pac. 1022; O'Brien v. Public Utility Comrs. 92 N. J. L. 44, P.U.R.1919B, 865, 105 Atl. 132, 92 N. J. L. 587, P.U.R.1919D, 774, 106 Atl. 414.

The order is in no way invalidated by observations in the findings, and which are shown clearly by the findings to have had no effect upon the rates fixed.

Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 88, 57 L. ed. 431, 33 Sup. Ct. Rep. 185; Lincoln Gas & E. L. Co. v. Lincoln, 250 U. S. 256, 63 L. ed. 968, 39 Sup. Ct. Rep. 454; State ex rel. Tacoma Eastern R.

Co. v. Northern P. R. Co. 104 Wash. 405, P.U.R.1919B, 924, 176 Pac. 539.

Experience is the final test of the reasonableness of a rate, and its results should generally be awaited before judicial relief is invoked.

Lincoln Gas & E. L. Co. v. Lincoln, *supra*.

Burnett, J., delivered the opinion of the court:

The authority for a suit of this nature is found in L. O. L. § 6910, reading thus: "Any railroad or other person, persons or corporation interested in or affected by any order of the Commission fixing any rate or rates, fares, charges, classifications, joint rate or rates, or any order fixing any regulations, practices or service, being dissatisfied therewith, may commence a suit in the circuit court of Marion county against the Commission as defendant to vacate and set aside any such order on the ground that the rate or rates, fares, charges, classifications, joint rate or rates, fixed in such order, is unlawful, or that any such regulation, practice or service prescribed or fixed in such order is unreasonable, in which suit a copy of the complaint shall be served with the summons as in civil actions. The Commission shall serve and file its answer to said complaint within ten days after the service thereof, whereupon said suit shall be at issue and stand ready for trial upon ten days' notice by either party. All suits brought under this section shall have precedence over any civil cause of a different nature pending in said court, and the circuit court shall always be deemed open for the trial thereof, and the same shall be tried and determined as a suit in equity. In all trials under this section, and §§ 6911, 6912, and 6913 hereof, the burden of proof [shall] be upon the plaintiff to show by clear and satisfactory evidence that the order of the Commission complained of is unlawful, or unreasonable, as the case may be."

Primarily, the right to fix the rate for transportation is lodged in the carrier (Laws 1913, chap. 361), but subject to control and revision by

the Public Service Commission, either on its own motion or at the complaint of interested parties (L. O. L. 6906). The object to be attained, and the canon by which all the activities of the Commission are controlled, is to establish a reasonable rate for services rendered or to be rendered by the carrier; every unjust and unreasonable charge being prohibited as unlawful. L. O. L. 6887. The power to compel rail-

Courts—power
to compel
carriers to
render service.

roads to render adequate service and to charge reasonable rates for such service is legislative in its nature, and not judicial. It has been held in *State v. Corvallis & E. R. Co.* 59 Or. 450, 117 Pac. 980, that the appointment of a commission to fix certain rates and practices as reasonable is not a delegation of legislative power; the principle being that, while a legislative assembly cannot delegate its powers to enact laws, it may direct the application of a statute to a specified state of facts which depend upon the existence of certain conditions to be determined in a particular manner. The ascertainment of the conditions governing the reasonableness of rates to be charged for transportation of people and property is confided to the Commission, and at least in an ancillary sense this may be classed as a branch of the legislative power.

The supreme court of Wisconsin, from the enactments of which state our Public Service Commission Statute is copied in large measure, speaking by Mr. Justice Timlin in *Minneapolis, St. P. & S. Ste. M. R. Co. v. Railroad Commission*, 136 Wis. 146, 17 L.R.A. (N.S.) 821, 116 N. W. 905, uses this language:

"This law (Laws 1905, chap. 362), establishes, and thenceforth assumes, the existence of rates, charges, classifications, and services discoverable by investigation, but undisclosed, which are exactly reasonable and just. It commits to the Railroad Commission the duty to ascertain and disclose that particular rate, charge, classification, or service. The law intends that there is

only one rate, charge, or service that is reasonable and just. When the order of the Commission is set aside by the court, it is because this reasonable and just rate, charge, classification, or service has not yet been correctly ascertained. When the order of the Commission has been rescinded or changed by the Commission because of changed conditions it is because there is a new reasonable rate to be ascertained and disclosed, applicable to such new conditions, and fixed by force of law immediately when the new conditions come into existence. But the theory and the mandate of the law is that this point always exists under any combination of conditions, and is always discoverable, although not always discovered. Until it is discovered and made known the former rates and service prevail. The order of the Commission is *prima facie* evidence that the rate, charge, or service found and fixed by it is the particular rate, charge, or service declared by the legislature in general terms to be lawful and to be in force. If it were conceded that the Commission had power or discretion to fix one of several rates, either of which would be just and reasonable, it would be hard to say that this was not a delegation of pure legislative power to the Commission. But the theory of this law is to delegate to the Commission the power to ascertain facts and to make mere administrative regulations.

"If this court or the circuit court were, by the statute in question, authorized to investigate the subject anew, to put itself in the place of the Commission and search for this reasonable and just rate, with power to substitute its own judgment of what is reasonable and just for the judgment of the Commissioners, the statute might be subject to grave criticism. But the courts are not by this statute so authorized. The authority given to the circuit court is not to search for or disclose or declare this 'reasonable and just' rate or service, but merely to determine whether the order of the Commission is 'unreasonable'—quite a dif-

ferent thing. We think the legislature was within its power in conferring upon the courts such authority to inquire whether or not the order of the Commission was unreasonable, and to vacate the order if so found. In doing so the courts are required to exercise no legislative power, to ascertain and disclose no rates, to declare no rule, or no law, unreasonable, but merely to exercise judicial power to ascertain and determine whether the Commission has so far failed in its search for this lawful, just, and reasonable rate as to have found instead, and declared, that which is unreasonable. The result of the reversal of the order of the Commission is not to establish this fact, or ascertain this point of reasonableness, but to leave it undisclosed, leaving the former rates to stand or requiring the Commissioners to try over again to find it. In reviewing the order of the Railroad Commission the inquiry is not, whether the rate, regulation, or service fixed by the Commission is just and reasonable, but whether the order of the Commission is unreasonable or unlawful. The nature of the inquiry is changed at this point, and the court is not investigating for the purpose of establishing a fixed point. Whether or not the order is within the field of reasonableness, or outside of its boundaries, is the question for the court. It is quite a different question from that which was before the Commission in this respect. The order, being found by the court to be such that reasonable men might well differ with respect to its correctness, cannot be said to be unreasonable. From this aspect it is within the domain of reason, not outside of its boundaries. This is the viewpoint of the reviewing court. Doubtless the court may, for the purpose of comparison and to aid it in ascertaining how far the order diverges from a reasonable standard, take evidence of and consider such criterion. But this is only for comparison. The court cannot legally adjudicate or declare this statutory standard.

"Unless the plaintiff is able to show by clear and satisfactory evidence that the order of the Commission complained of is unlawful or unreasonable, as the case may be, the order must stand. The words 'clear and satisfactory evidence' are significant, because at the time of the enactment of this statute they were used in the law of this state to describe a degree of proof greater than a preponderance of evidence, and such as was necessary in order to establish fraud by that party to an action, upon whom the burden of proof rested [citing authorities]."

A finding without evidence, or against the evidence, is arbitrary and beyond the power of the Commission; and an order based thereon is contrary to law and subject to be set aside by a court of competent jurisdiction. "In a case like the present, the courts will not review the Commission's conclusions of fact . . . by passing upon the credibility of witnesses, or conflicts in the testimony. But the legal effect of evidence is a question of law." *Interstate Commerce Commission v. Louisville & N. R. Co.* 227 U. S. 88, 57 L. ed. 431, 33 Sup. Ct. Rep. 185. In *Public Service Commission v. Cleveland, C. C. & St. L. R. Co.* — Ind. —, P.U.R.1919B, 837, 121 N. E. 116, it is held, in a suit to set aside the findings of the Commission, that on appeal to the supreme court the decision of the trial court will be approved if there is any evidence to sustain it. See also *Hocking Valley R. Co. v. Public Utilities Commission*, 92 Ohio St. 9, L.R.A.1918A, 267, P.U.R.1916A, 1062, 110 N. E. 521, Ann. Cas. 1917B, 1154; *Id.*, 92 Ohio St. 362, P.U.R.1916B, 406, 110 N. E. 952.

The reasonableness of the rate is the only justiciable question in contentions of this sort, and the court will not assume the place of the Commission or set its order aside on the court's conception of its wisdom. *State v. Great Northern R. Co.* 150 Minn. 57, P.U.R. 1915D, 467, 153 N. W. 247,

—power to set aside finding of Commission.

—wisdom of ruling.

Ann. Cas. 1917B, 1201. State v. Great Northern R. Co. 135 Minn. 19, P.U.R.1917B, 413, 159 N. W. 1089, was a case where the Commission was called upon to require the defendant company to construct a new depot at Ada, a station on its lines. In speaking of the rules and orders made by the Commission, the court said:

"The making of such regulations is a legislative or administrative, and not a judicial, function. The reasonableness of such an order is, however, a judicial question. The court may review the orders of the Commission, but only so far as to determine whether they are reasonable. The order may be vacated as unreasonable if it is contrary to some provision of the Federal or state Constitution or laws, or if it is beyond the power granted to the Commission, or if it is based on some mistake of law, or if there is no evidence to support it, or if, having regard to the interest of both the public and the carrier, it is so arbitrary as to be beyond the exercise of a reasonable discretion and judgment. . . . The court does not consider the wisdom or expediency of the order. The court ascribes to the findings of the Commission 'the strength due to the judgments of a tribunal appointed by law and informed by experience,' and its conclusion, when supported by substantial evidence, is accepted as final."

"If the conclusion arrived at by the Commission finds justification in the testimony, this court will not substitute its judgment for that of the Commission." *Grand Rapids & I. R. Co. v. Michigan R. Commission*. 188 Mich. 108, P.U.R.1915F, 805, 154 N. W. 15.

This is the manifest substance and effect of our own statute; for the suit is authorized not to make new rates, but only to set aside those established by the order of the Commission. In brief, the function of the court is, in a sense, to review the proceedings of the Commission, and to ascertain if it has violated any principle of law, or gone beyond the scope of its duty in making the or-

der. However much the judges' hearing the case at any stage of the judicial proceedings might differ on the conclusion of the Commission, as to its wisdom, or as to its determination, of any pure question of fact, the courts must respect the decision of the Commission, if it has not departed from the scope of its authority established by the legislative power of the state.

The case was tried in the circuit court solely on the testimony taken before the Commission. Neither the objectors, plaintiffs here, nor the railroad company, tendered any additional testimony. The principal grievance voiced by the plaintiffs is that the Commission considered as one of the elements, in making up the rates which the railroad company was entitled to charge, the amortization of the reasonable value of the plant of the company, and as incidental to that reckoned the discount upon the bonds of the company which it sold at 5 per cent less than par to obtain funds with which to build the road. It is contended by plaintiffs that all the shipper is required to pay is for carriage of its products, a sufficient amount to cover a reasonable rate of interest on the value of the plant employed in the carriage. For the defendant it is maintained that the company, as time goes on, is entitled to charge such a rate as will not only afford a fair return of interest on the value of the plant, but will provide for and absorb the depreciation of the property under all the circumstances of the particular case. The carrier devotes its private property to public service, but it is none the less on that account within the protection of the Constitution that such property shall not be taken for public use, nor the particular services of any man demanded, without just compensation. Or. Const. art. 1, § 18. Thus to devote its property means that it gives to the public the right or option to demand its service or the use of its property, but this is always subject to the condition of just compensation. Neither the public nor any of its component parts is

compelled to exercise this right or option, but, if it is exercised, it can be only under the attendant constitutional condition. It is said that a shipper should not be compelled to buy the company's railroad. But it is equally true in principle that the company is entitled to such rates as will fairly compensate it for the service rendered, and for depreciation of its plant employed in such service, even though it reaches the vanishing point. In other words, the company ought to be allowed to come out even, in an undertaking which may reasonably be expected to exhaust itself, and, besides quitting whole, to receive a fair compensation for its services. The carrier ought not to be compelled to sacrifice its plant, and be content merely with compensation amounting only to interest on its value. To ignore this principle would be to violate the constitutional inhibition already quoted. A public service corporation cannot be expected to sacrifice its property for the public good. Nor is it bound to see its property gradually wasted by wear and decay, without making provision for its replacement. It is entitled to earn enough not only to meet the expenses of current repairs, but

Rates—replacement of plant.

also to provide means for replacing the parts of the plant when these can no longer be used. Cedar Rapids Gaslight Co. v. Cedar Rapids, 144 Iowa, 426, 48 L.R.A. (N.S.) 1025, 138 Am. St. Rep. 299, 120 N. W. 966. The whole subject involved in this litigation is ably and exhaustively treated in the note to Kansas City Southern R. Co. v. United States, 52 L.R.A. (N.S.) 1.

There was testimony before the Commission to the effect that almost the only freight that could be carried by the railroad company consisted of the logs cut from the timber in a restricted section in Columbia county, amounting to about 2,000,000 feet, and that when this was exhausted the plant of the company would have only a scrap value. In other words, aside from the junk value of the plant, it would perish

in the using. The doctrine that the shipper should be required to pay such a rate as would not only yield a reasonable return on the value of the property, but also provide for absorbing its depreciation, is abundantly established in cases involving roads which are permanent in their character and which may reasonably be expected to have a flourishing traffic perpetually, or at least as long as carriage by railroad shall continue in vogue. The precept is equally applicable to a road the activity of which is circumscribed by the fact that freight available for it will be exhausted in the near future. The principle is the same, and the two cases differ only in the degree and rapidity of depreciation. A fully equipped railroad, built on a circle with a radius of a hundred miles from the North Pole, would be, at the present day, utterly valueless. There would be no traffic for it, and nothing to use it for. Differing only in degree would be a railroad running into a logged-off barren, where there was nothing for it to haul and no use to which it could be put. There was testimony from which the Commission could arrive at the conclusion that this would be the fate of the railroad here involved, in the near future. It was within the scope of the Commission's authority to establish such a rate as would amortize this depreciation, as well as to yield to the carrier a fair return —charge of amortization. for its services. To

hold otherwise would be to say that, when an individual or corporation devotes property to public uses, it amounts to a voluntary sacrifice or thank offering on the public altar. Under our Constitution no such gratuity is contemplated. In proper cases, under the law of eminent domain, the public may condemn and take the property of a private concern, of course accompanied by an award of just compensation. The individual may voluntarily devote his property to the public service, without awaiting condemnation, granting to the public the option of taking it and using it, but only on

the condition that such remuneration shall be afforded as will enable the individual to come out even.

Objection is made also to the effect that the Commission had no right to consider the discount suffered by the bonds of the company in the market in the endeavor to raise the funds necessary to complete the road. It is by no means clear that the Commission included this in making up the valuation of the road. It is true that in the report or decision of the Commission the various elements accompanying the construction of the road are tabulated, wherein appears an item, grouped with others, of interest during construction. In giving a history of the undertaking, the sale of the bonds is narrated, and in winding up the table of all of the items the value of the investment on January 1, 1918, is fixed at \$1,373,778.79. But after considering all of the situation, the Commission fixed the value of the property for rate-making purposes at \$1,263.883, making a difference in the way of deduction of \$109,895.79. This more than covers all the discount in any way connected with the undertaking, which is shown to be \$61,037.50. It is enough to say on this branch of the case that the plaintiffs have not shown that in making up the value of the property for rate-making purposes the Commission included anything whatever for discount on bonds. In other words, the plaintiffs have not made out their case on that point. The statute under which they proceed declares that "in all trials under this section, and §§ 6911, 6912, and 6913 hereof, the burden of proof [shall] be upon the plaintiff to show by clear and satisfactory evidence that the order of the Commission complained of is unlawful, or unreasonable, as the case may be." L. O. L. § 6910.

We might well rest here; but, as to interest on the investment, it seems that a reasonable rate should be allowed from the beginning of the undertaking. It is fair compensation for the use of the

money, and it matters not whether that is paid directly to the company, or is passed on to the one from whom the company borrows the money. If the charge is reasonable, it ought to be allowed. It is quite a different thing from allowing a return on what is colloquially known as "watered stock." No carrier is entitled to a return upon fictitious or inflated values, and this is the principal evil against which rate-making legislation and laws establishing Public Service Commissions have been directed. The intent of the law is to allow a fair compensation, based upon fair and reasonable value of the service and the utilities employed. The bench mark to which the rates are referable is the reasonable value of the plant, which includes all of the elements of fair and reasonable expense in establishing it, qualified, of course, by the depreciation which has already occurred.

In *Chicago & N. W. R. Co. v. Railroad Commission*, 156 Wis. 47, 145 N. W. 216, 974, it was held in substance that the reference by the Commission in its decision to extraneous matters does not necessarily mean that it has reached a conclusion without evidence. And in *State ex rel. Seattle v. Public Service Commission*, 76 Wash. 492, 136 Pac. 850, it is taught that the Commission has a right to supplement evidence offered by the parties with an inquiry on its own motion, and when so doing is not acting judicially. These cases, and others like them, dispose of the minor contention of the plaintiffs, urged in their complaint but not insisted upon in their brief, that the Commission considered a personal examination of the railroad by one member of the board. The Commission is charged, as stated, with statutory duties closely allied to the legislative power of the state. In very truth, it is a part of the co-ordinate branch of the government, with the duties of which the judicial part of the fabric may not interfere,

Public Service
Commission—
ruling based on
personal inspection—validity.

—interest on
investment.

except as already stated, to wit, upon the judicial questions involved.

The plaintiffs have not maintained the burden of proof of showing that the Commission exceeded its powers or acted in violation of any principle of law. Moreover, in the very nature of things, the factors involved in an inquiry of this kind are so many and so variable that it is impossible to fix rates that will be mathematically correct, or exactly applicable to all the new conditions that may

**Rates—
mathematical
correctness.**

arise, even in the immediate future.

In practice, it is reasonable and just in most instances to give the rates in question a fair trial under actual operation. This is the teaching of *Darnell v. Edwards*, 244 U. S. 564, 61 L. ed. 1317, P.U.R.1917F, 64, 37 Sup. Ct. Rep. 701, a leading case cited by the plaintiffs. See also *Lincoln Gas & E. L. Co. v. Lincoln*, 250 U. S. 256, 63 L. ed. 968, 39 Sup. Ct.

Rep. 454. Besides all this, the establishment of a given rate sheet is not absolutely final and conclusive for all time, for new conditions may arise to-morrow which will make unreasonable, one way or the other, a rate which to-day is just and fair. The whole matter is continually under the scrutiny of the Commission, in the exercise of a flexible administrative authority, and can be reopened at any time, either on its own motion or on the petition of interested parties. L. O. L. § 6906.

For the reasons stated, we are constrained to respect the Commission's decision, and to affirm the decree of the Circuit Court, without prejudice to renewed inquiry hereafter, as the Commission may be advised.

McBride, Ch. J., and Bennett and Johns, JJ., concur.

Petition for rehearing denied June 29, 1920.

ANNOTATION.

Right of carrier to rates which will amortize cost of road.

The question under consideration in the reported case (*HAMMOND LUMBER CO. v. PUBLIC SERVICE COMMISSION*, ante, 1223), as to whether the railroad company there involved was entitled to a charge which would provide for an amortization of the cost of the railroad, is an unusual one. Ordinarily, railroads are constructed to be permanently used, and the question resolves itself into one of maintenance or charges for depreciation, a question beyond the scope of the present discussion. It was held in *Darnell v. Edwards* (1917) 244 U. S. 564, 61 L. ed. 1317, P.U.R.1917F, 64, 37 Sup. Ct. Rep. 701, that one twentieth of the amount expended by the owner of a railway in the construction of a road could not be charged against the annual operating revenue, in determining whether rates fixed under state authority were confiscatory as not yielding a proper return, merely because of a contract whereby the ownership of the road was to be transferred at the end

of twenty years to a connecting railroad, without payment of any purchase price. The court states that, "in determining whether rates are confiscatory because not yielding a proper return, the basis of calculation is the fair value of the property used in the service of the public. *Smyth v. Ames* (1898) 169 U. S. 466, 546, 42 L. ed. 819, 849, 18 Sup. Ct. Rep. 418; *Minnesota Rate Cases* (*Simpson v. Shepard*) (1913) 230 U. S. 352, 434, 57 L. ed. 1511, 1555, 48 L.R.A. (N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18. The hypothetical annual payments of one twentieth of the cost of the road to *Darnell* were not a proper rent charge, and bore no relation to the actual value of the property. They arose out of the contractual arrangement between *Darnell* and the *Illinois Central* and were in the nature of an amortization charge to take account of his diminishing interest in the road. But upon that theory the interest of the

Illinois Central increased in value by as much as that of Darnell decreased. In any aspect, the transference of his interest to the Illinois Central, and any charge on that account, made by

him for purposes of his own bookkeeping, had no proper relation to the question of the value of the property, and hence were of no concern to the public." W. A. E.

D. COLLOTTA, Appt.,

v.

WESTERN UNION TELEGRAPH COMPANY.

Missouri Supreme Court (In Banc)—January 12, 1920.

(— Miss. —, 83 So. 401.)

Telegram — messenger as agent of sender of message.

A rule of a telegraph company that, in carrying messages from senders to the transmitting office, its messengers act as agents of the senders, is reasonable, and therefore the company cannot be held liable for failure to transmit a message which the messenger to whom it was committed never took to the transmitting office.

[See note on this question beginning on page 1235.]

APPEAL by plaintiff from a judgment of the Circuit Court for Sunflower County (Elmore, J.) in favor of defendant in an action brought to recover damages alleged to have been sustained by its failure to transmit and deliver a telegram. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. J. B. Harris for appellant.

Mr. Frank E. Everett for appellee.

Stevens, J., delivered the opinion of the court:

Appellant, as plaintiff in the circuit court, sued to recover damages alleged to have been sustained by reason of the failure of the Western Union Telegraph Company to transmit and deliver a telegram addressed to him at Indianola, Mississippi. Appellant was engaged in the business of handling fruits, including bananas, in carload lots. In May, 1918, plaintiff ordered from one S. Zemurray, of New Orleans, Louisiana, two cars of bananas, one car to be shipped to Yazoo City, the other to West Point. The shipper undertook to wire appellant by way of the Western Union Telegraph Company, and claims to have written out and delivered to the company the following telegram: "May 18, 5:35pmc. D. Collotta, Indianola, Miss. Shock-

ing Yazoo City IOFBB West Point LUOIF both inflame. [Signed] S. Zemurray. Paid rush rush rush."

This telegram was never delivered, and as a result of the failure to receive the telegram appellant claims that the bananas rotted, and that he was damaged in the sum of \$756.59. The defendant in the court below filed the general issue and four special pleas. The first and second special pleas undertook to raise a Federal question by reason of the fact that the message was an interstate message. The third and fourth special pleas set forth and pleaded the benefit of the following stipulation appearing on the telegraph blank as a part of the contract between Zemurray, the sender, and the telegraph company: "No responsibility attaches to this company concerning telegrams until same are accepted at one of its transmitting offices, and if the tele-

gram is sent to such office by one of the company's messengers, he acts for that purpose as agent of the sender."

And the pleas expressly averred that the message in question was given by the sender to a messenger, and was never delivered to the company at its transmitting office, and that the company never in fact received, and therefore never undertook to transmit, the message. A demurrer was interposed to the third and fourth special pleas, challenging their sufficiency in law. The demurrer submits that the stipulation relied upon by the telegraph company is against public policy and void; that the pleas admit the delivery of the message to a messenger, and a delivery to a messenger should be construed to be a delivery to the company, for the reason that the company cannot plead its own negligence.

A demurrer was also interposed to special pleas 1 and 2. For the purpose of this opinion it is unnecessary to set forth the first and second special pleas, or to notice the disposition which the trial court made of these pleas and the demurrer thereto.

The demurrer to the third and fourth special pleas was overruled, and, the plaintiff declining to plead further, judgment was entered in favor of the defendant. The present appeal challenges the ruling of the trial court in sustaining the demurrer to the third and fourth pleas and in entering final judgment thereon.

The only question for decision is whether the quoted, printed provision on the telegraph blank, to the effect that the company's messenger, in receiving the telegram for transmission, acts for that purpose as agent for the sender, is a reasonable

Telegram—
messenger as
agent of sender
of message.

and therefore a lawful stipulation. The authorities, we think, are in accord in upholding the validity of this stipulation. Gray, *Communication by* *Telegraph*, ¶ 13, p. 23; *Jones, Telegraph & Telephone Co.* §§ 278 and 409; 27 Am.

& Eng. Enc. Law, 2d ed. 1051; *Ayres v. Western U. Telegr. Co.* 65 App. Div. 149, 72 N. Y. Supp. 634; *Stamey v. Western U. Telegr. Co.* 92 Ga. 613, 44 Am. St. Rep. 95, 18 S. E. 1008.

The special pleas set forth in detail that the telegram was given to a messenger and was never received at the transmitting office of the company and never accepted. If the provision relied upon by the telegraph company is a reasonable and lawful provision, it follows that the sendee cannot base an action in tort for a failure to deliver the message. The reasons why the stipulation under review should be regarded as a reasonable regulation are well stated by Judge Lumpkin, speaking for the Georgia court, in *Stamey v. Western U. Telegr. Co.* *supra*. The opinion, among other things, says: "The work performed by the messenger in carrying the message from the office or residence of the sender to the transmitting office of the company forms no part of the transmission of the message by the company, for which latter purpose alone the company makes a charge. There is nothing onerous or one-sided about the rule. It dictates no terms to the sender, and gives no advantage to the company. It is neither obligatory nor arbitrary. In a word, it gives the sender the alternative of delivering his despatch to the messenger, to be delivered by him at the office of the company on the condition prescribed, or of making such delivery either in person or by his own servant. We have been unable to find a direct adjudication upon this rule by any court, and we think this shows, or tends to show, the consensus of public and professional opinion in favor of its reasonableness. The rule is held to be reasonable in the work of Gray on *Communication by Telegraph*, § 13, top of page 23. Assuming, then the reasonableness of the rule, it follows, in the absence of other facts to the contrary, that the message was not delivered to the company, because it was not presented at one of its trans-

mitting offices by the agent of the senders, and was not accepted by the company. . . . Messengers of a telegraph company are not sent out from the company's office to solicit telegrams, and, being engaged in a most subordinate work of the company's service, it is to be presumed that they are not invested by the company with the powers of receiving the company's charges or fees for the transmission of telegrams, and that they have no powers of rejecting telegrams offered to them, either for the nonpayment in advance of the company's charges for transmission, or for being illegibly written, or for containing matter which would make the company liable in tort or otherwise for transmitting an indecent or immoral telegram,—all of which are powers reserved by law to the company for its protection, and with which it is known to the public, or should be, the receiving agent of the company at its transmitting offices is invested." 92 Ga. 615-617.

Mr. Jones observes: "It is well known that the messengers are usually young and inexperienced boys, and of course are not familiar with the rules in regard to the proper messages to be accepted for transmission."

And, further, that, if a delivery to a messenger boy should be considered a delivery to the company, "the latter would be liable for failure to send a message delivered to its messenger, although to do so would subject the company to an indictment or to an actionable wrong." § 278.

Mr. Gray adds a further and persuasive reason that "knowledge of the condition of the company's lines, and generally of the company's ability to communicate a message, is peculiarly within the scope of an operator's business; and it is his right and duty, on one hand, to disclose the fact if the company is unable to achieve what it undertakes to do, and, on the other, to be informed of any facts which may aid him in correctly performing the contract." § 13, p. 23.

There is no fact or circumstance in this case to estop the company or to take the case out of the general rule under discussion. The point arises in this case upon the sufficiency of the defendant's special pleas, and the learned circuit judge was correct in overruling the demurrer. The plaintiff declined to plead further, and so the final judgment appealed from must be affirmed.

ANNOTATION.

Validity of rule or stipulation making messenger in employment of telegraph company agent of sender in taking message to office for transmission.

It appears from the cases hereinafter referred to that the blanks furnished by telegraph companies in the United States ordinarily have printed on the back thereof a stipulation substantially as follows: "No responsibility regarding messages attaches to this company until the same are presented and accepted at one of its transmitting offices, and if a message is sent to such office by one of the company's messengers, he acts for that purpose as the agent of the sender." With but a single exception the cases passing on the question have held this rule to be reasonable and

valid. Applying that rule, the courts hold that where a person to whom a telegram is delivered by a messenger in the employ of a telegraph company writes a reply thereto on a blank bearing a stipulation of that kind, and sends it to a transmitting office by the messenger, he cannot recover for the failure of the messenger to deliver it promptly for transmission. *Stamey v. Western U. Teleg. Co.* (1894) 92 Ga. 613, 44 Am. St. Rep. 95, 18 S. E. 1008; *Ayres v. Western U. Teleg. Co.* (1901) 65 App. Div. 49, 72 N. Y. Supp. 634; *Carter v. Western U. Teleg. Co.* (1915) 101 S. C. 284, 85 S. E. 584. See also

the reported case (*COLLOTTA v. WESTERN U. TELEG. CO.* ante, 1233), where in the validity of the stipulation in question is sustained, but it does not appear under what circumstances the telegram was delivered to the messenger.

A different view was taken in *Will v. Postal Teleg. Cable Co.* (1896) 3 App. Div. 22, 37 N. Y. Supp. 933. In that case it appeared that a telegram was received from the plaintiff, who was in the city of New York, addressed to his firm in the city of Buffalo, which not only bore on its face evidence that it related to important business affairs which required prompt attention, but also, in express terms, demanded an immediate reply. With a full appreciation of its importance as well as of its requirements, the defendant's manager sent it to the plaintiff's firm, with directions to the messenger boy by whom it was sent to wait for an answer. The answer was obtained by the messenger and placed in his pocket, where it remained until accidentally discovered some time on the following day. Although he returned to the defendant's office soon after leaving the sender's place of business, it did not appear that either the operator or the manager bestowed sufficient thought on the subject to inquire if the plaintiff's firm had furnished him with an answer. The defendant sought immunity from the negligence established by the facts in a provision on the telegraph blank, in effect, that whenever a message is sent to its office by one of its messengers, he is to be deemed the agent of the sender. It was held that this regulation was not reasonable in its character, or in accord with public policy, and that the company was liable for the fault or omission of the messenger. The court said: "This is certainly a most remarkable 'regulation,' and it is one of which, we have no hesitation in saying, the defendant should not be permitted to avail itself. It is a well-known fact that, as competitive agencies, the various telegraph companies in this country have wires and appliances placed in the stores and offices of their patrons in the large

er cities, by means of which a messenger can be summoned from the central office at any time to take a despatch to that office. These messengers are in the employ of the companies, and they are sent in response to calls for their services in order to obtain business for the companies which they represent; and it appears that the defendant was at this very time making use of this agency to increase its patronage in the city of Buffalo. Now, it would be a singular condition of affairs if a patron of one of these companies, through an instrumentality which the latter had furnished, should summon a messenger who was in its employ for this very purpose, deliver to him a message to be transmitted by the company for a money consideration, and then, when it became necessary to call the company to account for some omission of duty upon the part of the messenger, discover that, in order to avail himself of the means thus provided, he had been obliged to stipulate that the messenger was his, and not the company's, agent, and that he had thereby released the company from all responsibility so far as the acts or omissions of the messenger were concerned. It is undoubtedly within the power of a telegraph company, as it is of any other corporation, to make rules and regulations for the proper conduct of its business, but such rules should be reasonable in their character and in accord with good, sound public policy. The one under consideration was neither; on the contrary, it was an imposition upon the public and upon every patron of the defendant who had not the time or disposition to go in person to its transmitting office for the purpose of sending a message. Telegraph companies are creatures of the state. They are organized and transact business because of the pecuniary gain which they expect to reap from the public, and they are certainly under an obligation to render service which shall furnish some fair equivalent for the compensation thus received; but if they are to be permitted to establish a regulation like the one in question, there is no reason why

they should not impose upon their patrons, as a condition of transacting their business and receiving their money, the requirement that the operator, and the messenger at the other end of the line, shall be regarded as their agents; and it consequently becomes merely a question of time when, in this manner, the companies shall escape what little liability they still assume. We have chosen thus far to consider this case upon the lines indicated, for the reason that we believe it to be the duty of the courts to place some wholesome limitations upon the rule under which corporations are attempting, by shrewd and ingenious devices, to escape all responsibility for their negligent acts; but we do not regard this case as necessarily resting upon the principle thus enunciated, for the evidence shows quite conclusively that the defendant's messenger boy was directed to obtain an answer to the message in question, and that he did in fact solicit and receive one. This being the case, he was unquestionably the defendant's agent, even if the 'regulation' were to be given the full effect claimed for it. In other words, by asking, waiting for, and receiving the plaintiff's message, the defendant ignored and waived the rule of which it is now seeking to avail itself."

However, in *Ayres v. Western U. Teleg. Co.* (1901) 65 App. Div. 149, 72 N. Y. Supp. 634, a similar stipulation was held to be a reasonable provision. It was proved in that case that a messenger of the defendant delivered a message to the plaintiff, and the latter immediately wrote out a reply and gave it to the messenger, but the message was not promptly transmitted and delivered. The defendant for a defense alleged that the message was written on one of the company's blanks, which contained the stipulation heretofore referred to. It was held that this provision was reasonable and enforceable, and no liability attached for the negligence of the messenger in returning the message to the office. The case of *Will v. Postal Teleg. Cable Co.* (N. Y.) *supra*, was distinguished, the court stating that

in that case the messenger was constituted an agent of the company to receive the answer by the defendant's manager. In discussing the validity of such stipulations, as a general rule, the court said: "I also think that the regulation upon the back of this telegram by which the sender agreed that the messenger to whom he delivered the answer at Monmouth beach should be considered as his agent, and not the agent of the company, in delivering the message to the operator of the defendant, was, under the circumstances of this case, a reasonable regulation for the transaction of the defendant's business. The messenger who delivered the telegram to the plaintiff, to which the one in question was an answer, was, so far as appears, an employee authorized to deliver telegrams, and not to receive them. There is nothing to show that this messenger of the company had any authority from the defendant to receive telegrams to be transmitted by the company,—nothing to show that it was the custom of the company to allow its messengers to receive telegrams. There was no payment made to this messenger by the plaintiff. The message was written upon one of the blanks of the company, which had upon it plainly the statement that the telegram was sent subject to the conditions indorsed upon its back, which conditions were agreed to by the sender of the message. In the absence of evidence to the contrary, he must be assumed to have been familiar with the terms upon the back of the message, and the request to send the message was subject to the conditions which were agreed to by the sender. Those terms and conditions were that no responsibility regarding the message should attach to the company until the same was presented and accepted at one of the defendant's transmitting offices. These messengers were employed to deliver messages only. If the messenger was sent with several messages to deliver in a country district where residences are at a distance from each other, and the delivery of which would require some time before the messenger could return

to the company's transmitting office, it would be unreasonable to charge the company with gross negligence if the messenger did not return to the office at once. Indeed, others to whom messages were addressed could complain if their messages were delayed because the messenger employed to deliver messages was required to carry answers back to the telegraph office. If the plaintiff had wished to insure the immediate transmission of his message, he could have taken it himself to the transmitting office; but, with knowledge of this regulation, which he agreed to, if he trusted the message to the messenger who had delivered to him a telegram, the company would not be responsible for its transmission until it was actually received at the transmitting office. This certainly was not, under the circumstances, an unreasonable regulation, within the principles established in *Kiley v. Western U. Teleg. Co.* (1888) 109 N. Y. 236, 16 N. E. 75, for, as was there said: "They have the right to make reasonable regulations for the transaction of their business, and to protect themselves against liabilities which they would otherwise incur through the carelessness of the numerous agents, and the mistakes and defaults incident to the transaction of their peculiar business."

A limitation of the general rule to the effect that when a company sends a messenger for the express purpose of taking a message the stipulation is not controlling was recognized and applied in *Alexander v. Western U. Teleg. Co.* (1912) 158 N. C. 473, 42 L.R.A.(N.S.) 407, 74 S. E. 449, wherein the evidence showed that the message in question was written on a regular blank, and the sender's secretary then called the telegraph office by telephone and asked that a boy be

sent for the telegram. The message was given to the messenger, but was never delivered at the transmitting office. In an action against the telegraph company for failure to transmit and deliver the message, it was held that a stipulation on the blank, to the effect that the messenger boy was deemed to be the agent of the sender in taking a telegram to the office for transmission, was not applicable.

In *Postal Teleg.-Cable Co. v. W. C. Craig & Co.* (1913) 106 Miss. 279, 63 So. 573, it was shown that while the plaintiff delivered a telegram to a messenger of the defendant company, it was in fact promptly delivered by him, and the delay complained of occurred in transmission. In holding that the stipulation making the messenger the agent of the sender had no application to the facts shown, the court said: "This regulation or condition, analyzed, means that the company will not be responsible for messages delivered to one of its messengers until the messenger delivers it to its office; and it notifies senders that, if they choose to send the message by their messenger, they take the risk of his failure to deliver same. The messenger is made the agent of sender to get the message to the company. This condition was written by the company, and cannot be given a meaning broader than its language imports. There was no failure to deliver; the message was delivered and accepted at the office of the company. The messenger was the agent of the company, except as provided by the printed condition. Conceding that the printed matter binds persons using the blanks, we can find nothing in the condition, relied on by appellant, to support its contention." E. C. B.

CHARLES H. BILLINGS et al., Exrs., etc., of Samuel F. Dobbins,
Deceased,

v.

MARSHALL FURNACE COMPANY et al.

and

CHARLES W. DOBBINS, Appt.

Michigan Supreme Court — April 10, 1920.

(— Mich. —, 177 N. W. 222.)

Will — creation of voting trust of corporate stock — validity.

1. The attempt by a testator to create a voting trust of stock standing in his name in a corporation, and exclude for a fixed period his representatives from the exercise of their personal judgment in the management of the affairs of the corporation, and to perpetuate certain persons in control of the corporation without regard to the rights of minority stockholders, is contrary to public policy and void.

[See note on this question beginning on page 1242.]

Corporation — right of representatives of deceased stockholder to vote.

2. Representatives of a deceased holder of stock in a corporation have

a right to vote with respect to stock standing on the corporate books in the name of decedent.

[See 7 R. C. L. 346.]

APPEAL by defendant, Charles W. Dobbins, from a decree of the Circuit Court for Calhoun County, in Chancery (North, J.) construing the will of Samuel F. Dobbins, deceased. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. Joseph L. Hooper, for appellant:

The executors' duties as executors, under the will, are inseparably blended and merged with their duties as trustees.

39 Cyc. 249, 250.

A person may by will create a trust for the voting of a majority of the stock in a corporation, which will, in effect, absolutely control the destinies of the corporation for the period during which the trust is to continue.

Fletcher, Cyc. Corp. p. 2874.

Mr. James W. Mackey, for all defendants except appellant:

Restrictions in ¶ 10 of will in question do not apply to the plaintiffs, for they are acting solely as executors, and not as trustees under said will.

Re Erdman, 179 Mich. 567, 146 N. W. 400; Michigan Home Missionary Soc. v. Corning, 164 Mich. 397, 129 N. W. 686.

A stock-voting agreement entered into by a majority of the directors and owners of a majority of the stock of a corporation for the purpose of perpet-

uating themselves and their successors in office and control of the company, not only during their own lives, but for years after their death, without regard to the rights of the minority of the directors and stockholders, is deemed prima facie illegal.

7 R. C. L. 351; Snow v. Church, 13 App. Div. 108, 42 N. Y. Supp. 1072; Clarke v. Central R. & Bkq. Co. 15 L.R.A. 683, and note, 50 Fed. 338; Morel v. Hoge, 16 L.R.A.(N.S.) 1136, 14 Ann. Cas. 935, and notes, 130 Ga. 625, 61 S. E. 487; Gage v. Fisher, 5 N. D. 297, 31 L.R.A. 557, 65 N. W. 809; Smith v. San Francisco & N. P. R. Co. 56 Am. St. Rep. 140, note; Harvey v. Linville Improv. Co. 118 N. C. 693, 32 L.R.A. 265, 54 Am. St. Rep. 749, 24 S. E. 489; Cone v. Russell, 48 N. J. Eq. 208, 21 Atl. 847; 5 Thomp. Corp. § 6604; Kreissl v. Distilling Co. of America, 61 N. J. Eq. 5, 47 Atl. 471; Warren v. Pim, 66 N. J. Eq. 353, 59 Atl. 773; Shepaug Voting Trust Cases, 60 Conn. 556, 24 Atl. 32.

While it is true that in some instances voting trust agreements have

been upheld, it is only in those classes of cases wherein the purpose of the shareholders entering into said voting trust agreement was for the betterment of the corporation and the advantage of all the shareholders of the company, and in those classes of cases the voting agreement was revocable at the will of any of the stockholders to the agreement.

7 R. C. L. 350; *Smith v. San Francisco & N. P. R. Co.* 56 Am. St. Rep. 199, and note. 115 Cal. 584, 35 L.R.A. 309, 47 Pac. 582; *Hall v. Merrill Trust Co.* 106 Me. 465, 138 Am. St. Rep. 355, 76 Atl. 926; *Carnegie Trust Co. v. Security L. Ins. Co.* 31 L.R.A. (N.S.) 1186, note; *Morel v. Hoge*, 14 Ann. Cas. 938, note.

Executors have the power to vote the stock of their testator at all meetings, being the personal representatives of such decedent, and until a settlement and division of the estate the stock of a decedent belongs to his personal estate.

7 R. C. L. 346; *Schmidt v. Mitchell*, 101 Ky. 570, 72 Am. St. Rep. 427, 41 S. W. 929; *Jones v. Green*, 129 Mich. 203, 95 Am. St. Rep. 433, 38 N. W. 1047; *Tunis v. Hestonville, M. & F. Pass. R. Co.* 149 Pa. 70, 15 L.R.A. 665, 24 Atl. 88.

The right to vote is inseparable from the right of ownership of stock, unless with the owner's consent; and therefore a proxy to vote the stock, to be valid, must have been given by the person who is the legal owner of the stock and entitled to vote the same at the time it is voted.

Marshall, Corp. 910; *Re Mohawk & H. R. Co.* 19 Wend. 135; *Tunis v. Hestonville, M. & F. Pass. R. Co.* 149 Pa. 70, 15 L.R.A. 665, 24 Atl. 88; *Cook, Stockholders*, § 610; *Morawetz, Corp.* § 486; *Com. ex rel. Dickinson v. Detwiller*, 131 Pa. 614, 7 L.R.A. 357, 18 Atl. 990, 992.

Mr. Burritt Hamilton, for appellees: The direction to trustees does not apply to the executors, even though the same persons are named for both offices.

28 Am. & Eng. Enc. Law, 2d ed. 935, 936.

A voting agreement by which one of the parties to the agreement is to receive an office in the corporation, or where the arrangement is made for the sole benefit of the parties to the agreement, and not for the general welfare of the corporation and all of its stockholders, is invalid.

Shepaug Voting Trust Cases, 60 Conn. 579, 24 Atl. 41; *Guernsey v. Cook*, 120 Mass. 501; *Woodruff v. Wentworth*, 133 Mass. 309; *Cone v. Russell*, 48 N. J. Eq. 208, 21 Atl. 847; *Robotham v. Prudential Ins. Co.* 64 N. J. Eq. 673, 53 Atl. 842; *Fennessy v. Ross*, 5 App. Div. 342, 39 N. Y. Supp. 323; *Gage v. Fisher*, 5 N. D. 297, 31 L.R.A. 557, 65 N. W. 809; *Withers v. Edmonds*, 26 Tex. Civ. App. 189, 62 S. W. 795; *Noyes v. Marsh*, 123 Mass. 286; *Snow v. Church*, 13 App. Div. 108, 42 N. Y. Supp. 1072; 3 *Clark & M. Corp.* § 657, p. 2018; *Wilbur v. Stoepel*, 82 Mich. 344, 21 Am. St. Rep. 568, 46 N. W. 724.

No case has been found which has gone so far as to hold that one who has died seised of a majority of the stock of a corporation may control corporate elections and corporate action from his grave.

Tunis v. Hestonville, M. & F. Pass. R. Co. 149 Pa. 70, 15 L.R.A. 665, 24 Atl. 88.

The legal title to decedent's stock is in the executors, and the right and duty to vote in accordance with the dictates of their judgment and conscience follows the legal title.

Jones v. Green, 129 Mich. 203, 95 Am. St. Rep. 433, 38 N. W. 1047.

A minority is always entitled to the good-faith exercise of the discretion of the majority stockholders.

6 *Fletcher, Cyc. Corp.* 3985, p. 6790; *Miner v. Belle Isle Ice Co.* 93 Mich. 97, 17 L.R.A. 412, 53 N. W. 218; *Luthy v. Ream*, 270 Ill. 170, 110 N. E. 373, Ann. Cas. 1917B, 368; *Morel v. Hoge*, 130 Ga. 625, 16 L.R.A. (N.S.) 1136, 61 S. E. 487, 14 Ann. Cas. 935.

Corporate control is exercisable by stockholders only.

Luthy v. Ream, 270 Ill. 170, 110 N. E. 373, Ann. Cas. 1917B, 368; *Snow v. Church*, 13 App. Div. 108, 42 N. Y. Supp. 1072.

Clark, J., delivered the opinion of the court:

From a decree construing the will of Samuel F. Dobbins, who died in 1917, this case is brought here by appeal of one of the defendants. The plaintiffs, named as executors and trustees in the will, were appointed executors by the probate court of the county of Calloun and entered upon the discharge of their duties. The greater portion of the estate consists of 1,070 shares of the cap-

ital stock of the Marshall Furnace Company, a Michigan corporation organized under the provisions of Act 232 of the Public Acts of 1903. The par value of the 1,070 shares is \$107,000, which constitutes more than two thirds of the total, \$150,000, authorized capital stock of the company, all of which is issued and outstanding. The defendants are the above-named corporation, Grace Dobbins, testator's widow, devisee and legatee under the will, Dale M. Dobbins, Samuel F. Dobbins, Jr., and Charles W. Dobbins, testator's sons, legatees under the will. The minority stockholders of the corporation were permitted to intervene as defendants. All of the defendants appeared and answered.

The particular language submitted for construction is the tenth paragraph of the will, and is as follows: "I hereby direct my said trustees to so vote upon the shares of stock of said Marshall Furnace Company belonging to said trust estate, that my two sons, Dale M. Dobbins and Charles W. Dobbins, and at least one of said trustees above mentioned, during the term of this trust, shall be, if possible, elected annually to serve as directors of said Marshall Furnace Company, and that the by-laws of said company during said trust period remain as now fixed, providing for a board of five directors, qualified to serve, and who will serve, be elected in each year, and that, in the event of the death, disqualification, or resignation or refusal to serve of any director, an active, competent successor for such director shall be immediately chosen, and that the directors as such shall receive no salary, and that my said trustees, so far as lies within their power through control of the membership of said board of directors, shall see to it that no person connected with said company shall receive any salary not reasonably proportionate to the value of the services by such person actually rendered in said company."

A resolution to increase the capital stock of the corporation from

\$150,000 to \$300,000 is before the stockholders. To adopt the resolution a vote of two thirds in interest of the capital stock is required. A stockholder, at present the successful manager of the business to whom nearly all of the rights of subscription have been assigned, has offered to take the increase of 1,500 shares at \$130 per share, a total of \$195,000. The plaintiffs, nearly all of the defendants, and the trial court, agree that it is advisable and necessary to increase the capital stock of the company, and that such action will be beneficial to the company and hence to the estate. The plaintiffs as executors have refrained from voting upon the resolution because of the paragraph of the will above stated, and for the reason that as a result of such increase, if authorized, the estate may become a minority stockholder and the executors and trustees therefore may be unable to comply with the quoted provisions of the will. The relief prayed is that the tenth paragraph of the will be held void, and that the executors and trustees under the will be decreed to have full and free right to vote at any and all meetings of the stockholders and upon said resolution the shares of capital stock held by the estate.

The decree of the trial court, in part:

"That the true construction and interpretation of said will is that the word 'trustees,' when used in ¶ 10 of said will, refers equally to the executors named in said will, and that the provisions of ¶ 10 apply with equal force to the executors and to the trustees named in said will, and to their successors in office; and

"That in so far as the provisions of ¶ 10 of said will attempt to create a testamentary voting trust, said provisions are void.

"That the voting instructions to executors and trustees set forth in ¶ 10 of said will, whereby said testator attempted to determine the personnel of a majority of the board of said Marshall Furnace Company, and to prevent amend-

ment of the by-laws thereof, for a period of ten years, are invalid, and that said executors and trustees are not bound thereby.

"That said voting instructions were, under the terms of said will as construed by this court, to be carried out only in the event the same were found possible, and that observance of said voting instructions, although physically possible, is not legally possible, and that said executors and trustees are therefore under no obligation or legal requirement to observe the same.

"That there is nothing in said will which in any way prevents said executors and trustees, plaintiffs herein, from co-operating in the plan of increasing the capital stock of said company and in making the proposed sale thereof in accordance with the plan submitted to this court . . . or in accordance with any other lawful plan."

The court had jurisdiction to construe the will. *Dean v. Mumford*, 102 Mich. 510, 61 N. W. 7.

Representatives of the deceased have the right to vote with respect to stock standing on the corporate books in the name of the testator. See 10 Cyc. 334.

"It is clear that executors have power to vote the stock of their testator at all meetings, being the personal representatives of such decedent, and that until a settlement and division of the estate the stock

of a decedent belongs to his personal representative. Similarly, corporate stock standing in the name of an administrator may be voted by him, in electing directors, as against those holding a beneficiary interest therein. . . . In the case of shares in the hands of a trustee, if the trust is of such a nature that the trustee has the control and management of the property, and is to exercise his discretion concerning it, then he is the proper person to represent and vote upon it. And the corporation cannot be required to examine into the nature of the trust, with a view to decide as to the right to vote." 7 R. C. L. p. 346.

See also *Jones v. Green*, 129 Mich. 203, 95 Am. St. Rep. 433, 88 N. W. 1047.

The tenth paragraph of the will, wherein the testator attempts to create and direct a testamentary voting trust for a fixed period of irrevocability, and to exclude for a fixed period his representatives from the exercise of their personal judgment as to the management of affairs of the corporation, and to perpetuate certain persons in office and control of the company without regard to the rights of minority stockholders, is contrary to public policy and void. 7 R. C. L. p. 351; 14 C. J. p. 917; *Morel v. Hoge*, 130 Ga. 625, 16 L.R.A. (N.S.) 1136, 61 S. E. 487, 14 Ann. Cas. 935.

The decree is affirmed,

ANNOTATION.

Validity and effect of provisions in will to control voting power of corporate stock.

The few cases found on this subject leave the matter in an unsettled condition.

It will be observed that it is held in the reported case (*BILLINGS v. MARSHALL FURNACE Co.* ante, 1239) that the attempt of a testator owning two thirds of the stock of a corporation to control by his will its policy for a fixed period after his death is void as

against the rights of minority stockholders. It appears by brief of counsel that this was a friendly suit, and that the testator's executors and trustees were not individually opposed to the desires of the minority stockholders.

It is to be regretted that the cases hereafter referred to arising under the Lafferty and Boyle wills (except

Corporation—
right of repre-
sentatives of
deceased stock-
holder to vote.

have the right to
vote with respect to
stock standing on
the corporate books
in the name of the

Will—creation
of voting trust
of corporate
stock—validity.

the case in 149 Pa.) were not (so far as appears) brought to the court's attention, although in those cases no question was raised by minority stockholders as such.

In *Tunis v. Hestonville, M. & F. Pass. R. Co.* (1892) 149 Pa. 70, 15 L.R.A. 665, 24 Atl. 88, it appeared that Charles Lafferty by his will bequeathed his stock in a corporation, of which he owned between one sixth and one seventh of the stock, to three executors and trustees, one of whom was his son, and by a codicil directed that as to all elections said stock should be voted as his son should direct and appoint, stating that "my executors are directed to give a proxy or authority to vote said stock as he may desire to vote the same." Upon an election the son, who was president of the corporation, tendered one ballot and his coexecutors and trustees another opposing ballot, and both ballots were held properly rejected on the ground that joint owners must agree, the court not deciding whether the proxy provided for by the codicil could have been compelled. Later, in *Lafferty's Estate* (1893) 154 Pa. 430, 26 Atl. 388, the son sued his cotrustees to compel them to give him the proxy directed by the codicil, and the lower court, though divided in opinion, held that the proxy must be given; the supreme court being equally divided, the lower court's decision prevailed. The defendants had answered that the codicil was not capable of enforcement, because it deprived the defendants of the right of franchise, which was one of the essential elements of ownership of stock, and that the son was acting for his corrupt purposes in re-electing himself and a subservient board of directors; that he had doubled his salary, depressed the stock so that the estate could not sell, and that the estate had received no revenue from the stock during the son's control; but that owing to the disfranchisement of the stock of the estate the other stockholders had been able to elect an honest board of directors, who had increased the earnings of the road. The lower court in its majority opinion said that there was nothing in the

codicil subversive of the doctrine that the franchise was an incident of ownership, that the testator had tried to prevent the loss of the vote of the stock through dissensions, "and while he vested the title to the stock in three persons, he delegated the vote which it authorized to one whom he selected out of the three. Whether his selection of that person was a tribute to the fitness of the voter, or was the arbitrary utterance of his own will, is of little consequence; he had at least this warrant for his action, that divided councils would not disfranchise the stock, and that the party who should cast the vote would be an owner, and would have an equal interest with the other owners in voting wisely. The device by which the testator sought to carry out his plan was clumsy in this,—that by prescribing a formal proxy, where the proxy had in fact been already given in the will, he put it in the power of either of the respondents to prevent the stock from being voted at all. . . . If the testator had said that they should sell only in case one of their number, whom he designated, should deem it expedient to sell, what right of the trustees, or of the cestuis que trust, would be infringed? and has he done more in saying that they shall vote as the petitioner, to whom he has intrusted the duty, shall decide?" As to the charges against the plaintiff, the court, while stating that no other stockholder had called him to account and that no fraud against the estate or the corporation was established by the evidence, said: "If these charges had been made out, we should still doubt our power to refuse the relief which had been demanded by the petitioner. Upon the ground that he was imperiling the estate, we might dismiss him from the trust, but so long as we suffered him to remain a trustee, we could not well abridge the authority which, in that capacity, has been given him by the will. . . . Nor were the acts of the petitioner which are complained of acts committed as a trustee, but as president, whose evils to the trust are only a reflex of the injuries to the corporation. And if the answer

of the respondents, so far as it is responsive to the petition, must be accepted as true until overcome by adequate evidence, we must enter upon an inquiry affecting a corporate body which is not before us, and which cannot be affected by our decree. We are doing this, too, at the instance, not of shareholders, as such, but of cestuis que trust. It is, perhaps, the first time in which a court of our limited jurisdiction has sat in judgment upon the internal management of a corporation, which was not at the same time a trustee. The respondents and their beneficiaries have a forum open to them, but they have preferred no complaint there, nor in the corporation where the wrongs are said to have been done." There was a dissenting opinion in the lower court, stating that it was not clear that the defendants were intended to be absolutely without voice, and that the plaintiff had not come up to the standard of deserving the help of the court.

In *Boyle v. John Boyle & Co.* (1910) 136 App. Div. 367, 120 N. Y. Supp. 1048, affirmed without opinion in (1911) 200 N. Y. 597, 94 N. E. 1092, the testator directed that a corporation be formed to carry on his business, naming his wife, his son, and four other persons as directors, and stating: "In the incorporation of any company as above directed, whatever is done shall be done with the approval of my wife or such of the directors above named as shall serve, or a majority of them. . . . Fourteenth. That the stock of the corporation organized to continue my business . . . shall be voted by the executors and trustees as directed by the six persons above named to serve as directors of said proposed corporation, or their survivors, or such of them as shall consent to act as directors, and in the event of their disagreement and the dissent of any two of their number, the stock shall be voted as the corporate executor or trustee shall deem best." The will directed further that the executors and trustees should pay over to the testator's wife 6 per cent of the income from his business and a certain proportion of the remaining prof-

its and income. The corporation was formed and a large part of the residuary estate was turned over to it. It was held that the corporation rightly refused to turn over to the executors and trustees out of the surplus accumulated in good years property to make up for lack of dividends in poor years. The court said: "Instead of measuring their rights by the shares, instead of submitting to and obeying the 14th paragraph of the will, the trustees leap over and disregard them and seek a control, possession, and title that would have belonged to them if no transfer and investment in the corporation had been made, but which the will and law both deny them. Whatever the testator directed done he presumably intended to be done pursuant to and in subjection to the law of the state. When he directed the creation of a corporation, he meant a legal entity coming into being as the statute directed, to be conducted pursuant thereto, having the powers and subject to the constraints placed thereon by the statute. He intended that the directors thereof should be amenable to and obey the law; he did not intend, he did not suggest, narrowing their capacities or duties so that they would disobey the law, so that they would in the conduct of the corporation use less judgment, wisdom, discretion, or power than the law contemplates. What other directors may legally do, they were endowed with ability to do; and yet if the plaintiffs' contention is true, they are the creatures of the will, and not the statute: it is the will that commands them; it is the will that circumscribes their power, so that the usual legal ability to create a reserve is taken away; it is the will that fixes the tenure of the property of the corporation. In my judgment the will does not seek to constrain them, but merely directs that a corporation such as the law contemplates be formed, that to it the trust property be transferred, and that the corporation be conducted only as the law commands."

The same will came before the court again in *Elger v. Boyle* (1910) 69 Misc. 273, 126 N. Y. Supp. 946. The

testator had appointed as executors and trustees his wife, his son, and one other person,—all of them being among the six persons named by him to be directors of the proposed corporation, but he appointed no corporate executor or trustee. The son declined to act as director and the widow dissented from the other four directors. The court held that by the 14th clause of the will the trustees were controlled in their voting of the stock by the persons named in the will, and said: "I find no force in the contention that the trustees, as holders of the stock, cannot be controlled in their manner of voting. The power to vote stock, incidental to ownership of the stock itself, may not be taken from the holder in invitum; but he may certainly qualify his ownership by his own consent that another may vote for him, as in the familiar instance of a vote by proxy, or may accept the ownership with a condition which involves that consent, as here. These trustees became possessed of the stock, not as their own asset, but solely by virtue of the will and of the conditions which the will imposed. One condition involved their consent to a restriction of their voting power, and no rule of law or of public policy is offended by giving effect to that consent."

Where under the will of the owner of the majority of the stock of a corporation the right to vote the stock of the deceased passed to his widow and his counsel jointly, as executors

and trustees, and differences arose between them, and an application had been made to the surrogate's court to remove the counsel, and the surrogate had enjoined him from voting on the stock pending the trial in that court. the Federal court pending that proceeding, and on the application of the salaried vice president of the corporation owning one fifth of the stock, enjoined the widow from voting, and postponed the time of election. *Villamil v. Hirsch* (1905) 138 Fed. 690.

Where a testator by his will left his stock in two corporations to his three executors as trustees, and directed that "my said executors shall vote the said shares of stock at any corporation meeting, and shall otherwise dispose thereof or enter into any agreement in relation thereto by their joint action, and not otherwise," it was held that the voting and the attendance of one executor only was not binding on the estate. *Townsend v. Winburn* (1919) 107 Misc. 443, 177 N. Y. Supp. 757.

It may be noted that it was held in *Schmidt v. Mitchell* (1897) 101 Ky. 570, 72 Am. St. Rep. 427, 41 S. W. 929, that a proxy given by one of three executors is revoked if one of the other executors attends and votes the stock of the estate.

For a devise and bequest for a charitable purpose to a corporation to be created after the death of the testator. see *St. John v. Andrews Inst.* (1908) 191 N. Y. 254, 83 N. E. 981, 14 Ann. Cas. 708. B. B. B.

DR. J. FREDERICK HEMPEL, Appt.,

v.

JOSEPHINE G. HALL.

Maryland Court of Appeals—February 20, 1920.

(— Md. —, 110 Atl. 210.)

Automobile — duty of pedestrian to look at street intersection.

1. A pedestrian about to cross one street at the intersection of another is not, as matter of law, guilty of negligence in failing to look along the latter street for approaching automobiles.

[See note on this question beginning on page 1248.]

— duty to sound warning at corner.

2. The driver of an automobile may be found to be negligent in failing to sound a warning when approaching a street corner which he intends to turn.

[See 2 R. C. L. 1193.]

Trial — question for jury — credibility of police officer.

3. The question of the credibility of a police officer testifying with respect to an automobile accident is for the jury.

[See 16 R. C. L. 183.]

APPEAL by defendant from a judgment of the Baltimore City Court (Duffy, J.) in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. E. Allan Sauerwein, Jr., Robert R. Carman, James T. Carter, and Victor I. Cook, for appellant:

There was no negligence on the part of the defendant.

Carnaggio v. Chapman, 131 Md. 285; 101 Atl. 672; Sullivan v. Smith, 123 Md. 546, 91 Atl. 456; Havermale v. Houck, 122 Md. 82, 89 Atl. 314; Gittings v. Schenuit, 122 Md. 282, 90 Atl. 51; Baltimore Traction Co. v. Helms, 84 Md. 515, 36 L.R.A. 215, 36 Atl. 119, 1 Am. Neg. Rep. 63.

Plaintiff was guilty of negligence.

Gittings v. Schenuit, 122 Md. 282, 90 Atl. 51; Cook v. United R. & Electric Co. 132 Md. 553, 104 Atl. 37; Baltimore Traction Co. v. Helms, 84 Md. 515, 36 L.R.A. 215, 36 Atl. 119, 1 Am. Neg. Rep. 63; Huddy, Automobiles, § 464, p. 568; O'Reilly v. Davis, 136 App. Div. 386, 120 N. Y. Supp. 883.

Messrs. William Colton and Brodie & Sachs, for appellee:

Plaintiff was not guilty of contributory negligence.

Buscher v. New York Transp. Co. 106 App. Div. 493, 94 N. Y. Supp. 798, 18 Am. Neg. Rep. 575; Huddy, Automobiles, 5th ed. pp. 308, 378; Holderman v. Witmer, 166 Iowa, 406, 147 N. W. 926; Gouin v. Ryder, — R. I. —, 87 Atl. 185; Taxicab Co. v. Emanuel, 125 Md. 246, 93 Atl. 807; Baltimore Traction Co. v. Helms, 84 Md. 515, 36 L.R.A. 215, 36 Atl. 119, 1 Am. Neg. Rep. 63; Sullivan v. Smith, 123 Md. 556, 91 Atl. 456; Winner v. Linton, 120 Md. 276, 87 Atl. 674; Maryland Ice Cream Co. v. Woodburn, 133 Md. 295, 105 Atl. 269.

Adkins, J., delivered the opinion of the court:

On October 30, 1918, at 10 o'clock P. M., appellee, while crossing Tenth street or Windsor Mill road in the city of Baltimore, was struck and in-

jured by the automobile of appellant, which he was then driving. The testimony shows that both of them before the accident happened were going on North avenue west towards Tenth street. The only exception in this case is to the granting of plaintiff's prayer and to the rejection of defendant's first, second, and fourth prayers. The plaintiff's prayer was the usual damage prayer, and was properly granted unless the case should have been withdrawn from the jury. The defendant's fourth prayer was erroneous at least in failing to recognize the right of way which the automobile law of this state gives to pedestrians at crossings.

In the brief of appellant it is said: "There is only one error assigned in the case, and that is the failure of the court to direct a verdict for the defendant," and that was the only point argued before us. So the only question we have to decide is: Should the court below have granted either the first prayer of the defendant, which asked the court to instruct the jury that there was no evidence legally sufficient to entitle the plaintiff to recover; or the second, which sought to have the jury instructed: "That it appears from the uncontradicted evidence in this case that the plaintiff's injuries were caused directly by the failure of the plaintiff to exercise such care and caution for her own safety as is ordinarily exercised by a prudent person under similar circumstances, and the verdict of the jury shall therefore be for the defendant."

These prayers both assume the truth of all of plaintiff's testimony, so in this case it will be necessary to refer to very little of it.

She testified substantially as follows:

That after stepping down from the sidewalk into the street, in the act of crossing Tenth street, appellant's machine swung around from North avenue into Tenth street and hit her, and that is all that she remembers as to the accident; that before stepping off from the pavement to the street she looked both to her right and to her left, that is, up and down Tenth street, and no automobile was then in sight; then immediately, almost, after this, she stepped into the street and started to cross, and, just as she started to cross, the automobile swung around the corner from North avenue and struck her; that no signal of any kind was given that a machine was coming; "absolutely none;" that she is positive no horn was sounded; that her eyesight and hearing were very good. Appellant testified that he was going only 8 miles an hour; that he blew his horn before he got to Tenth street, and again before he made his turn into Tenth street.

On the issue of the negligence of the defendant, if he failed to blow his horn, that was enough to send the case to the jury. The plaintiff testified positively that he did not blow it; and she was within a few feet of where he says he blew it and where it was his duty to blow it; and, moreover, at the time she was in a position where it was her duty to be listening before crossing a much-used thoroughfare with which she was familiar, and the danger of which she knew.

In *United R. & Electric Co. v. Crain*, 123 Md. 332, 91 Atl. 405, 10 N. C. C. A. 571, which is a case of collision between a street car and an automobile at a crossing in Baltimore county, Judge Pattison, speaking for the court, says: "The

record in this case discloses no legally sufficient evidence of any negligent act of the defendant having any causal connection with the accident complained of unless it be that it failed to give the required signal of its approach to the crossing."

Then, after setting out the testimony of the motorman and several passengers, witnesses for defendant, who swore positively that the whistle was blown, and of several witnesses for the plaintiff, one of whom swore there was no whistle, and others that they did not hear any whistle, and citing a number of cases from other states, and the cases of *Baltimore & O. R. Co. v. State*, 96 Md. 67, 53 Atl. 672, and *Northern C. R. Co. v. State*, 100 Md. 404, 108 Am. St. Rep. 439, 60 Atl. 19, 3 Ann. Cas. 445, the judge goes on to say: "It may be safely stated, from the above-cited authorities and others, that where the attention of those testifying to a negative was not attracted to the occurrence which they say they did not see or hear, and where their situation was not such that they probably would have observed it, their testimony is not inconsistent with that of credible witnesses who were in a situation favorable for observation, and who testified affirmatively and positively to the occurrence. *Chicago & N. W. R. Co. v. Andrews*, 64 C. C. A. 399, 130 Fed. 65. But if it be shown that the witness could have observed the signal, had it been given, and that his attention was attracted thereto because of a duty imposed upon him in connection therewith, or because of the known position of danger in which he was at the time placed, naturally suggesting that he, for his own safety and protection, should look and listen for the warning or signal of danger, . . . the fact that he did not hear the signal is evidence sufficient to go to the jury, tending to show that such warning or signal was not given."

The court held the case was prop-

Automobile—
duty to sound
warning at
corner.

erly submitted to the jury. In such cases the jury is properly left to weigh the conflicting testimony.

But appellant insists that appellee was guilty of contributory negligence in failing to look up and down North avenue as well as Tenth street. If she had done so and had seen the automobile, she could not have known it would turn around the corner. Indeed, she would have had the right to assume that it would not make the turn if it be true, as she swore, that no horn was blown.

Assuming, as we must, appellee's testimony to be true, it cannot be said that her conduct was such as

to justify the court in saying as a matter of law she was guilty of contributory negligence. To give such an instruction, the court must be satisfied that the case presents "some such feature of recklessness as could leave no opportunity for difference of opinion as to its imprudence in the minds of ordinary, prudent men." *Baltimore, C. & A. R. Co. v. Moon*, 18 Md. 380, 84 Atl. 536; *New Theatre Co. v. Hartlove*, 123

—duty of pedestrian to look at street intersection.

Md. 78, 90 Atl. 990; *Chesapeake & P. Teleph. Co. v. Casey*, 124 Md. 527, 93 Atl. 11; *Taxicab Co. v. Emanuel*, 125 Md. 246, 93 Atl. 807; *Commissioners of Delmar v. Venables*, 125 Md. 471, 94 Atl. 89.

We are not unmindful of the testimony of George A. Hayward of the police department, who, testifying for appellant, said that shortly after the accident, and after her fractured leg had been set, in a conversation with him, appellee told him she was hurrying to catch a street car, and stepped down from the sidewalk in front of the automobile. Appellee swore she was told that a police officer was down to the hospital to see her, but had no recollection of having talked with him or anyone else, or of having the conversation. He testified to the credibility of the policeman as well as of appellant was a question for the jury.

Trial—question for jury—credibility of police officer.

There was no error in the rejection of defendant's first and second prayers.

Judgment affirmed, with costs to appellee.

ANNOTATION.

Duty of pedestrian before crossing street to look for vehicles approaching on intersecting street.

As a general rule a pedestrian who is about to cross a street is under no duty to look up and down the street which intersects the one he is about to cross, to see if there are any vehicles approaching from such direction, and his failure to so look is not contributory negligence as a matter of law, but his negligence is a question for the jury. *Johnson v. Thomas* (1896) 5 Cal. Unrep. 256, 43 Pac. 578; *HEMPEL v. HALL* (reported herewith) ante, 1245; *Keaveny v. Moran* (1911) 208 Mass. 277, 94 N. E. 274; *Rottenberg v. Segelke* (1893) 6 Misc. 3, 25 N. Y. Supp. 997, affirmed without opinion in (1895) 148 N. Y. 734, 42 N. E. 725; *Buscher v. New York Transp. Co.* (1905) 106 App. Div. 493, 94 N. Y.

Supp. 798, 18 Am. Neg. Rep. 575; *Spina v. New York Transp. Co.* (1905) 96 N. Y. Supp. 270.

Thus, it was held in *Keaveny v. Moran* (1911) 208 Mass. 277, 94 N. E. 274, affirming a judgment for plaintiff, that a pedestrian crossing a street upon the proper crosswalk, walking in the usual way, after having looked in each direction for approaching vehicles upon such street, was not bound to anticipate that a horse and wagon would come rapidly down an intersecting street, turn suddenly into the street he was crossing, and run against him.

And in the reported case (*HEMPEL v. HALL*, ante, 1245) a pedestrian struck by an automobile turning around the

corner from an intersecting street was held not to be guilty of contributory negligence as matter of law, because she failed, before crossing, to look in the direction from which it came, the court saying that if she had done so and had seen the automobile, she could not have known it would turn around the corner, but, on the contrary, would have had the right to assume that it would not make the turn, because no horn was blown.

And a pedestrian knocked down and run over by a horse and wagon turning into the street which he was crossing, from an intersecting street, was held not guilty of contributory negligence as matter of law in *Johnson v. Thomas* (Cal.) *supra*, where it appeared that such pedestrian first saw the horse and wagon a block away, coming down the intersecting street, when he was near the center of the street which he was crossing, and supposing from the rapidity with which the horse was being driven that it would continue on straight down the street, he did not further observe it or look for it until at or about the moment he was struck down. The court, in this case, said: "To hold that a foot passenger, in crossing a side street, must watch and plan to escape injury from vehicles upon a main street, without some indication that the latter are about to leave such main street, and that a failure so to do is conclusive evidence of negligence, is to carry the doctrine of contributory negligence to a romantic and unwarranted length."

In *Rottenberg v. Segelke* (1893) 6 Misc. 3, 25 N. Y. Supp. 997, affirmed without opinion in (1895) 148 N. Y. 734, 42 N. E. 725, the case was held properly submitted to the jury, where it appeared that the plaintiff, an infant of the age of eight years, was on her way to school, accompanied by her sister, four years old, and while in the act of crossing a street both children were knocked down by a horse attached to a wagon, which came up an intersecting street at a rapid rate, and suddenly, without warning, turned into the street which the children were crossing, and the court said:

9 A.L.R.—79.

"There is no duty, as matter of law, upon a person crossing the street, either at a crosswalk or elsewhere, to look up and down to avoid an approaching wagon. . . . In this case the plaintiff had the right to assume that the driver would not turn a sharp corner and run over her without warning."

In an action by a father to recover for loss of services of his minor son, who was injured by collision with an automobile at the intersection of two streets, it was held that it could not be said as matter of law that the boy was guilty of contributory negligence, where the son testified that he was going north on the left side, that he looked east, but did not observe any wagon, and that he had taken three steps into the street in order to cross when he was struck by the automobile, and that he did not see the automobile until it struck him, and his witnesses testified that the automobile came south along the right side of the intersecting street, and swung into the street of the accident in a westerly direction. *Spina v. New York Transp. Co.* (1905) 96 N. Y. Supp. 270.

And the question as to the contributory negligence of a boy of eight years, run over by an automobile in crossing a street, was held to be for the jury in *Buscher v. New York Transp. Co.* (1905) 106 App. Div. 493, 94 N. Y. Supp. 798, 18 Am. Neg. Rep. 575, where the evidence showed that the deceased was a bright, active boy, capable in some degree of caring for himself while on the street; that the automobile was running at a very rapid rate of speed on an intersecting street; that, as it reached the corner of the street which the boy was crossing, it turned into such street without slackening its speed, and without giving any signal of its approach; that two pedestrians crossed the street ahead of the automobile before the accident happened, and were obliged to hurry to get out of its way, the boy at that time standing on the sidewalk, and that, as they crossed the street, their backs were toward the automobile, and almost immediately they heard a scream, turned, and saw the

hind wheel of the automobile passing over the boy's body, about 2 feet distant from the curb. In this case the court said that a person, whether adult or infant, had the right to assume that the defendant, in the operation of the automobile, would exercise care and respect the rights of pedestrians, when it had occasion to turn the corner of the street.

In *Sandy v. Swift & Co.* (1908) 159 Fed. 271, affirmed in (1908) 92 C. C. A. 56, 165 Fed. 622, where it appeared that a wagon turned suddenly from an

intersecting street into the street which a lady was crossing, and passed so close to her that she was injured in an attempt to extricate herself from the sudden peril which arose from the driver's negligent actions, the court said that she had a right to be where she was at the time, and to cross the street as she did, and had a right to assume that the driver would continue along the intersecting street; or at least had a right to expect him not to turn so suddenly as to put her in danger of personal injury. G. V. I.

CHRISTIAN SIMONSEN, Appt.,

v.

SAMUEL A. SWENSON.

Nebraska Supreme Court — February 14, 1920.

(— Neb. —, 177 N. W. 831.)

Physician — liability for disclosing nature of disease.

1. Where a physician makes a disclosure of information imparted by a patient to secure treatment, believing that a disclosure was necessary to prevent the spread of the disease, and when the disclosure is made to one who, it is reasonable to believe, might otherwise be exposed, and when the physician acts in entire good faith, with reasonable grounds for his diagnosis and without malice, he cannot be held liable in damages by his patient, even though he is mistaken in his diagnosis and has reported that his patient was afflicted with a disease which in fact he did not have.

[See note on this question beginning on page 1254.]

— confidential communications —
contagious disease.

2. The information given to a physician by his patient, though confidential, is given subject to the understanding, conclusively presumed in law, that, if the patient's disease is found to be of a dangerous and so highly contagious or infectious a nature that it may be transmitted to others unless the danger of transmission is disclosed to them, the physician

is then privileged to make so much of a disclosure to such persons as is reasonable and necessary to prevent the spread of the disease.

[See 21 R. C. L. 377, 378.]

Definition — betrayal.

3. The word "betrayal" in the statute forbidding betrayal of professional secrets by a physician means a wrongful disclosure of a professional secret in violation of the trust imposed by the patient.

Headnotes 1 and 2 by FLANSBURG, C.

APPEAL by plaintiff from a judgment of the District Court for Burt County (Troup, J.) in favor of defendant in an action brought to recover damages for alleged breach of confidential relationship between defendant and plaintiff as physician and patient. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Messrs. Frank V. Lawson and Gray & Brumbaugh, for appellant:

A physician's knowledge gained of a patient's condition, as well as conversation, is privileged.

Sovereign Camp, W. W. v. Grandon, 64 Neb. 39, 89 N. W. 448.

Where the law creates or imposes a duty upon one person toward another, a violation of such duty, which is the proximate cause of injury to one to whom the duty is owing, creates a liability in favor of the person injured thereby, providing he is not guilty of negligence which contributes to such injury.

Steiert v. Coulter, 54 Ind. App. 643, 102 N. E. 113, 103 N. E. 117, 4 N. C. C. A. 561.

Where a physician wrongfully divulges confidential communications of a patient, a cause of action will arise in favor of the latter.

21 R. C. L. p. 378, § 24; Smith v. Driscoll, 94 Wash. 441, L.R.A.1917C, 1128, 162 Pac. 572.

Mr. Alvin F. Johnson, for appellee:

Any prohibition by law against disclosure of communications between physician and patient must depend upon statute.

Jones, Ev. § 759; Thrasher v. State, 92 Neb. 110, 138 N. W. 120, Ann. Cas. 1913E, 882.

The interest of the public at large should be of first consideration in determining whether disclosures by physicians, elsewhere than in judicial proceedings, are improper.

Sovereign Camp, W. W. v. Grandon, 64 Neb. 39, 89 N. W. 448; Re Gray, 88 Neb. 885, 33 L.R.A.(N.S.) 319, 130 N. W. 746, Ann. Cas. 1912B, 1087; Thrasher v. State, 92 Neb. 110, 138 N. W. 120, Ann. Cas. 1913E, 882; Re Watson, 88 Neb. 211, 119 N. W. 451; Osenkop v. State, 86 Neb. 539, 126 N. W. 72; Farley v. Peebles, 50 Neb. 723, 70 N. W. 231; Basye v. State, 45 Neb. 261, 63 N. W. 811; Brady v. State, 39 Neb. 529, 58 N. W. 161; Western Travelers' Acci. Asso. v. Munson, 73 Neb. 858, 1 L.R.A.(N.S.) 1068, 108 N. W. 688.

The law does not favor concealment of contagious and infectious diseases, or the withholding of information with reference thereto, even by physicians occupying a confidential relationship to an afflicted person.

Brown v. Manning, 103 Neb. 540, 172 N. W. 522.

A communication is privileged when made in good faith in answer to one

having an interest in the information sought, or if volunteered, when the party to whom the communication is made has an interest in it and the writer or speaker stands in such relation to him as to make it a reasonable duty, or at least proper, that he should give the information.

Pokrok Zapadu Pub. Co. v. Zizkovsky, 42 Neb. 65, 60 N. W. 358; Pierce v. Oard, 23 Neb. 828, 37 N. W. 677; 25 Cyc. 393; Alpin v. Morton, 21 Ohio St. 536.

Plaintiff should show not only that he has sustained damages, and that the defendant has committed a tort, but that the damage is the clear and necessary consequence of the tort, and that it can be clearly defined and ascertained.

Karbach v. Fogel, 63 Neb. 601, 88 N. W. 659; Dennison v. Daily News Pub. Co. 82 Neb. 675, 23 L.R.A.(N.S.) 362, 118 N. W. 568.

Flansburg, C., filed the following opinion:

Action for damages for alleged breach of duty arising from confidential relationship between defendant, who is a physician, and plaintiff, who was his patient. At the close of the testimony the court directed a verdict in favor of the defendant, and plaintiff appeals.

Plaintiff, with other employees of a telephone company, was working at Oakland, Nebraska. He was a stranger at the place, and was stopping with these men at a small hotel operated by a Mrs. Bristol. He became afflicted with sores on his body, and went to the defendant, a practising physician at that place, who took the history of plaintiff's trouble, gave him a physical examination, and informed him that he believed his disease to be syphilis. He further stated, however, that it was impossible to be positive without making certain Wasserman tests, for which he had no equipment.

Defendant was the physician of the Bristol family, and acted as their hotel doctor when one was needed. He told plaintiff that there would be much danger of his communicating the disease to others in the hotel if he remained there, and requested

that he leave the next day, which plaintiff promised to do.

On the following day the defendant, while making a professional call upon Mr. Bristol, who was ill, learned that plaintiff had not moved from the hotel. He therefore warned Mrs. Bristol that he thought plaintiff was afflicted with a "contagious disease," and for her to be careful, to disinfect his bedclothing, and to wash her hands in alcohol afterwards. Mrs. Bristol, acting upon this warning, placed all of plaintiff's belongings in the hallway, and fumigated his room. Plaintiff was forced to leave.

The testimony of the physicians disclosed that this particular disease is very readily transmitted in its early stages, and could be carried through drinking cups, eating utensils, and other articles handled or used by the diseased person.

After leaving Oakland, plaintiff consulted another physician. He gave to this physician a history, showing that he might have been exposed a few weeks before to such a disease, and was given a physical examination by this doctor. One Wasserman test was made, which proved negative. That test alone, however, this physician testified, proved nothing, since the presence or absence of such disease could not be positively known without extended tests. These had not been made, and this doctor said that it was impossible for him to say whether the plaintiff had or had not the disease when he examined him. He went on further to say that the symptoms and information upon which the defendant acted were, however, reasonably sufficient to cause the defendant to believe as he did.

The testimony is practically without conflict; plaintiff having called the defendant to testify as his own witness.

The plaintiff contends that, having shown the relationship of physician and patient, the law prohibits absolutely a disclosure of any confidential communication, at any time or under any circumstances, and

that a breach of this duty of secrecy, on the part of the physician, gives rise to a cause of action in damages in favor of the patient.

At common law there was no privilege as to communications between physician and patient, and this rule still prevails when not changed by statute. *Thrasher v. State*, 92 Neb. 110, 138 N. W. 120, Ann. Cas. 1913E, 882; 40 Cyc. 2381.

Section 7898, Rev. Stat. 1913, provides that a physician shall not be allowed to disclose, on the witness stand, any confidential communication intrusted to him in his professional capacity. The disclosure of confidences in this case was not by the defendant as a sworn witness, and this statute, therefore, obviously does not apply and has no bearing upon this case.

There is a further provision of our statute, however (Rev. Stat. 1913, § 2721), providing that no physician shall practise medicine without a license from the board of health, and that such a license may be revoked when a physician is found guilty of "unprofessional or dishonorable conduct." Among the acts of such misconduct defined by the statute is the "betrayal of a professional secret to the detriment of a patient."

By this statute, it appears to us, a positive duty is imposed upon the physician, both for the benefit and advantage of the patient as well as in the interest of general public policy. The relation of physician and patient is necessarily a highly confidential one. It is often necessary for the patient to give information about himself which would be most embarrassing or harmful to him if given general circulation. This information the physician is bound, not only upon his own professional honor and the ethics of his high profession, to keep secret, but by reason of the affirmative mandate of the statute itself. A wrongful breach of such confidence, and a betrayal of such trust, would give rise to a civil action for the damages naturally flowing from such wrong.

Is such a rule of secrecy, then, subject to any qualifications or exceptions? The doctor's duty does not necessarily end with the patient; for, on the other hand, the malady of his patient may be such that a duty may be owing to the public and, in some cases, to other particular individuals. Recognition of that fact is given by the statutes in this state, which delegate power to the state board of health, and to municipalities generally, to require reports of, and provide rules of quarantine for, diseases which are contagious and dangerous. An ordinance in Omaha enacted under such power, providing quarantine of communicable venereal diseases, has been sustained by our court in *Brown v. Manning*, 103 Neb. 540, 172 N. W. 522.

When a physician, in response to a duty imposed by statute, makes disclosure to public authorities of private confidences of his patient, to the extent only of what is necessary to a strict compliance with the statute on his part, and when his report is made in the manner prescribed by law, he of course has committed no breach of duty toward his patient, and has betrayed no confidence, and no liability could result. Can the same privilege be extended to him in any instance in the absence of an express legal enactment imposing upon him a strict duty to report? The statute making the "betrayal of a professional secret" misconduct on the part of a physician is in derogation of the common law, and should be strictly construed. We believe

**Definition—
betrayal.**

the word "betrayal" is used to signify a wrongful disclosure of a professional secret in violation of the trust imposed by the patient.

No patient can expect that if his malady is found to be of a dangerously contagious nature he can still require it to be kept secret from those to whom, if there was no disclosure, such disease would be transmitted. The information given to a physician by his patient, though confidential, must, it seems to us, be given and received subject to the

qualification that if the patient's disease is found to be of a dangerous and so highly contagious or infectious a nature that it will necessarily be transmitted to others unless the danger of contagion is disclosed to them, then the physician should, in that event, if no other means of protection is possible, be privileged to make so much of a disclosure to such persons as is necessary to prevent the spread of the disease. A disclosure in such case would, it follows, not be a betrayal of the confidence of the patient, since the patient must know, when he imparts the information or subjects himself to the examination, that, in the exception stated, his disease may be disclosed.

**Physician—
confidential
communications
—contagious
disease.**

**—liability for
disclosing
nature of
disease.**

In order that such a privilege of making a disclosure be available to a physician, however, he must have had ordinary skill and learning of a physician, and must have exercised ordinary diligence and care in making his diagnosis; otherwise he could be subjected to an action for negligence in making a wrongful report. *Harriott v. Plimpton*, 166 Mass. 585, 44 N. E. 992.

In making such disclosure a physician must also be governed by the rules as to qualifiedly privileged communications in slander and libel cases. He must prove that a disclosure was necessary to prevent spread of disease, that the communication was to one who, it was reasonable to suppose, might otherwise be exposed, and that he himself acted in entire good faith, with reasonable grounds for his diagnosis and without malice.

The plaintiff cites the case of *Smith v. Driscoll*, 94 Wash. 441, L.R.A.1917C, 1128, 162 Pac. 572, and contends that this case holds that any disclosure by a physician of a confidential communication from his patient is actionable. That was a case to hold a physician liable for divulging professional se-

crets in his testimony in court, and when his statements were claimed to be not relevant nor pertinent to the issues involved in the case. The court held the petition against the physician demurrable under the law in that state, for the reason that it contained no allegations that the matter of which he testified was irrelevant, and not pertinent to the issues of the case. In a dictum the court stated: "Neither is it necessary to pursue at length the inquiry of whether a cause of action lies in favor of a patient against a physician for wrongfully divulging confidential communications. For the purposes of what we shall say, it will be assumed that, for so palpable a wrong, the law provides a remedy."

The instant case is a novel one. No cases bearing directly upon the question have been cited by counsel,

and our search has been unsuccessful.

It appears to us that the facts disclosed by the record in this case show that the occasion was privileged; that the defendant had reasonable grounds for his belief; that he made no further disclosure than was reasonably necessary under the circumstances; and that he acted in good faith and without malice.

Had the plaintiff put in issue any of these facts, the case should have gone to the jury, but, as we take it, the testimony introduced raises no issues upon those questions.

For the reasons given, we recommend the case be affirmed.

Per Curiam:

For the reasons stated in the foregoing opinion, the judgment of the District Court is affirmed, and this opinion is adopted by and made the opinion of the court.

ANNOTATION.

Liability of physician or surgeon for disclosing professional secrets.

Search has revealed very little information upon this subject. As stated in the reported case (*SIMONSEN v. SWENSON*, ante, 1250), there was no privilege as to communications between physician and patient under the common law. The disclosure of professional secrets by a physician is now generally prohibited by statute, and reason and the little authority found would seem to indicate that, as a general rule, he would be liable for the damages resulting to the patient therefrom. The reported case (*SIMONSEN v. SWENSON*); *Smith v. Driscoll* (1917) 94 Wash. 441, L.R.A.1917C, 1128, 162 Pac. 572; *A. B. v. C. D.* (1905) 7 F. (Scot.) 72, as set out in 2 *Butterworth's Ten Years' Dig.* p. 850, ¶ 1.

The authority found for this rule is, however, not very strong, as such holding in the reported case (*SIMONSEN v. SWENSON*) is apparently based in part at least on a statute providing that the license of a physician may be revoked when he is found guilty of unprofessional or dishonorable conduct, which is defined as consisting,

among other things, in the betrayal of a professional secret to the detriment of a patient.

Smith v. Driscoll, which is sufficiently set out at the close of the opinion in the reported case, was decided upon a point of pleading, and what is there said upon the question of substantive law is obiter.

And the holding of the case of *A. B. v. C. D.* (1905) 7 F. (Scot.) 72, is based upon the meager report of that case in *Butterworth's Ten Years' Digest*, vol. 2, p. 850, ¶ 1, which reads as follows: "Information obtained by a medical man by examining or questioning a patient is confidential, and ought not to be disclosed to others; but it must depend upon all the circumstances of the case whether any disclosure made to others is an actionable wrong."

It will be observed that the decision in the reported case against liability rested upon facts and circumstances which, in view of the court, justified the disclosure and protected the physician even though mistaken in his

diagnosis. The opinion, it will be observed, applies the rules as to qualifiedly privileged communications in libel and slander cases; summarizing in this connection the necessity of disclosure to prevent spread of the dis-

ease; communication to one who, it was reasonable to suppose, might otherwise be exposed; good faith and absence of malice on the part of defendant, and reasonable grounds for his diagnosis.
G. V. I.

ARMSTRONG-TURNER MILLINERY COMPANY, Appt.,
v.
MRS. E. ROUND.

Kansas Supreme Court—January 10, 1920.

(106 Kan. 146, 186 Pac. 979.)

Exemptions — “stock in trade.”

1. “Stock in trade,” within the meaning of the act exempting certain property from sale upon execution or other process, means that form of property owned by a craftsman upon which he exercises his art, skill, or workmanship, and upon which he uses the tools of his trade or business.

[See note on this question beginning on page 1259.]

— milliner’s material for hats.

2. Under the eighth subdivision of § 4700 of the General Statutes of 1915, exempting to the head of a family \$400 worth of her stock in trade from sale upon execution or other process, the materials upon which a milliner exercised her skill and workmanship in making and trimming women’s hats, the silks, velvets, ribbons, feathers, flowers, hat frames, etc., and the finished hats made by herself, are her “stock in trade,” and are protected from forced process invoked against her by a creditor.

— insurance — proceeds of exempt property.

3. The proceeds of an insurance policy which covered personal property which was exempt from forced process as stock in trade, and which was destroyed by fire, stand in the place of the exempt property, and are likewise exempt from forced process, and to the same extent.

[See 11 R. C. L. 532.]

Statute — construction — foreign interpretation.

4. The Kansas court, in construing the state exemption law, does not follow the decisions of other states.

Headnotes 1-3 by DAWSON, J.

APPEAL by plaintiff from a judgment of the District Court for Norton County (Falconer, J.) in his favor in part only, in an action brought to recover the amount alleged to be due for millinery goods sold by plaintiff to defendant, with garnishment against the proceeds of an insurance policy covering the goods. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. E. N. Boatman, for appellant:

There is no exemption to a merchant, or of merchandise bought for resale at a profit.

Guptil v. McFee, 9 Kan. 30; Bequillard v. Bartlett, 19 Kan. 382, 27 Am. Rep. 120; Ritchie v. Kansas, N. & N. D. R. Co. 55 Kan. 36, 39 Pac. 718; Dodge City Water Supply Co. v. Dodge

City, 55 Kan. 60, 39 Pac. 219; 18 Cyc. 1420; Hillyer v. Remore, 42 Minn. 254, 44 N. W. 116.

The burden of proof rested upon the defendant to show herself entitled to the exemption claimed.

18 Cyc. 1493; 10 R. C. L. p. 901, § 52; Ely v. Blacker, 112 Ala. 311, 20 So. 570; Joyce v. Miller, 59 Iowa, 761,

13 N. W. 664; *Bates v. Lyman*, 35 Kan. 634, 12 Pac. 33; *Collier v. Monger*, 75 Kan. 550, 89 Pac. 1011.

An order affecting a substantial right, made in a special proceeding, is a final order.

Carlyle v. Smith, 36 Kan. 614, 14 Pac. 156.

There are no exemptions at common law, and none exist except where created by statute. No exemption of insurance was provided by our legislature.

Smith v. Ratcliff, 66 Miss. 683, 14 Am. St. Rep. 606, 6 So. 460; *Wooster v. Page*, 54 N. H. 125, 20 Am. Rep. 128; *Monniea v. German Ins. Co.* 12 Ill. App. 240.

The proceeds of a sale of exempt personal property are not exempt.

Robinson v. Burke, 70 N. H. 2, 85 Am. St. Rep. 595, 45 Atl. 713; *Knabb v. Drake*, 23 Pa. 489, 62 Am. Dec. 352.

A policy of insurance is purely a personal contract, and does not attach to or run with the title of the property.

14 R. C. L. p. 1365, § 535; *Shadgett v. Phillips & C. Co.* 131 Ala. 478, 56 L.R.A. 461, 90 Am. St. Rep. 95, 81 So. 20; *Continental Ins. Co. v. Munns*, 120 Ind. 30, 5 L.R.A. 430, 22 N. E. 78.

Mr. L. H. Wilder, for appellee:

Defendant's millinery stock to the amount of \$400 was exempt to her as stock in trade.

Bequillard v. Bartlett, 19 Kan. 386, 27 Am. Rep. 120; *Fish v. Street*, 27 Kan. 270.

The proceeds of such property in the form of insurance money are also exempt.

Tillotson v. Wolcott, 48 N. Y. 188; *Mulliken v. Winter*, 2 Duv. 256, 87 Am. Dec. 495; *Leavitt v. Metcalf*, 2 Vt. 342, 19 Am. Dec. 718; *Ellis v. Pratt City*, 111 Ala. 629, 33 L.R.A. 264, 56 Am. St. Rep. 76, 20 So. 649; *Crawford v. Carroll*, 93 Tenn. 661, 26 L.R.A. 415, 42 Am. St. Rep. 943, 27 S. W. 1010.

Dawson, J., delivered the opinion of the court:

This appeal calls for an examination of the Kansas Exemption Law, so far as it relates to "stock in trade."

The defendant kept a millinery store in Norton. Her stock and fixtures were destroyed by fire. The loss was covered by insurance. The defendant owed the plaintiff about \$700 on an open account for millinery goods, and plaintiff garnished the proceeds of the insurance policy.

The trial court held that \$400 of the insurance money was exempt as proceeds of insurance upon defendant's exempt stock in trade, but sustained the garnishment as to the residue.

Plaintiff appeals, contending that the millinery goods destroyed by the fire were merchandise, and not stock in trade, and contending also that, even if the goods had been exempt, the proceeds of the insurance policy which covered the goods were not exempt.

The evidence disclosed that the defendant, who was the head of a family, kept an ordinary millinery store; that her stock consisted of shapes of hats, hat frames, and piece goods, such as silks, velvets, ribbons, feathers, and flowers, and that she used these goods in trimming hat frames and in preparing them for sale. She had a separate price for each of these articles, and the price of each hat was the sum of the separate articles composing it, plus a charge for her skill and work in putting them together. Plaintiff was in the habit of selling these millinery materials not made up, as occasion arose, but only about 5 per cent of her stock was thus retailed. At the time of the fire she also had on hand some "pattern" hats which she bought and sold as merchandise, and about fifty hats which she had made up from the materials in her stock.

The Kansas Exemption Statute is very lenient towards debtors, and it has stood for sixty years practically unmodified by the legislature. So far as here pertinent, it reads:

"Every person residing in this state, and being the head of a family, shall have exempt from seizure and sale upon any attachment, execution or other process issued from any court in this state, the following articles of personal property: . . .

"Eighth, the necessary tools and implements of any mechanic, miner

or other person, used and kept in stock for the purpose of carrying on his trade or business, and in addition thereto, stock in trade not exceeding \$400 in value." Gen. Stat. 1915, § 4700.

"None of the personal property mentioned in this act shall be exempt from attachment or execution for the wages of any clerk, mechanic, laborer or servant." Id. § 4703.

See also Kan. Stat. 1859 (Territorial) chap. 67, § 11; Comp. Laws 1862, chap. 92, § 11; Gen. Stat. 1868, chap. 38, § 3.

Under the humane and generous purposes of this exemption clause, it has been held that the materials out of which watches are made, together with the finished watches made by the debtor himself, are stock in trade of a jeweler, and are exempted from execution if he is the head of a family. *Bequillard v. Bartlett*, 19 Kan. 382, syl. ¶ 4, 27 Am. Rep. 120. It has been held that the finished cheeses made by a cheesemaker herself were exempt from attachment, as well as the equipment necessary for making them. *Fish v. Street*, 27 Kan. 270. The cloth and trimmings out of which a merchant tailor made clothing were held to be exempt as stock in trade. *Rice v. Nolan*, 33 Kan. 28, 5 Pac. 437. Tin used for making tinware and for making a tin roof for a building, as well as the tinware made by the tinner, was held to be exempted as stock in trade in *Miller v. Weeks*, 46 Kan. 307, 26 Pac. 694.

The critical student of this exemption clause will readily discern that it exempts two distinct kinds of property: (1) Tools and implements for use in the debtor's trade or business; and (2) in addition thereto, stock in trade to the amount of \$400 in value. Under our statute,

Exemptions—
stock in trade.

therefore, "stock in trade" means that form of property owned by a craftsman upon which he exercises his art, skill, or workmanship, and upon which he uses the tools of his trade or business.

It seems clear that the materials which composed the defendant's property and upon —milliner's material for hats.

which she exercised her craft as a milliner constituted her stock in trade, and up to the value of \$400 they were exempt from seizure under forced process. Of course, the "pattern" hats were merchandise; but the fact that a small percentage of the goods was sold as merchandise when opportunity offered, and that they were all susceptible of being sold as merchandise, did not alter their inherent status as stock in trade. 18 Cyc. 1420. Any other view would practically nullify the humane purposes of the legislature in enacting the statute. The stock in trade of any artisan is susceptible of sale as merchandise, and it would not do to say that, if such artisan dared to sell as merchandise a few articles of his stock in trade, he would imperil or waive his statutory exemption of \$400 worth of it from forced process. Since the margin of insurance money above \$400, upon which plaintiff's garnishment was allowed to operate, was more than sufficient to equal the value of the "pattern" hats sold as ordinary merchandise, that detail of the case will need no attention.

It will next be considered whether the proceeds of the insurance policy covering the exempted stock in trade were likewise exempt from seizure under forced process. Appellant cites cases from other jurisdictions holding that the proceeds of insurance upon exempt property are not exempt. But it was held long ago that our Exemption Law is in effect a Kansas institution, to be interpreted and applied in the spirit of Kansas jurisprudence, and that Kansas leads and does not follow in the interpretation of laws of this character. *Jenkins v. McNall*, 27 Kan. 532, 533, 41 Am. Rep. 422; *Rice v. Nolan*, 33 Kan. 28, 31, 5 Pac. 437; *Bliss v. Vedder*, 34 Kan. 57, 60, 7 Pac. 599, 55 Am. Rep. 237. In our own decisions, an-

Statute—
construction—
foreign
interpretation.

alogous precedents are not wanting. It has been held that, where a span of horses which was exempt property was sold on execution, the money derived by the sale of the horses was likewise exempt, and was recoverable by the debtor without set-off by his too insistent creditor. *Treat v. Wilson*, 65 Kan. 729, 732, 733, 70 Pac. 893. Where a homestead was sold to satisfy valid liens, the surplus in cash after payment of the liens was held to be exempt from seizure by another judgment creditor who held no lien, so long as the debtor intended to use it in purchasing another homestead. *Mitchell v. Milhoan*, 11 Kan. 617, syl. ¶¶ 3, 4. In *Continental Ins. Co. v. Daly*, 33 Kan. 601, 608, 7 Pac. 158, it was said that the insurance money paid as compensation for the loss of an exempt property (a dwelling house) would also be exempt, and that the collection of such insurance money was chiefly the concern of the heirs of the insured, and not of his administratrix.

It would not be helpful to go very far into the decisions of other jurisdictions on the question whether the proceeds of an insurance policy covering exempt property are likewise exempt, for a square conflict among those decisions is discovered as soon as we open the books. In Iowa, New York, Texas, and California, the view to which this court inclines seems to be upheld, while New Hampshire, Illinois, and Mississippi hold to the contrary. See note in 19 L.R.A. 34.

In *Reynolds v. Haines*, 83 Iowa, 342, 13 L.R.A. 719, 32 Am. St. Rep. 311, 49 N. W. 851, where a creditor sought to garnish the proceeds of an insurance policy covering the (exempt) library of a physician, the court said: "The statute must be liberally construed, to carry out its purpose and spirit. . . . The books, instruments, etc., of the physician, and surgeon, may be kept subject to the authority to change them, by sale or otherwise, in order to procure those of better character

or improved construction. It is plain that the physician may sell his books and replace them by better ones. Such sale is a proper use of his books and instruments in his profession. Another proper use of his books and instruments is their preservation from injury and destruction. He may insure them, to protect himself and family from loss from fire. The fact that they were insured would not make them subject to his debts. If they are destroyed by fire, the indemnity secured by insurance, stands in the place of the books. It is intended to preserve the physician's library by securing means for its restoration after it is lost by fire. Surely that indemnity which is the indebtedness of the insurance company, or the money paid by it, stands in the place of the library, and ought to be, as it is, exempt from execution. The money due on the policy stands in the place of the property destroyed, and this must be true whether the money takes the place of the property by contract, or is acquired in invitum by proceedings against the owner."

See also 18 Cyc. 1444; 11 R. C. L. 532.

We doubt if either the true interest of creditors or the interest of the debtor or of society would be served by a narrow construction of our Exemption Law. If this woman is to discharge her duty to her family,—and that is the chief concern of exemption acts (18 Cyc. 1374),—she should be protected and encouraged to reimbarb in her vocation and to reinvest the proceeds of the insurance in a new supply of her stock in trade. She will thus relieve society of concern touching the support of her family, and she will be enabled in time to pay the plaintiff creditor all that she justly owes. It was on the faith of her honesty, ability, and diligence in the pursuit of her revocation that plaintiff sold goods to her upon an open account, and not on the assumption that it could seize all her insurance money if a fire should destroy her exempt stock in trade.

If all the insurance money which stands in the place of defendant's stock in trade is subjected to plaintiff's garnishment, this woman will have no means with which to resume her business. The oft-declared public

Exemptions—
insurance—
proceeds of ex-
empt property.

policy of this state is that she should be encouraged to do so.

The trial court's judgment withholding \$400 of the insurance money from forced process and sustaining the plaintiff's garnishment as to the residue was correct.

The judgment is affirmed.

ANNOTATION.

What is "stock in trade" within Exemption Law.

As including only goods manufactured by debtor.

In some jurisdictions, the statute exempting a "stock in trade" so closely connects it with the tools and implements of an artisan that the courts construe the statute as exempting only a stock of goods manufactured or constituting raw material for manufacture by the debtor. *Re Jones* (1872) 2 Dill. 343, Fed. Cas. No. 7,445 (Kansas statute); *Guptil v. McFee* (1872) 9 Kan. 30; *Bequillard v. Bartlett* (1877) 19 Kan. 382, 27 Am. Rep. 120; *Rice v. Nolan* (1885) 83 Kan. 28, 5 Pac. 437; *Miller v. Weeks* (1891) 46 Kan. 307, 26 Pac. 694; *Wilson v. Elliot* (1856) 7 Gray (Mass.) 69; *Reed v. Neale* (1857) 10 Gray (Mass.) 242; *Rayner v. Whicher* (1863) 6 Allen (Mass.) 292; *Eager v. Taylor* (1864) 9 Allen (Mass.) 156; *Grimes v. Bryne* (1858) 2 Minn. 89, Gil. 72; *McAbe v. Thompson* (1880) 27 Minn. 134, 6 N. W. 479; *Prosser v. Hartley* (1886) 35 Minn. 840, 29 N. W. 156; *Hillyer v. Remore* (1890) 42 Minn. 254, 44 N. W. 116. And see the reported case (*ARMSTRONG-TURNER MILLINERY Co. v. ROUND*, ante, 1255).

The statutes of Kansas and Minnesota are identical, exempting "the tools and implements of any mechanic, miner, or other person, used and kept for the purpose of carrying on his trade or business, and, in addition thereto, stock in trade," not exceeding a certain sum. The court held in *Grimes v. Bryne* (1858) 2 Minn. 89, Gil. 72, that this statute applied only to the stock in trade kept and used by persons using tools and implements in their trade or business, and that it did not exempt the stock in trade kept for

sale by a merchant or shopkeeper. See to the same effect, *Prosser v. Hartley* (1886) 35 Minn. 340, 29 N. W. 156. In *Grimes v. Bryne* (Minn.) supra, it was said: "In addition to what? Why, manifestly, in addition to the tools and implements above exempted. The legislature did not intend to leave the tools of the shoemaker and harness maker in his hands, and deprive him of the means of using them; they gave him a stock of material to work upon to render the previous exemption of some utility. The two clauses must stand together to bring either in harmony with the spirit of the law; the stock would be worthless without the tools, and the tools idle without the stock."

Following the previous decisions, it was held in *Hillyer v. Remore* (1890) 42 Minn. 254, 44 N. W. 116, that although the statutory exemption did not extend to the stock in trade of a mere merchant, the articles manufactured by a milliner, in whole or in part, were exempt, and that it made no difference that they were placed on sale with the nonexempt goods.

And in *McAbe v. Thompson* (1880) 27 Minn. 134, 6 N. W. 479, it was held that unfinished burial cases were exempt as "stock in trade" when owned and held by a manufacturer for the purpose of being so finished and made fit for use by him. It was said that the term "stock in trade" had reference to any materials belonging to a mechanic, and which he had provided and held for the purpose of enabling him to make their use a beneficial or profitable one as a means of support. It was further stated that it included all the materials procured and held

for that purpose, in whatever condition or state of preparation for use they might be, so that they were suitable and adapted to the end in view and to the particular business in which the merchant was engaged, wherein the use of such tools was necessary.

In *Guptil v. McFee* (1872) 9 Kan. 30, meats and the like, constituting the stock of a meat market, were held not to be exempt, following *Grimes v. Bryne* (Minn.) *supra*.

In the case of *Re Jones* (1872) 2 Dill. 343, Fed. Cas. No. 7,445, the court held that the Kansas statute exempted goods purchased and held by a merchant tailor, not with a view to selling them, but for the purpose of making them up into clothing for customers on special orders.

So, in *Rice v. Nolan* (1885) 33 Kan. 28, 5 Pac. 437, it was held that a merchant tailor was entitled to an exemption of the stock in trade of cloth and trimmings out of which he made clothing.

The same rule was stated in *Bequillard v. Bartlett* (1877) 19 Kan. 382, 27 Am. Rep. 120, wherein the evidence showed that the plaintiff was a watchmaker and jeweler by trade, and that he carried on the business, all in one room, of making and repairing watches and jewelry, and of buying and selling watches and jewelry. He kept one lamp to light this room, two show cases in which to show and display his watches and jewelry, two tables on which to support the show cases, and one iron frame to protect one of the show cases. These articles were all used in the plaintiff's business, and were so used with respect to the goods manufactured by the plaintiff himself, as well as to those purchased of others. The defendant, as assignee for the benefit of the plaintiff's creditors, took possession of all these articles, and also took thirty-seven articles of jewelry manufactured by the plaintiff himself for the purpose of sale, and kept by him for that purpose. Several of these thirty-seven articles were not fully completed when the defendant took them, but the most of them were. The defendant

also took a large number of other articles of jewelry purchased by the plaintiff for sale, and kept by him for that purpose. The court said: "The words, 'stock in trade,' we think, are broad enough to cover, not only the raw materials from which the mechanic intends to manufacture goods, but also to cover the manufactured goods themselves; and they are also broad enough to cover not only goods manufactured for particular customers upon special orders, but also to cover goods manufactured for sale to customers generally, or to any person who might afterward choose to purchase. Some mechanics or tradesmen, like tailors, manufacture nearly all their goods upon special orders, while others, like miners of coal (and the statute specially mentions 'miners'), prepare their goods for customers generally, and without reference to special orders, or to whom any specific articles shall go. Now we would suppose that the coal procured by a miner for customers generally would be equally exempt with the coat made by a tailor for a particular customer. The amount exempted as 'stock in trade' is, of course, limited; and if the mechanic, miner, or tradesman takes a portion of it in manufactured goods, he cannot, of course, take so much of it in raw material. In the aggregate, the value of the articles, manufactured and unmanufactured, exempted as 'stock in trade,' cannot exceed \$400."

And in *Miller v. Weeks* (1891) 46 Kan. 307, 26 Pac. 694, it was held that the stock in trade of a tinner, necessary to carry on the trade of a tinner, and used for that purpose, was exempt from seizure and sale under the Exemption Law.

In the reported case (*ARMSTRONG-TURNER MILLINERY CO. v. ROUND*, ante. 1255) it is held that the material used by a milliner, and on which she exercises her craft, constitute her stock in trade, and are exempt to the statutory amount.

In Massachusetts the statute exempts "materials and stock designed and procured" by a debtor, and "necessary for carrying on his trade and business, and intended to be used and

wrought therein." In *Wilson v. Elliot* (1856) 7 Gray (Mass.) 69, in denying an exemption to a stock of goods, consisting of the customary assortment of dry goods and groceries of a "country store," the court said: "In his business as a country storekeeper, the plaintiff had no work to do which required to be wrought by the aid and instrumentality of tools and implements. In that respect, his business bore no resemblance to the occupation or the necessities of the artisan, mechanic, or actual cultivator of the soil. The real purpose and meaning of the provisions of these statutes seem to be fully developed in the recent act of the legislature, in which the materials and stock of the debtor, to be exempted from attachment, are described to be such as are designed and procured by the debtor for carrying on his trade and business, and necessary therefor, and intended to be used and wrought therein. . . . The property of which the plaintiff was possessed, at the time of his application for the benefit of the act for the relief of insolvent debtors, not having been of that description, nor, within the meaning of the provisions of law, exempt from attachment, passed by assignment to the defendants." See to the same effect, *Reed v. Neale* (1857) 10 Gray (Mass.) 242. In *Eager v. Taylor* (1864) 9 Allen (Mass.) 156, it appeared that the plaintiff was an insolvent debtor, and for fifteen years had carried on the business of making, repairing, and painting carriages, and making harnesses, and had a general manufactory and place of business, and a general superintendence of the whole business and of the men employed. He kept on hand articles to be used in these occupations, and would occasionally sell any of them to a customer or stranger, if called for, but he never advertised or held himself out as a vendor of any of them. He originally learned the trade of painting, but afterwards became acquainted with other branches of his business, and could himself perform work in all of them. In August, 1861, he went into insolvency, and the defendant, who was his assignee in insolvency,

delivered to him all the stock and tools belonging exclusively to the painting department, amounting to \$10 in value, and sold the rest, which were worth over \$100, without the plaintiff's consent. It was held that the fact that the plaintiff occasionally sold articles to a customer from his stock would not render them liable to be seized on execution, as the articles were in reality kept for the purpose of being used in his own business. In *Rayner v. Whicher* (1863) 6 Allen (Mass.) 292, the court, after quoting the statute, said: "As to this class of articles, an essential element in their exemption from attachment is, that they are goods intended by the debtor to be used in carrying on his trade and business. If, therefore, it appears that the debtor having such stock or materials designed and procured for carrying on his trade and business, the entire value of which exceeds \$100, changes his purpose to use the same in his business, and determines to sell the same, and does in fact sell the same to a third person, such bargain being made to defraud creditors, and this purpose being participated in by the vendee, the conveyance gives no title to the purchaser, and the same may be claimed and held by the assignee, in an action against the purchaser. *Stevenson v. White* (1862) 5 Allen (Mass.) 148. The right of the assignee to recover for the kid skins, linings, rubber gorings, and shoe uppers, articles alleged to be exempt as stock and materials, may be sustained under the rule of law above stated, if the same are held by a sale made under such circumstances."

As including goods bought for resale by debtor.

In some jurisdictions an exemption of a "stock in trade" is held to extend not only to the stock of an artisan, but to that of a merchant, purchased by him for resale. *Re Bjornstad* (1878) 9 Biss. 13, Fed. Cas. No. 1,453 (Wisconsin statute); *Martin v. Bond* (1890) 14 Colo. 466, 24 Pac. 326; *Weil v. Nevitt* (1892) 18 Colo. 10, 31 Pac. 487; *Stewart v. Welton* (1875) 32 Mich. 56; *Hutchinson v. Roe* (1880) 44 Mich. 389, 6 N. W. 870; *Fischer v.*

McIntyre (1887) 66 Mich. 681, 33 N. W. 762; Wicker v. Comstock (1881) 52 Wis. 315, 9 N. W. 25. Compare *Re Peabody* (1877) 16 Nat. Bankr. Reg. 243, Fed. Cas. No. 10,866 (Colorado statute); *Ex parte Robinson* (1876) 7 Biss. 125, Fed. Cas. No. 11,933 (Wisconsin statute); *Walsch v. Call* (1873) 32 Wis. 159.

The exemption statutes of Colorado and Wisconsin contain the following provision: "The tools and implements or stock in trade of any mechanic, miner or other person, used and kept for the purpose of carrying on his trade or business, not exceeding \$200 in value." The use of the disjunctive "or" in the language, "the tools and implements or stock in trade of any mechanic, miner or other person," is deemed to indicate a purpose of providing for two classes of persons; that is to say, for mechanics, miners, and others, to the exercise of whose trade or business tools or implements are necessary, and to another class of persons, like merchants, to whose business stock in trade is essential, but tools and implements are not. *Wicker v. Comstock* (1881) 52 Wis. 315, 9 N. W. 25, wherein the court said: "Looking through these statutes we find no adequate provision in favor of merchants or shopkeepers as a class, unless it is contained in the statute under consideration. Their little stocks in trade may be as indispensable to the support of their families as are the tools of the mechanic or miner, the press and types of the printer, or the library to the lawyer. Why should they not have the same protection as the others? And when we find language in a statute which may fairly be construed as giving them the same protection extended to other classes of debtors, why should not that construction be adopted?"

A like construction was put on the Wisconsin statute in the case of *Re Bjornstad* (Fed.) *supra*, wherein it was held that the stock of a merchant was exempt, the court saying: "I think, at any rate, the language will fairly bear this construction. It is certainly broad enough, if interpreted anyway literally, to include mer-

chants, and considering the beneficent purpose of the law to make reasonable and equal provision for all classes of the community, I am disposed to think that the maxim "*noscitur a sociis*" should not in this case prevail over all other principles of construction, so as to deny to so large and useful a class of the community an equal participation and enjoyment of the Exemption Law."

But in the case of *Ex parte Robinson* (1876) 7 Biss. 125, Fed. Cas. No. 11,933, a different conclusion was reached. The court so construed the Wisconsin statute as to deny to a merchant exemption as to his stock in trade. It was said: "Now can it be said that any article which a merchant buys merely for the purpose of exchanging for money or other valuable property, or that a watch bought by a jeweler for the purpose of selling, is a part of the stock in trade used and kept for the purpose of carrying on his business? He buys to exchange; he does not use and keep it for the purpose of carrying on his business, whereas the tools and implements, or any other article that a mechanic or miner uses and keeps for carrying on his business, is something different. For example, take the case of jeweler; while it may be said that the watches or silverware or jewels which he buys simply to exchange for money are not used and kept for the purpose of carrying on his business, yet other things about his establishment, as show cases and all the instruments connected with the business, are used and kept for that purpose, just as the tools or implements of a mechanic are used and kept. I am not aware that this view of the case has been taken by the supreme court of this state, but it seems to me to be worth consideration, and there may be some doubt whether a proper construction of this language, when examined critically, can refer to articles purchased simply for exchange. They may be said not to be used and kept for the purpose of carrying on a man's business, but to constitute the business itself. But however this may be, I think it is clear that this case is not within any of the

decisions which have been made by the supreme court of this state."

In *Martin v. Bond* (1890) 14 Colo. 466, 24 Pac. 326, a writ of attachment was served on the defendant, and the latter claimed that a portion of the property levied on was exempt under this statute, alleging that she possessed a stock of merchandise with which she carried on a business. The court, following the decision of *Wicker v. Comstock* (Wis.) *supra*, held that the statute applied to a merchant or shopkeeper as well as to a mechanic, and that the defendant was entitled to the exemption.

Walsch v. Call (1873) 32 Wis. 159, was an action to recover the possession of certain liquors, and it appeared on the trial that the defendant seized the liquors by virtue of a writ of attachment against the property of the plaintiffs. It further appeared that at the time of the seizure, the plaintiffs were engaged in keeping a saloon for the sale of liquors by the glass, to be drunk on the premises, and they had no license to do so from the proper village authorities. It was held that the plaintiffs were not entitled to the statutory exemption, the court saying: "The question to be determined is, therefore, whether the stock in trade of the plaintiffs, who were thus unlawfully engaged in the business of selling intoxicating liquors, was exempt by law from seizure on attachment. It seems almost too clear to admit of argument or dispute that this question must be answered in the negative. If, when the liquor was seized, the plaintiffs had not been engaged in any business, the liquor would most certainly have been liable to seizure on the attachment. For in such case the essential condition of the exemption, that the property must be used and kept for the purpose of carrying on the trade or business of its owner, could not be complied with. Now, the doctrine that while the plaintiffs obeyed the law their property was liable to seizure, but as soon as they violated the law and committed a misdemeanor, perhaps scores of them, by engaging in an unlawful business, the same property became exempt from

seizure, cannot be tolerated for a moment."

But in *Weil v. Nevitt* (1892) 18 Colo. 10, 31 Pac. 487, it appeared that the debtor was engaged in the liquor business, and, while thus engaged a portion of his stock of liquor was levied on by virtue of an execution in favor of the defendant. In holding that the debtor was entitled to have this property exempted, the court said: "No matter what opinion individuals may entertain regarding the expediency or morality of the liquor traffic, so long as the government recognizes the sale of intoxicating liquors as lawful, anyone regularly carrying on business as a saloon keeper is entitled to have his property in such liquors protected the same as other property; he is a liquor merchant, and his liquors are his 'stock in trade.'"

In the case of *Re Peabody* (1877) 16 Nat. Bankr. Reg. 243, Fed. Cas. No. 10,866, it was held, under the Colorado act, that the stock in trade of a merchant was not exempt.

In *Fischer v. McIntyre* (1887) 66 Mich. 681, 33 N. W. 762, it was held that masquerade suits owned by a tailor, which had been made by him during times when there was no work in his trade, and kept by him for renting out, were exempt under a statute exempting "the tools, implements, materials, stock, apparatus . . . or other things to enable any person to carry on the profession, trade, occupation, or business in which he is wholly or principally engaged." Under the same act in *Hutchinson v. Roe* (1880) 44 Mich. 389, 6 N. W. 870, the court held to be exempt a small quantity of shingles and lumber owned by a carpenter, which he was using in the erection of a house on his homestead. In *Stewart v. Welton* (1875) 32 Mich. 56, an action of trespass in justice's court for the unlawful taking of certain property, it was shown that the plaintiff's principal business was blacksmithing, and during his leisure hours he manufactured wagons and whippetrees for sale, the proceeds to be used in carrying on his business. The defendants claimed to have purchased the property at an execution

sale. It was held that the property should be exempted, the court saying: "It is very evident that, to sustain this position and hold that the property in question, under the facts as found in this case, was subject to seizure and sale upon execution, would be to discourage debtors engaged in a profession, trade, or occupation from making proper use of their leisure time, and thus prevent them from effectually and profitably carrying on their principal business. A jeweler who is principally engaged in cleaning and repairing watches and jewelry surely may employ his leisure time in finishing and completing watches purchased by him in a rough and unfinished condition, and then offer them for sale. If, however, under such circumstances they would be subject to seizure by his creditors whenever finished, then he had better have remained idle, so far as himself and family would be concerned, than to have invested what little means he otherwise might have appropriated to their support, thereby losing what he invested and his labor besides. The mechanic, who, in order to support himself and family, must have no idle moments, in case he cannot obtain custom work sufficient to keep him busily engaged all the time, must he remain idle, although by so doing those dependent on his exertions are suffering for the bare necessities of life? Or can he, when not otherwise engaged, make, either in whole or in part, some article properly pertaining to his principal business, then sell the same, and from the proceeds of such sale replenish his stock and continue his business? We have no doubt but that he has this right, and that all such property, not exceeding in value the limit fixed by the statute, would be exempt, not only before, but after its completion, and while being offered for sale."

In *Edgewood Distilling Co. v. Rosser* (1914) 116 Va. 624, 82 S. E. 716, the action was brought by the infant children of a deceased debtor to recover alleged exemptions due from the proceeds of the personal estate. It was claimed by the creditors of the estate that the exemptions should not be al-

lowed, as the statute provided that such exemption "shall not be claimed or held in a shifting stock of merchandise." The evidence showed that the deceased had been a retail liquor dealer. The court, in holding that the claimants were entitled to the exemption, said: "The exemption, in this instance, does not come within the inhibition. It is true the fund in question is in part the product of the sale of goods in stock in Rosser's lifetime, and at that time constituted a shifting stock of merchandise within the meaning of the prohibition; but upon his death, by operation of law, title to all his personal assets devolved upon his administrator, who had neither added to the stock by purchase nor diminished it by sale. In other words, the business absolutely terminated with the death of Rosser, and the stock ceased to be shifting and became fixed and stable, and so remained intact until, as remarked, it was converted into money by the administrator by a sale at public auction and in bulk."

In *Endrizzi v. Peto* (1917) — B. C. —, [1917] 1 West. Week. Rep. 1439, it was held that the safe, cash register, and counter of a merchant were "stock in trade" within a proviso of the Exemption Law, and hence not exempt from seizure. The court said: "The defendant here is a trader. If he were just planning to enter into business as a trader, he must first ascertain what he needs to carry on his business and what capital would be required. I should be of the opinion that whatever he would need to carry on his business, not only of merchandise which he places upon his shelves or counter for sale, but such other materials as he would need for measuring, weighing, or cutting such materials, or for keeping his books, or cash in connection with his business, would constitute the 'stock in trade of his business.' . . . I am of the opinion, therefore, that the goods in question here come within the meaning of the phrase 'stock in trade of the defendant's business,' and are consequently not exempt from seizure."

E. C. B.

TOWN OF ROST, Respt.,
v.
JOHN O'CONNOR, Appt.

Minnesota Supreme Court — February 6, 1920.

(— Minn. —, 176 N. W. 166.)

Highway — trees — right of public.

1. Section 2560, Gen. Stat. 1913, in so far as it authorizes local highway officials, without notice to the abutting landowner or opportunity by him to be heard, as a penalty for his failure to pay the expense of cutting down trees thereby authorized to be removed from the highway, to make an ex parte sale of the trees and appropriate the proceeds to the use of the municipality, even though the amount may greatly exceed such expense, is unconstitutional and void as an attempt to deprive the owner of his property without due process of law.

[See note on this question beginning on page 1239.]

— title of abutting owner.

2. The title of the owner of land abutting on a public highway extends to the center of the road and includes all trees standing and growing there-

in, of which he can be deprived for the public use by due process of law only.

[See 4 R. C. L. 78; 13 R. C. L. 132.]

Headnotes by BROWN, Ch. J.

(Hallam and Dibell, JJ., dissent.)

APPEAL by defendant from a judgment of the District Court for Jackson County (Dean, J.) in favor of plaintiff in an action brought to recover the cost and expense incurred in cutting down certain trees standing in the highway along defendant's farm. *Reversed.*

The facts are stated in the opinion of the court.

Mr. F. B. Faber, for appellant:

The statute involved, as applied to this case, is unconstitutional and void as depriving an abutting property owner of his property in trees growing in roads without compensation and without due process of law.

37 Cyc. 203, 204; 15 Am. & Eng. Enc. Law, 2d ed. 416, 417; Glencoe v. Reed, 93 Minn. 518, 67 L.R.A. 901, 101 N. W. 956, 2 Ann. Cas. 594; Althen v. Kelly, 32 Minn. 280, 20 N. W. 188; Rich v. Minneapolis, 37 Minn. 423, 5 Am. St. Rep. 861, 35 N. W. 2; Brisbane v. St. Paul & S. C. R. Co. 23 Minn. 114; Elliott, Roads & Streets, §§ 410, 411; Chase v. Oshkosh, 81 Wis. 313, 15 L.R.A. 553, 29 Am. St. Rep. 898, 51 N. W. 560; Palatine v. Kreuger, 121 Ill. 72, 12 N. E. 75; Cole v. Drew, 44 Vt. 49, 8 Am. Rep. 363.

There is no showing that the road in question was within the statute.

Meyer v. Petersburg, 99 Minn. 450, 9 A.L.R.—80.

109 N. W. 840; Cassidy v. Smith, 13 Minn. 129, Gil. 122; Lyle v. Chicago. M. & St. P. R. Co. 55 Minn. 223, 56 N. W. 820.

Mr. E. H. Nicholas, for respondent:

The statute seeks to compel landowners to remove trees from the highway when their presence in the highway has become a nuisance, and when they interfere with the proper maintenance of the highway for public travel.

Vanderhurst v. Tholcke, 113 Cal. 147, 85 L.R.A. 267, 45 Pac. 266; Chase v. Oshkosh, 81 Wis. 313, 15 L.R.A. 553, 29 Am. St. Rep. 898, 51 N. W. 560; Taylor v. Reynolds, 92 Cal. 573, 28 Pac. 688; Marini v. Graham, 67 Cal. 130, 7 Pac. 442; Turner v. Ringwood Highway Bd. L. R. 9 Eq. 418, 21 L. T. N. S. 745, 18 Week. Rep. 424.

In case the abutting landowner refuses to abate the nuisance and to remove the obstruction, the public may do so and may tax the expense of abat-

ing such nuisance to such abutting landowner.

2 Hare, Am. Const. Law, p. 766; Sedgw. Stat. & Const. Law, 435; 1 Dill. Mun. Corp. p. 212; Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; People v. Gillson, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; Carthage v. Frederick, 122 N. Y. 268, 10 L.R.A. 178, 19 Am. St. Rep. 490, 25 N. E. 480.

Brown, Ch. J., delivered the opinion of the court:

The town board of supervisors of the town of Rost, Jackson county, on July 13, 1914, acting under the authority conferred by chapter 235, § 73, General Laws 1913 (Gen. Stat. 1913, § 2560), made and promulgated an ex parte order to the effect that the public interests required the removal of certain trees standing in a highway as it extended along the farm of defendant. Defendant was thereafter notified of the order by "registered mail" and directed to "cut down the trees and take them off the highway within ninety days of this notice." If defendant received the notice, he gave it no attention, and did not comply with its command. Thereafter, on the 12th and 13th days of November, the road overseer, acting on the orders of the town board, proceeded to the premises, and with the assistance of a crew of men cut down the trees embraced within the order, about 200 in number, ranging in size from 10 to 30 inches in circumference and 30 feet in height. They were not then removed from the highway, and on December 21st defendant by "registered mail" was notified that the cost and expense of cutting the trees was \$42, and that he might claim them by paying the amount thereof to the town treasurer within sixty days. If defendant received that notice, he paid no attention to it, and subsequent to the date thereof took possession of the trees and removed them from the highway, converting them to his own use.

The town thereafter brought this action to recover the cost and expense of cutting the trees on the theory that by taking them away defendant by necessary implication

obligated himself to reimburse the town to the amount of the expense stated. The action was commenced in justice court, thence appealed to the district court, where plaintiff had judgment for the amount claimed. Defendant appealed.

The only question presented by the assignments of error which we deem necessary to consider is the constitutionality of the statute under which the proceedings were had by the town board. If the statute be invalid, and that is our conclusion, there is an end of the case, and plaintiff cannot recover, for its asserted right of action rests thereon. All other questions are therefore of no material importance, and they are passed without statement or comment.

The section of the statute involved (Gen. Stat. 1913, § 2560) is composed of three subdivisions, the first of which confers upon the town board authority to order the cutting down of trees and hedges within highway limits whenever they shall determine that public interests require such action, subject, however, to the following restrictions, namely: "Provided, that trees, other than willow trees, shall not be so cut down unless the center of such trees is more than six (6) feet from the side of any road as established by statutory proceedings or dedicated specifically to public use; provided, such trees or hedges, or either of them, interfere with keeping the surface of the road in good order, or cause the snow to drift onto or accumulate upon said road in quantities that materially obstruct travel."

Subdivision 2 provides that when the town board shall determine to take the action thus authorized notice shall be given the owner of the abutting land to cut down the trees within ninety days from such notice. It further provides that, if the abutting owner fails or refuses to comply with the order, the town board may cause the trees to be cut down "at the expense of the town." It also provides that the timber and

wood of the trees shall belong to the abutting landowners: "Provided they pay the expense of cutting down said trees or hedges and remove the same from the roadside within sixty (60) days. If such timber or wood is not removed within said time, the town board shall sell the same or destroy it if it cannot be sold at a profit, and if sold, pay the proceeds thereof into the road and bridge fund of said town."

The third subdivision is unimportant. It simply authorizes the use of town funds to carry out any particular proceeding conducted under subdivisions 1 and 2.

The contention of defendant is that the statute violates § 7 of article 1 of the state Constitution, in that it makes no provision for notice to interested landowners, or otherwise secure to them an opportunity to be heard upon any of the questions involved in the proceeding, and that it violates § 13 of article 1 of the Constitution in that it authorizes the taking of private property for public use without compensation.

It is fundamental that the right of private ownership of property cannot be abridged or impaired in the interests of the public except by due process of law and the payment of just compensation. Due process of law means notice and opportunity to be heard at some stage of the proceeding in which it is proposed to so appropriate private property, and statutes authorizing a taking or appropriation without are null and void.

In this state the title of the owner of land extends to the center of a street or highway abutting thereon, and includes all trees, sand, gravel, and other appurtenances situated or being upon or within the same, subject to the general public right to take and use any thereof as may be necessary in the improvement of the highway for public use. That is settled law in this state and elsewhere. *Glencoe v. Reed*, 93 Minn. 518, 67 L.R.A.

901, 101 N. W. 956, 2 Ann. Cas. 594; *West v. White Bear*, 107 Minn. 237, 119 N. W. 1064; 2 Elliott, *Roads & Streets*, §§ 876 et seq. The municipal authorities, having in charge the care and maintenance of the public roads, no doubt possess the general right to cut down trees standing therein, when so located as to impair the usefulness of the way. The right is inherent and arises from the general obligation imposed upon them by law, within the limits of funds at their disposal, to keep and maintain the roads and highways within their respective jurisdictions in suitable condition for public use. But the statute in question expressly grants the authority subject to the restrictions and conditions imposed by the provisos above quoted, by which the private ownership of the trees is recognized and an ineffective attempt made to protect it.

Under the statute the local tribunal proceeds ex parte, determines the facts, and makes its order, and the first information the landowner has on the subject comes after the order has been made and in the form of notice or command to him to cut down the trees. If he fails to comply therewith, the board is authorized to cut them down "at the expense of the town," with the proviso, in recognition of the landowner's title to the trees, that he may have them if he pays the expense incurred by the town. He is given no opportunity to question the reasonableness of the expense, and as a penalty for his refusal to pay it the statute declares the town board shall sell the trees, if thereby a profit may be realized, depositing the proceeds in the town road and bridge fund. The landowner is given no notice of the time, place, or manner of the intended sale, and by the ex parte proceeding is deprived of the proceeds, though the amount may greatly exceed the expense incurred by the town.

It seems clear that the statute, in so far as it authorizes an ex parte sale of the trees and the appropria-

Highway—title
of abutting
owner.

tion of the entire proceeds to the use of the town, though the amount in a particular instance may largely exceed the expense incurred by it, invades rights protected by the Constitution, rendering the statute in this respect null and void. 1 Dunnell's Dig. (Minn.) §§ 1637 and 3085; Minnesota Linseed Oil Co. v. Palmer, 20 Minn. 468, Gil. 424; Lyle v. Chicago, M. & St. P. R. Co. 55 Minn. 223, 56 N. W. 820; Lyon County v. Lien, 105 Minn. 55, 116 N. W. 1017; State v. McGuire, 109 Minn. 88, 122 N. W. 1120; State v. Burnes, 124 Minn. 471, 145 N. W. 377; State ex rel. Murray v. District Ct. 138 Minn. 204, 164 N. W. 815. There would be less objection to the statute if the provisions as to a sale of the trees were limited to a purpose of reimbursing the town for the expense, authorizing a sale of so much thereof as might be necessary for that purpose, as in other local municipal improvements. But the statute does not so provide; on the contrary, by its express language and terms it puts the town in the position of a profiteer, declaring that on the default of the landowner to pay the bill of expense the trees shall be destroyed, unless they may be sold at a profit, and if a profit may be realized by a sale, then the whole proceeds, however much in excess of the expense, goes into the town treasury as a part of its road and bridge fund. Thus is the property of the landowner, even the one who resides in some adjoining county remote from the scene of action, without notice or opportunity to be heard, arbitrarily taken from him and devoted to the public use. Surely the legislature is without constitutional authority to so provide.

The exact value of the trees, some 200 in number, does not appear. But that is not important. Certain trees similarly situated and proceeded against by road officers, and valuable only for ornamental purposes, were protected in equity in

West v. White Bear, 107 Minn. 237, 119 N. W. 1064, and Gilbert v. White Bear, 107 Minn. 239, 119 N. W. 1063. And, moreover, we may assume, and properly so, that 200 trees of the dimensions of those in question, for use on a farm either for fencing or fuel purposes, are of far greater worth and value than the town expense here incurred in cutting them down, or as an ornament to a summer cottage on the shores of a lake.

The case of Viliski v. Minneapolis, 40 Minn. 304, 3 L.R.A. 831, 41 N. W. 1050, is not in point. That controversy involved a lot of crushed rock and other waste material resulting from excavations in a street for the purpose of constructing a sewer. The court there awarded the whole remnant of such material to the municipality on the theory that it would be impossible to separate from the common mass the portions belonging to the several lot owners, and as a short cut gave the whole to the city. The court conceded that there was no authority to support the decision in that respect, and was careful to exclude therefrom timber, trees, and mineral rights similarly situated and involved.

Statutes authorizing local municipal officers to order and require the destruction of noxious weeds by owners of land abutting upon public highways are not in point. No private property is there taken or appropriated to public use as authorized by the statute in question.

This covers the case and all questions necessary to be considered. Plaintiff's whole case rests on the statute, and since the statute in the respect stated is invalid, no right of recovery is shown, and defendant is entitled to judgment accordingly. There was no appearance by defendant in any of the proceedings such as to deprive him of his right, nor was he notified thereof in a manner required by due process. The only evidence of notice was that he was "notified by registered mail." That, whatever it may

mean, has not heretofore been recognized or provided by law as a substitute for personal service in proceedings wherein a personal obligation is sought to be created or enforced.

The judgment appealed from is reversed, and the cause remanded to the court below, with directions to dismiss the action.

Hallam, J., dissenting:

I dissent. My opinion in this case is as follows:

It is not necessary for a town to give a property holder notice before determining the necessity of an ordinary public improvement of a highway adjacent to his land, even though the improvement may be of pecuniary concern to him. *Hennepin County v. Bartleson*, 37 Minn. 343, 34 N. W. 222; *Rosenthal v. Goldsboro*, 149 N. C. 128, 20 L.R.A. (N.S.) 809, 62 S. E. 905, 16 Ann. Cas. 639; *Chase v. Oshkosh*, 81 Wis. 313, 15 L.R.A. 553, 29 Am. St. Rep. 898, 51 N. W. 560, 2 Beach, Pub. Corp. § 1234. When it becomes necessary to remove trees for improvement of the highway the legislature has the constitutional power to provide that, after first giving the abutting owner an opportunity to remove them, the town may remove them and dispose of the timber, without accounting to him. *Viliski v. Minneapolis*, 40 Minn. 304, 308, 3 L.R.A. 831, 41 N. W. 1050. See also 2 *Lewis, Em. Dom.* § 853; *Denniston v. Clark*, 125 Mass. 216; *Grover v. Cornet*, 135 Mo. 21, 35 S. W. 1148. The *Viliski* Case determined that much and more. The decision in that case is summarized in these words: "Whenever it becomes reasonably necessary, for purposes connected with the use or improvement of a . . . street, . . . to have . . .

rock excavated and removed therefrom, and where it is impracticable . . . to commit to the owners of the soil the work of excavation and removal, the public authorities may do this, unembarrassed by claims of private ownership and right of disposal. The public may dispose of the material which it is required to remove . . . without accountability to the owner of the soil." "This is properly incident to the public easement."

The constitutional rights of an owner are the same whether his property be stone or trees. In the *Viliski* Case the court intimated that a distinction may be drawn in case of trees, but only to the extent indicated in the following quotation. The court said: "We have not assumed to state the law as to the removal of trees standing in the highway. It may be that in general it would be practicable to allow adjacent proprietors to remove them if they shall elect to do so, when removal becomes necessary."

This is just what the law here in question does. The decision in the *Viliski* Case seems to me decisive of this case.

The portion of the statute which gives the property owner the right to take the timber after severance, upon payment of the expense of severance, simply accords him a further privilege which the state was not required by any provision of the Constitution to give.

When defendant took the timber, he, in my opinion, took upon himself the obligation to make payment of the expenses which the statute imposes as a condition to the right to such possession.

Dibell, J.:

I dissent from the majority opinion.

ANNOTATION.

Property rights of abutting owners in trees cut or removed from street or highway.

The general question of ownership and control of such trees as bearing upon the right to remove them or pre-

vent their removal, or upon a right of action for injuries to them, is not within the scope of the note. The re-

ported case (*ROST v. O'CONNOR*, ante, 1265), it will be seen, is in accord with the great weight of authority that, once the trees are severed from the soil, the profits in them belong to the abutting owner.

Thus, in *Lyman v. Arnold* (1828) 5 Mason, 195, Fed. Cas. No. 8,626, it is said by Judge Story: "Where a highway is made over another's land the soil still remains in the owner subject to the easement. If there are trees on it they are his. If it be necessary to cut them down and remove them, in order to make the highway, still the property of the trees so cut down is unchanged."

So, too, in *Barclay v. Howell* (1832) 6 Pet. (U. S.) 498, 8 L. ed. 477, it is said that "by the common law the fee in the soil remains in the original owner, where a public road is established over it . . . and while it is used as a highway, he is entitled to the timber and grass which may grow upon the surface."

And Lord Mansfield said in *Goodtitle ex dem. Chester v. Alker* (1757) 1 Burr. 184, 97 Eng. Reprint, 231: "1 Rolle, Abr. 392, letter B, pl. 1, is express,—that the King has nothing but the passage for himself and his people, but the freehold and all profits belong to the owner of the soil.' So do all the trees upon it."

On the appropriation of land for the purpose of a road the right of property in the timber growing upon such land is not changed, but remains in the abutting owner. *Deaton v. Polk County* (1859) 9 Iowa, 594.

And although village authorities have the right to cut down and remove timber in a roadway dedicated as a village street, for the purpose of opening the same, the trees when cut down belong to the owners of the soil, and they may recover for any timber taken away. *Niagara Falls Suspension Bridge Co. v. Bachman* (1871) 4 Lans. (N. Y.) 523.

In *Clark v. Dasso* (1876) 34 Mich. 86, it was held that the selling of shade trees along the highway was not justified under a statute providing "that whenever it shall appear to the board of commissioners for highways

in any town in this state that any shade or ornamental trees or shrubs are an obstruction or an injury to any highway, said trees or shrubs may be cut down and removed by order of the aforesaid board of commissioners of highways." The court said: "It seems hardly necessary to say that the commissioner has not acted under this section. He has found some shade trees belonging to the plaintiff standing in the highway, and he has proceeded to sell them. For this he will find no authority whatever in the statute. Being prosecuted for this action which he had no right to take, he falls back upon what he might have done but which he has not attempted. Selling a tree is a very different thing from ordering its removal. The attempted justification, therefore, fails entirely. . . . It is to be remembered that the trees are the property of the adjacent owner, who cannot lawfully be deprived of any species of property in the summary mode which was adopted in this case. If the trees must be removed he may prefer to take them as living trees and transplant them elsewhere,—perhaps in more suitable localities in the street; and he should not be compelled to cut them down where removal is preferred. The order of removal should, therefore, be given to him, and he should be allowed a reasonable time to comply with it before the commissioner should act further. . . . The cutting of the trees in this case was entirely regardless of plaintiff's rights. It is not shown that plaintiff could not have been notified, but the trouble was not taken to inform him of what was proposed."

And in *Stretch v. Cassopolis* (1900) 125 Mich. 167, 51 L.R.A. 345, 84 Am. St. Rep. 567, 84 N. W. 51, it was held, citing *Clark v. Wasso* (Mich.) *supra*, as authority, that the removal by a municipality of shade trees from a street without giving the abutting owner who owns the fee of the street any notice of the public necessity for the removal, or any opportunity to transplant them or to remove them himself, constitutes an invasion of the owner's legal rights, for which the

municipality is liable in damages. There is no other view, the court stated, consistent with the ownership of the trees by the adjacent owner. True this title is subservient to the public right, but the public right may well be exercised in a manner not to entail entire loss of property upon the owner.

In *Makepeace v. Worden* (1816) 1 N. H. 16, where surveyors of highways in repairing the highway cut down and converted to their own use trees growing thereon, it was held that the abutting owner was entitled to judgment for the value of the wood. The court stated that whether towns have a right to use trees thus cut, in the construction of the road, was a question not necessary to be settled in this case.

However, in the later case of *Baker v. Shephard* (1851) 24 N. H. 208, that question was presented, and it was there held that by the laying out of a public highway the public acquires no right to use any trees or timber growing upon the land for the purpose of building or repairing the road, but only the right to cut and remove to a convenient distance, for the use of the owner, such trees as it is necessary to remove in order to make and repair the road in a proper and reasonable manner.

Trees and brushwood growing upon land condemned to the uses of a highway are not included in the condemnation and estimate of damages, and, when removed by the surveyor of highways for the purpose of opening and building the highways, are to be left for the owner of the land, and cannot be used in the building of the roadways. *Tucker v. Eldred* (1860) 6 R. I. 404. In reply to the contention that the assessment of damages for the laying out of the highway included the use of the wood as an item of these damages, the court said: "The damages for which the statute provides are 'the damages which the owners of the

land shall sustain by means of such highway passing through their lands;' that is, the damages which they may suffer from the right of the public continually to pass over their lands,—the adaptation of the soil to that passage,—the removal of everything therefrom which may interfere with the travel, and the fact that they must by such use be deprived to a great extent of the profit of the soil; the growth of timber thereon being one source of profit. These damages are necessarily assessed before the land is entered upon for the purpose of making the way; and therefore cannot be for all the injury, necessary or unnecessary, which may be actually done by the surveyor or other person in making the way and opening it for travel. The assessment can only be for such damages as necessarily will be done to the owner of the land in order that the public might be enabled conveniently to pass over the land. The use of the timber in the construction of the way is certainly not reasonably necessary to the passage of the public; though the removal of it from the path may be and would be. Until such necessity is shown no reason is shown why the value of the timber should be an item of damages to be awarded to the owner of the land."

In *Felch v. Gilman* (1849) 22 Vt. 38, on the other hand, it was held that trees found within the limits of a highway may be cut down and the timber used in a reasonable manner for the purpose of repairing the road or bridges.

The court in this case stated that it is a common principle that when the law gives a right, it at the same time impliedly gives what is necessary to a reasonable enjoyment of that right, and this incidental, and to some extent a contingent, right should no doubt be taken into account in assessing the landholders' damages.

J. H. B.

RE FRANCIS C. CARY.

Minnesota Supreme Court — June 4, 1920.

(— Minn. —, 177 N. W. 801.)

Attorney and client — excessive charge for services.

1. A charge by an attorney of one half of what the state might appropriate for injuries received in fighting a forest fire, which required merely the securing of a few affidavits and preparing and presenting the bills to the legislature, shows the attorney to be morally unfit to be permitted to practise his profession.

[See note on this question beginning on page 1277.]

Evidence — sufficiency — dishonesty of attorney.

2. The evidence sustains the charges that the accused attorney at law wilfully made false and fraudulent representation to a legislative committee with reference to his pecuniary interest in certain bills then being considered by the committee, and also that he obtained from the beneficiaries named in said bills agreements to pay such exorbitant compensation for the

services he was to render in securing their passage as to show him guilty of dishonesty and bad faith towards his clients.

Attorney and client — dishonesty — disbarment.

3. Misconduct indicative of moral unfitness for the profession, whether it be professional or nonprofessional, justifies dismissal, as well as exclusion from the bar.

[See 2 R. C. L. 1089, 1099.]

Headnotes 2 and 3 by the COURT.

PETITION by the Secretary of the State Board of Law Examiners for the disbarment of Francis C. Cary, an attorney, because of unprofessional conduct to which he entered plea of not guilty. *Judgment of disbarment entered.*

The facts are stated in the opinion of the court.

Messrs. J. D. Sullivan and Vernon C. Pidgeon for petitioner.

Mr. C. D. O'Brien, for respondent:

The charges against respondent should not be sustained.

Re Hertz, 189 Minn. 504, 166 N. W. 397.

Per Curiam:

The secretary of the state board of law examiners presented a petition to this court, accusing Francis C. Cary, an attorney at law duly admitted to practise in this state, of unprofessional conduct in this: (1) That during the 1919 general session of the legislature he appeared before the committee on finance of the senate, advocating favorable action upon four bills, then under consideration by the committee, appropriating money to certain persons, and falsely and deceitfully represented to the members of said committee that neither he

nor anyone connected with his law firm had any pecuniary interest in the money to be appropriated, when as a matter of fact he then had an agreement with each of the four beneficiaries in said bills whereby he was to receive one half of any money appropriated, and that his conduct toward the committee was wilfully deceitful and unprofessional. (2) That the compensation exacted from the beneficiaries was so unreasonably large that it amounted to dishonest and unconscionable conduct towards his clients. In response to an order of this court requiring Francis C. Cary to answer the accusations made in the petition, he appeared and entered the plea of not guilty. Thereupon Honorable Frederick N. Dickson was designated to act for the court in the taking such

evidence as might be tendered by the parties, and which he deemed material and pertinent to the issues. The evidence thus taken has been reported to us, and the briefs and arguments thereon presented.

1. As to the alleged deception practised on the senate committee. The bills referred to in the petition and respondent's connection with them arose in this wise: On October 12, 1918, a frightful forest fire swept over the northeastern part of the state, bringing death, injury, and destitution over a wide range of territory, completely wiping out not only farm structures, but villages and even cities. The Minnesota Home Guards were called out by the governor and did heroic relief work. In this service some of its members met death or were seriously injured. Respondent, a major and acting judge advocate in the Guards, was on duty at Moose Lake, when in November, 1918, he came in contact with Mrs. Colles, whose husband had died while on military duty in this relief service, and he suggested to her that the legislature might be induced to appropriate money for her relief. He also found another widow, Mrs. Vader, in the same situation; and Martin Larson, a member of the Guards, who had been seriously injured on duty. These three claims, so-called, were among the office files of respondent, when, in January, 1919, one H. H. Rolfe entered the employ of respondent's law firm as a clerk or "handy man," at a salary or "drawing account" of \$100 per month, and extra pay upon any business he might bring the firm. Upon discovering the three claims mentioned in the office files, it occurred to him that one John H. Paulzine, whose son, a member of the Guards, contracted death in the relief service, might likewise be entitled to the state's bounty. Through Rolfe's efforts Paulzine came to the office and made a written agreement with respondent, or his law firm, under

which the claim was to be presented to the legislature and for the services rendered the compensation should be one half of whatever sum might be appropriated. Unfortunately the copy of the contract given Paulzine was destroyed by him after he thought it had served its purpose. The duplicate retained in the office files was not produced. Respondent's relation with Mrs. Colles, and the agreement with her as to fees, appears inferentially but clearly from letters written by him. Some of the letters were signed by him with the name of his law firm, others were signed with his own name, appending the letters "J. A.," standing for "Judge Advocate." Under date of March 3, 1919, he writes her: "I feel that something ought to be done in your case to hurry along information on which we can base a bill through the legislature. I believe it would be well to make arrangements with a lawyer to undertake this on a commission basis so that he would make it his business to get the bill introduced and push on it until the bill would go through. . . . I have in mind an attorney that we could employ in your behalf who would charge nothing whatever if he doesn't get the bill through, and would charge one half of whatever was gotten if the bill goes through. I really believe it is the best thing to do and I believe he would get a bill through that would get something for you to help you along. If you feel the same way about it please write me and I will take the matter up with him and try and get it moving."

On March 15, he wrote, among other matters: "We believe you are as deserving as anyone could be of getting relief from the state, and we want to do all we can to help. We have made arrangements with Henry H. Rolfe, a lawyer who is specializing in this work, to handle the claims on a 50 per cent basis. If he does not succeed he gets no pay whatever, so that you cannot lose anything; if he does get a good

allowance for you you will be that much ahead. He has specialized on this work, and for that reason it is better to pay him in case you win, and we will make arrangements for him to handle it for you with us. He is also a lieutenant in the National Guard and will do everything in his power to get the claim allowed."

We think this correspondence indicates an employment by respondent, and that Rolfe's name was only used as a subterfuge to make it easier to obtain the coveted fees. Rolfe absolutely denies that the claim was turned over to him, or that he was employed to handle it. In answer to a letter from Captain Swedberg, the commander of Colles, Vader, and Larson, respondent, under date of March 5, 1919, wrote, signing the name of his law firm to the communication: "Answering your letter of March 4, regarding Pvt. Geo. Vader and Corp. Martin Larson, beg to state that the law firm I am connected with will handle these cases for the interested parties to the best of their ability."

This clearly enough shows that respondent had procured employment from Mrs. Vader and Martin Larson. There was also direct testimony from Mrs. Larson that respondent was employed, and that he made the bargain for one half of what might be secured as fees for his services. Respondent contends that whatever he did in the premises was gratuitous and as an official assisting members of the Guards or their dependents, and that Rolfe was the attorney who handled the matters and bargained for and earned the fees. This Rolfe absolutely denies, except that on the Paulzine claim, which he brought into the office, he was to receive one third of whatever respondent obtained as fees.

We are convinced, and so find the fact to be, that whether or not any of the contracts with the four claimants was made in the name of Rolfe ostensibly, it was for the bene-

fit of respondent, and that respondent was the real party to receive all the fees bargained for with each of said claimants, except that Rolfe was to receive one third of the fees obtained by respondent in the Paulzine matter. We also find that such was the situation in regard to the arrangement for compensation when respondent appeared before the senate committee on finance, as hereinafter stated.

In January, 1919, the legislature convened. Some time, presumably in March, four bills were prepared in respondent's office and under his direction and supervision, on the four claims mentioned, viz.: (1) For the relief for Gertrude Colles for the death of her husband, \$2,000; (2) for the relief of John H. Paulzine, on account of the death of his son, \$2,000; (3) for the relief of Martin Larson, for disabilities suffered, \$5,000; (4) for the relief of Mrs. G. Vader for the death of her husband, \$2,500. He brought the bills to the capitol and procured members of the legislature to introduce them in the house and senate. When they were considered by the senate committee on finance, respondent appeared before the committee, urging favorable action. Rolfe was also present and took part. On this occasion different members of the committee questioned respondent very pointedly as to whether he or anyone connected with his firm had any pecuniary interest in the bills. To everyone respondent answered that neither he nor anyone connected with his law firm were to receive 1 cent for their services. Respondent wore a major's uniform, and stated to the committee that he was "a dollar a year man." Respondent does not now deny that he answered, in effect, as above stated.

We find that respondent made the representations to the committee that neither he nor anyone connected with his law firm had any pecuniary interest in the bills mentioned as charged in the petition, and

Evidence—
sufficiency—dis-
honesty of
attorney.

that such representations were willfully false, and made with intent to deceive the committee.

The bills as introduced were embodied and passed in the General Appropriation Act (Laws 1919, chap. 464, §§ 39-42) for the specific sum named in the bills. Respondent caused the beneficiaries to give Rolfe a power of attorney, and armed therewith the latter procured the auditor's warrants on the treasurer payable to Mrs. Colles, Martin Larson, and John H. Paulzine. For some reason, not disclosed by the evidence, Mrs. Vader's warrant was not secured. Rolfe delivered the three warrants mentioned to respondent. He procured the payee's indorsements. One of the warrants respondent deposited to the credit of his individual bank account, and the other two he exchanged for certificates of deposit payable to his own order. Respondent provided the cash by which the payee or clients received their one half of the amount of the warrants. He sent his stenographer with \$1,000 in currency to Moose Lake, with instructions to pay it to Mrs. Colles upon her indorsement of the warrant, which was brought back to respondent. Mr. Paulzine was likewise paid \$1,000 in currency at the office by the same stenographer, upon indorsing his warrant, which was also received and disposed of by respondent as above stated. Martin Larson died before the warrant was procured or paid. Respondent's law firm secured the appointment of an administrator for his estate, to whom respondent paid \$2,500 in cash, and at the same time informing the administrator that Larson had agreed that the balance was to be retained by respondent for his services, also saying that the expenses were heavy and that Rolfe was to have some compensation out of it. The contention of respondent now is that out of the \$4,500, withheld from the beneficiaries named in the bills, \$500 only went to respondent's law firm, and that said sum

was not payment for services rendered by him or his firm, but to repay the firm for money advanced Rolfe on his drawing account. In short, that Rolfe received the whole \$4,500, but allowed \$500 thereof to be applied upon his drawing account. Rolfe positively denies this, and claims that in the whole matter he was employed merely as a clerk by respondent's law firm, and did what he was told; that he never received anything out of the several claims, except \$200, which respondent gave him out of the fees obtained from Paulzine, with the statement that that amount was one third of the fees received after deducting the expenses. Respondent has no book entries showing any payment to Rolfe; he has no receipts or other written evidence whatever that Rolfe received any part of the \$4,500 traced into the hands of respondent, or any other money from respondent, or from his firm, except small checks issued to Rolfe at various times during the employment, evidently in payment of his salary and for some trifling disbursements made for the firm, and except the \$200 which Rolfe says he got upon the Paulzine matter. There is nothing to show that respondent's partner, now dead, received any part of the proceeds. Indeed, respondent testified that his partner never knew that any of these claims were in the office or had any existence until after the bills were passed; that nothing in regard to the claims or proceeds ever appeared on the firm books; and that no services whatever were rendered by his partner to secure the appropriations from the state. As to his partner's freedom from any connection with either the claims or proceeds we are willing to accept respondent's testimony.

We find that respondent received and kept for his own use \$4,300 of the amounts received upon the warrants issued in payment of the Colles, Paulzine, and Larson appropriations.

On the argument it was suggested

that respondent's appearance before the finance committee of the senate was not in any legal proceeding, and therefore his deceit there cannot come under the designation of unprofessional conduct as an attorney. We cannot adopt the suggestion. In *People ex rel. Chicago Bar Asso. v. Meyerovitz*, 278 Ill. 356, 116 N. E. 189, the court said: "The weight of authority holds that mis-

Attorney and
client—dis-
honesty—dis-
barment.

conduct of an attorney outside his professional dealings may afford good

ground for disbarment."

Such is also the holding in *De-lano's Case*, 58 N. H. 5, 42 Am. Rep. 555; *Re Wilson*, 79 Kan. 674, 21 L.R.A.(N.S.) 517, 100 Pac. 635, 17 Ann. Cas. 690; *Sanborn v. Kimball*, 64 Me. 140; *Re Radford*, 168 Mich. 475, 134 N. W. 472; *Re Peck*, 88 Conn. 447, L.R.A.1915A, 663, 91 Atl. 274, Ann. Cas. 1917B, 227, it was said: "Professional honesty and honor are not to be expected as the accompaniment of dishonesty and dishonor in other relations. So it is that we, in common with other courts, hold, as did Lord Mansfield more than a century ago, that misconduct, indicative of moral unfitness for the profession, whether it be professional or nonprofessional, justifies dismissal as well as exclusion from the bar."

The senate committee was engaged in important public duties, as respondent well knew, and he undoubtedly also well knew of the practice that obtained with the committee of making provisions in the bill for attorney's fees or other expenses that the state should bear, so that what the legislature meant to give would reach the object of its bounty intact. The motive for respondent's deceit is readily discerned, and the facts above found prove, without further comment, that, if he ever had that good character which entitled him to enter the profession, he has lost it and is no longer worthy to continue therein. Even if there were any truth in his

claim that Rolfe was the one who represented the parties named in the bills and received all the fees, it would make respondent's conduct and representations just as reprehensible and deceitful. Rolfe was an employee of respondent's law firm, and respondent knew that the agreements for compensation which he claims to have made with Rolfe were so exorbitant and unconscionable that the committee would at once have taken steps to prevent the exaction.

2. We also have no hesitancy in finding that the fee or compensation which respondent induced his clients to agree to pay was so excessive in comparison with the services in contemplation that it shows dishonesty and bad faith to the clients. There was to be no legal battle, no tedious work in the preparation of a trial in court. It was a mere matter of procuring some affidavits from persons conversant with the facts. And, outside the immediate claimants, such affidavits could no doubt be furnished by the companions in arms of the dead or injured involved in the bills. Under those circumstances to bargain for half of what the state might be willing to give the sufferers seems to us downright robbery, and shows a person of such greed that he ought

—excessive
charge for
services.

not to be in a position to bargain for professional fees. By what is here said we do not mean to hold that every bargain for excessive fees by an attorney merits disbarment. In the ordinary litigation there are contingencies that justify large fees. But this particular employment does not come under the head of litigation.

Our conclusion is that the findings hereinbefore made require that Francis C. Cary be removed from office.

It is ordered that respondent be removed from his office of attorney at law in this state and a formal judgment of disbarment be entered.

ANNOTATION.

Attorney's misconduct with regard to proposed legislation as ground for disbarment.

It will be seen that it is held in the reported case (*RE CARY*, ante, 1272) that an attorney may be disbarred where, having a large contingent interest in the passage by the legislature of bills for the relief of his clients, he advocates the bills before a committee of the legislature, and on being questioned by members of the committee denies that he has a pecuniary interest in the bills.

Notwithstanding the cases on the subject of the validity of contracts between attorney and client for services in relation to the passage of bills by the legislature, no case has been found directly upon the subject of this note other than the reported case (*RE CARY*).

In a case of alleged bribery of members of the legislature in connection with the election of a United States Senator, it was held that "a lawyer who is guilty of wilful bribery of members of the legislature is unworthy of the honors and responsibilities accompanying the office of an attorney and counselor at law; and if, after fair,

impartial, and searching investigation, a lawyer be clearly proven guilty of such an offense, it is due to the profession, and to the courts of which he is an officer, and to the state, that his license to practise be revoked, or that he be suspended from the performance of the duties of his high office for a stated period of time." *Re Wellcome* (1899) 23 Mont. 213, 58 Pac. 47. See also dictum in *Re Wellcome* (1899) 23 Mont. 140, 58 Pac. 45.

It may be noted that in *Marshall v. Baltimore & O. R. Co.* (1853) 16 How. (U. S.) 314, 14 L. ed. 953, Grier, J., said: "Where persons act as counsel or agents, or in any representative capacity, it is due to those before whom they plead or solicit, that they should honestly appear in their true characters, so that their arguments and representations, openly and candidly made, may receive their just weight and consideration. A hired advocate or agent, assuming to act in a different character, is practising deceit on the legislature." See also *Rose's Notes* to this case. B. B. B.

LOS ANGELES GAS & ELECTRIC COMPANY, Respt.,

v.

COUNTY OF LOS ANGELES, Appt.*California Supreme Court (In Banc)—February 2, 1919.*

(162 Cal. 164, 121 Pac. 384.)

Tax — necessity of participation by board of equalization.

1. To enable a taxpayer to assail a fraudulent valuation of his property for taxation by the assessors, he must show that the fraud was participated in by the board of equalization.

[See note on this question beginning on page 1284.]

— conclusion of assessing officers — power of courts.

2. The conclusion of assessing officers as to the value of property for the purpose of taxation, when honestly arrived at, and when not made in pursuance of some fixed rule or general

system, the result of which is necessarily discriminatory and inequitable, is conclusive on the courts, however erroneous the conclusion may be.

— right to assail fraudulent assessment.

3. A taxpayer may assail in the

courts an assessment which was fraudulently and corruptly made with the intention of discriminating against him, and for the purpose of causing him to pay more than his share of the public taxes.

[See 26 R. C. L. 246.]

— **curing fraud.**

4. A finding by the board of equalization that the value of certain property for purposes of taxation, fixed by the assessors, was fair, renders immaterial whatever fraud the assessors may have been guilty of in fixing the value.

— **finding of board of equalization — conclusiveness.**

5. A finding by the board of equalization that specified property was assessed for taxation at the same value proportionately as all the other prop-

erty in the county is conclusive on the question of fairness of the valuation, unless the board proceeded arbitrarily and in wilful disregard of the law intended for its guidance and control, with the evident purpose of imposing unequal burdens upon certain taxpayers, or there is something equivalent to fraud in the action of the board.

— **use of different method of valuation.**

6. The rule that the judgment of the board of equalization is conclusive upon the question of valuation of property for taxation applies even in case the complaint is of intentional use, for purposes of discrimination, of a method of assessment different from that applied to other property, if the only alleged effect of the assessors' action is overvaluation of the property about which complaint is made.

APPEAL by defendant from a judgment of the Superior Court for Los Angeles County (Bordwell, J.) in favor of plaintiff, and from an order denying a new trial in an action brought to recover the amount of state and county taxes paid by plaintiff under protest. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. J. D. Fredericks and Hartley Shaw, for appellant:

The action of the board of equalization in refusing to reduce plaintiff's assessment is conclusive upon the plaintiff.

27 Am. & Eng. Enc. Law, 2d ed. 720; People v. Whyler, 41 Cal. 354; San Jose Gas Co. v. January, 57 Cal. 614; Ballerino v. Mason, 83 Cal. 449, 23 Pac. 530; Henne v. Los Angeles County, 129 Cal. 299, 61 Pac. 1081; La Grange Hydraulic Gold Min. Co. v. Carter, 142 Cal. 565, 76 Pac. 241; California Domestic Water Co. v. Los Angeles County, 10 Cal. App. 185, 101 Pac. 547; Stanley v. Albany County, 121 U. S. 535, 30 L. ed. 1000, 7 Sup. Ct. Rep. 1234; Western U. Teleg. Co. v. Missouri, 190 U. S. 427, 47 L. ed. 1122, 23 Sup. Ct. Rep. 730; Pittsburgh, C. C. & St. L. R. Co. v. Backus, 154 U. S. 421, 434, 38 L. ed. 1031, 1039, 14 Sup. Ct. Rep. 1114; Western U. Teleg. Co. v. Taggart, 163 U. S. 30, 41 L. ed. 60, 16 Sup. Ct. Rep. 1054; Albuquerque Nat. Bank v. Perea, 147 U. S. 87, 37 L. ed. 91, 13 Sup. Ct. Rep. 194; McLeod v. Receveur, 18 C. C. A. 188, 34 U. S. App. 583, 71 Fed. 455.

Even in a case where fraud in the assessment is charged, the taxpayer is not entitled to relief unless the re-

viewing board participated in the fraud.

La Grange Hydraulic Gold Min. Co. v. Carter, 142 Cal. 565, 76 Pac. 241; Cooley, Taxn. 2d ed. p. 1459; 27 Am. & Eng. Enc. Law, 2d ed. 728; State v. Central P. R. Co. 21 Nev. 178, 26 Pac. 225, 1109; Southern Oregon Co. v. Coos County, 39 Or. 185, 64 Pac. 646; Burton Stock Car Co. v. Traeger, 187 Ill. 9, 58 N. E. 418; Crawford v. Polk County, 112 Iowa, 118, 83 N. W. 825.

Where fraud is charged, the complaint must clearly and distinctly allege all the necessary facts.

20 Cyc. 97; Cosgrove v. Fisk, 90 Cal. 75, 27 Pac. 56; Heller v. Dyerville Mfg. Co. 116 Cal. 127, 47 Pac. 1016; Truett v. Onderdonk, 120 Cal. 581, 53 Pac. 26.

The taxpayer cannot attack the assessment in court for overvaluation.

Cooley, Taxn. 3d ed. 1387; 27 Am. & Eng. Enc. Law, 2d ed. 726; Crawford v. Polk County, 112 Iowa, 118, 83 N. W. 825; Los Angeles v. Glassell, 4 Cal. App. 43, 87 Pac. 241; Henne v. Los Angeles County, 129 Cal. 299, 61 Pac. 1081.

A mistake on the part of the assessor as to the value of plaintiff's property, or his use of different evidence to ascertain its value, does not constitute a discrimination.

San Jose Gas Co. v. January, 57 Cal.

614; *Cummings v. Merchants' Nat. Bank*, 101 U. S. 153-157, 25 L. ed. 903-905; *German Nat. Bank v. Kimball*, 103 U. S. 732, 26 L. ed. 469; *Stanley v. Albany County*, 121 U. S. 535, 30 L. ed. 1000, 7 Sup. Ct. Rep. 1234; *New York v. Barker*, 179 U. S. 279, 45 L. ed. 190, 21 Sup. Ct. Rep. 121; *Taylor v. Louisville & N. R. Co.* 31 C. C. A. 537, 60 U. S. App. 166, 88 Fed. 350; *Coulter v. Louisville & N. R. Co.* 196 U. S. 599-604, 49 L. ed. 615, 616, 25 Sup. Ct. Rep. 342; *First Nat. Bank v. Treasurer*, 25 Fed. 752; *Raymond v. Chicago Union Traction Co.* 207 U. S. 20, 52 L. ed. 78, 28 Sup. Ct. Rep. 7, 12 Ann. Cas. 757; *People v. McCreery*, 34 Cal. 458; 1 Cooley, Taxn. 3d ed. p. 383; *State v. Virginia & T. R. Co.* 23 Nev. 283, 35 L.R.A. 759, 46 Pac. 723.

Messrs. William A. Cheney, George P. Adams, and LeRoy M. Edwards, for respondent:

Where the assessor intentionally adopts and employs a different rate and method in assessing the property of one person than that used and adopted by him in assessing all other property of the same kind, the party injured by this unequal assessment is denied the equal protection of the laws, and the courts will correct the evil.

Raymond v. Chicago Union Traction Co. 207 U. S. 20, 52 L. ed. 78, 28 Sup. Ct. Rep. 7, 12 Ann. Cas. 757; *Randell v. Bridgeport*, 63 Conn. 321, 28 Atl. 523; *Judson*, Taxn. p. 608; *Bureau County v. Chicago, B. & Q. R. Co.* 44 Ill. 229; *Chicago B. & Q. R. Co. v. Atchison County*, 54 Kan. 781, 39 Pac. 1039; *Taylor v. Louisville & N. R. Co.* 31 C. C. A. 537, 60 U. S. App. 166, 88 Fed. 350; *Ex parte Ft. Smith & V. B. Bridge Co.* 62 Ark. 461, 36 S. W. 1060.

The judgment of a board of equalization is not final in a case where the tax is void, or where the complaining party has been denied the equal protection of the laws.

Raymond v. Chicago Union Traction Co. supra; *Cummings v. Merchants' Nat. Bank*, 101 U. S. 153, 25 L. ed. 903; *Taylor v. Louisville & N. R. Co.* 31 C. C. A. 537, 60 U. S. App. 166, 88 Fed. 350; *Whatcom County v. Fairhaven Land Co.* 7 Wash. 101, 34 Pac. 563; *Columbia Sav. Bank v. Los Angeles County*, 137 Cal. 467, 70 Pac. 308; *Pueblo County v. Wilson*, 15 Colo. 90, 24 Pac. 563.

Angellotti, J., delivered the opinion of the court:

This is an appeal from a judg-

ment and from an order denying the defendant's motion for a new trial in an action brought by plaintiff to recover \$11,728.12 state and county taxes paid by plaintiff under protest for the fiscal year 1906-7. The judgment was in favor of plaintiff for the full amount claimed.

The amount sought to be recovered was a portion of the taxes paid by plaintiff upon certain tangible assets, such as its gas pipes, meters, regulators, electric service, poles, wire, electric underground system, gas works plant, electric works plant, etc., and was the amount claimed to have been illegally collected by reason of an overvaluation of such property by the assessor of Los Angeles county. Recognizing the general rule that no remedy can be had in the courts for mistakes honestly made in the valuation of property for purposes of taxation by the assessing officers and tribunals appointed by law for the review of assessments, such as our county boards of equalization, the theory of plaintiff's complaint was that the excessive valuations of its property were the result of an arbitrary plan adopted by the assessor for the valuation thereof, varying from that employed by him with reference to the property of other taxpayers, and resulting in placing upon its property an unequal burden of taxation, which plan was wilfully and designedly adopted by him for the purpose of discriminating against plaintiff. The result was, it is claimed, not that the property was assessed for a sum exceeding its cash value, but that it was assessed at a greater proportion of such value than any other property, and especially the property of its two competitors in business, thus bringing about inequality of taxation and denying plaintiff the equal protection of the laws. While the trial court found that the allegations of the complaint to the effect that the assessor acted with corrupt or malicious motives or fraudulently were untrue, it did find that "the extreme disparity between the val-

uation of plaintiff's property and other property of substantially the same character and value . . . all arose from a design on the part of the assessor to discriminate against plaintiff, and the adoption and use by said assessor of an intentionally radically different method in arriving at the value of plaintiff's property from that used in all other cases involving property of the same character and similarly situated, and from an entire failure on the part of the assessor to make any examination whatever of any of the properties of plaintiff so assessed, and that by reason of said intentional discrimination and the use of said radically different method plaintiff was inevitably assessed upon a very much larger proportion of its properties' values than were other taxpayers and property owners in the county of Los Angeles, and than were its competitors in business in said county."

There was no attempt to state in the complaint or to prove on the trial anything in the nature of wilful fraud on the part of the county board of equalization, to which application was made by plaintiff for a reduction of its assessment, and by which such application, so far as the particular property here involved is concerned, was denied. The only allegation in this behalf was as follows: "Plaintiff alleges that so many other protests and petitions for reductions of assessments were filed after plaintiff's said protest and petition (alleged to have been filed July 13, 1906) were filed, heard, and submitted, and the time of the said board of supervisors in which to hear and pass upon the same was so short, that the said board of supervisors did not have time in which to consider in detail said protest of plaintiff, and by reason thereof refused to reduce or alter said assessment values in any manner whatsoever." It is possible that after judgment this allegation might properly be construed in support of the judgment as alleging that the board refused to reduce or

even consider the assessment solely because it did not have time to give it any consideration, but there was no evidence in the record tending to support any such conclusion. The trial court found that "said board did not take time in which to consider in detail said protest of plaintiff, and said protest was not fully heard or considered by said board, and plaintiff was not given time and opportunity to introduce fully all evidence offered by it in support of its protest, and said board did not act with fairness and justice in the matter, and failed and refused to give plaintiff's application careful and proper consideration, and the action of said board in passing upon said protest and claim of plaintiff and refusing to reduce or alter said assessment values in any manner whatsoever was merely perfunctory in character and hardly more than a mere form, and did not constitute a hearing of plaintiff's protest."

It is not disputed that the conclusion of assessing officers as to the value of property for purposes of taxation, when honestly arrived at, and

Tax—conclusion of assessing officers—power of courts.

when not made in pursuance of some fixed rule or general system, the result of which is necessarily discriminatory and inequitable, is conclusive on the courts, however erroneous the conclusion of those officers may be. The law necessarily leaves the determination of the question of the fact of value to certain officers, and when it appoints tribunals for that purpose, as in this state primarily the assessor, and, for purpose of review, the board of supervisors acting as a county board of equalization, the conclusion of those tribunals on such a question of fact constitutes a judgment that is not collaterally assailable in the courts. This is the universal rule, and has been so held in this state. *San Jose Gas Co. v. January*, 57 Cal. 614; *Henne v. Los Angeles County*, 129 Cal. 297, 61 Pac. 1081. See also *Gray, Limitations of Taxing Power*, § 1460. As

put in *Taylor v. Louisville & N. R. Co.* 31 C. C. A. 537, 60 U. S. App. 166, 88 Fed. 350, such an attack will not lie in the courts "where the injury complained of arises only from the erroneous but honest judgment of the lawfully constituted tax tribunal." But it is likewise universally held that a taxpayer may so as-

—right to assail
fraudulent
assessment.

sail an assessment in the courts, where it was "fraudulently and corruptly made with the intention of discriminating against him, and for the purpose of causing him to pay more than his share of the public taxes," and it has that effect, or where there is something equivalent to fraud in the making of the assessment, producing such effect. See *Los Angeles County v. Ballerino*, 99 Cal. 593, 32 Pac. 581, 34 Pac. 329; *Pacific Postal Teleg. Cable Co. v. Dalton*, 119 Cal. 604, 51 Pac. 1072; *Oregon & C. R. Co. v. Jackson County*, 38 Or. 589, 599, 64 Pac. 307, 65 Pac. 369, and cases there cited. This is as true where the injurious effect so produced is caused by inequality of valuation as by any other cause, for, as said in *Judson on Taxation*, p. 608: "It is obvious that where taxation is upon property that requires valuation, inequality of taxation is produced as surely by inequality of valuation as by inequality of the rate of tax." We are, however, satisfied that it should be held, even if we assume that there is enough in the evidence to warrant a conclusion that there

—necessity of
participation
by board of
equalization.

was anything equivalent to fraud in the matter of the valuation of this property by the assessor, that, to enable plaintiff to prevail, it must be made to appear that the county board of equalization in some manner participated in the fraud when the matter came before it on application for reduction. Under our law, the county board of supervisors is a county board of equalization, invested with the power, after giving notice in such manner as it may by rule prescribe, "to increase or lower the en-

tire assessment roll, or any assessment contained therein, so as to equalize the assessment of the property contained in said roll, and make the assessment conform to the true value of such property in money." Pol. Code, § 3673. When completed, the assessment roll must be delivered to its clerk, who must give notice of the time at which the board will meet to equalize assessments. Pol. Code, § 3654. The board must meet on the first Monday of July in each year for equalization purposes, and continue in session until such business is disposed of, but not later than the third Monday in July. Pol. Code, § 3672. No reduction can be made except upon the verified application of the taxpayer, showing the facts upon which it is claimed the reduction should be made (Pol. Code, § 3674), and on the hearing the board must examine on oath the taxpayer or his agent, and may subpoena witnesses, and hear and take such evidence as in its discretion it may deem proper. Pol. Code, §§ 3675, 3676. Upon such hearing it is the duty of such board to determine the value of the property under consideration for assessment purposes upon such basis as is used in regard to other property, so as to make all the assessments as equal and fair as is practicable. In discharging these duties the board is exercising judicial functions, and its decision as to the value of the property and the fairness of the assessment so far as amount is concerned constitutes an independent and conclusive judgment of the tribunal created by law for the determination of that question, which abrogates and takes the place of the judgment of the assessor upon that question. Where the only alleged effect of the fraud of the assessor is excessive valuation of the property of the taxpayer for assessment purposes, the conclusion of the board of equalization that the fair value for such purposes is the amount fixed by the assessor — curing fraud. would appear to render the fraud of that officer im-

material, for it is in no way injurious. According to the conclusion of the board the property is assessed at the same value proportionately as all the other property in the county.

—finding of
board of
equalization—
conclusiveness.

Unless that determination can be avoided, it is conclusive on the question of fairness of the valuation, hence on the question of injury. Under the authorities it cannot be avoided unless the board has proceeded "arbitrarily and in wilful disregard of the law intended for their guidance and control, with the evident purpose of imposing unequal burdens upon certain of the taxpayers" (*Oregon & C. R. Co. v. Jackson County*, 38 Or. 589, 599, 64 Pac. 307, 65 Pac. 369), or unless there be something equivalent to fraud in the action of the board. Mere errors in honest judgment as to the value of the property will not obviate the binding effect of the conclusion of the board. Such a board is, "in the absence of fraud or malicious abuse of its powers, . . . the sole judge of questions of fact and of the values of property." *La Grange Hydraulic Gold Min. Co. v. Carter*, 142 Cal. 565, 76 Pac. 243.

The precise question under discussion has never been determined by this court, but what we have said not only appears to be true on principle, but is supported by ample authority. In *State v. Central P. R. Co.* 21 Nev. 178, 26 Pac. 225, 1109, an action to recover taxes, it was said that while fraud in the assessment is a good defense, it clearly must be such fraud as works some damage, that a fraudulent overvaluation of property, attempted by the assessor, can do no harm if corrected by the board of equalization, and that "if the board bring their honest judgment to bear upon the matter, and determine that the property has not been overvalued, this determination is conclusive that the assessor's attempted fraud has done the defendant no damage." In *Southern Oregon Co. v. Coos*

County, 39 Or. 185, 64 Pac. 646, the complaint was similar to the complaint made here; namely, fraudulent discrimination on the part of the assessor, resulting in an overvaluation of plaintiff's property as compared with the valuation put upon other property of equal value and similarly situated. The court said that "when the assessment is attacked because arbitrarily and fraudulently made, the charge must go further than to inculpate the assessor," and "that it must likewise involve the board of equalization and the county court sitting as an equalizing body, as the judgment of the latter is paramount." In *Burton Stock Car Co. v. Traeger*, 187 Ill. 9, 58 N. E. 418, where the board of review had full power to correct the assessment if unjust in any respect, but, after hearing, had allowed the assessor's valuation to stand, it was held, no fraud being charged on the part of the board, that even if there was fraudulent conduct on the part of the assessor in making the valuation, "such . . . fraud is purged by the hearing, review, and action of the board of review." See also *California Domestic Water Co. v. Los Angeles County*, 10 Cal. App. 185, 191, 101 Pac. 547; *Crawford v. Polk County*, 112 Iowa, 118, 83 N. W. 825; 27 Am. & Eng. Enc. Law, 728; *Cooley*, Taxn. 3d ed. p. 1459, note. No case cited is opposed to our views on this point. The question was not considered in either *Los Angeles County v. Ballerino*, 99 Cal. 593, 32 Pac. 581, 34 Pac. 329, or *Pacific Postal Teleg. Cable Co. v. Dalton*, 119 Cal. 604, 51 Pac. 1072, and apparently could not have been involved in the latter case. Learned counsel for plaintiff appear to concede that the judgment of the board of equalization, honestly given, "is conclusive on value, a matter of fact," but say that this is "not a case of excessive valuation, . . . but a plain case of the intentional use for the purpose of discrimination of a different method of assessment."

But in view of the fact that the only alleged effect of the assessor's action was an overvaluation of plaintiff's property, as compared with the valuation of other property, the question was simply whether there was such an overvaluation of plaintiff's property, a pure question of fact for the board of equalization to determine. As said in *Crawford v. Polk County*, 112 Iowa, 118, 83 N. W. 825: "An error in overvaluation, . . . if fraudulent, differs from others (errors) only with respect to the motive of the assessor. The same remedy is available." The case just cited is also authority for the proposition that in such a case fraud on the part of the assessor does not make the assessment void, but that the taxpayer must pursue the method pointed out by the statute for any review thereof. The cases of *Columbia Sav. Bank v. Los Angeles County*, 137 Cal. 467, 70 Pac. 308, and *Pueblo County v. Wilson*, 15 Colo. 90, 24 Pac. 563, are not at all in point, as is shown by the quotations therefrom contained in plaintiff's brief. In neither case was there any question of valuation of property concerned. In one the assessment was upon United States bonds, which could not be assessed at all, and was absolutely void, and in the other the questions raised were regarding the construction and validity of statutes and the legality of a tax imposed, none of which questions could be conclusively determined by the board of equalization. In the Colorado case it was said: "If the right to tax property was unquestioned, and the only questions were those of valuation and amount of tax, we might hold their (the board's) action conclusive."

We have already set forth the finding of the trial court regarding the proceedings before the board of equalization. In so far as it may be held to imply any lack of opportunity to plaintiff to fully present its case on the application for a reduc-

tion to that body, or any lack of diligence or fairness on the part of the members thereof in the hearing, consideration, and decision, or that the action of the board was hardly more than a mere form, not constituting a hearing of plaintiff's protest, we are satisfied that it must be held to be without sufficient support in the evidence. By reason of the fact that plaintiff's application was not filed until three days before the time when the board of equalization must finally adjourn, and that there were numerous other applications for reduction of assessment, the time for the consideration of plaintiff's application was necessarily short. It is also apparent that the proceedings before the board were not, and could not be, conducted with the same degree of order and formality that is ordinarily attained in a well-regulated court of justice. But there is no pretense that plaintiff did not introduce all the evidence that it offered, or that it was deprived of opportunity to offer all the evidence it desired, or that the members of the board did not do their best to arrive at a fair and honest decision in the matter. There is some complaint to the effect that, by reason of noise and confusion in the manner of conducting the proceedings, the members of the board could not hear and understand all that was said by the witnesses, but this claim appears to be based solely on the expressed doubt of one of the representatives of plaintiff whether they could, under the circumstances, hear all that was said. An official stenographer heard all the evidence and took it down in shorthand, and all of the members of the board who testified (four of the five members) said that they heard such evidence and considered it. It appears from the evidence that when it came to a decision, the application of plaintiff for a reduction of its assessment was granted in part upon some property, but denied as to the property involved in this case. The record does not show what evidence was given

before the board of equalization as to the value of the property here involved. The finding as to the action of the board being properly attacked by specifications of insufficiency of evidence, and the statement on motion for a new trial purporting to contain all the evidence given in the lower court on all matters covered by such specifications, there is absolutely no warrant for holding that the decision of the board was not an absolutely fair and correct decision upon the evidence introduced before it, a decision to the effect that, applying the same method as was applied in the ascertainment of the value for assessment purposes of all the property in the county, the value apportioned to plaintiff's property was not excessive. We can find no warrant in the record for avoiding the decision of the board of equalization, and that being so, it must be

held that it is an adjudication that the valuations placed upon plaintiff's property here involved were not excessive, and that such property was not assessed at a greater proportion of its value than any other property in the county, an adjudication which is conclusive upon the courts. The conclusion we have reached renders it unnecessary to consider any other proposition discussed in this appeal.

The judgment and order denying a new trial are reversed.

Lorigan, J., Sloss, J., Allen, J., pro tem., and Henshaw, J., concur.

Justice Allen of the district court of appeal of the second district participates herein, under order of the supreme court, in place of Justice Lucien Shaw, who deemed himself disqualified by reason of relationship to one of the attorneys.

ANNOTATION.

Action of board of equalization as affecting right to attack assessment on ground of assessor's fraud.

Action of board conclusive.

A fraudulent overvaluation of property by an assessor will not be set aside where it appears that the board of equalization has brought its honest judgment to bear on the matter, and determined the true value of the property. Such action by the board is conclusive on the question of fairness of valuation and hence on the question of injury to the taxpayer by the attempted fraud of the assessor. *Spring Valley Coal Co. v. People* (1895) 157 Ill. 543, 41 N. E. 874; *Burton Stock Car Co. v. Traeger* (1900) 187 Ill. 9, 58 N. E. 418; *State v. Central P. R. Co.* (1891) 21 Nev. 178, 26 Pac. 225, 1109; *Southern Oregon Co. v. Coos County* (1901) 39 Or. 185, 64 Pac. 646; *Clawson Lumber Co. v. Jones* (1899) 20 Tex. Civ. App. 208, 49 S. W. 909. And see the reported case (*LOS ANGELES GAS & E. Co. v. LOS ANGELES COUNTY*, ante, 1277).

Thus, in *Southern Oregon Co. v. Coos County* (1901) 39 Or. 185, 64 Pac. 646, supra, it was alleged that the

assessor had fraudulently assessed the complainant's property at a higher rate than neighboring property similarly situated. An appeal was taken to the board of review, which reduced the complainant's assessment. A subsequent appeal was taken to the court on the ground of the assessor's fraud, no fraud on the part of the board of review being alleged. It was held that the board's action was conclusive as to the value of the land, the court saying: "The board is given much larger power than the assessor, being invested with revisory jurisdiction; so that the act of the board cannot be deemed in any sense to be the act of the assessor." Thus it may transpire that the assessment made by the assessor may have been ever so arbitrarily and capriciously made and extended, while those adopted by the board may be eminently fair and equitable. It follows, therefore, logically and necessarily, that, when the assessment is attacked because arbitrarily and fraudulently made, the

charge must go further than to inculcate the assessor merely. It must likewise involve the board of equalization and the county court sitting as an equalizing body, as the judgment of the latter is paramount."

So, in *State v. Central P. R. Co.* (1891) 21 Nev. 178, 26 Pac. 1109, wherein it appeared that the board of equalization had sustained an alleged fraudulent assessment, and no allegation of fraud on the part of the board was made, it was held that the action of the board was conclusive against the complainant. The court said: "The answer alleges that the assessor, with knowledge that the road was only of the value of \$10,000 per mile, fraudulently assessed it at \$14,000; but there is no charge that the board of equalization acted fraudulently, or otherwise than in good faith, in equalizing the value at the same amount. Under these circumstances we are of the opinion that this defense is not open to the defendant. It was evidently the intention of the legislature that, in the absence of fraud, the action of the board should be final. No review of or appeal from their decision is provided for. That is the tribunal specially charged with the duty of equalizing values. If any taxpayer is aggrieved by the action of the assessor, his remedy is by appeal to this board; and if the members thereof act fairly and in good faith in the matter, their judgment concerning the valuation of property is not to be revised by a court which has no better opportunity than the board for arriving at a correct conclusion."

Likewise, in *Clawson Lumber Co. v. Jones* (1899) 20 Tex. Civ. App. 208, 49 S. W. 909, it appeared that the board of equalization, in good faith, had approved an alleged fraudulent assessment by the assessor. It was held that the valuation of the property was conclusive, the court saying: "The approval by the board of equalization of the tax rolls containing the assessment of appellant's property eliminated all question of fraud on the part of the assessor in placing an excessive valuation thereon."

The complainant, it appeared in

Burton Stock Car Co. v. Traeger (1900) 187 Ill. 9, 58 N. E. 418, alleging fraud on the part of the assessor, had appealed to the board of equalization, which found the true value. The court said: "As the board of review is not charged with having been guilty of any fraud, it will be presumed that they did their duty, and exercised, in a fair and reasonable way, the judgment and discretion conferred upon them by the statute. If there was a mistake in the judgment of the board of assessors, or even fraudulent conduct on their part in making the valuation, such mistake or fraud is purged by the hearing, review, and action of the board of review." And see *Spring Valley Coal Co. v. People* (1895) 157 Ill. 543, 41 N. E. 874, wherein the court said: "Even if we should assume that the values as fixed by the assessor . . . were fraudulently made by him, the results claimed by appellant do not follow. It petitioned the town board of review, and secured reductions in some of the values. It then appealed to the county board, and had before it a full hearing as to its supposed grievances, and secured from it still further reductions of values. There is no intimation that the county board was governed or influenced by either fraud or intimidation. Appellant, having availed itself of the remedies afforded by the statute, the decision made by the board of supervisors was final and conclusive, and it must be regarded that the fraud, if any, that there was in the original assessment, was purged out of it; otherwise it would be in the power of appellant, by securing the election of a prejudiced or dishonest assessor, to avoid the payment of any taxes whatever upon its large and valuable property."

Action of board not conclusive.

However, the fraudulent or illegal action of a board of equalization in sustaining a fraudulent assessment by an assessor is not conclusive, but will be reviewed by the courts. *Oregon & C. R. Co. v. Jackson County* (1901) 38 Or. 589, 64 Pac. 307, 65 Pac. 369. And see the reported case (*LOS ANGELES GAS & E. Co. v. LOS ANGELES COUNTY*,

ante, 1277). See also *New Haven Clock Co. v. Kochersperger* (1898) 175 Ill. 383, 51 N. E. 629.

In *Oregon & C. R. Co. v. Jackson County (Or.)* supra, the plaintiffs alleged that the assessor had made a fraudulent assessment of their property, and charged that the board of equalization, "well knowing that the same was fraudulent and oppressive as to the plaintiffs, and arbitrarily and illegally made, conspired and confederated with the assessor to perpetuate such assessment, and that they together refused to award plaintiffs any relief, and, intending arbitrarily to wrong and defraud plaintiffs, permitted said illegal and fraudulent assessment to stand." In granting relief to the plaintiffs, the court said: "It must be conceded that assessors, in fixing valuations and making assessments, and boards of equalization sitting in review of their work, act in a judicial capacity, or in the exercise of a judicial function; and when the roll is made up it stands in the nature of a judgment. . . . Hence their findings and judgments are not subject to review or revision except in the manner pointed out by law, nor can they be disturbed or annulled except when they proceed arbitrarily and in wilful disregard of the law intended for their guidance and control, with the evident purpose of imposing unequal burdens upon certain of the taxpayers. In the latter case, their acts being designedly oppressive and fraudulent, equity will interpose to prevent the consummation of such purpose, as there exists no adequate, certain, and complete remedy at law."

In *New Haven Clock Co. v. Kochersperger* (Ill.) supra, an action to enjoin the collection of excessive taxes, it was alleged by the complainant, and assumed on appeal to be true, that the property of the complainant was assessed at two and a half times its cash value as part of a general plan of dishonest spoliation. The complainant appealed to the county board, which "undertook to divest itself of the duty imposed upon it by law by resolving that it was impossible to go into inequalities and injustice against in-

dividuals and to hear and decide the case as required by law." It was held that the complainant was not entitled to injunctive relief because it had failed to pursue the remedy allowed by law; viz., an application for a writ of mandamus to compel the county board to consider its complaint. The court said: "Fraud is a familiar ground of equity jurisdiction, and if an assessment is fraudulent, equity should relieve against it where the taxpayer has been diligent in seeking the remedy which the statute affords. In matters of revenue it is important that all questions should be speedily settled, and the taxpayer should first seek the remedy given by the statute, which it is presumed will be sufficient. If he fails to do so, it is his own neglect or folly. The remedy against fraud is of an equitable nature, and should be applied where the injured party has been diligent for his own protection. but we think it should be withheld in a case of this kind, where the party has failed to insist upon a legal right which probably would have given full relief. The reports of the committee to the board plainly show that in its judgment assessments returned by some of the assessors, and complained of, were unequal and unjust. The board merely refused to do its duty and decide the cases. Although complainant was denied a hearing before the county board, it had an adequate remedy to compel its performance."

In Washington the rule seems to be that the courts will grant relief from a grossly inequitable and palpably excessive valuation of real property for taxation as constructively fraudulent, even though the assessing officers may have proceeded in good faith, and without regard to the action of the board of equalization. *First Thought Gold Mines v. Stevens County* (1916) 91 Wash. 437, 157 Pac. 1080; *Grays Harbor Constr. Co. v. Grays Harbor County* (1917) 99 Wash. 184, 168 Pac. 1138. See also *Northern P. R. Co. v. Pierce County* (1914) 77 Wash. 315, 137 Pac. 433, Ann. Cas. 1916E, 1194. A similar result was reached in *Knapp v. King County* (1897) 17 Wash. 567, 50 Pac. 480, where the court enjoined

the collection of a tax on real property based on an assessment which, although approved by the board of county commissioners, was declared by the court to be "excessive, unequal, unjust, and illegal," and to have been made "arbitrarily and without regard for the actual, true, and fair value thereof in money." So, in *Andrews v. King County* (1890) 1 Wash. 46, 22 Am. St. Rep. 137, 23 Pac. 409, it appeared that the board of equalization had confirmed assessments of mortgages at their par value, while other property was assessed at much less than its cash value. The complaint al-

leged fraud by both the assessor and the board of equalization. In enjoining the collection of the tax the court said: "The conclusion is inevitable that the honest judgment of the officer was not exercised; and that a rule or system of valuation was adopted by the assessor, and confirmed by the board of equalization, which was designed to discriminate unfairly against one class of taxpayers, and which was in plain contravention of the constitutional law which provides that 'all taxes shall be uniform, and that the assessment shall be according to the value of the property.'" A. S. M.

CHARLES H. KEITH, Trustee, Appt.,

v.

FREDERICK M. KILMER, Trustee.

RE NATIONAL PIANO COMPANY, Bankrupt.

United States Circuit Court of Appeals, First Circuit—November 15, 1919.

(261 Fed. 733.)

Bankruptcy — stockholder of corporation as creditor.

A holder of stock in a corporation cannot be converted into a creditor, so as to be entitled to prove under the Bankruptcy Act, by an executory contract for sale of his stock to the corporation, which is not disclosed by the records or books of the corporation.

[See note on this question beginning on page 1296.]

APPEAL by the trustee in bankruptcy from an order of the District Court of the United States for the District of Massachusetts (Morton, Jr., J.) allowing a claim of appellee Kilmer for alleged breach of contract for the purchase of certain shares of corporate stock. *Reversed.*

The facts are stated in the opinion of the court.

Argued before Bingham, Johnson, and Anderson, Circuit Judges.

Messrs. Lee M. Friedman and Percy A. Atherton, for appellant:

The corporation could not legally purchase its own stock, or make a legal contract so to do.

Re Brockway Mfg. Co. 89 Me. 121, 56 Am. St. Rep. 401, 35 Atl. 1012; Trevor v. Whitworth, L. R. 12 App. Cas. 409, 57 L. J. Ch. N. S. 28, 57 L. T. N. S. 457, 35 Week. Rep. 145; Hamor v. Taylor-Rice Engineering Co. 84 Fed. 392; Currier v. Lebanon Slate Co. 56 N. H. 262, 13 Mor. Min. Rep. 559; Latulippe v. New England Invest. Co. 77 N. H.

31, 86 Atl. 361; Crandall v. Lincoln, 52 Conn. 73, 52 Am. Rep. 560; Hall v. Alabama Terminal & Improv. Co. 173 Ala. 398, 56 So. 235; St. Louis Rawhide Co. v. Hill, 72 Mo. App. 142; Schaun v. Brandt, 116 Md. 560, 82 Atl. 551; Cartwright v. Dickinson, 88 Tenn. 476, 7 L.R.A. 706, 17 Am. St. Rep. 910, 12 S. W. 1030; Bank of San Luis Obispo v. Wickersham, 99 Cal. 655, 34 Pac. 444; Abeles v. Cochran, 22 Kan. 405, 31 Am. Rep. 194; Tait v. Pigott, 38 Wash. 59, 80 Pac. 172; Coppin v. Greenlees & R. Co. 88 Ohio St. 275, 43 Am. Rep. 425; Grasselli Chemical Co. v. Aetna Explosives Co. 258 Fed. 66;

Re Brueck & W. Co. 258 Fed. 69; *Jesson v. Noyes*, 157 C. C. A. 342, 245 Fed. 46; *Re Tichenor-Grand Co.* 203 Fed. 720.

Even where a corporation has the power to purchase, or to agree to purchase, its own stock, it cannot do so to the detriment of creditors.

Re Fechheimer Fishel Co. 129 C. C. A. 33, 212 Fed. 357; *Olmstead v. Vance & I. Co.* 196 Ill. 236, 63 N. E. 634; *Chicago, P. & S. W. R. Co. v. Marseilles*, 84 Ill. 643; *Clapp v. Peterson*, 104 Ill. 26; *Re S. P. Smith Lumber Co.* 132 Fed. 618, affirmed in 72 C. C. A. 682, 140 Fed. 988; *Coleman v. Tepel*, 144 C. C. A. 361, 230 Fed. 63; *Clark v. E. C. Clark Mach. Co.* 151 Mich. 416, 115 N. W. 416; *Union Trust Co. v. Amery*, 67 Wash. 1, 120 Pac. 539; *Coleman v. Booth*, 268 Mo. 64, 186 S. W. 1021; *Atlanta & W. Butter & Cheese Asso. v. Smith*, 141 Wis. 377, 32 L.R.A. (N.S.) 137, 135 Am. St. Rep. 42, 123 N. W. 106; *McIntyre v. E. Bement's Sons*, 146 Mich. 74, 109 N. W. 45, 10 Ann. Cas. 143; *Adams & W. Co. v. Deyette*, 5 S. D. 418, 48 Am. St. Rep. 887, 59 N. W. 214, affirmed on rehearing in 8 S. D. 119, 31 L.R.A. 497, 59 Am. St. Rep. 751, 65 N. W. 471; *Re O'Gara & Maguire*, 44 Am. Bankr. Rep. 49.

Section 47 (a) of the Bankruptcy Act, as amended in 1910, gives to a trustee in bankruptcy all the rights of a levying creditor.

Hamor v. Taylor-Rice Engineering Co. 84 Fed. 399; *King v. Pomeroy*, 58 C. C. A. 209, 121 Fed. 287; *Pittsburg Carbon Co. v. McMillin*, 119 N. Y. 46, 7 L.R.A. 46, 23 N. E. 530; *Coddington v. Canaday*, 157 Ind. 243, 61 N. E. 567; *Hayes v. Pierson*, 65 N. J. Eq. 353, 45 Atl. 1091; *Cushing v. Perot*, 175 Pa. 66, 34 L.R.A. 737, 52 Am. St. Rep. 835, 34 Atl. 447; 34 Cyc. 239.

As long as the corporation is under the domination of the wrongdoing officials, their silence or their failure to prosecute the corporation's rights does not preclude the corporation from afterwards asserting its rights.

Re Roanoke Furnace Co. 166 Fed. 944; *Crum's Appeal*, 66 Pa. 474; *Williams v. Riley*, 34 N. J. Eq. 398; *Oliver v. Rahway Ice Co.* 64 N. J. Eq. 596, 54 Atl. 460; *Kenyon Realty Co. v. National Deposit Bank*, 140 Ky. 133, 31 L.R.A. (N.S.) 169, 130 S. W. 965; *Chamberlain v. Pacific Wool-Growing Co.* 54 Cal. 103; *Old Dominion Copper Min. & Smelting Co. v. Bigelow*, 188 Mass. 315, 108 Am. St. Rep. 479, 74 N. E.

653; *Mallory v. Mallory Wheeler Co.* 61 Conn. 131, 23 Atl. 708.

Mr. Samuel D. Elmore, for appellee:

Appellee was entitled to recover under the written contract, and proof of a formal record vote was not necessary or required.

Sherman v. Fitch, 98 Mass. 59; *North Anson Lumber Co. v. Smith*, 209 Mass. 333, 95 N. E. 838; *Com. v. Suffolk Trust Co.* 161 Mass. 5 0, 37 N. E. 757; *St. James Parish v. Newburyport & A. Horse R. Co.* 141 Mass. 500, 6 N. E. 749; *Lyndebrough Glass Co. v. Massachusetts Glass Co.* 111 Mass. 315; *York v. Mathis*, 103 Me. 67, 68 Atl. 746; *Peirce v. Morse-Oliver Bldg. Co.* 94 Me. 409, 47 Atl. 914; *Merchants' Nat. Bank v. Citizens' Gaslight Co.* 159 Mass. 503, 38 Am. St. Rep. 453, 34 N. E. 1083; *Nims v. Mt. Hermon Boys' School*, 160 Mass. 177, 22 L.R.A. 364, 39 Am. St. Rep. 467, 35 N. E. 776; *Kelley v. Newburyport & A. Horse R. Co.* 141 Mass. 496, 6 N. E. 745; *Eastern Bldg. & L. Asso. v. Williamson*, 189 U. S. 122, 129, 47 L. ed. 735, 740, 23 Sup. Ct. Rep. 527.

The company was liable to appellee upon breach of the implied contract to pay for the common stock.

Cromwell v. Norton, 193 Mass. 291, 118 Am. St. Rep. 499, 79 N. E. 433; *Miller v. Roberts*, 169 Mass. 134, 47 N. E. 585; *Dix v. Marcy*, 116 Mass. 416; *Root v. Burt*, 118 Mass. 521; *Holbrook v. Clapp*, 165 Mass. 563, 43 N. E. 508.

A solvent corporation, having sufficient property or funds therefor in excess of the amount of its then-existing debts, has power to purchase its own stock.

Dupee v. Boston Water Power Co. 114 Mass. 37; *New England Trust Co. v. Abbott*, 162 Mass. 148, 27 L.R.A. 271, 38 N. E. 432; *Leonard v. Draper*, 187 Mass. 536, 73 N. E. 644.

The corporation is estopped from asserting its own wrong, and cannot be excused from payment upon the plea that the contract was beyond its own power.

Eastern Bldg. & L. Asso. v. Williamson, 189 U. S. 122, 129, 47 L. ed. 735, 740, 23 Sup. Ct. Rep. 527; *Burnes v. Burnes*, 132 Fed. 485, 70 C. C. A. 357, 137 Fed. 781; *Com. v. Suffolk Trust Co.* 161 Mass. 550, 37 N. E. 757.

If the company is liable to the appellee, his claim is provable and an allowable one in bankruptcy.

Bennett v. Aetna Ins. Co. 201 Mass. 554, 131 Am. St. Rep. 414, 88 N. E. 335;

Security Warehousing Co. v. Hand, 206 U. S. 415, 423, 51 L. ed. 1117, 1122, 27 Sup. Ct. Rep. 720, 11 Ann. Cas. 789; Abele v. S. A. Meagher Co. 227 Mass. 427, 116 N. E. 805; Merchants' Nat. Bank v. Citizens' Gaslight Co. 159 Mass. 505, 38 Am. St. Rep. 453, 34 N. E. 1083; Leonard v. Draper, 187 Mass. 386, 73 N. E. 644; William Filene's Sons Co. v. Weed, 245 U. S. 597, 62 L. ed. 497, 38 Sup. Ct. Rep. 211.

Anderson, Circuit Judge, delivered the opinion of the court:

This is an appeal by the trustee in bankruptcy of the National Piano Company, a Maine corporation, from an order of the district court, reversing the referee and allowing the claim of Kilmer in the sum of \$31,800. Kilmer's claim is based upon the breach of an alleged contract dated February 3, 1913, between him and the corporation, for the purchase from him at par of 318 shares of the bankrupt's capital stock in instalments of 3 shares a month, beginning on July 1, 1916. The corporation was adjudicated a bankrupt in June, 1916.

For present purposes we assume, without deciding, that the court below was correct in finding the contract was sufficiently authorized or ratified, or both, by the directors and stockholders, although in passing it may be noted that a minority of the stockholders appear to have had no knowledge of the transaction, and therefore, if unanimous assent was requisite (Von Arnim v. American Tube Works, 188 Mass. 515, 518, 74 N. E. 680), the corporation might not be bound; that question we pass. In like fashion, we assume that the court below was right in finding that at the time of the transaction the corporation was solvent, and the contract not tainted by fraud in fact,—an intent to cheat creditors, existing or prospective.

But it is entirely clear that the transaction out of which the alleged contract grew was entered into, not for the benefit of the corporation itself, but for the benefit of certain stockholders. In brief, junior and minority stockholders desired to buy out the senior and majority stock-

holders; and, having no money with which to buy, the parties agreed, not for the benefit of the corporation, but for the benefit of the trading stockholders, to have the corporation, in form at any rate, agree to buy and pay for a large part of the stock intended thus to pass ultimately from the seniors to the juniors, thus giving them control of the corporation and its offices, with the emoluments thereof. The corporation was, so to speak, made an accommodation purchaser for the benefit of certain vending and purchasing stockholders. Over \$32,000 was thus paid by the bankrupt to, or for the benefit of, its trading stockholders, before bankruptcy—the natural result of such unbusinesslike and unlawful methods—overtook the concern. Kilmer now seeks to prove a similar claim for \$31,800 more. The question presented, then, is whether, by executory contract between a Maine corporation and one of its stockholders, such stockholder may be transmuted from a stockholder into a creditor, and as such be permitted to share in the assets, *pari passu* with merchandise and other ordinary creditors, proving claims in bankruptcy. No authority is cited which, on analysis, sustains this proposition.

Under the laws of many states corporations may not purchase their own capital stock under any circumstances. See cases cited in 1 Machen, Corp. § 627, note 6; 8 Thomp. Corp. § 4076. This is not the rule in Massachusetts as to Massachusetts corporations. But there is no case in Massachusetts which sustains the proposition which underlies the present claim,—that a stockholder, contracting with the corporation, not for its own benefit, but for the benefit of himself and other stockholders, with whom he is dealing, may, through an executory contract, cease to be a stockholder, and become a creditor, to share in competition with other creditors in the assets of the corporation when bankrupt.

Dupee v. Boston Water Power Co.

114 Mass. 37, generally cited as the leading case in support of the proposition that a corporation may buy its own stock, was a bill in equity by minority stockholders to prevent the defendant company from selling land, taking one half the pay in the stock of the corporation at \$75 a share, alleged to be much more than the market value of the stock. The case was heard on the bill and answer. The court, by Colt, J., said: "There is nothing in the general laws of the commonwealth, or in the company's charter, which forbids the sale proposed. The power to purchase and hold implies the power to sell, and to sell upon such terms as to secure the highest price. The whole capital is now represented by these lands, from the sale, and not from the income or use, of which the shareholders must derive their return. In the absence of legislative provision to the contrary, a corporation may hold and sell its own stock, and may receive it in pledge or in payment in the lawful exercise of its corporate powers. *Leland v. Hayden*, 102 Mass. 542; *American Railway-Frog Co. v. Haven*, 101 Mass. 398, 3 Am. Rep. 377; *Nesmith v. Washington Bank*, 6 Pick. 324, 329."

The doctrine that the power exists, because there is no "legislative provision to the contrary," does not accord with the usual rule as to construing corporate charters. *Thomas v. West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950; *Morawetz, Corp.* 2d ed. § 316.

Leland v. Hayden, 102 Mass. 542, was a bill for instructions by trustees under a will as to the disposition of stock purchased out of accumulated profits and then distributed to its stockholders as a dividend. No question of the rights of creditors of the corporation arose. The court said, by Chapman, Ch. J., as to the course of the railroad company in investing surplus profits in the purchase of its own stock: "This they might legally do, taking the transfer to a trustee, instead of investing the money in the stocks of some other company, or

lending it, in order that it might be earning some income until they should be ready to divide or otherwise dispose of it."

This was said obiter, when the mind of the court was fixed upon the proper disposition of a trust estate. The relation of the stockholders to creditors of the corporation was not before the court.

In *American Railway-Frog Co. v. Haven*, 101 Mass. 398, 3 Am. Rep. 377, the question was whether stock which had been transferred to a trustee for the benefit of the corporation continued to have voting rights. The court held that it did not. Here, again, there was no question of the conflicting rights of creditors and stockholders.

New England Trust Co. v. Abbott, 162 Mass. 148, 27 L.R.A. 271, 38 N. E. 432, was a bill brought by the plaintiff trust company to compel the executors of a deceased stockholder to turn in the decedent's stock for purchase by the company, pursuant to provisions in the by-laws. No rights of creditors, existing or prospective, were considered by the court. The gist of the case was whether such provision, intended to keep the corporation a close corporation, could, as between the corporation and its stockholders, be made legally effective. The court held that it could.

Leonard v. Draper, 187 Mass. 536, 73 N. E. 644, was a suit upon a promissory note given by a street railway company in payment of the purchase price of shares of its capital stock. No rights of creditors of the corporation were involved; the court overruled the objection that a Massachusetts street railway company could not legally purchase its own stock.

None of these cases presented the question of the effect of such contracts upon the rights of either existing or future creditors. Compare *Lindsay v. Arlington Co-op. Asso.* 186 Mass. 371, 71 N. E. 797; *Jones v. Brown*, 171 Mass. 318, 50 N. E. 648; *Whiton v. Batchelder & L. Corp.* 179 Mass. 169, 60 N. E. 483; *Von Arnim v. American Tube*

Works, 188 Mass. 520, 74 N. E. 680; Hayward v. Leeson, 176 Mass. 310, 49 L.R.A. 725, 57 N. E. 656; Old Dominion Copper Min. & Smelting Co. v. Bigelow, 188 Mass. 315, 108 Am. St. Rep. 479, 74 N. E. 653.

Obviously, if a corporation may make an executory contract with its stockholders for the purchase of their stock at par, the statutory provisions as to the reduction of capital stock are, so far as the rights of future creditors are concerned, of no validity. If, as the decision of the district court necessarily imports, contracts between a corporation and its stockholders for the purchase of their capital stock are to be held valid, *pari passu*, with contracts for merchandise and other dealings in the usual and ordinary course of its business, the theory that capital stock is a trust fund for creditors is rejected. Compare *Morawetz, Corp.* 2d ed. §§ 111-113; *Machen, Corp.* §§ 626-634; 1 *Cook, Corp.* 7th ed. §§ 309, 311, and cases cited and reviewed.

Such a doctrine also controverts, by necessary implication, the decisions in which unpaid assessments are held assets reachable by or in behalf of creditors. Compare *Upton v. Tribilcock*, 91 U. S. 45, 23 L. ed. 203, and cases cited; *Handley v. Stutz*, 139 U. S. 417, 35 L. ed. 227, 11 Sup. Ct. Rep. 530; 10 Cyc. 653.

The language of Lord Herschell in *Trevor v. Whitworth*, L. R. 12 App. Cas. 409, 414, is most pertinent: "The result of the judgment in the court below is certainly somewhat startling. The creditors of the company which is being wound up, who have a right to look to the paid-up capital as the fund out of which their debts are to be discharged, find coming into competition with them persons who, in respect only of their having been, and having ceased to be, shareholders in the company, claim that the company shall pay to them a part of that capital. The memorandum of association, it is admitted, does not authorize the purchase by the company of its own shares. It states, as the objects for which the company

is established, the acquiring certain manufacturing businesses and the undertaking and carrying on the businesses so acquired, and any other business and transaction which the company consider to be in any way auxiliary thereto, or proper to be carried on in connection therewith."

In this case the House of Lords considered carefully this question, disapproved of the reasoning, if not the decision, of certain earlier cases which looked in the same direction as the Massachusetts cases, and settled the law of England in favor of the proposition that stockholders cannot thus be transmuted into creditors, to share in bankruptcy or winding-up proceedings with outsiders, who have presumably trusted the corporation on the faith of its being what it appeared to be and what the law required it to be.

In *Handley v. Stutz*, 139 U. S. 417, 427, 35 L. ed. 227, 234, 11 Sup. Ct. Rep. 534, the court, by Mr. Justice Brown, said: "Ever since the case of *Sawyer v. Hoag*, 17 Wall. 610, 21 L. ed. 731, it has been the settled doctrine of this court that the capital stock of an insolvent corporation is a trust fund for the payment of its debts; that the law implies a promise by the original subscribers of stock who did not pay for it in money or other property to pay for the same when called upon by creditors; and that a contract between themselves and the corporation, that the stock shall be treated as fully paid and nonassessable, or otherwise limiting their liability therefore, is void as against creditors. The decisions of this court upon this subject have been frequent and uniform, and no relaxation of the general principle has been admitted. *Upton v. Tribilcock*, 91 U. S. 45, 23 L. ed. 203; *Sanger v. Upton*, 91 U. S. 56, 23 L. ed. 220; *Webster v. Upton*, 91 U. S. 65, 23 L. ed. 384; *Chubb v. Upton*, 95 U. S. 665, 24 L. ed. 523; *Pullman v. Upton*, 96 U. S. 328, 24 L. ed. 818; *Morgan County v. Allen*, 103 U. S. 498, 26 L. ed. 498; *Hawkins v. Glenn*, 131 U. S. 319, 33 L. ed. 184, 9 Sup. Ct. Rep. 739; *Graham v. La Crosse & M. R.*

Co. 102 U. S. 148, 161, 26 L. ed. 106, 111; *Richardson v. Green* (Washburn v. Green) 133 U. S. 30, 33 L. ed. 516, 10 Sup. Ct. Rep. 280."

In *Sawyer v. Hoag*, supra, the court, by Mr. Justice Miller, stated the principle as follows: "Though it be a doctrine of modern date, we think it now well established that the capital stock of a corporation, especially its unpaid subscriptions, is a trust fund for the benefit of the general creditors of the corporation. And when we consider the rapid development of corporations as instrumentalities of the commercial and business world in the last few years, with the corresponding necessity of adapting legal principles to the new and varying exigencies of this business, it is no solid objection to such a principle that it is modern, for the occasion for it could not sooner have arisen."

In *Upton v. Tribilcock*, 91 U. S. 45, 47, 23 L. ed. 203, 204, Mr. Justice Hunt said: "The capital stock of a moneyed corporation is a fund for the payment of its debts. It is a trust fund, of which the directors are the trustees. It is a trust to be managed for the benefit of its shareholders during its life, and for the benefit of its creditors in the event of its dissolution. This duty is a sacred one, and cannot be disregarded. Its violation will not be undertaken by any just-minded man, and will not be permitted by the courts. The idea that the capital of a corporation is a football to be thrown into the market for the purposes of speculation, that its value may be elevated or depressed to advance the interests of its managers, is a modern and wicked invention. Equally unsound is the opinion that the obligation of a subscriber to pay his subscription may be released or surrendered to him by the trustees of the company. This has been often attempted, but never successfully. The capital paid in, and promised to be paid in, is a fund which the trustees cannot squander or give away. They are bound to call in what is unpaid, and carefully to husband it when received."

The question of allowing claims in bankruptcy grounded on such contracts came before the court of appeals for the second circuit in the case of *Re Fechheimer Fishel Co.* 129 C. C. A. 33, 212 Fed. 357. The court there, by Rogers, Circuit Judge, cited and discussed some of the chief authorities, and reached the conclusion that the note of a New York corporation, given in payment of its own stock, though given in good faith and at a time when the company was solvent, was unenforceable as against creditors if the corporation was insolvent at the time of maturity; holding that, in effect, such note is but a promise to pay out of surplus profits if such payment can be made without prejudice to creditors. Judge Rogers says:

"If, at the time the stockholder receives payment for his stock, the payment prejudices the creditors, payment cannot be enforced. If a stockholder sells his stock to a corporation which issued it, he sells at his peril, and assumes the risk of the consummation of the transaction without encroachment upon the funds which belong to the corporation in trust for the payment of its creditors.

"The right of the creditors of the corporation cannot be defeated by the fact that at the time the transaction was entered into the seller of the stock and the officers of the company who purchased it were acting in good faith and supposed that the company was solvent.

"The supreme court of Illinois in *Commercial Nat. Bank v. Burch*, 141 Ill. 519, 33 Am. St. Rep. 331, 31 N. E. 420, said: 'Purchase of its own stock by a corporation by the exchange of its property of equal value, though made in good faith and without any element of fraud,' or 'anything in the apparent condition of the' corporation 'to interfere with the making of the exchange, will not be allowed where it injuriously affects a creditor of the' corporation, 'even though the fact of the indebtedness was not at the time established or known

to the stockholders. . . . The capital stock of a corporation 'is a fund set apart for the payment of its debts, and the directors . . . hold it in trust for that purpose. . . . The shareholders of the corporation are conclusively charged with notice of the trust character which attaches to its capital stock. As to it, they cannot occupy the status of innocent purchasers,' and, when 'they have in their hands any of the trust fund, they hold it cum onere, subject to all equities which attach to it.'

"In *Clapp v. Peterson* (1882) 104 Ill. 26, the same court, after stating that the shareholders of a corporation are conclusively charged with notice of the trust character which attaches to its capital stock, and that when they have any of this trust fund in their hands they hold it cum onere, subject to all the equities which attach to it, went on to say: 'It is objected, against the principles above stated, that the cases in which they were declared were where there was actual or constructive fraud or unfairness, where the corporations were insolvent, or in process of being wound up. The question naturally would arise mostly in such circumstances, but the principles enunciated are general in scope, following from the nature of the capital stock of corporations, and the relation of a stockholder to the corporation, and we know of no limitation of their application as above suggested.'

"In this statement we fully concur. There can be no such limitation of the principle.

"The supreme court of Connecticut, in *Crandall v. Lincoln* (1884) 52 Conn. 73, 52 Am. Rep. 560, said: 'If the view we have taken of the character and nature of this stock is sound,' that it is a trust fund for the security of creditors, 'and we have no doubt that it is, the conclusion inevitably follows that under no circumstances can a stockholder sell his stock to the company and take therefor his portion of the capital stock to the prejudice of creditors. The illegality of the

transaction does not at all depend upon the actual knowledge or mala fides of the seller; if he in fact sells to the company and receives in return a part of the capital, the policy of the law requires him to know it, and conclusively charges him with knowledge. Thus selling, he sells at his peril. In no other way can the rights of creditors be protected. The seller can protect himself by selling to other parties, or he may hold his stock, taking, as he is bound to, the risk of his investment. The creditor is not bound to assume any part of the stockholder's risk, and he has no way of protecting himself. The law is his only protection.'

"The above cases were not based on any local statute, but upon general principles.

"In saying that the assets of a corporation constitute a trust fund, we are to be understood as referring to the assets of an insolvent corporation. A solvent corporation, of course, holds its property as any individual holds his. But when a corporation becomes insolvent, a trust arises in respect to the administration of its assets for the benefit of its creditors. *Hollins v. Brierfield Coal & I. Co.* (1893) 150 U. S. 371, 381, 383, 37 L. ed. 1113, 1115, 1116, 14 Sup. Ct. Rep. 127; *McDonald v. Williams* (1899) 174 U. S. 397, 401, 43 L. ed. 1022, 1023, 19 Sup. Ct. Rep. 743. Hence, when a corporation buys its own stock, payment cannot be made with funds which, upon insolvency, belong to its creditors, instead of to its stockholders. 1 *Cook, Corp.* 7th ed. § 9, pp. 42, 43."

See also *Re Tichenor-Grand Co.* (D. C.) 203 Fed. 720, where Hand, District Judge, dealt with a similar question arising as to a New York corporation.

In *Grasselli Chemical Co. v. Ætna Explosives Co.* (D. C.) 258 Fed. 66, Mayer, District Judge, reached the same result, to wit, that a note of a New York corporation, given in payment of stock, is enforceable only as against a surplus;

that it cannot be let into competition with creditors.

Re Brueck & W. Co. (D. C.) 258 Fed. 69, is another recent decision by Judge Mayer to the same effect.

Olmstead v. Vance & J. Co. 196 Ill. 236, 63 N. E. 634, is another well-considered case, in which the same result is reached. It was there held that an agreement by a corporation to buy its own stock cannot be enforced to the injury of creditors—such an agreement being the equivalent of a contract to diminish its capital; that the stockholders of a corporation are charged with notice that the capital stock is a trust fund for the payment of debts, and hold their stock subject to all the equities which attach. The court said: "This court has repeatedly held that, as against the claims of creditors, it is immaterial what private arrangements subscribers may make with the corporation, and that any device by which members of the corporation seek to avoid the liability imposed upon them by law is void as to creditors, whether binding or not as between themselves and the corporation. *Clapp v. Peterson*, 104 Ill. 26; *Alling v. Wenzel*, 133 Ill. 264, 24 N. E. 551; *Coleman v. Howe*, 154 Ill. 458, 45 Am. St. Rep. 133, 39 N. E. 725. If such an arrangement as that made between the *Smith & Jones Company* and *Bentley & Olmstead* could be enforced, a corporation might then, at the time of its organization, make such a contract with each of its stockholders as to totally destroy the capital stock of the concern and deprive the creditors of all security from this trust fund. The capital stock is a trust fund furnished for the benefit of the creditors of the corporation, and equity will not permit it to be destroyed or impaired to their injury for the benefit of stockholders. The creditors of this corporation had a right to rely upon the application of the capital stock toward the payment of their claims, and to permit this plaintiff in error to cancel his stock upon this inequitable agreement, and to receive a premium of 10 per cent in addition,

would be in violent disregard of a long line of decisions of this court."

Other authorities sustaining the same general doctrine are: *Crandall v. Lincoln*, 52 Conn. 73, 52 Am. Rep. 560, citing and reviewing many of the earlier cases; *Cartwright v. Dickinson*, 88 Tenn. 476, 7 L.R.A. 706, 17 Am. St. Rep. 910, 12 S. W. 1030; *White Mountains R. Co. v. Eastman*, 34 N. H. 124, 140; 8 *Thomp. Corp.* 2d ed. §§ 4075, 4076.

Mr. Morawetz, in his book on Corporations, says (vol. 1, § 112): "No verbiage can disguise the fact that a purchase by a corporation of shares in itself really amounts to a reduction of the company's assets, and that the shares purchased do in fact remain extinguished; at least until the reissue has taken place. The fact that such a transaction may not necessarily be injurious to any person is not a sufficient reason for supporting it. It is contrary to the fundamental agreement of the shareholders, and is condemned by the plainest dictates of sound policy. To allow the directors to exercise such a power would be a fruitful source of unfairness, mismanagement, and corruption. It is for these reasons that a shareholder cannot be allowed to withdraw from the corporation, with his proportionate amount of capital, either by a release and cancelation before the shares have been paid up, or by a purchase of the shares with the company's funds."

Machen (vol. 1, § 628) states the rule as follows: "In America, many courts uphold the same sound and wholesome doctrine as the English cases. But it must be conceded that a somewhat larger number of the American courts have taken the view that a corporation may, without express statutory authority, purchase its own shares, provided the purchase is entered into bona fide and does not endanger the claims of creditors. It should be observed that the American cases which agree with the English doctrine are often well considered and fully reasoned, whereas those which uphold the contrary view generally

lack any extended examination of the subject."

The court below apparently assumed that the bankrupt was a Massachusetts corporation. In fact it is a Maine corporation. While there is no decision by the Maine supreme court dealing flatly with the power of a Maine corporation to purchase under any circumstances shares of its own capital stock, the decision in the case of *Re Brockway Mfg. Co.* 89 Me. 121, 56 Am. St. Rep. 401, 35 Atl. 1012, accords with the doctrine of the Supreme Court of the United States and with the decisions above cited in the circuit court of appeals and the district courts, to the effect that such a claim cannot be sustained as against the rights of creditors, existing or subsequent.

In this case the treasurer of the corporation had used its funds to pay for the stock of the corporation purchased by him and other stockholders. It was held that the treasurer was responsible for the whole amount of the money so used, so far as necessary to satisfy the claims of creditors, even though all the stockholders had assented to the purchase. The court, by Peters, Ch. J., said (89 Me. 125): "Whatever rule might obtain, if this were a proceeding to enforce the liabilities of a stockholder under our statutes, we think that the case discloses in its facts a diversion of its property and assets to the detriment of creditors. The case is very like that of a trustee secretly applying the trust property to his own use. To hold otherwise would be a contradiction of the plain proposition that the stock and property of every corporation are to be regarded as a trust fund for the payment of its debts, and that its creditors have a lien thereon and the right to priority of payment over any stockholder. The payment of the amount claimed by Haskell for the benefit of the corporation amounted in law to an application of that sum in reduction of his indebtedness to the company, and therefore a reduction of its assets to that extent. It is well settled by numerous author-

ities that the stockholders of a corporation have no rights until all other creditors are satisfied. They have the full benefit of the profits made by the establishment, but cannot take any portion of the funds until all other claims on them are extinguished. Their rights are not to the capital stock, but to the residuum after all demands on it are paid. *Wood v. Dummer*, 3 Mason, 311, Fed. Cas. No. 17,944; *Sanger v. Upton*, 91 U. S. 60, 23 L. ed. 220. Creditors may hold the company's agents liable for wasting assets which are needed to satisfy their claims, on the ground that it constitutes a misapplication of trust funds."

The Maine corporation statutes expressly authorize their corporations to deal in the shares of "any other corporation." This express inclusion of power to deal in the shares of other corporations certainly implies a lack of power to deal in its own shares. Compare *Morawetz, Corp.* 2d ed. § 316. At any rate, there is nothing in the Maine decisions holding that a Maine corporation can, by process of contract with its stockholders, reduce a fund to which its creditors, existing or prospective, are entitled to look for the payment of their debts. If such contracts can be sustained, the statutory provisions as to the reduction of capital stock are waste paper.

Even in Wisconsin, where the trust fund doctrine as to capital stock is not entertained, a transaction such as this at bar is regarded as constructively fraudulent. *Atlanta & W. Butter & Cheese Asso. v. Smith*, 141 Wis. 377, 32 L.R.A. (N.S.) 137, 135 Am. St. Rep. 42, 123 N. W. 106.

A fortiori, under the decisions of the Supreme Court of the United States, holding the capital stock to be a trust fund for the benefit of creditors, it cannot be allowed to be dissipated by executory contracts between the corporation and its stockholders, not disclosed in the public

Bankruptcy—
stockholder
of corporation
as creditor.

records of the corporation, or even in its own books of account.

The decree of the District Court is reversed, and the case is remanded to that court, with directions to enter an order disallowing the claim, and the appellant recovers his costs of appeal.

A petition for rehearing having been filed, the following *Per Curiam* response was handed down on January 6, 1920:

The appellee has filed a petition for rehearing, accompanied by a long brief, arguing many questions not arising on this record, and therefore not touched upon by the court in the opinion. This petition points out no error of fact or of law; it must be denied. But, to avoid possible confusion, it may be desirable to add a few words as to what is not decided by this court in this case.

This record raises no issue, and this court intimates no opinion, as to the power of a corporation organized under the laws of the state of

Maine, or of any other state, to contract to purchase its own stock, paying therefor only out of surplus or accumulated profits. Compare *Re O'Gara & Maguire*, 259 Fed. 935; *Jesson v. Noyes*, 157 C. C. A. 342, 245 Fed. 46, 50. The only question presented in this case, and decided by this court, is as to whether a stockholder may prove damages for a breach of such contract, accruing after bankruptcy, against general assets, and in competition with ordinary creditors. That question we answer in the negative. As to any other questions concerning contracts by corporations for the purchase of their own stock, arising under different conditions, no opinion is intimated.

Petition denied.

Petition for a writ of certiorari denied by the Supreme Court of the United States, March 8, 1920 (U. S. Adv. Ops. 1919-20, p. 408) — U. S. —, 64 L. ed. —, 40 Sup. Ct. Rep. 344.

ANNOTATION.

Claim of one selling to corporation its own stock as provable against its estate in bankruptcy.

Apparently as an outgrowth of the trust-fund doctrine, it is consistently held that where a stockholder sells or agrees to sell his stock to the corporation, and the corporation is thereafter adjudicated a bankrupt, the stockholder is not entitled to prove his claim for the price or on the contract against the estate, in competition with creditors, but is entitled to compensation only in case a surplus remains after all the creditors have been paid. *Hamor v. Taylor-Rice Engineering Co.* (1897) 84 Fed. 392; *Re S. P. Smith Lumber Co.* (1904) 132 Fed. 618; *Re Tichenor-Grand Co.* (1913) 203 Fed. 720; *Re Fechheimer Fishel Co.* (1914) 129 C. C. A. 33, 212 Fed. 357, writ of certiorari denied in (1914) 234 U. S. 760, 58 L. ed. 1580, 34 Sup. Ct. Rep. 777; *Grasselli Chemical Co. v. Aetna Explosives Co.* (1918) 258 Fed. 66; *Re Brueck & W. Co.* (1919) 258

Fed. 69; *Re O'Gara & Maguire* (1919) 259 Fed. 935; *Olmstead v. Vance & J. Co.* (1902) 196 Ill. 236, 63 N. E. 634; *Clark v. E. C. Clark Mach. Co.* (1908) 151 Mich. 416, 115 N. W. 416. And see the reported case (*KEITH v. KILMER*, ante, 1287).

In the case of *Re S. P. Smith Lumber Co.* (1904) 132 Fed. 618, an appeal was taken from the disallowance by a referee in bankruptcy of a claim based on two promissory notes executed by the bankrupt company. The evidence showed that stock of the bankrupt corporation had been owned by the claimant and another. The claimant, being desirous of severing his connection with the company, transferred his stock to the other stockholder, and the entire consideration for this transfer was advanced in the form of negotiable instruments executed by the company. As a result of this trans-

action, the corporation became insolvent and bankruptcy proceedings resulted. In holding that the purchase of the shares with the funds of the corporation was a fraud on the creditors and rendered the claim invalid, the court said: "In event of the dissolution of a corporation the shareholders are only entitled to their aliquot part of the capital remaining after all debts are paid. Menefee, by his sale to Smith, withdrew from the company, ahead of all creditors, a substantial part of the consideration for his shares in cash and property, thereby reducing the company to insolvency. He now seeks to prove and have allowed as a debt against the bankruptcy estate the notes executed by the bankrupt, and given him as deferred payments. He seeks to share in the distribution of the estate with the creditors for whose pecuniary injury and financial loss he is in part responsible. The purchase of his shares by Smith with the funds and property of the company operated as a fraud upon its creditors, and the holding of the referee that the sale was invalid, and his consequential refusal to allow the claim of Menefee, is approved and confirmed."

Similarly, in the case of *Re O'Gara & Maguire* (1919) 259 Fed. 935, it appeared that the bankrupt corporation purchased several shares of its capital stock belonging to the claimant, and gave its three promissory notes in payment. After the corporation was adjudged a bankrupt, a claim was presented for the amount remaining unpaid on these notes. It was held that a contract by a corporation for the purchase of its capital stock could not be enforced except out of surplus earnings or accumulated profits; and since, at the time of the transfer of the stock, the liabilities of the company were greater than its resources, the capital stock could not be impaired to the injury of creditors by allowing the claims based on the notes in question to stand.

So, in *Hamor v. Taylor-Rice Engineering Co.* (1897) 84 Fed. 392, a claim was filed against a bankrupt corporation for the amount due on

several notes executed by the corporation to the claimant. The receivers of the insolvent corporation excepted to the allowance of the claim, alleging that the notes were given by the corporation as consideration for the transfer to it of the stock of the purchasing company held by the claimant. It was held that the corporation could not purchase the shares of its own stock if the transaction would impair the company's capital stock—the court saying: "The consideration for the original note was the surrender by Willard to the defendant of certain shares of its capital stock held by him. He now seeks to be recognized as one of the creditors of the defendant. Was the money which the defendant undertook to pay him for his surrender of stock to come out of any surplus or fund of net profits, on the one hand, or, on the other, out of the fund represented by the capital stock? The defendant was adjudged insolvent, and receivers were appointed within four months after the giving of the original note; and it is admitted that there are not sufficient funds or property in their hands to pay the corporate indebtedness, exclusive of the alleged claim of Willard. In so far as the existence of a surplus or fund of net profits at the time of the taking of the original note might tend to the establishment of a right on his part to compete with the creditors of the defendant, the burden of proof rested upon him to show the existence of such surplus or profits. No such showing has been made; and it cannot be assumed that such was a fact. The note must be treated as an undertaking by the defendant to dispose of part of its capital stock to secure a surrender of Willard's shares. It was a contract to do what was ultra vires of the defendant, as against its creditors, and was a nullity; and, therefore, the note given in renewal is void." See, to the same effect, *Olmstead v. Vance & J. Co.* (1902) 196 Ill. 236, 63 N. E. 634.

Likewise, it appeared in *Clark v. E. C. Clark Mach. Co.* (1908) 151 Mich. 416, 115 N. W. 416, that a corporation purchased some of its own stock, for which it gave three promissory notes,

secured by a chattel mortgage. The corporation, at the time it made the purchase, owed less than \$300. The assets of the corporation were worth about \$9,000. The stockholders had all agreed to the purchase, and, if there were any creditors existing at the time of the purchase, none of them complained. All the creditors who did complain were subsequent creditors, who gave credit with the mortgage on file in the proper office, but who insisted that it was not notice to them that the assets of the company had been used to purchase some of the capital stock. The court said that the assets of a corporation constituted a trust fund not only for the benefit of existing but also for future creditors, and that they could not be used in the purchase of outstanding stock to the exclusion of subsequent creditors, adding: "It is apparent under the record as it now stands that the assets will be more than sufficient to pay the debts. Should this prove to be the case, Mr. Wells (whose stock the company purchased) will be entitled to receive out of the surplus sufficient to pay this amount. The decree will be modified in accordance with this opinion."

So it has been held that the claim of a stockholder who had sold his stock to the corporation should be postponed until it was apparent that the rights of the creditors of the corporation would not be defeated. *Re Fechheimer Fischel Co.* (1914) 129 C. C. A. 33, 212 Fed. 357, writ of certiorari denied in (1914) 234 U. S. 760, 58 L. ed. 1580, 34 Sup. Ct. Rep. 777.

In the reported case (*KEITH v. KILMER*, ante, 1287) the trustee in bankruptcy appealed from an order allowing a claim of a former stockholder who had contracted to sell his stock to the corporation. The court reversed the order and entered a decree disallowing the claim. It is stated that a stockholder may not sell his shares of stock to the corporation, and subsequently, when the corporation is bankrupt, put in a claim, and share in like proportion with other creditors.

Similarly, where a claim was made against the receiver of an insolvent company to recover a sum alleged to be due under a contract by the terms of which the corporation agreed to repurchase the claimant's stock at the end of a stated time, it was held that the claim should not be allowed, as there was no surplus out of which payment could be made, and the claimant was not entitled to be let into competition with bona fide creditors. *Grasselli Chemical Co. v. Aetna Explosives Co.* (1918) 258 Fed. 66. See, to the same effect, *Re Brueck & W. Co.* (1919) 258 Fed. 69.

In the case of *Re Tichenor-Grand Co.* (1913) 203 Fed. 720, it was shown that a corporation agreed with a subscriber to stock to repurchase the same after a stated time. On a claim based on that agreement, against the estate of the corporation in bankruptcy, it was held that the agreement was invalid, the court saying: "I must say that all such rights appear to me to be quite contrary to a reasonable protection of creditors, unless they are limited to purchases which leave the original capital intact,—i. e., purchases from surplus,—because they necessarily result in keeping up the appearance of a capital which has been actually depleted. If a corporation has received property into its treasury of the value of its authorized shares, that is, no doubt, subject to the vicissitudes of its enterprises, which will be represented by public knowledge of its success or of the value of its shares. If, however, it purchases its own shares, this affects neither the value of the other shares, the success of its enterprises, nor the amount of its apparent share capital. It is merely a method of secret distribution, against the deceit of which its creditors have absolutely no means of protection. The fund which they have the right to rely upon has been surreptitiously taken from them. It seems to me very little relief against the evils which such a right causes, to limit it to cases where the corporation is thought to be solvent." E. C. B.

ESTATE OF ANNA C. BRACKETT, Deceased,
v.
ESTATE OF CHAUNCEY BURNHAM, Deceased, Plff. in Err.

Michigan Supreme Court — October 6, 1919.

(*Re Burnham*, 207 Mich. 361, 174 N. W. 121.)

Husband and wife — right of wife to compensation for services.

1. To enable a married woman to recover for personal services rendered to a stranger, he must have had knowledge that her husband had consented to her receiving the compensation for her services, and must have assented to and acquiesced in the arrangement.

[*See note on this question beginning on page 1303.*]

Evidence — of knowledge of emancipation of married woman.

2. A mere statement by a man who was being cared for in the home of a married couple that he wanted them to have what he had, to pay for what

the wife had done for him, does not show that he understood that she had been emancipated so that she personally could recover from his estate for the services rendered.

ERROR to the Circuit Court for Kalamazoo County (Weimer, J.) to reverse a judgment in favor of claimant in a proceeding to recover for services rendered to decedent while boarding with claimant and her husband. *Reversed.*

The facts are stated in the opinion of the court.

Mr. Lincoln H. Titus, for plaintiff in error:

In order to bind the defendant estate, it is incumbent upon the claimant to prove by a preponderance of the evidence that deceased knew that Anna C. Brackett intended to charge him for the items, which she now claims, and that he assented to the arrangement.

Mason v. Dunbar, 43 Mich. 407, 38 Am. Rep. 201, 5 N. W. 432; *Boughton v. Boughton*, 111 Mich. 26, 69 N. W. 94; *Heral v. McCabe*, 171 Mich. 530, 137 N. W. 237.

There is no evidence showing that the arrangement claimed to have been made between claimants, that the wife "might have whatever she earned," if she would allow Chauncey Burnham to come to their home to live; was ever communicated to him, or that such an arrangement was ever accepted by him, and therefore plaintiff cannot recover.

Ibid.

Messrs. Alfred S. Frost and Corwin & Norcross, for defendant in error:

The case was properly submitted to the jury to determine the extent and value of claimant's services, and, their verdict being within the evidence, the judgment should be affirmed.

Putnam v. Detroit United R. Co. 164 Mich. 342, 129 N. W. 860; *McManigle v. Detroit United R. Co.* 193 Mich. 530, 160 N. W. 423; *Hook v. Solomon*, 194 Mich. 517, 160 N. W. 839; *Armstrong v. Rachow*, 205 Mich. 168, 171 N. W. 389; *Re Young*, 39 Mich. 429; *Crampton v. Newton*, 132 Mich. 149, 93 N. W. 250; *Longwell v. Mierow*, 130 Wis. 208, 109 N. W. 943; *Lancaster v. O'Brien*, 136 Ky. 589, 124 S. W. 854; *McCoy v. McCoy*. — Ky. —, 125 S. W. 177; *Ashley v. Smith*, 152 Mich. 197, 115 N. W. 1052; *Mason v. Dunbar*, 43 Mich. 407, 38 Am. Rep. 201, 5 N. W. 432; *Re Barclay*, 146 Mich. 650, 110 N. W. 49; *Re De Spelder*, 181 Mich. 153, 147 N. W. 589; *Re Tolsma*, 183 Mich. 314, 149 N. W. 1050; *Jason v. Antone*, 131 Mass. 534; *Jenks v. Dyer*, 102 Mass. 235; *Kendall v. Kingsley*, 120 Mass. 94; *Burns v. Maurer*, 72 Misc. 481, 131 N. Y. Supp. 344; *Dayton v. Ewart*, 28 Mont. 153, 98 Am. St. Rep. 549, 72 Pac. 420.

Stone, J., delivered the opinion of the court:

This is the second appearance of this case in this court. When here on the former occasion, it will be found reported in 199 Mich. 326, 165 N.

W. 665. For a full statement of the history of the case, reference is had to the former opinion. The case was reversed, and a new trial ordered, for the single error there pointed out. The case has been retried, resulting in a verdict and judgment for the claimant in the sum of \$1,302.36, and the defendant has brought the case here upon writ of error.

Mary errors are assigned by appellant, but in our opinion the single meritorious question presented by the record is whether there was any evidence, upon the retrial, showing that the arrangement which it was claimed was made between claimant's husband and herself "that she might have whatever she earned," if she would allow Chauncey Burnham to come to the home of William A. Brackett and Anna C. Brackett to live, was ever communicated to Chauncey Burnham, or that such an arrangement was ever accepted by him, or understood or acquiesced in by him. When the case was here before we said: "We think the case should have been submitted to the jury upon the claim of Anna C. Brackett for her own services only."

The question now presented was not presented or considered upon the former hearing.

The evidence upon the retrial, as well as upon the first trial, upon the right of Anna C. Brackett to have her claim presented to the jury at all, was based upon a claimed conversation between Mr. and Mrs. Brackett, not in the presence of Chauncey Burnham, and was testified to by Mr. Brackett as follows:

Q. Any conversation that you had that was in his presence would not be admissible, but the conversation that was not in his presence would be; so do not say anything in regard to any conversation had while he was present. What, if anything, was said by you to your wife about his staying there when you were talking with her, when Mr. Burnham was not present?

A. I told her, if she wanted to

keep him, she could, and she could have what she could earn.

On cross-examination as follows:

Q. Mr. Brackett, what you have told the jury is what you and your wife have talked about when Chauncey Burnham was not present; is that right?

A. Yes, sir.

The rule of law in this state seems to be that, under such an arrangement as claimed between husband and wife, before the wife can recover for services rendered under such circumstances, this agreement must be brought home to the knowledge of the party to be charged, and it must appear that such party assented to and acquiesced in such arrangement.

Husband and wife—right of wife to compensation for services.

It is not enough to show that the husband has given the wife her services, but the other party must also understand that contract relations between himself and the wife, exist, and that the wife expects compensation.

It was and is the position of claimant's counsel that this part of the case is sustained by the testimony of the witness Amelia Planck, which was as follows:

Q. And what, if anything, did he [Burnham] say to you? How did this conversation come up, and what was said to you?

A. At different times, and one time especially, he was alone in the store and wasn't feeling very well, and I says, "Why don't you get married?" and he says, "I don't want to get married. I have got a home over to Mrs. Brackett's and she takes care of me and does all my washing and ironing and everything." And in the conversation he said, "I guess I ain't got nobody that I care for, and I want them to have all I got, and I want them to have it to pay for everything she has done for me." And I said, "Why don't you make a will?" And he said, "Because they would fight over a will;" and he says, "Whatever I owe

them, they can always put in a claim and get it. I have enough property or money, so they can always get what's coming to them."

At the close of the plaintiff's evidence, defendant's counsel moved for a directed verdict, upon the ground (among others) that there was no evidence to show that the deceased knew that Anna C. Brackett intended to charge him for the items claimed, or agreed to it. This motion was denied, and exception taken. Defendant requested the court to charge the jury (among other things) as follows: "(2) The plaintiff, or claimant, having failed to produce any evidence that deceased, Chauncey Burnham, knew that Anna C. Brackett, wife of William A. Brackett, claimant, intended to charge him for any services she rendered him, and for which she now claims compensation, and that he assented to the arrangements, neither she nor her estate can recover in this action; for, in order to bind the estate of Chauncey Burnham, it is incumbent upon the claimant to prove by a preponderance of the evidence that the deceased, Chauncey Burnham, knew that Anna C. Brackett intended to charge him for the items for which she now claims, and that he assented to the arrangements [citing cases]. Your verdict will be for the defendant, no cause of action."

This request was refused, and the case was submitted to the jury. The court, in the course of its charge, did charge the jury as follows: "It must appear to your satisfaction by a preponderance of the evidence that William Brackett, husband of Anna C. Brackett, relinquished to his wife the right to have whatever she might earn in caring for Chauncey Burnham, and that Chauncey Burnham himself understood and accepted such arrangement."

The infirmity of the case is that, in our opinion, there was no evidence to warrant the submission of the question to the jury. Neither the

Evidence—
of knowledge of
emancipation of
married woman.

testimony quoted, nor any evidence in the case, tended to show that Chauncey Burnham ever knew that the claimant had been emancipated, or knew of the claimed arrangement between the husband and wife, or knew that contract relations between himself and the claimant existed. This is not a new question in this state. That such evidence is necessary has often been held by this court. In *Mason v. Dunbar*, 43 Mich. 407, 38 Am. Rep. 201, 5 N. W. 432, Justice Cooley, speaking for the court, said: "The plaintiff claims that her husband and herself alternately took charge of the husband's father, who in his extreme old age was blind and imbecile, and required constant care and supervision, day and night, and that it was distinctly agreed between herself and her husband that for her own services she should receive compensation from the father. If such was the fact, and if the father understood the arrangement and assented to it, the court is of opinion that she would be entitled to recover what would be just and reasonable. The husband had the right to give her for this purpose her services, or to refuse to give them, at his option; and if he made the gift, the legal right to deal with the father as a stranger might would follow. But we are all of opinion that the father must have been made aware of the arrangement, and must expressly or by implication have assented to it before he could have been chargeable with any legal claim in plaintiff's favor. The legal presumption is that the wife is employing her services in her husband's interest; and where she is working with her husband, as was the case here, a great wrong would sometimes be done if each might present and recover upon separate claims, when the other party supposed, and had a right to suppose, he was dealing with the husband alone. It is not enough to show that the husband has given the wife her services, but the other party must also understand that contract relations between himself and the wife exist and

that the wife expects compensation."

This case has been approved and followed many times, as is evidenced by the following cases: *Barnes v. Moore*, 86 Mich. 585, 49 N. W. 585; *Boughton v. Boughton*, 111 Mich. 26-28, 69 N. W. 94; *Slack v. Norton*, 111 Mich. 213-215, 69 N. W. 947; *Decker v. Kanous*, 129 Mich. 146, 88 N. W. 398; *Re Barclay*, 146 Mich. 650, 110 N. W. 49; *Heral v. McCabe*, 171 Mich. 530-539, 137 N. W. 237.

In *Re Barclay*, 146 Mich. 650, 110 N. W. 49, Justice Ostrander, in speaking of an objection to the admissibility of certain testimony, said: "The specific objection to the introduction of this testimony was that such a bargain between husband and wife must be shown to have been brought home to the decedent, and to have been assented to by her. See *Mason v. Dunbar*, 43 Mich. 407, 38 Am. Rep. 201, 5 N. W. 432. If there was an arrangement that claimant should be paid, known and assented to by the husband, to the knowledge of decedent, so that liability to the wife personally was affirmed and liability to the husband was negatived, the rule that 'it is not enough to show that the husband has given the wife her services, but the other party must also understand that contract relations between himself and the wife exist, and that the wife expects compensation' (*ibid.*) is not violated."

The difficulty with the instant case is that there was no such evidence, the necessity of which is above indicated. The language is: "And I want *them* to have all I got, and I want *them* to have it, to pay for everything she has done for me. . . . Whatever I owe *them*, *they* can always put in a claim and get it. I have enough property or money, so *they* can always get what's coming to *them*."

Such language falls far short of indicating that Burnham supposed that contract relations existed between himself and the claimant, or that he was dealing with her.

In *Heral v. McCabe*, *supra*, Chief Justice Moore, speaking for the

court, after quoting from *Mason v. Dunbar*, said: "There is not a particle of evidence in the case from which the inference can be fairly drawn that the defendant understood that he was dealing with the plaintiff and that he was to pay her for her services."

That language is very pertinent here.

Counsel for claimant have called our attention to *Ashley v. Smith*, 152 Mich. 197, 115 N. W. 1052, and especially to the following language: "It is urged by defendant's counsel that such contract would not be good unless Smith did know of this, but we think this point is not well taken. If she had the right, and was competent to make such contract on her part, and he did make it on his, it would bind him, whatever he may have thought about it."

It would appear from a casual reading of the above excerpt that it is in conflict with the cases which we have cited; but a more careful reading shows that it was not the contract relation that was referred to there, but the right on the wife's part to make a contract. If the contract was actually made between claimant and deceased, and it turned out that she was authorized to make it, another question would arise, which is not the precise question we have been discussing, which is the contract relation. No cases are cited, and we do not think it was the intention to overrule the long line of decisions above cited without reference to them. It is also urged by appellant that the record in that case discloses that the questions here presented were not raised on the trial of that case. An examination of the record verifies that statement.

Many other reasons are urged by appellant why the case should be reversed, especially the weakness of the testimony as to the time and value of the services. We think, however, that enough was shown to take the case to the jury upon those questions.

Other questions raised and discussed will probably not arise upon

a new trial. Much as we regret to reverse this case again, we see no escape from it, if our numerous decisions are to be observed.

The judgment will be reversed, and a new trial granted, because of the error discussed. One of the reasons why we grant a new trial is because the effect of Act No. 196 of the Public Acts of 1911 (3 Comp. Laws 1915, § 11,478), entitled, "An Act Defining and Regulating the Right of Married Women to Their Own Earnings," has neither been

raised nor discussed. What effect that act should have in a case where, as here, no express contract is relied upon as to services rendered *after* that act took effect, may be a material question. It is claimed that the period of services extended to November 21, 1914. See *Re Scully*, 199 Mich. 181, 165 N. W. 688. Appellant will recover its costs of this court, to be taxed.

The late Justice Ostrander took no part in this decision.

ANNOTATION.

Consent of husband to rendition of services by wife as prerequisite to her recovery therefor.

The reported case (*BRACKETT v. BURNHAM*, ante, 1299) holds that the consent of the husband to the rendition of services by his wife is essential to a recovery by her of her earnings. This note, confining itself to that point, presents but few cases, though there have been a great number of decisions on closely related questions. At common law a husband was entitled to his wife's earnings, and she could receive them only by his consent. See 13 R. C. L. p. 1089. The property rights of married women are now so generally regulated by statute that the cases arising at common law are practically obsolete and valueless, and they are accordingly omitted from the present discussion.

In the gradual development of the married women's separate property acts, the earlier acts dealt primarily with the right of a married woman to hold "property," and considerable litigation arose as to whether "earnings" were covered by statutes of this type. These cases are deemed to be beyond the scope of the present discussion, as are the cases dealing generally with the right of a wife to her earnings under any form of statute, and those which concern the rights of a wife as a "sole trader."

But, granting a statutory right of a wife to her own earnings, the question arises whether that right is absolute or whether the consent of the husband

to her performance of services on her own account must be shown. A statute providing that the earnings of a wife shall be her separate property does not of itself emancipate her from the duties which she owes to her husband as a member of his household (see 13 R. C. L. p. 1090), and the rights of a wife with respect to her earnings are limited strictly to the terms of the statute granting them. See *Porter v. Dunn* (1892) 131 N. Y. 314, 30 N. E. 122.

In many jurisdictions the statutes apparently give the right to a married woman to recover her own earnings, irrespective of the consent of her husband, so clearly that in actions for such earnings the courts base the right to recover on the statute, and ignore the matter of consent. This note, therefore, shows an apparent preponderance of authority in favor of the view that consent is necessary, though, taking into account the statutes which so plainly dispense with consent as to have evoked no decision on the point, the majority rule is probably otherwise.

The case of *Bechtol v. Ewing* (1913) 89 Ohio St. 53, L.R.A.1917E, 279, 105 N. E. 72, Ann. Cas. 1915C, 1183, holds squarely that consent of the husband is not essential, the court saying that to hold otherwise would stultify the plain provision of a statute permitting married women to enter into any "en-

gagement or transaction" to the same extent as if unmarried.

So, the court said in *Garver v. Thoman* (1913) 15 Ariz. 38, 135 Pac. 724: "The restriction against the wife's power to contract concerning the common property, in our opinion, has reference to property in esse as a tangible asset of the community, and never was intended as a limitation upon the power of the wife to acquire property during coverture by personal efforts along any of the varied lines of business. She has the same legal right to contract as the man, except that she cannot bind by her contract the common property. Her acquisitions of whatever kind, while living with her husband, except those obtained by 'gift, devise, or descent,' are common property, and when once brought into the community are subject to the control and domination of the husband, except, of course, as provided by § 3104, Revised Statutes of 1901. But her ability and right to acquire property otherwise than by 'gift, devise, or descent' implies the power and right to contract her services."

Similarly, in *Turner v. Davenport* (1901) 63 N. J. Eq. 288, 49 Atl. 463, a bill by a married woman to recover from the defendant firm, of which her husband was a member, pay for her services, the court said: "It is clear that, under our statute, a married woman may engage for wages, by contract, with any person other than her husband, and that, whether her husband consent or not, she may receive the moneys due her for such services as her separate property, and, as it seems to me, this statute expressly negatives the right of the husband to reduce such wages to possession, by declaring that such wages 'shall be her sole and separate property,' for at common law he could not reduce property of her sole and separate estate to his possession to such an extent, at least, as to be free from liability to account to her therefor in equity."

Compare *Stevenson v. Akarman* (1912) 83 N. J. L. 458, 46 L.R.A. (N.S.) 238, 85 Atl. 166, as to services rendered by the wife in the home.

On the other hand, it was held in

Roberts v. Haines (1901) 112 Ga. 842, 38 S. E. 109, that the plaintiff could not recover in the absence of consent by her husband to the rendition of services. The court said: "The petition in this case fails to allege that there was any consent or agreement, either express or implied, on the part of the husband, that the earnings of his wife should be retained by her as her separate estate. At common law, the earnings of the wife belonged to her husband. In Georgia, since the Act of 1866, the husband may, by consent or agreement with his wife, express or implied, allow her to engage in an independent business on her own account, and to keep as her separate estate any earnings that she may make in such business. In the absence, however, of such an agreement, express or implied, the husband is entitled to his wife's earnings made during coverture. The petition in the present case alleges that the plaintiff contributed from her earnings a portion of the purchase money of the property in dispute, but it is nowhere claimed that these earnings were her separate estate. It is upon the theory that the husband is ordinarily entitled to the earnings of his wife that the law allows him to recover in his own right for personal injuries sustained by her while they are living together in a state of coverture. While it is true that the Act of 1866 has wrought many changes in the law with reference to the separate estate of a married woman, there is still imposed upon the husband the obligation to support his wife, with the corresponding right to her services and earnings during coverture."

See to the same effect, *Central of Georgia R. Co. v. Cheney* (1917) 20 Ga. App. 393, 93 S. E. 42.

So, in *Wren v. Wren* (1893) 100 Cal. 276, 38 Am. St. Rep. 287, 34 Pac. 775, the court said: "The earnings of a wife during marriage, and while living with her husband and in his house, are community property, and, as such, are subject to the management, control, and disposition of the husband; but the husband may relinquish to the wife the right to such earnings.

and when he has done so they become the separate property of the wife." See to the same effect, *Kaltschmidt v. Weber* (1904) 145 Cal. 596, 79 Pac. 272, and *Larson v. Larson* (1911) 15 Cal. App. 531, 115 Pac. 340. And see *Moore v. Crandall* (1913) 124 C. C. A. 11, 205 Fed. 689, applying law of California.

It was held in *Allen v. Eldridge* (1871) 1 Colo. 287, that by chapter 60, Revised Statutes 454, a husband had no interest in the earnings of his wife, and that she might bring action in her own name regardless of the consent of her husband. The court said: "The right of a married woman to the proceeds of her own labor under this statute cannot be doubted. The language of the act is clear and explicit, and the husband is deprived of all interest in the labor of his wife, rendered to third persons. It may be contended that the words 'on her sole and separate account,' in the first clause of § 6, restrict the woman's right to cases in which she declares her intention to appropriate the proceeds of her labor to her own use. But there is little room for such construction. It must be presumed that everyone who labors for hire is seeking his own personal emolument; for men do not sow that others may reap. The highest claim to the fruits of labor is vested in him who performs it, and none other need be asserted. We do not doubt the right of defendant in error to recover in her own name the value of her services personally rendered to plaintiff in error, and this, whether the contract for payment is express or implied."

In *Tucker v. Anderson* (1915) 172 Iowa, 277, 154 N. W. 477, Ann. Cas. 1918A, 769, it was held that, under a statute (Code, § 3162) providing that a wife might recover in her own name for services rendered by her, a married woman might recover for nursing where her husband had consented to her rendition of such services. See to the same effect, *Lindsey v. Lindsey* (1902) 116 Iowa, 480, 89 N. W. 1096.

The same rule was laid down in *Mason v. Dunbar* (1880) 43 Mich. 407, 38 Am. Rep. 201, 5 N. W. 432, wherein

the court said: "The plaintiff claims that her husband and herself alternately took charge of the husband's father, who in his extreme old age was blind and imbecile, and required constant care and supervision, day and night, and that it was distinctly agreed between herself and her husband that for her own services she should receive compensation from the father. If such was the fact, and if the father understood the arrangement and assented to it, the court is of opinion that she would be entitled to recover what would be just and reasonable. The husband had the right to give her for this purpose her services, or to refuse to give them, at his option; and if he made the gift, the legal right to deal with the father as a stranger would follow." And see the reported case (*BRACKETT v. BURNHAM*, ante, 1299), wherein it is further held that the person for whom services are performed by a married woman must be cognizant of her husband's consent thereto.

In Minnesota the consent of the husband to the rendition of services by his wife is necessary, but the person with whom she contracts need not know of the consent. *Riley v. Mitchell* (1886) 36 Minn. 3, 29 N. W. 588.

The New York cases hold, in the main, that consent of the husband is essential to a recovery by a married woman for services. Thus, it was held in *Sheldon v. Button* (1875) 5 Hun (N. Y.) 110, that since the passage of chapter 200 of the Laws of 1848, a wife might recover for services rendered, provided the husband consented to the rendition of such services. So, in *Beau v. Kiah* (1875) 4 Hun (N. Y.) 171, it appeared that the plaintiff, a married woman, in keeping house for her husband, supported her mother and sister, who promised to pay her for her services. The court held that she could not recover, as her services belonged to her husband, and he alone could recover, saying: "In the present case there is no evidence that the husband knew anything about the services. If we reverse the judgment, we must hold unqualifiedly that every time when a married woman does any

work for a person other than her husband, her earnings are separate. If this be so, I do not see why she is not entitled to be paid by her husband when she does work for him,—nurses him in sickness, or sews on his buttons in health. If we are to take the statute literally: "The earnings of any married woman from her . . . labor and services shall be her sole and separate property," why not her earnings in the work of the household? The section must be read as a whole. "A married woman may, etc., perform any labor and services on her sole and separate account, and her earnings . . . from [such] her . . . labor and services shall," etc. That is, she may carry on business, and she may perform labor, on her separate account. But not necessarily all business carried on or labor performed by her is on her separate account." On the same principle it was held in *Stokes v. Pease* (1894) 79 Hun, 304, 29 N. Y. Supp. 430, that a wife could recover where her husband had knowledge of the services rendered by her, under a statute (Laws 1884, chap. 381) providing as follows: "A married woman may contract to the same extent, with like effect, and in the same form, as if unmarried, and she and her separate estate shall be liable thereon, whether such contract relates to her separate business or estate or otherwise, and in no case shall a charge upon her separate estate be necessary." The court said: "Under these statutes if a married woman, with the knowledge of her husband, renders services to a third person, pursuant to a contract for compensation, she may maintain an action to recover the price agreed or the value of the services rendered." So, in *Carver v. Wagner* (1900) 51 App. Div. 47, 64 N. Y. Supp. 747, it appeared that a married woman took her sister into her house under a contract, made with her husband's consent, to render her services. It was held that the wife might interpose a counterclaim for the balance due her under the agreement with her sister, in an action by the latter to foreclose a mortgage. Likewise, the court said in *Snow v. Cable* (1879) 19

Hun (N. Y.) 280: "It plainly appears that the agreement counted on was with the plaintiff as a feme sole, with her husband's express approval. As to this fact there is no question. It is most unequivocally proved. Her husband permitted her to engage in the defendant's service, for herself, on her own account, and in her own right, and he consented to the use of her property for the defendant's benefit, under an arrangement between the parties that recompense should be made to her. The husband might, as he did do, permit his wife to engage in business on her own account, and have her own personal earnings. In such case the avails or proceeds are her own; and she may claim them, and recover them the same as if she were a feme sole." In *Briggs v. Devoe* (1903) 89 App. Div. 115, 84 N. Y. Supp. 1063, it was said: "Where a wife renders services and furnishes meals to a stranger under an agreement made between herself and her husband that, in case she renders such services and furnishes such meals, she alone shall receive the recompense therefor, and that it shall become her separate property, the common-law rights of the husband to his wife's services are abrogated, and she may enforce the claim in her own name and right." But it was held in *Re Dailey* (1904) 43 Misc. 552, 89 N. Y. Supp. 538, that by chapter 289 of the Laws of 1902, a wife could recover for services rendered in her own and separate right, and that the husband had no right to her earnings unless it was positively shown that he was to receive such earnings; and that unless in fraud of creditors, she might recover for services rendered of which the husband had knowledge. So, the plaintiff recovered in *Rowe v. Comley* (1882) 1 City Ct. Rep. (N. Y.) 466, without proof of consent on the part of her husband to the services which she rendered. The court said: "We are also of the opinion that where a married woman proves a contract made by herself for her own personal services, and payment is to be made to her, it will be presumed, in the absence of any

proof or circumstances tending to the contrary, that such services are to be performed on her sole and separate account." In *Pursell v. Fry* (1880) 19 Hun (N. Y.) 595, it was held that where a wife is living apart from her husband, she may recover without showing consent on his part.

In *Gage v. Gage* (1914) 78 Wash. 262, 138 Pac. 886, it appeared that an agreement had been made between the plaintiff and her husband that her earnings should be her private property. The court held that such an agreement was valid, and that the

plaintiff could recover for services rendered to the defendant.

The court said in *Jones v. Reid* (1877) 12 W. Va. 350, 29 Am. Rep. 455: "We have examined a number of authorities upon the subject, and conclude that where, by the husband's consent, the wife earns money, with the agreement or understanding between them that it is to be hers, and the rights of creditors do not intervene, it will in a court of equity be given to her, as against the devisees or distributees of the husband."

M. J. Q.

GULF TRANSPORTATION COMPANY, Appt.,
v.
FIREMEN'S FUND INSURANCE COMPANY.

Mississippi Supreme Court (In Banc)—March 8, 1920.

(— Miss. —, 83 So. 730.)

Insurance — marine — peril of sea — what is.

1. The breaking of a vessel under the weight of her own cargo when being towed in perfectly smooth and placid water, within thirty minutes after starting on her journey, is not within a policy of marine insurance against perils of the sea.

[See note on this question beginning on page 1314.]

Appeal — reversal on facts.

2. The chancellor's finding of facts will not be reversed unless clearly and manifestly wrong.

[See 2 R. C. L. 203.]

APPEAL by defendant from a decree of the Chancery Court for Harrison County (Denny, Jr., Ch.) in its favor for less than the amount claimed in a suit brought to enjoin the prosecution by it of a suit on a marine insurance policy. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. J. A. Leathers and Mize & Mize, for appellant:

The chancellor should have allowed the claim for \$35,000 in full, with interest from the 26th of January, 1918, the date of notice of abandonment.

Bell v. Beveridge, 4 Dall. 272, 1 L. ed. 830; *American F. Ins. Co. v. King Lumber & Mfg. Co.* 74 Fla. 130, 77 So. 168, 250 U. S. 2, 63 L. ed. 810, 39 Sup. Ct. Rep. 431; *Rivara v. Queen's Ins. Co.* 62 Miss. 728; *Wood, Fire Ins.* 641, 648, 650, 651; *Carrollton Furniture*

Mfg. Co. v. American Credit Indemnity Co. 52 C. C. A. 671, 115 Fed. 77; *Continental L. Ins. Co. v. Chamberlain*, 132 U. S. 304, 33 L. ed. 341, 10 Sup. Ct. Rep. 87; *Cook v. Federal Life Asso.* 74 Iowa, 746, 35 N. W. 500; *Western Assur. Co. v. Southwestern Transp. Co.* 16 C. C. A. 67, 30 U. S. App. 373, 68 Fed. 923.

Plaintiff is estopped to deny that the vessel was seaworthy.

Sassoon v. Western Assur. Co. [1912] A. C. 561, Ann. Cas. 1912D,

1037, 81 L. J. P. C. N. S. 231, 106 L. T. N. S. 929, 17 Com. Cas. 274, 49 Scot. L. R. 1045; Arnould, *Marine Ins.* 9th ed. 1017, § 610; *Weir v. Aberdeen*, 2 Barn. & Ald. 320, 106 Eng. Reprint, 383, 20 Revised Rep. 450; *Parfitt v. Thompson*, 13 Mees. & W. 392, 153 Eng. Reprint, 163, 14 L. J. Exch. N. S. 73; *Marine Fire Ins. Co. v. Burnett*, 29 Tex. 433; *Joyce, Ins.* 2d ed. § 2169, pp. 3706-3708; *Hoxie v. Home Ins. Co.* 32 Conn. 21, 85 Am. Dec. 240; *Frost v. Saratoga Mut. Ins. Co.* 5 Denio, 154, 49 Am. Dec. 234; *Agricultural Ins. Co. v. Anderson*, 120 Miss. 278, 82 So. 146; *Union Mut. L. Ins. Co. v. Wilkinson*, 13 Wall. 222, 20 L. ed. 617; *McMasters v. New York L. Ins. Co.* 183 U. S. 25, 46 L. ed. 64, 22 Sup. Ct. Rep. 10; *Vance, Ins. Hornbrook Series*, p. 381; 14 R. C. L. 1166, 1167, § 347; *Globe Nav. Co. v. Maryland Casualty Co.* 39 Wash. 299, 81 Pac. 826; *Givens v. Times-Republican Printing Co.* 52 C. C. A. 40, 114 Fed. 92; *Draper v. Oswego County, Fire Relief Asso.* 190 N. Y. 12, 82 N. E. 755.

The barge was injured by the perils of the sea when she sank in Houston ship channel.

Crescent Ins. Co. v. Vicksburg, Y. & S. River Packet Co. 69 Miss. 208, 30 Am. St. Rep. 537, 13 So. 254; *Arnould, Marine Ins.* 9th ed. 1914, p. 1016, § 812; *Rayner v. Godmond*, 5 Barn. & Ald. 225, 106 Eng. Reprint, 1175, 24 Revised Rep. 335; *Carruthers v. Sydebotham*, 4 Maule & S. 77, 105 Eng. Reprint, 764, 16 Revised Rep. 392; *Patrick v. Hallett*, 3 Johns. Cas. 76; *Garrigues v. Coxe*, 1 Binn. 592, 2 Am. Dec. 493; *Baker v. Manufacturers' Ins. Co.* 12 Gray, 603; *Starbuck v. Phenix Ins. Co.* 19 App. Div. 139, 45 N. Y. Supp. 995; *American-Hawaiian S. S. Co. v. Bennett & Goodall*, 123 C. C. A. 172, 207 Fed. 510; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co. (The Montana)* 129 U. S. 397, 32 L. ed. 788; 9 Sup. Ct. Rep. 469; *Union Ins. Co. v. Smith*, 124 U. S. 405, 31 L. ed. 497, 8 Sup. Ct. Rep. 534.

The Firemen's Fund Insurance Company is liable.

Bell v. Beveridge, 4 Dall. 271, 1 L. ed. 830; *Fireman's Fund Ins. Co. v. Globe Nav. Co.* 149 C. C. A. 614, 236 Fed. 618; *Titus v. Glens Falls Ins. Co.* 81 N. Y. 419; 2 *Arnould, Marine Ins.* 9th ed. 1487, § 1192; 26 Cyc. 702, 703; *Germania F. Ins. Co. v. Pitcher*, 160 Ind. 392, 64 N. E. 921, 66 N. E. 1003; *Roby v. American Cent. Ins. Co.* 120 N. Y. 518, 24 N. E. 810; *Pratt v.*

Dwelling House Mut. F. Ins. Co. 180 N. Y. 206, 29 N. E. 117; *Gordon v. Massachusetts F. & M. Ins. Co.* 2 Pick. 249; *Searles v. Western Assur. Co.* 88 Miss. 260, 117 Am. St. Rep. 741, 40 So. 866; *Great Western Ins. Co. v. Fogarty*, 19 Wall. 640, 22 L. ed. 216; *Wallerstein v. Columbian Ins. Co.* 44 N. Y. 204, 4 Am. Rep. 664.

Messrs. Dart, Kernan, & Dart and White & Ford, for appellee:

The "Bert" was not damaged by reason of any casualty or peril insured against while on her voyage in the Houston ship channel on July 7, 1917, but became disabled as a result of structural weakness.

Arnould, Marine Ins. 8th ed. § 783; *The G. R. Booth*, 171 U. S. 450, 460, 43 L. ed. 230, 240, 19 Sup. Ct. Rep. 9; *General Mut. Ins. Co. v. Sherwood*, 14 How. 352, 14 L. ed. 452; *The Gulnare*, 42 Fed. 861; *The Arctic Bird*, 109 Fed. 167; *The Folmina (Jahn v. The Folmina)*, 212 U. S. 354, 53 L. ed. 546, 29 Sup. Ct. Rep. 363, 15 Ann. Cas. 748; *Miller v. California Ins. Co.* 76 Cal. 145, 9 Am. St. Rep. 184, 18 Pac. 155; *Joyce, Ins.* § 2797; *Magnus v. Buttemer*, 11 C. B. 876, 138 Eng. Reprint, 720, 21 L. J. C. P. N. S. 119, 16 Jur. 480.

The insurers did not waive and are not estopped from pleading the breach of the warranty as a defense to this action.

Richelieu & O. Nav. Co. v. Boston Marine Ins. Co. 136 U. S. 408, 34 L. ed. 398, 10 Sup. Ct. Rep. 934; 4 *Joyce, Ins.* 2d ed. § 2151; *Hoxie v. Home Ins. Co.* 32 Conn. 21, 85 Am. Dec. 241; *Flemming v. Marine Ins. Co.* 33 Am. Dec. 37, and note, 4 Whart. 59; *Whitney v. Ocean Ins. Co.* 14 La. 485, 33 Am. Dec. 595; *Lapene v. Sun Mut. Ins. Co.* 56 Am. Dec. 671, note.

Neither the doctrine of estoppel nor that of waiver applies.

New York L. Ins. Co. v. Fletcher, 117 U. S. 519, 29 L. ed. 934, 6 Sup. Ct. Rep. 837; *Union Mut. L. Ins. Co. v. Wilkinson*, 13 Wall. 222, 20 L. ed. 617; 16 Cyc. 723; *Turnipseed v. Hudson*, 50 Misc. 436, 19 Am. Rep. 15; *Maloney v. Northwestern Masonic Aid Asso.* 8 App. Div. 575, 40 N. Y. Supp. 918; *Lehigh Valley R. Co. v. Providence Washington Ins. Co.* 97 C. C. A. 62, 172 Fed. 364; *Portland & F. R. Co. v. Spillman*, 23 Or. 587, 32 Pac. 689; *Bennecke v. Connecticut Mut. L. Ins. Co.* 105 U. S. 379, 26 L. ed. 992; *Barber v. Vinton*, 82 Vt. 327, 73 Atl. 881; *Enterprise Mfg. Co. v. Oppenheim*, 114 Md. 368,

38 L.R.A.(N.S.) 554, 79 Atl. 1007; Alexander v. North Carolina Sav. Bank & T. Co. 155 N. C. 124, 71 S. E. 69.

The law requires the assured to decide whether he will keep the vessel or abandon it; and when the assured elects to retain the vessel, he cannot, months afterwards, change his mind and abandon it.

5 Joyce, Ins. 2d ed. §§ 2951-2954; 2 Arnould, Marine Ins. 9th ed. § 1192.

Stevens, J., delivered the opinion of the court:

Appellant, a Mississippi corporation, had constructed and is the owner of a certain wooden barge "Bert." This barge was constructed at Gulfport, Mississippi, in 1916, and on August 2, 1916, appellee, the Fireman's Fund Insurance Company, a foreign corporation of San Francisco, California, executed a time policy of marine insurance whereby it undertook to insure the said Gulf Transportation Company for a period of one year, and in the sum of \$35,000, against any loss or damage to said barge caused by the perils of the sea as named and set forth in the written contract. The perils, accidents, or contingencies insured against are set forth in the following clause: "Touching the adventures and perils which the said insurance company is contented to bear and take upon itself in this voyage, they are of the seas, fire, barratry of the master (unless the insured be an owner of the vessel), and of the mariners and all other losses and misfortunes which have or shall have come to the damage of the said property or any part thereof, to which insurers are liable by the rules and customs of insurance in Boston, subject to the provisions or conditions referred to by clauses in this policy."

The barge was constructed for the transportation of oil, and soon after it was constructed, and the policy of insurance written, it was towed from Gulfport to Tampico, Mexico, where it was used in carrying oil from Tampico to Lobos island, making several trips. In February,

1917, it started upon a voyage from Tampico to New Orleans, Louisiana, in tow of a tug. On this voyage it encountered a storm which badly water-logged and otherwise damaged the barge to such an extent that it was compelled to put into the port of Galveston for repairs. Thereupon appellee company appointed one T. J. Anderson, a ship surveyor, to make a survey and report to the insurance company. Mr. A. E. Fant appears to be the principal owner, the active agent, and dominant influence in appellant company. Mr. Fant went to Galveston to look after the interest of his company and there received from Anderson, the surveyor, recommendations as to what should be done to repair the damage to the barge. Without referring to immaterial conflicts in the testimony, it may be said generally that these negotiations between Fant and Anderson led to the preparation by Mr. Anderson of plans and specifications for the necessary repairs, and that, based upon these specifications, Fant, acting for the Gulf Transportation Company, contracted with one Weaver to repair or rebuild the barge in accordance with Anderson's specifications. In the course of the work, Fant made payment to Weaver on the contract in accordance with the O.K. or recommendation of Mr. Anderson. The total expense of these repairs appears to have been \$20,504.54, and under the terms of the policy appellant claimed and recovered \$16,964.21 as the amount for which the Insurance Company was chargeable. Weaver completed his contract, and thereupon Anderson, at Mr. Fant's request, gave a certificate of seaworthiness, upon which Frank B. Hall & Company, the New York agents of appellee company, reinstated the policy for the full amount of \$35,000; the additional premium to be paid when appellee settled for the loss incurred as above stated. Mr. Fant thereupon leased the barge, as repaired, to Charles Clark & Company, which company

had the barge towed up Houston ship channel to Lynchburg, Texas, where she was loaded with oil and proceeded on a voyage down Houston ship channel to Port Arthur, Texas. After going a short distance, about thirty minutes after she started, and while in smooth and placid waters, she gradually began to settle, the oil began to seep out of the barge and make its appearance in the wake of the barge, and to prevent further sinking the captain "shoved her out of the channel in shallow water and anchored the barge and then proceeded to Galveston light to report." The captain left the barge anchored over night, and, returning the next morning, states: "She was resting on the bottom in about 12 feet of water." That he thereupon "pumped water out of her and she floated, and we got back in the channel and carried her back to Lynchburg."

The parties failed to adjust or agree upon the loss or amount properly chargeable under the terms of the policy, whereupon the Gulf Transportation Company instituted a suit on the policy in the circuit court of Harrison county for the recovery, first, of the sum of \$16,964.21 under the first loss; and for the sum of \$35,000, alleged total loss for the accident in Houston ship channel. It was the contention of the plaintiff that the barge opened up, became hogged, and so badly went to pieces in Houston ship channel that she is no longer fit for the purpose for which she was constructed, and that inasmuch as, under certain estimates obtained by appellant, it would require at least \$40,000 to make the barge seaworthy, she is now a total loss. The barge at the time this suit was instituted, and at the time it was tried in the lower court, was anchored at Galveston, and a photograph of the barge as she lies at anchor is made a part of the record. Before the case was tried in the circuit court, appellee filed its bill in the chancery court of Harrison county to enjoin the prosecution of the suit at law,

and seeking to transfer the issues to a court of equity for reasons unnecessary here to set out. To this bill appellant, as plaintiff in the action at law, filed an answer and cross bill, and consented to equity jurisdiction. The pleadings were thereupon drawn in accordance with the practice in chancery, and the cause submitted to the chancellor upon the pleadings and proof, and a decree rendered awarding to appellant the full amount of \$16,964.21, together with interest thereon, as the appropriate amount of loss incurred as a result of the storm and as a consequence of the repairs made by Weaver, but denied any recovery on account of the alleged second disaster in the Houston ship channel. Appellant company was satisfied with the recovery awarded for the first loss and elects to accept the amount found to be due for the first disaster, but prosecutes its appeal from that portion of the decree denying the claim of \$35,000 on the policy as restored for the loss alleged to have been sustained in the Houston ship channel. The only issue presented by this appeal, therefore, is the question whether or not appellant is entitled to recover damages claimed to have been sustained on the last voyage.

On the question of liability two main contentions are made by counsel for appellant: First, that the repairs at Galveston were under the direct supervision of T. J. Anderson, a surveyor for the insurance company; that Anderson, as a surveyor for appellee company, issued a certificate of seaworthiness; that, acting upon this certificate of seaworthiness the insurance company restored the policy for the full amount, and the barge started upon the journey which resulted in disaster; and that the insurance company is accordingly estopped from pleading or successfully maintaining that the barge was not seaworthy. Second, that the gradual settling or threatened sinking of the barge, which the captain prevented by anchoring in shallow water, was

a peril of the sea contemplated and covered by the terms of the policy. Much is said in the bill of complaint and the cross bill as to the authority of Mr. Anderson, the surveyor, and the alleged fraud of Mr. Fant in procuring the certificate of seaworthiness from Anderson; but the lengthy averments on these points have little or no bearing on the point discussed in this opinion. Complaint is likewise made that the barge went to pieces on July 7, 1917, and appellant did not give formal notice of abandonment until January 26, 1918. There was no cross appeal by appellee company from that portion of the decree awarding damages for the first loss. There is an express warranty of seaworthiness, and upon this written clause of the policy appellee relies. Appellee furthermore contends that the proximate cause of the damage alleged to have been sustained on July 7, 1917, was not one or more of the perils which appellee company agreed to bear. In reference to the proximate cause of the damage, there is evidence tending to show that the barge was structurally weak and not suited for the purposes for which she was built; that the new work done by Mr. Weaver, the contractor, in Galveston, gave way when the barge was loaded and started on the voyage down Houston ship channel, and that "she broke under the weight of her cargo;" that in Houston ship channel the water was smooth and placid; there was no collision, no obstructions, and no negligence on the part of the master of the crew; that the barge became hogged and water-logged as a result both of structural weakness and the fact that the repairs were not properly made; that there were not sufficient longitudinal timbers to make her strong enough for the Gulf of Mexico trade; that the longitudinal bulkheads were halved into one another, and as a consequence thereof they do not furnish the strength that they should; and, furthermore, that the contractor who originally constructed this barge

has, since this accident, placed more longitudinal timbers in barges subsequently constructed under similar plans to avert an accident of the kind here complained of. We shall quote certain portions of this testimony in disposing of the one and only law point which, in our judgment, is decisive of this appeal.

Our view of the law as applied to the particular facts leads to an affirmance of the decree complained of. Aside from any other question in the case, and especially the question of estoppel so much relied upon, any loss occasioned by the last voyage in the Houston ship channel was not proximately caused by any of the perils insured against. Mr. Arnould, the leading authority on marine insurance, observes: "Causa proxima non remota spectatur is a principle which is more rigorously applied to cases of marine insurance than to those of other liabilities."

Insurance—
marine—
peril of sea—
what is.

Arnould, Marine Ins. 9th ed. ¶ 788. The loss or damage sued for is not the result of any violent action of wind or waves, a collision, or obstruction. It affirmatively appears that the barge on its last journey encountered no storm or rough weather, struck no rock or other obstacle, but, on the contrary, while being towed in perfectly smooth and placid waters, and in thirty minutes after starting on the journey, broke under the weight of her own cargo. The testimony of Mr. Fant himself is conclusive on this point. He testifies that the original hogged and unfit condition of the barge was the result of the storm, which he thought could be remedied "by building the bulkheads back up and down her, and putting in sheathing on the inside, 4x12 inside the frame to hold her back in her shape;" that this, he thought, would make her strong enough to go to sea. But, continuing, he says: "That would hold her when she was light; but after putting in a cargo these 4x12's were so strained that they

gave way, I suppose, and, the fastenings being already once worked, she hogged again with the first cargo." Captain Larche, the United States inspector of hulls, among other things, says: "Since she went down the second time, I concluded that a great many of the fastenings had been broken and the new fastenings would not hold, and she broke under the weight of her cargo."

Mr. Grant, a marine surveyor employed by appellant company after this second disaster, held a regular survey of the barge, and solemnly makes a report in which he certifies: "After careful examination of the barge, I am of the opinion she is structurally weak and not suited for the purposes she was constructed for. . . . It was further ascertained that the longitudinal bulkheads were halved into one another. This method of construction practically takes all the strength out of the longitudinal bulkheads."

Mr. Walmsley, appellant's witness, says: "The port stern was broken or damaged to such an extent that it was lower than the starboard side, and that condition would show the barge is not staunch and strong enough for carrying bulk cargo. It might be termed hogged, but I call it broken. Hogged in the barge would mean a bend about amidship whether up or down, but being on the corners I would call it broken. The weight of the oil caused this. Her condition shows that the barge was not staunch and strong enough for the purpose of carrying oil, . . . and that condition existed before the oil was loaded in the barge."

Both witnesses Haden and Collin testified as to structural weakness and lack of sufficient longitudinal timbers.

It is elementary that we should not reverse the chancellor on the facts unless his findings are clearly or "manifestly" wrong. Appellant relies largely upon legal presumptions. It contends

the appellee's agent supervised the repairs at Galveston and admitted that the barge was seaworthy for the last voyage, and on that account is not only estopped from relying upon the breach of warranty pleaded in this case, but is furthermore estopped from insisting that the barge settled or began to sink as the result of unseaworthiness. It may be conceded that in proper cases the insurance company can admit the seaworthiness of a vessel and be estopped from relying upon a promissory warranty of seaworthiness. But, if it be granted that appellee admitted the seaworthiness of the vessel at the commencement of the voyage down Houston ship channel, it does not follow that appellant is thereby entitled to recover under the policy. The loss complained of must be one within the terms of the policy. Certainly if the vessel broke under the weight of her own cargo, without encountering any perils of the sea, there can be no recovery. The testimony in the case justifies such a conclusion of the chancellor; and so any presumptions or conjectures must yield to the proof. It is not a case where a vessel sinks without any known cause. Competent surveyors have examined the barge since the last mishap and give their testimony as experts on the real efficient cause of the accident. Under this view, it is unnecessary to indulge in any presumptions in favor of seaworthiness, or as to the burden of proof on this point. Aside from the usual presumptions so much discussed in the briefs, there was no extraordinary circumstance or weather, wind, rock, sand, or any other fortuitous event which contributed in whole or in part to the loss complained of. It is not a case of stranding, and therefore a loss under the policy.

Counsel for appellant cite Arnould on Marine Insurance, 9th ed. ¶ 694, to the point that, if the ship starts seaworthy, the underwriters are precluded of any defense based upon any alleged unseaworthy

Appeal—
reversal
on facts.

facts unless his
findings are clear-
ly or "manifestly"

condition. The author is there discussing cases in which the underwriters on the face of the policy "allowed the vessel to be seaworthy for the voyage," and the effect of such a provision on a loss "caused remotely by the ship having become unseaworthy, but proximately by a peril insured against." Counsel have cited no case which does not require the loss to be "proximately caused" by one of the perils insured against. Surely the contract must govern the rights and obligations of the parties, and, as stated by counsel for appellee, "an insurance policy is not a promissory note." It is certainly not our purpose to define the term "perils of the sea," or to indicate all the losses comprehended by a policy of marine insurance. Our duty in the case at bar is to determine whether the misfortune is an extraordinary or fortuitous accident against which indemnity is given, or an ordinary event which is not contemplated by the policy. Mr. Arnould, in ¶ 812, quotes from Lord Herschell as follows: "There must be some casualty, something which could not be foreseen as one of the necessary incidents of the adventure. The purpose of the policy is to secure an indemnity against accidents which may happen, not against events which must happen."

And, further: "Rule 7 of the Rules for Construction of Policy in the First Schedule of the Marine Insurance Act, 1906, declares that the term "perils of the seas" refers only to fortuitous accidents or casualties of the seas. It does not include the ordinary action of the winds and waves."

In 19 Am. & Eng. Enc. of Law, 2d ed. 1023, it is said: "In considering what is and what is not a peril of the sea the question is whether the loss arose from injury from without or from weakness within."

In the case of *Sassoon v. Western Assur. Co.* [1912] A. C. 561, Ann. Cas. 1912D, 1087, it appears that the leak through which sea water percolated was wholly due to the

rotten hulk. Lord Mersey observes: "There was no weather, nor any other fortuitous circumstance, contributing to the incursion of the water; the water merely gravitated by its own weight through the opening in the decayed wood and so damaged the opium. It would be an abuse of language to describe this as a loss due to perils of the sea."

The contention that the underwriters are estopped to deny that the barge was seaworthy presents a more debatable question, and one which, under our view of the vital and controlling issue, it is unnecessary to decide. In the opinion of the writer there is much difficulty in the way of applying the doctrine of estoppel in this case. It is in evidence that not only Anderson, but that Captian Larche approved the original specifications for the repairs, and that both Anderson and Fant believed the barge would be seaworthy when the contractor, Weaver, had done the work in accordance with these specifications. It affirmatively appears that both parties to the contract thought the barge would be seaworthy, and therefore it is not a case where the underwriters, with knowledge of the unseaworthy condition of the vessel, nevertheless admit that the vessel is seaworthy. How can appellee company waive a condition which it did not know to exist? Mr. Arnould, in ¶ 688, observes: "Whether the assured were ignorant of the unseaworthiness of the ship or not also makes no difference; if the ship was not, in fact, seaworthy at the outset of the adventure, either in the degree commensurate with her then risk, or for the voyage, as the case may be, that state of things never existed which was the foundation for the underwriter's promise, and he subsequently can never be bound thereby."

But, as stated, it is unnecessary to decide whether there was a breach of the warranty in this case. It is significant that the very contractor who did the work was not

used as a witness by either party, and there is evidence which tends to show that the repairs which Mr. Weaver did were not sufficiently substantial, and that the money paid to Weaver is a clear loss.

This, under the issues, is appellant's misfortune.

On the law and the facts the decree of the learned chancellor must be affirmed.

Petition for rehearing denied.

ANNOTATION.

Inherent defect in vessel as affecting question whether loss is due to "perils of the sea" within policy of marine insurance.

Although the question whether particular losses were caused by a "peril of the sea" has frequently been decided, and there are many cases involving a warranty of seaworthiness in a policy of marine insurance (see 14 R. C. L. pp. 1043, 1203), there are few decisions which determine the exact point decided in the reported case (*GULF TRANSP. CO. v. FIREMEN'S FUND INS. CO.* ante, 1307), as to whether the action of the elements on a vessel which is inherently unseaworthy constitutes a "peril of the sea." These decisions, however, all confirm the rule announced in that case, that a loss directly due to an inherent defect or unseaworthiness of a vessel is not within the meaning of the term "perils of the sea," as used in a policy of marine insurance.

Thus, in *Charles Clarke & Co. v. Mannheim Ins. Co.* (1919) — *Tex.* —, 210 S. W. 523, reversing (1913) — *Tex. Civ. App.* —, 157 S. W. 291, it was said: "Loss or damage occasioned by natural deterioration or decay, or by ordinary wear and tear of the vessel, are not within the term 'perils of the sea.' . . . Whether expressed in the contract of insurance or carriage or not, there is an implied warranty that the vessel is seaworthy; that is, that she is so constructed, manned, supplied, equipped, and in such condition of repair, as to be able reasonably to perform the service in which she is engaged; from which it follows that any loss proximately caused by unseaworthiness of the vessel at the time of leaving port is not a loss by peril of the sea."

So it was held in *Thompson v. Hopper* (1856) 6 El. & Bl. 172, 119 Eng.

Reprint, 828, that a plea alleging that the plaintiffs sent the ship to sea in a state of unseaworthiness "at a time when it was dangerous for the ship to go to sea in the state and condition in which she then was;" and that they "wrongfully and improperly caused and permitted the said ship to be and remain on the high seas near to the seashore, for a great length of time, in the state and condition aforesaid," was a good defense to an action on a policy of marine insurance for loss occasioned by "perils of the sea."

In *West India P. Teleg. Co. v. Home & C. Marine Ins. Co.* (1880) L. R. 6 Q. B. Div. (Eng.) 57, 50 L. J. Q. B. N. 41, 43 L. T. N. S. 420, 29 Week. Rep. 92. 4 Asp. Mar. L. Cas. 341, it was held that a loss occasioned by the bursting of a boiler was a peril not within the general term "perils of the sea."

See, to the same effect, *Miller v. California Ins. Co.* (1888) 76 Cal. 145, 9 Am. St. Rep. 184, 18 Pac. 155.

In *Sassoon v. Western Assur. Co.* [1912] A. C. (Eng.) 561, 81 L. J. P. C. N. S. 231, 106 L. T. N. S. 929, 17 Com. Cas. 274, 49 Scot. L. R. 1045, Ann. Cas. 1912D, 1037, it was held that where a cargo stored in a wooden hulk moored in a river was damaged by water percolating through a leak caused by the rotten condition of the hulk, the damage was not caused by a peril of the sea, within the meaning of a policy of marine insurance, but was caused by the unseaworthiness of the hulk, although the damage was proximately due to sea water.

In *The Gulnare* (1890) 42 Fed. 861, a suit on a policy of marine insurance, the claim of the petitioner was re-

jected, the court holding that since the evidence disclosed that the vessel, almost immediately after starting on a return voyage, sprang a leak, she was unseaworthy, and the loss was not due to a peril of the sea. W. F. F.

STATE OF MISSOURI EX REL. B. F. BUSH, Receiver of St. Louis, Iron Mountain, & Southern Railway Company,

v.

JOHN T. STURGIS et al., Judges.

Missouri Supreme Court (Division No. 2)—March 13, 1920.

(— Mo. —, 221 S. W. 91.)

Railroad — injury on highway crossing — trespass in traveling tracks.

1. One injured by a railroad train while on a public highway crossing is not a trespasser, whether he reached the crossing by traveling the public highway or the railroad tracks.

[See note on this question beginning on page 1322.]

Appeal — review of decision of court of appeals — scope.

2. Upon certiorari to review a decision of the court of appeals because it contravenes decisions of the supreme court, the power of the latter court is limited to determining whether or not the decision of the court of appeals discloses such conflict.

— difference in theory of case.

3. A mere difference in findings as to the conditions under which an accident arose between the trial and appellate courts does not warrant a quashing of the decision of the latter court on the ground of difference in theory of the case, unless the difference is such as to constitute an essential factor in determining the result.

Evidence — burden of showing liability of defendant.

4. If an injury may result from one of two causes, for one of which, and not for the other, the defendant is liable, plaintiff must show with reasonable certainty that the cause for which defendant was liable produced the result which may have resulted.

Appeal — theory of case — difference in findings.

5. The manner in which one injured

by a train on a public highway crossing reached such crossing, whether by the highway or traveling the railroad tracks, is immaterial, and therefore not an issue in the case, so as to constitute a difference in findings upon it between the trial and appellate court a difference in theory.

— law of case — ruling on former appeal.

6. The rule that a ruling on first appeal is the law of the case on a second appeal is apposite only when the former ruling is determinative of some issue in the case.

— difference in facts.

7. The doctrine of law of the case cannot be invoked where the facts shown on the second trial are different from those shown on the first one.

[See 2 R. C. L. 224, 225.]

Pleadings — reliance on facts stated in reply.

8. A decision cannot be reversed because based upon matters stated in the reply instead of in the petition, if the reply was given no other office by the court than to inform defendant of the facts which plaintiff intended to prove in rebuttal of the plea of contributory negligence.

PETITION for a writ of certiorari to review the record of the Springfield Court of Appeals, in a case against relator, which affirmed a judgment of the Circuit Court for Christian County (Stewart, J.) in favor of plaintiff in an action brought to recover damages for the alleged negligent killing of her husband. *Writ quashed.*

The facts are stated in the opinion of the court.

Messrs. J. F. Green and Barbour & McDavid, for relator:

In disposing of the case on appeal, respondents have done so on a theory not presented below, and thus have affirmed the cause on issues never presented to the trial court or jury by pleadings or instructions; which is not permissible.

Brunswick v. Standard Acci. Ins. Co. — Mo. —, 7 A.L.R. 1213, 213 S. W. 46; Degonia v. St. Louis, I. M. & S. R. Co. 224 Mo. 588, 123 S. W. 807; Chinn v. Naylor, 182 Mo. 595, 81 S. W. 1109; Deschner v. St. Louis & M. River R. Co. 200 Mo. 332, 98 S. W. 737; Mirrieles v. Wabash R. Co. 163 Mo. 486, 63 S. W. 718; Meyer Bros. Drug Co. v. Bybee, 179 Mo. 369, 78 S. W. 579; Henry County v. Citizens Bank, 208 Mo. 226, 14 L.R.A. (N.S.) 1052, 106 S. W. 622.

A plaintiff must recover, if at all, on the matters alleged in the petition, and may not take out such petition by matters brought into the case by reply.

Mathieson v. St. Louis & S. F. R. Co. 219 Mo. 552, 118 S. W. 9; Milliken v. Thyson Commission Co. 202 Mo. 654, 100 S. W. 604; Moss v. Fitch, 212 Mo. 502, 126 Am. St. Rep. 568, 111 S. W. 475; Hill v. Rich Hill Coal Min. Co. 119 Mo. 30, 24 S. W. 223.

Crossing signals are for the benefit only of travelers on the public highway, and not for trespassers, and trespassers may not expect or depend upon signals, and they may not expect or depend upon headlights.

Degonia v. St. Louis, I. M. & S. R. Co. 224 Mo. 592, 123 S. W. 807; Burger v. Missouri P. R. Co. 112 Mo. 246, 34 Am. St. Rep. 379, 20 S. W. 439; Frye v. St. Louis, I. M. & S. R. Co. 200 Mo. 407, 8 L.R.A. (N.S.) 1069, 98 S. W. 566; Bell v. Hannibal & St. J. R. Co. 72 Mo. 58; Maxey v. Missouri P. R. Co. 113 Mo. 11, 20 S. W. 654; Gurley v. Missouri P. R. Co. 104 Mo. 223, 16 S. W. 11; Evans v. Atlantic & P. R. Co. 62 Mo. 57; Ayers v. Wabash R. Co. 190 Mo. 237, 88 S. W. 608.

Where a case has been tried and appealed, the opinion rendered by the appellate court on such an appeal becomes the law of that case for any subsequent trial, and is binding on the trial court, the parties in interest, and on the appellate court on any subsequent appeal.

May v. Crawford, 150 Mo. 524, 51 S. W. 693; Benton v. St. Louis, 248 Mo. 102, 154 S. W. 473; Gracey v. St. Louis, 221 Mo. 5, 119 S. W. 949; Armor v.

Frey, 253 Mo. 465, 161 S. W. 829; Southern Illinois & M. Bridge Co. v. Stone, 194 Mo. 184, 92 S. W. 475.

Messrs. George Thornsberry, Hamlin & Hamlin, and Collins, Holladay, & Stough, for respondents:

Deceased had a right to assume that defendant would give statutory signals and warn him of the approaching train.

Kenney v. Hannibal & St. J. R. Co. 105 Mo. 270, 15 S. W. 983, 16 S. W. 837; Crumpley v. Hannibal & St. J. R. Co. 111 Mo. 158, 19 S. W. 820.

The failure to ring the bell or sound the whistle makes a prima facie case for a jury.

Byars v. Wabash R. Co. 161 Mo. App. 702, 141 S. W. 926; Kenney v. Hannibal & St. J. R. Co. 105 Mo. 270, 15 S. W. 983, 16 S. W. 837; King v. Missouri P. R. Co. 98 Mo. 235, 11 S. W. 563; McNulty v. St. Louis & S. F. R. Co. 203 Mo. 475, 101 S. W. 1082.

There need be no proof that the failure to ring the bell or sound the whistle caused the injury. The law supplies that proof, and casts the burden upon the defendant to show that the failure to ring the bell or sound the whistle was not the cause of the injury.

McNulty v. St. Louis & S. F. R. Co. 203 Mo. 477, 101 S. W. 1082; Huckhold v. St. Louis, I. M. & S. R. Co. 90 Mo. 554, 2 S. W. 794; Crumpley v. Hannibal & St. J. R. Co. 111 Mo. 162, 19 S. W. 820; Lane v. Missouri P. R. Co. 132 Mo. 4, 33 S. W. 645, 1128; Barr v. Hannibal & St. J. R. Co. 30 Mo. App. 243; Kerr v. Bush, 198 Mo. App. 607, 200 S. W. 672.

The law presumes that deceased exercised due care for his own safety.

Stotler v. Chicago & A. R. Co. 200 Mo. 146, 98 S. W. 509; Byars v. Wabash R. Co. 161 Mo. App. 702, 141 S. W. 926; Kerr v. Bush, 198 Mo. App. 607, 200 S. W. 672.

Whether or not deceased should have stopped in approaching the crossing, in addition to looking and listening, was a question for the jury.

Byars v. Wabash R. Co. 161 Mo. App. 708, 141 S. W. 926; Mayes v. St. Louis, K. & N. W. R. Co. 71 Mo. App. 140; Frank v. St. Louis Transit Co. 99 Mo. App. 323, 73 S. W. 239.

Even if plaintiff had no positive evidence that no bell was rung or whistle sounded, and her sole evidence on this score was negative evidence, as against positive evidence on behalf of defendant, it would be for the jury to say whether it would take the negative

evidence in preference to positive evidence.

Johnson v. Springfield Traction Co. 176 Mo. App. 191, 161 S. W. 1193; *State ex rel. Essex v. Kansas City, Ft. S. & M. R. Co.* 70 Mo. App. 641; *Milligan v. Chicago, B. & Q. R. Co.* 79 Mo. App. 393.

Whether the deceased negligently caused his death was solely a question for the jury.

Lagarce v. Missouri P. R. Co. 183 Mo. App. 70, 166 S. W. 1063; *Goff v. St. Louis Transit Co.* 199 Mo. 694, 9 L.R.A. (N.S.) 244, 98 S. W. 49.

Under the facts in this case, if plaintiff is entitled to anything, she is entitled to the full amount awarded her; and as to the amount of the verdict under this record, defendant is not at all injured.

Hufford v. Metropolitan Street R. Co. 130 Mo. App. 644, 109 S. W. 1062; *Parman v. Kansas City*, 105 Mo. App. 691, 78 S. W. 1046; *Wheeler v. Bowles*, 163 Mo. 398, 63 S. W. 675; *Haymaker v. Adams*, 61 Mo. App. 581; *Browning v. Wabash Western R. Co.* 124 Mo. 55, 27 S. W. 644; *Waddell v. Metropolitan Street R. Co.* 213 Mo. 8, 111 S. W. 542; *Minter v. Bradstreet Co.* 174 Mo. 491, 78 S. W. 668; *Smith v. Fordyce*, 190 Mo. 32, 88 S. W. 679.

The defendant should, if he desired, have asked for more definite and explicit instructions pointing out the proper element of damages, and excluding any improper element.

Winston v. Lusk, 186 Mo. App. 381, 172 S. W. 76; *Hawkins v. St. Louis & S. F. R. Co.* 189 Mo. App. 201, 174 S. W. 129; *O'Malley v. Musick*, 191 Mo. App. 405, 177 S. W. 749; *Rickards v. Kansas City*, 181 Mo. App. 338, 168 S. W. 845; *Nelson v. United R. Co.* 176 Mo. App. 429, 158 S. W. 446; *State ex rel. United R. Co. v. Reynolds*, 257 Mo. 38, 165 S. W. 729; *Lathrop v. Quincy, O. & K. C. R. Co.* 135 Mo. App. 16, 115 S. W. 493; *Gummerson v. Kansas City Bolt & Nut Co.* 185 Mo. App. 16, 171 S. W. 959, 8 N. C. C. A. 907.

The credibility of its eleventh-hour witness, Levert and Williams, was a question for the jury; and what the jury "bound" in the trial court will not be "loosed" in this court.

Kerr v. Bush, 198 Mo. App. 610, 200 S. W. 672; 16 Cyc. 1051; *United States v. Ross*, 92 U. S. 283, 23 L. ed. 707; *Glick v. Kansas City, Ft. S. & M. R. Co.* 57 Mo. App. 104; 1 Rice, Ev. p. 53, § 34; *Lawson*, Presumptive Ev. p.

569, Rule 118; *Bird v. Sellers*, 113 Mo. 580, 21 S. W. 91; *Philadelphia City Pass. R. Co. v. Henrice*, 92 Pa. 431, 37 Am. Rep. 699.

Where the facts bearing on the issue are disputed, or are undisputed, but admit of different constructions and inferences (presumptions), it must be left to the jury to decide.

Powers v. St. Louis Transit Co. 202 Mo. 280, 100 S. W. 655; *Berry v. Missouri P. R. Co.* 124 Mo. 223, 25 S. W. 229; *Eckhard v. St. Louis Transit Co.* 190 Mo. 593, 89 S. W. 602; *Marshall v. Schricker*, 63 Mo. 308; *Ostertag v. Pacific R. Co.* 64 Mo. 421; *Mauerman v. Siemerts*, 71 Mo. 101; *Charles v. Patch*, 87 Mo. 450; *Tabler v. Hannibal & St. J. R. Co.* 93 Mo. 79, 5 S. W. 810; *Fletcher v. Atlantic & P. R. Co.* 64 Mo. 484; *Huhn v. Missouri P. R. Co.* 92 Mo. 440, 4 S. W. 937; *Roddy v. Missouri P. R. Co.* 104 Mo. 234, 12 L.R.A. 746, 24 Am. St. Rep. 333, 15 S. W. 1112; *Bell v. Hannibal & St. J. R. Co.* 72 Mo. 50; *Nagel v. Missouri P. R. Co.* 75 Mo. 653, 42 Am. Rep. 418; *Petty v. Hannibal & St. J. R. Co.* 88 Mo. 306.

Walker, J., delivered the opinion of the court:

Certiorari to the Springfield court of appeals to review the record of that court in the case of *Susie E. Kerr* against *Bush*, receiver of the *St. Louis, Iron Mountain, & Southern Railway Company*, for damages for the killing of her husband through the negligence of that company. Upon a trial before a jury a verdict was rendered in her favor in the sum of \$3,500. From this finding an appeal was perfected to the Springfield court of appeals, which affirmed the judgment of the trial court (— Mo. App. —, 215 S. W. 393). We are asked to quash the record of the court of appeals on the ground that its ruling contravenes certain decisions of this court.

I. The limit of our review is the opinion of the court of appeals. If it does not disclose a conflict with the former rulings of this court, then

Appeal—review of decision of court of appeals—scope.

our power of superintendence is at an end. *State ex rel. United R. Co. v. Reynolds*, 257 Mo. 19, 165 S. W. 729; *State ex rel. Dunham v. El-*

lison, — Mo. —, 213 S. W. 459; State ex rel. Commonwealth Trust Co. v. Reynolds, — Mo. —, 213 S. W. 804.

II. The first contention as to a contrariety of opinion is that the court of appeals disposed of the case upon a different theory from that upon which it was tried below. As to the theory at the trial, the opinion states that "the negligence, alleged in the petition, is the failure of defendant to give the statutory signal by bell or whistle on the train in question approaching and passing over this public road crossing. The petition alleges, and the jury found, that [the deceased] reached this crossing by traveling the public highway. In plaintiff's reply, primarily to meet the defense of contributory negligence in that [the deceased] went on the railroad track in front of the moving train heedlessly and without looking or listening, it is alleged that the night was very dark, the engine without a headlight and pushing a car in front, and that no signal whatever was given for this crossing."

The court, after reviewing the testimony at length, states "that there is neither any presumption nor any evidence on which to base a finding that deceased approached the crossing where he was killed along the dirt road, and not along the railroad."

Following this conclusion, the court adds that "if . . . defendant's liability is to rest on the finding that the deceased approached this crossing along the public road, then to sustain such verdict would be violative of the rule that, where the injury may with equal or greater probability have resulted from a different cause for which the defendant is not liable, then the verdict cannot stand; for it devolves on the plaintiff to prove with reasonable certainty that the cause for which defendant is liable produced the result, and this cannot be left to conjecture [citing cases]."

It is evident, therefore, that the

specific nature of relator's contention as to a variance between the theory of the trial court and the court of appeals consists in their respective findings as to the manner in which the deceased approached the crossing. This difference, to avail the defendant, must be of such a nature as to constitute an essential factor in determining defendant's liability. A mere difference in findings not so determinative will ^{—difference in theory of case.} not authorize a ruling adverse to the judgment. This in no wise militates against the well-established rule that if an injury may have resulted from one of two ^{Evidence—burden of showing liability of defendant.} causes, for one of which, and not the

other, the defendant is liable, the plaintiff must show with reasonable certainty that the cause for which the defendant is liable produced the result, and if the evidence leaves it to conjecture, the defendant is not liable.

To this effect, and no further, is our ruling in *Degonia v. St. Louis, I. M. & S. R. Co.* 224 Mo. loc. cit. 588, 123 S. W. 807, in which we held that, although there was a good case on the facts, it was not submitted upon a proper theory of the law, and hence the judgment could not be sustained.

In *Henry County v. Citizens Bank*, 208 Mo. loc. cit. 225, 14 L.R.A. (N.S.) 1052, 106 S. W. 622, we held that a suit could not be brought upon one cause of action and a recovery had upon another, and that a case could not be tried upon one theory and a recovery had upon another on appeal.

In *Deschner v. St. Louis & M. River R. Co.* 200 Mo. loc. cit. 332, 98 S. W. 737, we held that, where a case was tried and instructions on both sides proceeded on the theory that it was the motorman's duty to see and warn the injured party, the case will be reviewed upon that theory in the appellate court.

In *McGrath v. St. Louis Transit Co.* 197 Mo. loc. cit. 105, 94 S. W.

872, specific acts of negligence having been pleaded, a recovery, if had at all, must be upon the acts as pleaded.

In *Chinn v. Naylor*, 182 Mo. loc. cit. 594, 81 S. W. 1109, where the case was tried below upon the theory that the land in controversy was an accretion to the shore land of plaintiff, the latter would not be heard upon appeal upon a different theory.

In *Meyer Bros. Drug Co. v. Bybee*, 179 Mo. loc. cit. 369, 78 S. W. 579, we held that litigants will not be permitted to contest a proceeding upon one theory, and, on appeal, shift their position by demanding formal proof of facts practically admitted in the court below.

In *Mirrielees v. Wabash R. Co.* 163 Mo. loc. cit. 486, 63 S. W. 718, where both parties tried the case upon the theory that the defendant was bound to exercise ordinary care to prevent injury to a trespasser after it knew of his peril, we are relieved upon a review of the case here from considering whether a carrier's liability is limited to wilful or wanton injuries, or extends to injuries caused by want of ordinary care.

From these cases, relied upon by relator, and many others which might be cited to the same effect, it appears that the difference in theory between the trial of a case and its review and disposition upon appeal must, to authorize the invoking of the rule, involve a matter essential to the rendition of the judgment. The correctness of this conclusion is rendered more apparent when we consider the province of an appellate court, which is that of review. Such review is for the purpose of ascertaining if the real matters in issue were tried without error. Other than this the court has no concern, because the trial court's ruling upon an immaterial matter is not error. *Lesser Cotton Co. v. St. Louis, I. M. & S. R. Co.* 52 C. C. A. 95, 114 Fed. 133, 11 Am. Neg. Rep. 523; *Drew v. School Twp.* 146 Iowa, 721, 125 N. W. 815. Further than

this, the appellate court, having no original jurisdiction, cannot, on appeal, consider a matter not submitted below. *Woods v. Bryan*, 41 S. C. 74, 44 Am. St. Rep. 688, 19 S. E. 218. An illuminating dissenting opinion of Wheeler, J., in *Coles v. Kelsey*, 2 Tex. 541, 47 Am. Dec. 661, is apposite in this connection. It is to this effect: If an objection not raised in the court below could be considered in the appellate court, there would be no assurance there would ever be an end to the litigation; for, should the judgment be reversed on such ground and the cause be again brought before the appellate court, some new objection, not before taken, would require the judgment to be reversed and the cause remanded, and the same process might be continued indefinitely. See also 3 C. J. p. 691, § 580, and notes, and 4 C. J. p. 661, § 2556, and notes.

It remains to be determined, therefore, whether the diverse findings of the trial court and the court of appeals in regard to the manner in which the deceased approached the crossing are of such a nature as to bring the case within the rule of a difference in theory between the trial and the appellate court. The court of appeals holds that if defendant's liability is to rest upon the finding of the trial court in this regard, the verdict cannot stand. Considered alone, this is an unqualified holding of nonliability under the facts stated, but, construed with reference to the nature of the facts found, and in connection with the court's subsequent language, and its disposition of the case upon issues essential to a recovery, it cannot be held to be a determinative ruling upon a matter at issue.

While it is true, as stated by the court of appeals, that "it devolves upon a plaintiff to prove with reasonable certainty that the cause for which a defendant is liable produced the result," the manner of the approach of the deceased to the crossing had no relation to or connection with the cause which resulted in his

death. This cause was the manner in which the defendant's train approached the crossing. The duty of the defendant was to give some effective warning to free itself from a charge of negligence, taking into consideration the physical location, at the time, of the deceased, and his status towards the defendant, due to said location. The evidence discloses that he was on the public crossing when struck by defendant's train. Thus located, he was

Railroad—
injury on
highway cross-
ing—trespass in
traveling tracks.

not a trespasser, and this is true so far as concerns the liability of the defendant, regardless of the manner in which the deceased approached the crossing. This conclusion accords with reason, and is in harmony with our ruling in the recent case of *Torrance v. Pryor*, — Mo. —, 210 S. W. 430, which was followed by the court of appeals. Graves, J., speaking for the court in that case, said in effect that "whilst in a public highway one cannot be a trespasser, an intention to shortly leave the highway (along the railroad) would not change a person's right to be in the street, nor make her a trespasser upon the railroad property in the street."

This case fixes the status of the person injured as a nontrespasser, and as a consequence defines the conditions of defendant's liability. In so holding, the immateriality of the fact as to the manner in which the injured party reached the highway is clearly indicated. Being immaterial, it is not an issue. Not being an issue, it cannot be held to constitute a theory upon which the case was tried, and hence the relator's contention must be overruled.

III. No discussion is required to demonstrate the inapplicability, under the facts in this case, of the rule, sought to be invoked by relator, that crossing signals are for the benefit of travelers on the public highway, and not for trespassers. We have shown that the deceased was not a

trespasser, and hence not subject to the rule. The numerous cases cited, therefore, in support of this rule, with the correctness of which under a proper state of facts we have no controversy, are not in contravention of the ruling of the court of appeals in this case, and their citation is futile to affect its judgment.

IV. On a former appeal of this case, 198 Mo. App. loc. cit. 615, 200 S. W. 672, the court of appeals held that, if the deceased came upon the crossing by walking along the railroad track, instead of the public road, he was not entitled to recover on the negligence alleged as though his approach was by such public road. In the present opinion the court held that, although the deceased did approach the crossing by walking along the railroad track, the defendant was nevertheless liable. This, relator contends, is error under the rule that the former opinion, absent any new evidence, became the law upon a subsequent appeal. This rule becomes apposite

—law of case—
ruling on
former appeal.

only when the ruling in the former opinion is determinative of some issue in the case. We have shown that the finding as to the manner of the approach of the deceased to the crossing was not to be so classified. Decisive of nothing, it could not, therefore, then or thereafter, become the law of the case. This conclusion aside, however, there is in this case an equally potent reason why the rule cannot under its express limitations, be made applicable. The facts as to the manner in which the deceased approached the crossing are not the same in the instant as in the former case. Note the language pertinent hereto of the court of appeals in its opinion here under review (— Mo. App. —, 215 S. W. loc. cit. 395): "On this point the evidence is not the same as at the previous trial. On the other appeal we said, and such was then the evidence, that no one saw the deceased after he left the town of Galena, going eastward toward his home, and no one testi-

fied as to whether, on leaving the town and crossing James river on the bridge, he chose to follow the public road or to follow a much-used path onto and along the railroad track to the fatal crossing. Considering the muddy condition of the dirt road and the dangers of going along the railroad, one could 'guess' at which he did. But on this trial the defendant produced two witnesses . . . who each testified that they saw the deceased going toward his home along the railroad track on the evening he was killed. Neither had testified at the other trial, and each said he had not told anyone of seeing the deceased going along the track till just before this trial. . . . According to the positive evidence of these two witnesses, the deceased went onto the railroad after crossing the bridge just east of Galena, and walked along said track toward his home."

This excerpt is sufficient to show that in this regard there was a material difference in the testimony at the two trials. Under such circumstances the doctrine as to the binding force of a former ruling cannot be effectively invoked. A review of the cases on this subject is confirmatory of this conclusion: *State v. Powell*, 266 Mo. loc. cit. 106, 180 S. W. 851; *Armor v. Frey*, 253 Mo. loc. cit. 465, 161 S. W. 829; *Curtis v. Sexton*, 252 Mo. loc. cit. 248, 159 S. W. 512; *Benton v. St. Louis*, 248 Mo. 102, 154 S. W. 473; *Gracey v. St. Louis*, 221 Mo. loc. cit. 5, 119 S. W. 949; *Southern Illinois & M. Bridge Co. v. Stone*, 194 Mo. 184, 92 S. W. 475; *May v. Crawford*, 150 Mo. loc. cit. 524, 51 S. W. 693; *Keeton v. National Union*, — Mo. App. —, 182 S. W. 798.

—difference
in facts.

V. Relator further contends that the opinion affirms the judgment of the trial court upon issues and matters contained only in the reply, and not in the petition, in contravention of the rule that a plaintiff must recover, if at all, on the matters alleged in the petition, and not eke out the latter by matters brought into

the case by the reply. This contention, inadvertently, of course, does not correctly state the court of appeals findings. After stating the substance of the pleadings, which we have set out in *hæc verba* in paragraph II. of this opinion, the court indicates the manner in which it construed the reply in so far as the latter affected the disposition of the case, in that its effect and purpose was "primarily to meet the defense of contributory negligence set up in the defendant's answer." This was in harmony with the theory upon which the case was tried, in which the instructions limited the plaintiff's right of recovery to the grounds of negligence stated in the petition; the language of the opinion being that:

"On an examination of the entire record, we find that the case was actually tried and determined on this theory. The real issue presented and tried was whether any signals were given or any effective warning sound made by this train in approaching and passing this crossing, and whether any conspicuous light was being displayed; the dark and stormy condition being practically conceded. The evidence is such that the jury must have found, either that the full statutory signals were given by this train, or that no warning signals whatever were given; that either the headlight was burning as usual, or that no light was displayed. No middle ground was presented. Under the evidence and instructions, the jury could have acquitted the deceased of contributory negligence only by finding that this train approached this crossing and struck deceased thereon without any sufficient warning, by sound or whistle, to apprise him, in the exercise of due care, of its approach.

"Such, also, are the issues presented by the pleadings taken as a whole; for, while the petition counts on the failure to give the statutory signals, the reply is: 'The plaintiff for her reply denies that her husband could have seen or heard the train prior to going upon the track,

because the night was very dark and the engine drawing said train was running without a light upon the front end, and that a car was attached to the front end of said engine, and was being pushed in front of said engine; that no signal whatever was given; no light upon said engine. Therefore, owing to the conditions aforesaid, her husband had no warning of the approach of said train.'

"The defendant was therefore fully informed of the exact facts which plaintiff intended to prove, and which plaintiff's evidence, as believed by the jury, did prove. It is also true that, while plaintiff's instructions predicate liability on failure to give the arbitrary statutory signals by bell or whistle on approaching this crossing, yet to so find under the evidence necessarily was to find that no signals or warning whatever were given; and by defendant's instruction on contributory negligence the finding must have been for defendant if the deceased could, by using due care in looking and listening, have discovered the coming train in time to have avoided being struck by it."

That the reply, therefore, either at the trial or upon appeal, had or was attempted to be given any other office than to inform the defendant of the facts which plaintiff intended

Pleadings—
reliance on
facts stated
in reply.

to prove in rebuttal of the plea of contributory negligence, is not apparent from the record.

The plaintiff's right of recovery having been limited to the cause of action stated in her petition, and the triers of the facts having, under proper instructions, so found, there is no substantial merit in this contention. As a consequence the following cases: *Mathieson v. St. Louis & S. F. R. Co.* 219 Mo. loc. cit. 552, 118 S. W. 9; *Milliken v. Thyson Commission Co.* 202 Mo. loc. cit. 654, 100 S. W. 604; *Moss v. Fitch.* 212 Mo. loc. cit. 503, 126 Am. St. Rep. 568, 111 S. W. 475, and case reviewed therein; *Hill v. Rich Hill Coal Co.* 119 Mo. 9, 24 S. W. 223; and *Rhodes v. Holladay-Klotz Land & Lumber Co.* 105 Mo. App. 279, 79 S. W. 1145, which announce the doctrine, well established in this jurisdiction, that a plaintiff must recover, if at all, upon the cause of action stated in the petition, and not upon one stated in the reply, are inapplicable.

Finding no contravention in the opinion of the Court of Appeals with the last previous rulings of this court, there exists no ground for our interference with the judgment, and our writ is therefore quashed.

All concur.

Petition for rehearing denied March 26, 1920.

ANNOTATION.

Status of one at railroad crossing who has walked or intends to walk along tracks.

General rule.

Railroad companies have a right to a clear track in the prosecution of their lawful business, and where a railroad right of way is the exclusive property of the railroad company, no person without authority has a right to be on the track, except at a crossing, or to use it for any purpose; and one so doing is usually considered to be a trespasser, and as such entitled only to such protection as a trespasser can

rightfully claim; namely, that the railroad company shall abstain from wilfully or wantonly injuring him after his peril is discovered. 22 R. C. L. p. 935. In a few cases the question has arisen as to the status of a person at a railroad crossing who has walked or intends to walk along the tracks, and the decisions are practically unanimous in holding that a person so situated is not a trespasser, and consequently is entitled to all of the

common-law and statutory rights and safeguards due to a person crossing a railroad track at a public highway.

Arkansas.—*Chicago, R. I. & P. R. Co. v. Batsel* (1911) 100 Ark. 526, 140 S. W. 726.

Georgia.—Compare *Central R. & Bkg. Co. v. Raiford* (1889) 82 Ga. 400, 9 S. E. 169.

Illinois.—*McGuire v. Chicago & E. I. R. Co.* (1905) 120 Ill. App. 112; *Chicago, B. & Q. R. Co. v. Sample* (1907) 138 Ill. App. 95, affirmed in (1908) 233 Ill. 564, 84 N. E. 643.

Missouri.—*Torrance v. Pryor* (1919) — Mo. —, 210 S. W. 430. And see the reported case (*STATE EX REL. BUSH v. STURGIS*, ante, 1315); *Stevens v. Missouri P. R. Co.* (1896) 67 Mo. App. 356; *Kerr v. Bush* (1919) — Mo. App. —, 215 S. W. 393.

Pennsylvania.—Compare *Matthews v. Philadelphia & R. R. Co.* (1894) 161 Pa. 28, 28 Atl. 936.

Virginia.—*Shiveley v. Norfolk & W. R. Co.* (1919) — Va. —, 99 S. E. 650.

West Virginia.—*Bowles v. Chesapeake & O. R. Co.* (1907) 61 W. Va. 272, 57 S. E. 131.

Application of rule.

Thus, in *Torrance v. Pryor* (Mo.) supra, cited and followed in the reported case, the court, in answer to the contention of the railroad company that the plaintiff was a trespasser, said: "This is answered by the fact that at the time of the injury she was upon and within a public street crossing. She was in Scott street when struck. She had been in Scott street for nearly the width of the street (50 feet) before she was struck. It is true that she was going across Scott street from south to north; but she was in Scott street, and at a public crossing. One within a public street, at a public crossing, is not a trespasser. The general public has rights in streets as well as railroads crossing such streets. Whilst in a public highway, as here, a person cannot be a trespasser. Her intention to shortly leave the public highway would not change her right to be in the street, and would not make her a trespasser upon the railroad property in the street. We fail to see the force of

this contention under the practically undisputed facts of the case. She might have intended to become a trespasser; but so long as she was in a public highway, where the public has at least a qualified right to be, she could not be a trespasser."

So, in *Stevens v. Missouri P. R. Co.* (1896) 67 Mo. App. 356, the court said: "That plaintiff intended, when passing over the street crossing, to go upon defendant's right of way (outside of crossing), and thence over its private yards to his, plaintiff's, dwelling, can have no bearing on the merits of the case. He had an undoubted right to pass over the street crossing, whether thereafter intending to go east, west, north, or south. The material question is, Was he, at the time he was run over by the cars, within the limits of the street crossing? What course, or over what property, he intended subsequently to travel, was wholly immaterial."

Kerr v. Bush (Mo.) supra, was an action for damages for the killing of the plaintiff's husband by one of the defendant's trains. The accident occurred at a public road crossing, and the negligence alleged was the failure of the defendant to give the statutory signal by bell or whistle when the train in question approached and passed over this public crossing. It was held that while the arbitrary statutory requirements of signals at crossings are intended for the protection of persons crossing the track thereat, and not for those walking along the track, yet, where a person of the latter class is injured on the crossing, a failure to give the statutory signals is evidence of common-law negligence. Citing the case of *Torrance v. Pryor* (Mo.) supra, the court pointed out that in the *Torrance Case* the plaintiff was relying on the common-law duty rather than the statutory requirement as to giving adequate warning when about to run a train across a public highway. The court said: "We see no difference in principle, though the common-law duty and requirements are far more flexible and less arbitrary." In the course of the opinion it was said further: "While, therefore,

a failure to give the arbitrary statutory signals may not be negligence per se toward one using the track as a roadway, a sufficient warning to constitute due care being given in other respects, yet, had this case proceeded on the theory that the deceased was injured on the crossing, and that the train approached and passed over this public crossing on a dark, stormy night, without any headlight or other warning light, and without giving any warning sound or signal of its approach, then, such facts being found to be true, the plaintiff is entitled to recover under the ruling in *Torrance v. Pryor* (Mo.) supra, notwithstanding the deceased had approached such crossing along the railroad track."

The same principle was announced in *Chicago, R. I. & P. R. Co. v. Batsel* (1911) 100 Ark. 526, 140 S. W. 726, an action to recover damages for personal injuries sustained by the plaintiff by being run over by one of the defendant's trains at a public crossing. The defendant contended that the plaintiff could not recover, as the evidence disclosed that he was a trespasser on the defendant's property. The court said: "We do not think it necessary to pass upon the question as to whether or not the public was using the railroad right of way along the vacant block as a highway by implied invitation or permission of defendant, or whether the use thereof by the public and the plaintiff as a footpath was so general, long continued, and oft repeated that the defendant must have known it and acquiesced in it, and thus have constituted the plaintiff, while in the use thereof, a licensee, and not a trespasser. . . . The injury did not occur upon the railroad right of way in this vacant block, but it occurred at the public crossing in a public street. The fact that, prior to that time the plaintiff had been walking on the roadbed between the tracks along the vacant block, whether he was then a trespasser or not, could not affect his rights at the time when he was actually on the public crossing. When he was in the street at this public crossing, he then became a traveler in a public

highway at the crossing of defendant's track, and he had then the right to use such crossing equally with the defendant. At that place and time he was not a trespasser upon defendant's right of way."

So, in *Bowles v. Chesapeake & O. R. Co.* (1907) 61 W. Va. 272, 57 S. E. 131, the defense asked the trial court to give the following instruction: "The court instructs the jury that the undisputed facts in this case show that John H. Bowles was unlawfully walking on defendant's track for his own convenience in going to Wood's restaurant, and although he may have been struck on or near the crossing, yet his administratrix cannot recover damages for his death, even if legal signals were not given nor lights displayed, unless you find from the evidence that, after he was discovered on the track, the defendant's employees, by the exercise of reasonable care, could have avoided striking him." In holding that this instruction was misleading and was properly refused, the court said: "I would hold that even if Bowles had been walking on the track, when he reached the crossing he ceased to be a trespasser. When he set foot in the crossing it became immaterial how he reached it, whether by coming off the track or from the county highway, because over the ground covered by the crossing the company was bound to furnish protection and safety for all persons on it."

Likewise, in *Chicago, B. & Q. R. Co. v. Sample* (1907) 138 Ill. App. 95, affirmed in (1908) 233 Ill. 564, 84 N. E. 643, wherein the specific act of negligence charged against the railroad company was its failure to keep in repair the crossing and approaches thereto, it was held that when once a person is within the boundaries of a railroad crossing he has a right to travel thereon in any direction, without regard to the place or direction whence he may have approached and entered on the crossing, or irrespective of whether he was a trespasser immediately prior to going on the crossing.

The same conclusion was reached

in *McGuire v. Chicago & E. I. R. Co.* (1905) 120 Ill. App. 112, which was an action to recover damages for the killing of the plaintiff's intestate by a passenger train of the defendant at the crossing of its railroad with a street in an incorporated village. The court said: "The deceased had the undoubted right to travel this public street 'in the pursuit of his business, pleasure, or even caprice,' and we are of opinion that if, at the time he met with his death, he was passing over or along the right of way, within the limits of the street, he was where he had a right to be, and not a trespasser. And this is so without regard to whence he came or whither he was going."

In *Shiveley v. Norfolk & W. R. Co.* (1919) — Va. —, 99 S. E. 650, the evidence disclosed that the plaintiff's intestate was walking along the defendant's right of way, and was struck by a train when he reached a public crossing. The defendant insisted that the statute (Code, § 1294d, subd. 24) requiring crossing signals to be sounded had no application under the facts, because the deceased was traveling along the railroad track, and not along the highway. It was held that the deceased was entitled to such safeguards when on the crossing, although he had reached the crossing by traveling along the railroad right of way.

However in *Matthews v. Philadelphia & R. R. Co.* (1894) 161 Pa. 28, 28 Atl. 936, wherein it appeared that the plaintiff's husband was killed at a public railroad crossing, negligence was alleged on the part of the company in not lowering the safety gates or giving any warning of the approaching train. It was held that, as the deceased reached the crossing by walking along the track, he was a trespasser, and was in no sense a traveler, and that the lowering of the gates was a safeguard to keep people from going on the crossing on the approach of trains, not to warn them to get off, and a compulsory nonsuit was held to have been properly entered.

In *Central R. & Bkg. Co. v. Raiford* (1889) 82 Ga. 400, 9 S. E. 169, the plaintiff, it appeared, was walking along a railroad track, and at about the time he reached a public crossing was struck by a train which approached from the rear. It was alleged that the defendant was guilty of gross negligence in failing to give the signals required by law on approaching the street crossing, either by ringing the bell or blowing the whistle of the engine; and that, when the train approached the crossing, the defendant's employees failed to slacken its speed and to have it under control so as to stop. The court said: "Whether he was then upon the crossing or slightly beyond it is uncertain; but in either case there was negligence on the part of the railroad employees, under §§ 708, 709, and 710 of the Code, in failing to ring the bell and check the train. While these measures of statutory diligence are intended for the protection of persons crossing the track, and not for those walking along the track, yet, relatively to the latter, as well as the former, a failure to comply with the statute is evidence of negligence, to be considered by the jury.

On the part of the company there seems to have been no negligence whatever except in failing to ring the bell and check the train, as required by the statute. With knowledge that the train was behind, and was soon to pass along the track, Raiford, while walking along the track in front of it, was bound to come up to that measure of diligence which a prudent person would have exercised for his own safety under like circumstances. He may have exercised that degree of care which such a person would have used in crossing a railroad upon a public crossing, but that would not suffice; for one who walks upon a railway track, using and intending to use it as a passway, not only at the crossing, but on both sides, must, even when at the crossing, be much more on the alert than when he merely attempts to cross from side to side of the railroad."

W. F. F.

W. AUSTIN THOMPSON

v.

J. WAYNE DE LONG, Substituted as Admr. c. t. a. of John W. De Long,
Deceased, Appt.

Pennsylvania Supreme Court — April 19, 1920.

(— Pa. —, 110 Atl. 251.)

Party wall — right to remove building.

1. The owner of a building supported by a party wall may replace it with a new one without liability to the co-owner if his work is properly done.

[See note on this question beginning on page 1329.]

— easement.

2. The existence and use of a party wall for twenty-one years establishes an easement in favor of each co-owner which the other cannot destroy.

[See 20 R. C. L. 1085.]

Trial — question for jury — custom.

3. The question of the existence of a custom which depends upon parol evidence is for the jury.

— assumption by court.

4. The court cannot assume the existence of a custom to protect a party wall upon removing one building supported by it.

Damages — for removal of party wall.

5. The owner of a building supported by a party wall injured by the negligent failure of the co-owner to protect the wall when removing his building may recover all damages resulting from the unlawful act or negligence of such co-owner which could not have been avoided by the exercise of reasonable care on his own part.

[See 20 R. C. L. 1090, 1093.]

— failure to protect wall — prevention.

6. The owner of a party wall cannot recover for injury to his personal property by the failure to protect the wall upon removal of the adjoining building, which protection he himself prevented.

Appeal — admission of evidence — photograph.

7. There is no error in admitting in evidence photographs the accuracy of which is shown by witnesses although they did not take them.

[See 10 R. C. L. 1153, 1154.]

— evidence as to condition of building.

8. In an action for injury to personal property in a building supported by a party wall by the removal of the other building so supported, it is not error to admit evidence of the condition of the wall and plaintiff's property five months after the building was removed.

[See 10 R. C. L. 943.]

APPEAL by defendant from a judgment of the Court of Common Pleas No. 1 for Philadelphia County (Patterson, J.) in favor of plaintiff in an action brought to recover damages for injury to plaintiff's property alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Robert M. Boyle and David J. Myers, for appellant:

Plaintiff, who since November 11, 1910, used an illegal and partially built division wall, containing openings and other defects, may not base an action thereon for injuries resulting from the exposure of said wall and openings by the razing of the adjoining building.

Vollmer's Appeal, 61 Pa. 118; Fowler v. Scully, 72 Pa. 456, 13 Am. Rep. 699;

Thorne v. Travellers Ins. Co. 80 Pa. 15, 21 Am. Rep. 89; Phoenix Silk Mfg. Co. v. Reilly, 187 Pa. 526, 41 Atl. 523; Evans v. Myers, 25 Pa. 114, 15 Mor. Min. Rep. 243; Plymouth Coal Co. v. Kommiskey, 116 Pa. 365, 9 Atl. 646.

Plaintiff, in any event, was jointly bound to finish the wall, by building in the openings, and is, hence, chargeable with contributory negligence.

Heil v. Glanding, 42 Pa. 493, 82 Am.

Dec. 587; *Waters v. Wing*, 59 Pa. 211; *Decker v. New York C. & H. R. R. Co.* 57 Pa. Super. Ct. 432.

The wall was inherently defective, and hence defendant is not liable for resulting consequences.

Richart v. Scott, 7 Watts, 460, 32 Am. Dec. 779; *Jackman v. Rosenbaum Co.* 263 Pa. 158, 106 Atl. 238.

Neither the defective wall, nor the open spaces therein, nor the razing of defendant's old building, was the direct cause of the injury alleged. Each may have been a condition, but not the proximate cause; for without rain and snow, which plaintiff was bound in common experience to expect, no damage would have occurred.

Herr v. Lebanon, 149 Pa. 222, 16 L.R.A. 106, 34 Am. St. Rep. 608, 24 Atl. 207; *King v. Lehigh Valley R. Co.* 245 Pa. 25, 91 Atl. 214.

Mr. Frederick H. Warner, for appellee:

The wall was not illegal, and it was not a party wall. A division wall is only a party wall where at the time of its erection the properties it separates were owned by different persons.

Amer v. Longstreth, 10 Pa. 145; *Doyle v. Ritter*, 6 Phila. 577.

There was no error in admitting the photographs.

Com. v. Connors, 156 Pa. 147, 27 Atl. 366; *Com. v. Swartz*, 40 Pa. Super. Ct. 370.

Plaintiff was entitled to compensation for inconveniences suffered.

Baker v. Pennsylvania R. Co. 236 Pa. 479, 84 Atl. 959; *Swisher v. Sipps*, 19 Pa. Super. Ct. 43.

Walling, J., delivered the opinion of the court:

This is an action of trespass between owners of adjoining property. Some forty years ago, the owner of the lot on the south side of Chelton avenue, west of Pulaski avenue, Philadelphia, built thereon a three-story double house, called twin houses, of stone and brick construction, with a division wall of like material separating the two houses. He sold each house to a separate purchaser, with the center of the wall as the dividing line. Thereafter plaintiff bought the west house in 1910, and defendant the east house in 1916, and removed it the same year to make room for a new two-story brick garage. This exposed the division wall, which was

found loosely constructed and of defective material; in fact, there were holes through the wall especially near the rafters. In erecting his garage, defendant built a new wall two stories in height, adjoining the old wall, which left the third story of the latter exposed to the weather; and the evidence for plaintiff is to the effect that the defendant so removed the joists of his old building from the division wall as to make additional openings therein; and that at the second floor of the garage he inserted steel beams into the old wall by which it was overloaded and greatly damaged; also, that he entirely neglected to protect the exposed wall, or to place flashing between it and the roof of the garage. Plaintiff resided on the third floor of his house and occupied the balance thereof as a store and shop wherein he made, repaired, and stored furniture and materials therefor; and the evidence on his behalf tends to show that the rain and snow came through the exposed wall, and also went down between the new and old walls and filtered through the latter, by reason of which large quantities of water entered plaintiff's building doing great injury both to it and its contents, for which plaintiff brought this suit. Each side submitted evidence, and the jury found for the plaintiff. This appeal by defendant is from judgment entered upon the verdict.

Notwithstanding the division wall, or the defects therein (*Richart v. Scott*, 7 Watts, 460, 32 Am. Dec. 779), defendant might lawfully replace his old building with a new one; and, if properly done, he would be in the exercise of a right, and not liable to the adjoining owner. See opinion of this court by Mr. Justice Moschzisker, in *Jackman v. Rosenbaum Co.* 263 Pa. 158, 170, 106 Atl. 238; also *Buck v. Weeks*, 194 Pa. 522, 45 Atl. 325, and *Swisher v. Sipps*, 19 Pa. Super. Ct. 43. However, the old wall had been a division wall, sup-

Party wall—
right to remove
building.

porting both buildings for over twenty-one years, and plaintiff had an easement in defendant's part thereof which the latter could not destroy (*Bright v. Morgan*, 218 Pa. 178, 67 Atl. 58, 11 Ann. Cas. 626; *Lukens v. Lasher*, 202 Pa. 327, 51 Atl. 887; *McVey v. Durkin*, 136 Pa. 418, 20 Atl. 541; *Bright v. Allan*, 203 Pa. 394, 93 Am. St. Rep. 769, 53 Atl. 251; *Medara v. Du Bois*, 187 Pa. 431, 41 Atl. 322), and in fact made no claim of a right to do so.

As no part of the old wall was removed and the new wall was built entirely upon defendant's own land, the question as to the construction or reconstruction of a party wall is not involved; nor is it material to this case whether it is technically a party wall or merely a division wall. Plaintiff's claim is based upon charges of negligence, and he contends that it was defendant's duty to protect the exposed wall by a permanent covering of some suitable material. This is supported by the evidence of two building experts to the effect that such is the general custom and duty of one who has exposed a division or party wall. Plaintiff further contends that defendant was negligent in leaving an opening between the roof of the garage and the old wall, by making holes through the latter in the removal of the joists, and by overloading it with the new girders, etc. The evidence as to these contentions was conflicting, except as to the alleged custom, and that depended upon the

Trial-question for jury—custom.

credibility of parol evidence, and, with the other questions, was for the jury. In the main the case was well tried, but the affirmance of plaintiff's second point (ninth assignment), viz., "plaintiff was under no legal obligation to protect the party wall on the De Long side, after being exposed by De Long's acts; but this obligation rested entirely on the defendant in this case"—was error. For except as the jury found there was a general custom to that effect, the obli-

gation did not rest upon defendant to protect the so-called party wall, although he might still be liable if the jury found against him on the other allegation of negligence; but the court could not assume the existence of the custom or of the negligence complained of.

As the case goes back for a new trial, it may not be amiss to refer to the question of damages. If entitled to recover, plaintiff should be compensated for the actual damages resulting from the unlawful acts or neglect of the defendant.

—assumption by court.

Damages—for removal of party wall.

Irvine v. Smith, 204 Pa. 58, 53 Atl. 510. However, plaintiff cannot recover for any damages which could have been avoided by the exercise of reasonable care on his part (17 C. J. 767), and the test is what would an ordinarily prudent man be expected to do under like circumstances (id. 770). There can be no recovery for damages which by the exercise of reasonable care plaintiff might have avoided (id. 926). If he knew, or by the exercise of reasonable care should have known, that his personal property was being injured by the dampness, and did not, when he could, remove it to a suitable place, he must bear the loss. *Haverly v. State Line & S. R. Co.* 135 Pa. 50, 60, 20 Am. St. Rep. 848, 19 Atl. 1013; *Krum & Peters v. Anthony*, 115 Pa. 431, 8 Atl. 598; *Scowden v. Erie R. Co.* 26 Pa. Super. Ct. 15; *Decker v. New York C. & H. R. R. Co.* 57 Pa. Super. Ct. 432, 439; *Foehr v. New York Short Line R. Co.* 40 Pa. Super. Ct. 9, 23; 13 Cyc. 71. Or if plaintiff received furniture and materials therefor into his house and knowingly stored the same in damp rooms, he must bear the loss resulting therefrom; for one cannot recover damages occasioned by a voluntary exposure of his person or property to a known danger. 29 Cyc. 518; 20 R. C. L. p. 116. It is incumbent on an injured party to do whatever he reasonably can to lessen the injury. *Chamberlain v.*

Morgan, 68 Pa. 168. One cannot stand idly by and see his property destroyed by water, if by a reasonable effort on his part the injury may be avoided. Taylor v. Canton Twp. 30 Pa. Super. Ct. 305. To like effect is the opinion of that eminent jurist, President Judge Edwards, in Campbell v. Olyphant, 10 Lack. Jur. 369. Plaintiff makes complaint of inconvenience and loss of use of the building, etc.; but there is no evidence as to the amount of damages thereby sustained.

There is some evidence that defendant's employees were taking proper steps to protect the wall, but ^{-failure to protect wall—} ^{prevention.} were prevented from so doing by plaintiff; if so, he could not recover for damages

thereafter resulting from the wall being unprotected.

It is better practice to show the accuracy of photographs by the artist who took them, yet, as those here in question were shown by other witnesses to be correct, there was no error in admitting them. Com. v. Connors, 156 Pa. 147, 27 Atl. 366; Com. v. Swartz, 40 Pa. Super. Ct. 370. Neither was it error to admit evidence of the condition of the wall and plaintiff's property five months after the old building was removed. ^{-evidence as to condition of building.}

The ninth assignment of error is sustained, and the judgment is reversed, with a venire facias de novo.

ANNOTATION.

Right of a co-owner of a party or division wall to remove or demolish his own building.

It is held in the reported case (THOMPSON v. DE LONG, ante, 1326) that an owner who tears down his house and builds a new one not so high as the old is not bound to protect from rain and snow the portion of a party wall thus exposed.

It would seem that the co-owner of a party wall ought not to be required to preserve his building for the sake of the party wall.

In Fisher v. Seaboard Air Line R. Co. (1904) 102 Va. 363, 46 S. E. 381, 1 Ann. Cas. 622, it was held that a pleading was demurrable which alleged that the defendant did pull down and carry away the building upon its lot in such manner that the partition wall, with communicating doors, between the houses of the plaintiff and the defendant, "was left unprotected, exposed, and in a most unsightly condition, by means whereof the plaintiff's said tenement has been greatly injured and depreciated in value," as the act complained of "is one which the defendant had a right to do. It was the owner of the building which it pulled down, and its liability, if any,

9 A.L.R.—84.

results from its doing a lawful act in an unlawful or negligent manner."

It is clear indeed upon the authorities that the owners of a party wall do not have a reciprocal easement of support from each other's buildings. Clemens v. Speed (1892) 93 Ky. 284, 19 L.R.A. 240, 19 S. W. 660; Bicak v. Runde (1912) 78 Misc. 358, 138 N. Y. Supp. 413; Fisher v. Seaboard Air Line R. Co. (1904) 102 Va. 363, 46 S. E. 381, 1 Ann. Cas. 622, supra; Demers v. Lemieux (1900) Rap Jud. Quebec 21 C. S. 26.

The owners of a party wall do not have a reciprocal easement of support from each other's buildings, but either of them may remove his own building without liability for resulting damage to the other, provided he gives proper notice of the removal and uses reasonable care and caution to protect the wall and remaining building. Clemens v. Speed (Ky.) and Demers v. Lemieux (Quebec) supra.

In Bicak v. Runde (1912) 78 Misc. 358, 138 N. Y. Supp. 413, supra, where the defendant razed a party wall, the court said that if the damages to the

plaintiff's house "were caused by sagging of the plaintiff's house through the loss of lateral support caused by the removal of defendant's house, the defendant is not liable, for she was under no obligation to give this support."

But there is in one case a statement indicating that an owner must preserve his house if its preservation is necessary for the safety of a party wall which has not fallen into decay. Thus in *Earl v. Beadleston* (1877) 10 Jones & S. (N. Y.) 294, in reversing a judgment for the plaintiff, Sedgwick, J., said: "There is no denial that the defendant had the right at his pleasure to take down his own house, excepting such part of it as was portion of the party wall, and the ends of the

beams in the wall. If the weakening of the party wall perpendicularly was a necessary consequence of the taking down of the house, then, the party wall itself not having fallen into decay, the defendant would be responsible for the damage, whether he hired workmen to pull the building down or did it through a contract."

(In this connection, however, reference may be made to *Negus v. Becker* (1894) 143 N. Y. 303, 25 L.R.A. 667, 42 Am. St. Rep. 724, 88 N. E. 290, where the defendant had a right to increase the height of a party wall between him and the plaintiff, and the new part of the wall fell on the plaintiff's roof, and it was held that the defendant was not liable in the absence of negligence.) B. B. B.

EMANUEL BREISCH et al., Township Supervisors, Appts.,

v.

LOCUST MOUNTAIN COAL COMPANY et al.

Pennsylvania Supreme Court — May 17, 1920.

(— Pa. —, 110 Atl. 242.)

Highway — right to remove underlying minerals.

1. One over whose property a public highway is laid has the right to remove the coal from beneath the highway, provided he does not injure the surface or create a condition which may cause injury.

[See note on this question beginning on page 1333.]

— right to interfere with surface.

2. The owner of the fee of a highway cannot strip the surface to secure the coal lying beneath and thereby interrupt the public use of the highway.

[See 13 R. C. L. 129; 18 R. C. L. 1178.]

— right to stipulate for vacation.

3. The attorneys in an action by township officials to enjoin interference with a highway by mining coal beneath it cannot stipulate that the highway may be vacated to permit the mining to continue.

Parties — action to protect highway.

4. Township supervisors are proper parties to ask for a mandate to compel

desistence from interference with a public highway.

Injunction — to prevent interference with highway.

5. Injunction lies to prevent the stripping of the surface from a highway to secure the coal beneath it.

Highway — right to consent to interference with.

6. Township supervisors have no authority to consent to the stripping of the surface from a public highway for the purpose of securing the coal beneath it.

Nuisance — effect of lapse of time.

7. Lapse of time will not legalize a public nuisance.

[See 20 R. C. L. 498.]

APPEAL by plaintiffs from a decree of the Court of Common Pleas for Schuylkill County (Berger, J.) in favor of defendants in an action brought to enjoin interference with a highway by coal mining. *Reversed.*

The facts are stated in the opinion of the court.

Mr. E. P. Leuschner for appellants.
Messrs. H. S. Drinker and D. W. Kaercher for appellees.

Kephart, J., delivered the opinion of the court:

It is admitted defendants are the owners in fee of the coal underlying and on either side of the public highway, as it affects the present case. There is nothing to show how Krebs road originally became a public highway. If, in the original taking, the right of property in any aspect had been injuriously affected, the owner would have been entitled to damages; but, as the ownership of the coal is not in dispute, it is clear that when the road was laid out the owner had full dominion and control over the coal with the right of an absolute owner to it, subject, however, to the easement in favor of the public. He has the right to mine and remove it, but the removal must

Highway—right
to remove
underlying
minerals.

be done in such
manner as not to in-
jure the surface of
the highway, or cre-

ate a condition whereby injury may later follow. The servient estate must always be in such condition that the road may be continued as a highway for the traveling public in the future. From the undisputed facts this servient estate owed to the road above such support as will at all times preserve and keep it from subsiding.

An abutting owner may use the land (the surface) for his own purposes in any way not inconsistent with the public easement, and is entitled to all profit and advantage that may be derived therefrom. 13 R. C. L. § 107, p. 121.

"The rights and title of an abutting owner . . . are subject . . . to the easement and servitude in favor of the public, and to the right of the public authorities to occupy the space above [and below] the surface of the way for any purpose within the scope of the public

uses to which highways may be put." 13 R. C. L. § 108, p. 123.

But above and beyond this reasonable use of the public, the owner undoubtedly retains the right to use his land, and so it has been held, where one owns the fee in the minerals under the surface of the highway, and the mines on the surface adjacent thereto, they may work such mines, but must do so in such way as not to cause the road to subside. 17 E. R. C. p. 554.

The coal under the highway could not be removed without disturbing the surface; to mine it the surface itself, which includes the highway, must be physically displaced, stripped so that the coal might be taken out. The company's right to do this was subordinate to the right of the public to the highway. This use, encroachment, or obstruction by the company was a nuisance per se, which could not be legalized unless the highway ceased to exist as such; in that event, the land reverts to the owners, and its use is no longer a public one.

—right to
interfere with
surface.

To cause the "land" to revert, the road must be vacated in the manner provided by law, and, as public highways are within the control of the commonwealth, the statutory directions for their creation and abolishment must be followed. When counsel in this case agreed that the road should be vacated, thus permitting the coal company to continue the nuisance and the public to be deprived of the use of the highway for travel, they clearly ex-

—right to stipu-
late for
vacation.

ceeded any authority they had as attorneys, and they attempted to do something which even the supervisors had no power to do; and the same may be said as to supplying the road vacated. To permit such an evasion of a legislative mandate as to highways would be to create an easy method to have

important highways changed to suit the convenience of a few persons without notice to others interested who might be injured thereby. The Acts of 1836 (P. L. 555) or 1911 (P. L. 123) should have been invoked.

The supervisors, as municipal authorities, were proper officers to ask for a compulsory mandate to redress the injury. It should

Parties—action
to protect
highway.

not have been denied, as a clear legal right existed. Where there has been an invasion of a public right by the use, for private purposes, of that which belongs to the public, whether the injury be great or small, it is the continuing deprivation of that right which gives cause for equitable intervention to prevent the creation or the continuance of such wrongful exercise. For a broader reason should this be recognized where the injury is substantial and material, calculated not only to interfere with the right and comfort of the public as such, but possibly to the damage of individuals. So it has been held that injunctions to restrain encroachments on highways, though they should

Injunction—
to prevent
interference
with highway.

be granted with care, will, when public rights are invaded, be granted. In such case no question of the amount of damages is raised, but simply the one of the invasion of a right. *Reimer's Appeal*, 100 Pa. 182, 187, 45 Am. Rep. 373. A nuisance per se, when public in its character, may, upon information by the attorney general, or at the suit of a municipality, be enjoined. *Mint Realty Co. v. Wanamaker*, 231 Pa. 277, 279, 79 Atl. 514.

The defendants did not acquire any right to excavate the Krebs road for the purpose of their stripping operation because of any consent the supervisors of the township might

Highway—right
to consent to
interference
with.

have given, official or otherwise. In Pennsylvania, a highway is the property of the people,—not of a

particular district, but of the whole state,—and, when a public right has been acquired, it cannot be lost by nonuser or by municipal action not expressly authorized by law. Any occupation of the property inconsistent with the public right is a nuisance, and no length of time will legalize a public nuisance. *Pittsburgh v. Epping-Carpenter Co.* 194 Pa. 318, 45 Atl. 129. While laches may be imputed to the commonwealth, or its representatives, it is done only in rare cases, as stated by our present chief justice in *Bradford v. New York & P. Teleph. & Teleg. Co.* 206 Pa. 582, 56 Atl. 41. Under the circumstances of this case, appellants lost no right in the prosecution of this litigation. They acted under what they believed to be lawful orders of the court; but defendants will not be heard to complain of this, as they have not met the obligation assumed in the unauthorized agreement and order.

Nuisance—
effect of lapse
of time.

The decree of the court below is reversed, and a mandatory injunction is directed to issue as prayed for; and, owing to the peculiar circumstances caused by the orders of the first judge who heard the case, the issuance of the writ to be withheld for a period of six months, pending which time appellees may institute proper proceedings to have Krebs road vacated and supplied, if it is thought proper so to do; or within which time the parties may, under the Act of 1911, change the location of the road as therein provided, on the conditions stated in the act, that the cost and expense should not exceed the sum of \$300. This would not limit the amount respondents may decide to pay in order to accomplish the result. If the proceedings as instituted are prosecuted with due vigor, but are uncompleted at the end of the six months, the court below, in its sound discretion, may grant a further extension of time.

The decree is reversed, at the cost of the appellees.

ANNOTATION.

Duty of one removing mineral under highway to support surface.

As a general rule one removing minerals under a highway is under the duty of supporting the surface of the highway. *Scranton v. People's Coal Co.* (1916) 256 Pa. 332, 100 Atl. 818; *BREISCH v. LOCUST MOUNTAIN COAL CO.* (reported herewith) ante, 1330; *Benfieldside v. Consett Iron Co.* (1877) L. R. 3 Exch. Div. (Eng.) 54, 47 L. J. Exch. N. S. 491, 38 L. T. N. S. 580, 26 Week. Rep. 114; *Atty. Gen. v. Conduit Colliery Co.* (1895) 64 L. J. Q. B. N. S. (Eng.) 207, [1895] 1 Q. B. 301, 16 Reports, 267, 71 L. T. N. S. 771, 43 Week. Rep. 366, 59 J. P. 70; *Lodge Holes Colliery Co. v. Wednesbury* (1908) 77 L. J. K. B. N. S. (Eng.) 847, [1908] A. C. 323, 99 L. T. N. S. 210, 72 J. P. 417, 6 L. G. R. 924, 24 Times L. R. 771, 52 Sol. Jo. 620.

Thus, it is held in *Scranton v. People's Coal Co.* (Pa.) supra, and in the reported case (*BREISCH v. LOCUST MOUNTAIN COAL CO.* ante, 1330) that the removal of coal under a street in such a manner as to cause a subsidence of the surface of the road is a nuisance which will be restrained at the instance of the proper municipal authorities.

In *Benfieldside v. Consett Iron Co.* (1877) L. R. 3 Exch. Div. (Eng.) 54, 47 L. J. Exch. N. S. 491, 38 L. T. N. S. 580, 26 Week. Rep. 114, where public highways were laid out by commissioners under a local inclosure act reserving to the lord of the manor and his assigns all mines, with power to do any act necessary for the working of such mines the same as if the act had not been made, without paying any damages or making any satisfaction for so doing, it was held that such reservation did not authorize the removal of minerals under the highways without leaving any support, and did not protect the assignees of the lord of the manor from liability for damages for causing a subsidence of the surface of the highways by the removal of the minerals thereunder.

In *Atty. Gen. v. Conduit Colliery Coal Co.* (1895) 64 L. J. Q. B. N. S.

(Eng.) 207, [1895] 1 Q. B. 301, 16 Reports, 267, 71 L. T. N. S. 771, 43 Week. Rep. 366, 59 J. P. 70, where it appeared that from the working of a coal mine under a highway a gradual and uniform subsidence of the surface resulted in such a manner that no actual damage was done to the highway thereby, nor was it rendered less convenient for travel, but a railroad company, whose tracks crossed the highway on the level, made an embankment to retain the track on the original level, thus completely obstructing the highway, it was held that the mine owners were not liable in damages for the obstruction of the highway caused by the railroad company, but it was held by one of the judges that, since the subsidence of the highway was substantial, the highway authorities, although no appreciable damage resulted to the highway by such subsidence, could recover nominal damages for the injuries to their proprietary rights in the highway.

And in *Lodge Holes Colliery Co. v. Wednesbury* [1908] 77 L. J. K. B. N. S. (Eng.) 847, [1908] A. C. 323, 99 L. T. N. S. 210, 72 J. P. 417, 6 L. G. R. 924, 24 Times L. R. 771, 52 Sol. Jo. 620, an action by the local authorities against mine owners whose workings had caused a road to subside, there was no dispute except as to the amount of the damages, it being admitted or assumed that the mine owners in removing minerals under the road were bound to support the surface.

The following cases, while not strictly in point, throw some light upon this question: In *Atty. Gen. v. Roe* [1915] 1 Ch. (Eng.) 235, 84 L. J. Ch. N. S. 322, 112 L. T. N. S. 581, 79 J. P. 263, 13 L. G. R. 335, where it appeared that a prior owner of a worked-out quarry adjoining a highway, because of the danger to travelers from the excavation, built a retaining wall alongside the road, and that such wall long after collapsed and fell into the quarry, causing the surface of the road to fall in also, it was held that a sub-

sequent owner of the land was under the obligation of maintaining the wall, and a mandatory order was made requiring him to abate the nuisance by restoring the road to its condition prior to the subsidence by rebuilding the wall.

In *Clarendon v. Medina Quarry Co.* (1905) 102 App. Div. 217, 92 N. Y. Supp. 530, it was held that the public easement in a highway must not be unnecessarily interfered with in quarrying stone underneath the highway; but where the highway is in the country and little traveled, the quarry company in removing the stone need not keep the highway open to its full width, while the quarrying is going on, but ought to be required to keep a passageway open upon the surface of the ground, or by bridges, of width sufficient to enable teams to pass each other thereon, and keep it in good re-

pair. The court suggested in this case that the safer and better way to take care of travel while the quarrying was being done would be to build a road adjacent to the highway for temporary use, but as the highway commissioners could not be compelled to permit such a temporary change in the road, it could only be done with their consent.

And in *Dean v. Carroll* (1913) 143 N. Y. Supp. 12, stone was quarried under a country highway, under a contract with the highway authorities that the quarry company was to maintain a good temporary road, and after the removal of the stone restore the original road, the action being to compel the quarry company to restore the original highway, and for damages because they had not restored the road within the time prescribed by the contract.

G. V. L.

WALTER E. GREENFIELD, Appt.,

v.

ANDREW RUSSEL, Auditor of Public Accounts, et al.

Illinois Supreme Court — April 21, 1920.

(292 Ill. 392, 127 N. E. 102.)

Legislature — power to conduct investigation of private institution.

1. The legislature cannot conduct a public or judicial investigation of charges made against any private institution or individual under the pretense or cloak of its power to investigate for the purpose of legislation.

[See note on this question beginning on page 1341.]

Constitutional law — power of legislature to institute proceedings.

2. The legislature has no power to invoke or set in motion any public or private law for the purpose of securing to individuals any remedy or relief from alleged wrongs.

[See 6 R. C. L. 160-163.]

Courts — power to protect jurisdiction.

3. It is the duty of the court to pro-

tect the rights of individuals against legislative investigation by refusing to permit the legislature thus to invade the jurisdiction of the court.

[See 6 R. C. L. 157, 158.]

Injunction — against payment of expenses of legislative investigation.

4. Payment of expenses of a legislative investigation which is wholly illegal should be enjoined.

APPEAL by petitioner from an order of the Circuit Court for Sangamon County (Burton, J.), denying leave to file a bill of complaint to restrain defendants from paying out funds of the state. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Felsenthal, Wilson, & Struckmann, and Theodore Forby, for appellant:

The powers of the government of the state of Illinois, by the Constitution of 1870, are divided into three distinct departments: legislative, executive, and judicial; and no person or collection of persons, being one of these departments, shall exercise power properly belonging to either of the others, except as hereinafter expressly directed or permitted.

Kilbourn v. Thompson, 103 U. S. 168, 26 L. ed. 377; Re Day, 181 Ill. 73, 50 L.R.A. 519, 54 N. E. 646; People ex rel. Martin v. Mallary, 195 Ill. 582, 88 Am. St. Rep. 212, 63 N. E. 508; Cleveland, C. C. & St. L. R. Co. v. People, 212 Ill. 638, 72 N. E. 725; Witter v. Cook County, 256 Ill. 616, 100 N. E. 148; State ex rel. Robertson Realty Co. v. Guilbert, 75 Ohio St. 1, 78 N. E. 934; 12 C. J. p. 807, § 239; People ex rel. MacDonald v. Leubischer, 34 App. Div. 577, 54 N. Y. Supp. 869; Merrill v. Sherburne, 1 N. H. 199, 8 Am. Dec. 52; Newland v. Marsh, 19 Ill. 376.

No person shall be deprived of life, liberty, or property without due process of law.

Cleveland, C. C. & St. L. R. Co. v. People, 212 Ill. 638, 72 N. E. 725; People ex rel. Martin v. Mallary, 195 Ill. 590, 88 Am. St. Rep. 212, 63 N. E. 508.

The legislative department is without authority to pass an act or resolution authorizing an investigation by committees where such investigation is judicial in its nature.

Kilbourn v. Thompson, 103 U. S. 168, 26 L. ed. 377; State ex rel. Robertson Realty Co. v. Guilbert, 75 Ohio St. 1, 78 N. E. 934; State ex rel. Rulison v. Gayman, 81 Ohio C. C. 59; People ex rel. MacDonald v. Leubischer, 34 App. Div. 577, 54 N. Y. Supp. 869.

A taxpayer may resort to a court of equity in the event of an attempted misapplication of public funds where appropriation has been made by the legislature for the payment of such funds, based upon unconstitutional action or legislation.

Fergus v. Russel, 270 Ill. 304, 110 N. E. 130, Ann. Cas. 1916B, 1120.

The appropriation provided for in House Bill No. 602 is illegal and void.

Hall v. Hamilton, 74 Ill. 437; Hogan v. Stophlet, 179 Ill. 150, 44 L.R.A. 809, 53 N. E. 604; Bruce v. Diekey, 116 Ill. 527, 6 N. E. 435; Whittemore v. People, 227 Ill. 453, 81 N. E. 427, 10 Ann. Cas. 44.

Messrs. Edward J. Brundage, Attorney General, and Clarence N. Boord, Assistant Attorney General, for appellees:

The Constitution is not a grant of power to the legislature, but is a limitation on its powers. The legislature possesses plenary powers of legislation except where limited by the Constitution, and has every power not delegated to some other department, or expressly denied to it by the Constitution.

Winch v. Tobin, 107 Ill. 212; People ex rel. Woodyatt v. Thompson, 155 Ill. 451, 40 N. E. 307; Harder's Fire Proof Storage & Van Co. v. Chicago, 235 Ill. 58, 85 N. E. 245, 14 Ann. Cas. 536.

The legislature and its committees have the power to investigate for the purpose of securing information upon which it may act in enacting or refusing to enact laws.

Cooley, Const. Lim. 7th ed. 198; Fergus v. Russel, 270 Ill. 304, 110 N. E. 130 Ann. Cas. 1916B, 1120; Burnham v. Morrissey, 14 Gray, 226, 74 Am. Dec. 676; Ex parte Parker, 74 S. C. 466, 114 Am. St. Rep. 1011, 55 S. E. 122, 7 Ann. Cas. 874; State ex rel. Rosenhein v. Frear, 138 Wis. 173, 119 N. W. 894; People ex rel. McDonald v. Keeler, 99 N. Y. 463, 52 Am. Rep. 49, 2 N. E. 615.

The courts will not question the motive of the legislature if it has the power to do the thing it undertakes to do. If it has the power to act, the court will presume its motives to be proper.

People ex rel. Woodyatt v. Thompson, 155 Ill. 451, 40 N. E. 307; People ex rel. Heffernan v. Carlock, 198 Ill. 150, 65 N. E. 109; People ex rel. Bruce v. Dunne, 258 Ill. 441, 45 L.R.A. (N.S.) 500, 101 N. E. 560; People ex rel. McDonald v. Keeler, 99 N. Y. 463, 52 Am. Rep. 49, 2 N. E. 615.

The courts have no power to interfere with legislative investigations properly conducted for the purpose of securing information upon which to base remedial legislation.

People ex rel. McDonald v. Keeler, supra.

The investigation authorized by House Joint Resolution No. 11 is a proper legislative act, and does not encroach upon the judicial department of government.

Ibid.; State ex rel. Rosenhein v. Frear, 138 Wis. 173, 119 N. W. 894; Cushing, Law & Practice of Legislative Assemblies, § 641.

Duncan, J., delivered the opinion of the court:

Appellant presented a petition to the circuit court of Sangamon county, accompanied by a bill of complaint, to restrain appellees, as auditor of public accounts and state treasurer, respectively, from paying out funds of the state by reason of House Bill No. 602, and asked leave to file the bill. The circuit court refused to allow the bill to be filed, and this appeal followed.

The petition was filed in accordance with "An Act in Relation to Suits to Restrain and Enjoin the Disbursement of Public Moneys by Officers of the State." Laws of 1917, p. 534. That act provides that a suit in equity to restrain and enjoin the disbursement of public moneys by the proper officer or officers of the state may be maintained either by the attorney general or by any citizen and taxpayer of the state, and, when begun by a citizen of the state, shall be commenced by a petition for leave to file a bill in equity, etc. If, upon a hearing, the court or the judge thereof shall be satisfied that there is reasonable ground for the filing of such bill, such court or judge may grant the petition and order the bill to be filed and process issued, and, if such petition is denied, an appeal may be prosecuted to this court.

The material allegations in the bill, relied on by appellant, are: That the petitioner is, and for several years has been, a citizen and resident and taxpayer of this state, and that the appellees, Andrew Russell and Fred E. Sterling, are, respectively, the auditor of public accounts and treasurer of the state of Illinois; that a certain joint resolution was introduced and passed by the house of representatives and the senate of Illinois, known as House Joint Resolution No. 7, and was afterwards superseded by another joint resolution known as House Joint Resolution No. 11, the latter being the same as the former, with slight amendments; and that, as

amended, the resolution is as follows:

House Joint Resolution No. 11.

Whereas, an institution calling itself "The Christian Catholic Apostolic Church of Zion," located at Zion City, in the state of Illinois, and one Wilbur Glenn Voliva, the owner or pretended owner of all or nearly all the real estate in said city, and by profession claims to be endowed with supernatural powers and is represented as claiming direct communication with divine power; and

Whereas, it is represented that said institution and its said pretended owner and overseer, Wilbur Glenn Voliva, through such supernatural and divine powers is and has been enticing and encouraging citizens of this and other states to invest large sums of money in leases of land in said city and in other Zion enterprises, and by and through such leases pretending to extend over a period of a thousand years, it is charged that the same is a mere means and pretense to secure and inveigle the moneys and property of innocent persons under the guise of a false and fictitious religion, and that said institution through that and other means is using the city government of Zion City, the schools of said city and the courts of said city to carry out its illegal and fraudulent purposes in securing property and oppressing those citizens of the state of Illinois who do not conform to the pretended beliefs of said institution, and that in many other and divers ways, as it is represented, the said institution and its overseer, by controlling the rents, lots and homes, the business, the municipal school and judicial government of said city, is and has become a blot upon the state of Illinois and is and has been depriving citizens of said city of the rights of citizenship and of a free government, and is and has been misrepresenting and fraudulently stating to the public its financial status and its religious beliefs, and is being run

for the purpose of defrauding the public; and

Whereas, *there are other persons, institutions and pretended organizations soliciting funds, deceiving the people and preying upon the public of the like and similar nature:*

Therefore be it

Resolved by the house of representatives, the senate concurring therein, that a committee of nine be appointed, five from the house and four from the senate, to investigate the said institution *and said other persons, institutions and pretended organizations;* and be it further

Resolved, that said committee is hereby fully authorized to take evidence and have the power to summon before it, or such subcommittee as said committee may appoint, witnesses and documents as said committee may find necessary to do to fully and completely investigate and examine into all of the affairs of said institutions and said overseer *and said other persons, institutions and pretended organizations,* and to report the same, with the recommendations of said committee, to both houses of the general assembly; and be it further

Resolved, that said committee have full power, with the assent of the speaker of the house, to employ a sergeant at arms and a secretary and such stenographers as may be necessary to fully and completely carry out said investigation.

It is further alleged that the words, "There are other persons, institutions and pretended organizations soliciting funds," etc., which are found in the third paragraph of the resolution above set forth, all in italics, were added to the original resolution as a mere subterfuge, and in an attempt to create a legal and lawful subject of inquiry of said committee, and that it was never intended that the committee should investigate any other persons than those named in the original resolution. It is also alleged that House Bill No. 602 was regularly passed by both branches of the legislature and signed by the governor, providing,

in substance, that there is appropriated by the general assembly the sum of \$5,000 for the necessary expenses of a joint committee created by resolution No. 11, and providing that the auditor of public accounts is authorized to draw his warrants on that appropriation, upon presentation of vouchers certified to as correct by the chairman of the committee and approved by the speaker of the house of representatives and the president of the senate, and that the state is authorized and directed to pay them, and that it became a law at once by an emergency clause; that, pursuant to said resolution, a committee of ten members, five from each house, was selected, and that they met at Chicago and proceeded to hear evidence in accordance with the resolution, after selecting a chairman; that it is their purpose to hold other meetings and incur further expenses in carrying out said resolution, and to present vouchers for all such expenses; that the auditor intends to and will issue vouchers for said expenses, and that the treasurer threatens and intends to pay the same unless prevented by order of court. The prayer of the bill is that appellees be restrained and enjoined from drawing or paying any warrants for such expenses.

Two grounds are urged by appellant for a reversal of the decree of the court: (1) That the general assembly was without authority or power to pass said resolution or to incur any expenses whatever thereunder, as charged in the bill; (2) that the members of the committee, being members of the legislature, are not legally entitled to be paid their personal expenses for such services.

When properly analyzed, the foregoing resolution is in three parts. The first part—the first paragraph of the resolution—sets forth the subject or the persons that are to be particularly and specially considered or treated. These persons are set forth in that paragraph as the Christian Catholic Apostolic Church of Zion, located at Zion City, in this

state, and one Wilbur Glenn Voliva, who is referred to as the owner or pretended owner of all or nearly all of the real estate in that city, and one who by profession claims to be endowed with supernatural powers and claims direct communication with divine power. The second part of the resolution consists of various charges of offenses or misdoings by said church and Wilbur Glenn Voliva, the latter being styled overseer and pretended owner of said church. These charges profess to be on information, and are made much after the fashion and style of an indictment found by a grand jury. The charges are, in substance, that said church and its overseer have been securing and inveigling the moneys and properties of innocent persons under the guise of a false and fictitious religion and through a claim of supernatural and divine power, and by falsely pretending that the leases of land in said city in which such innocents are induced to invest extend over a period of a thousand years; that said church and its overseer are using the city government of Zion City, the schools of said city, and the courts of said city to carry out their illegal and fraudulent purposes and for oppressing those citizens who do not conform to the pretended beliefs of said church; and that in many other and divers ways said church and its overseer, by controlling the rents, lots, and homes, the business, the municipal schools, and judicial government of the city, are and have been depriving citizens of said city of the rights of citizenship and of free government, and are and have been misrepresenting and fraudulently stating to the public the financial status of said church and its religious beliefs; and that it is being run for the purpose of defrauding the public. The third part of the resolution immediately follows the second, and consists of the resolutions of the general assembly to appoint a committee from its body, and to empower it to summon witnesses and documents neces-

sary to fully and completely investigate and examine into all of the affairs of said institution and of said overseer, and of all other persons and institutions soliciting funds, deceiving the people, and preying upon the public, of the like and similar nature as said church and its overseer, and to report the same, with recommendations of the committee, to both houses of the general assembly.

We are convinced, from a consideration of this resolution, that it was not passed by the general assembly with a view to have this committee investigate said charges, and for the purpose of future legislation if the same should be deemed advisable. This resolution does not anywhere in it contain language that expresses such a purpose or intention. The purposes sought to be accomplished by the investigation are not disclosed by the resolution. It is the past conduct of a private party and a private institution that is to be investigated, and the committee is to investigate all the affairs of said institution and of said party. It appears that the private party to be investigated is not a public officer of any character in this state, and that the institution to be investigated is not a municipality or corporation organized under the state law. The church is not chartered under the state, as it appears in this case. The bill in this case is sworn to and its allegations must be taken to be true. It is expressly averred in the bill that it was at no time the intention of the legislature to investigate anyone except said institution and its overseer, and that the amendment of the resolution, as already indicated, was for the mere purpose of making the resolution appear to be legal and general in its application, and not specially directed to the conduct of said individuals. A careful examination of the original resolution and the amended resolution also indicates that this averment in the bill is true, as the resolution as amended is still directed, in its first clause, to only the

private individual and institution aforesaid. To state the matter briefly, the legislature has made charges of past misconduct of said church and of its overseer, and a committee is appointed and empowered to investigate that conduct and to report concerning the same, with recommendations, and this resolution has evidently been inspired by the complaint of some unknown party, as it is made upon information. A careful consideration of the charges made must also necessarily lead to the conclusion that no legislation was contemplated by the legislature, as the aggrieved parties already had remedies provided for them under the law as it then existed, and that the legislature had no power or right to invoke or set in motion any public or private law for the purpose of

Constitutional
law—power of
legislature
to institute
proceedings.

securing to the parties any remedy or relief from the wrongs alleged to have been inflicted, as the exercise of such a power and right is necessarily the exercise of judicial functions.

Article 3 of our present Constitution provides as follows: "The powers of the government of this state are divided into three distinct departments,—the legislative, executive and judicial; and no person, or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted."

The exceptions "directed or permitted" by the foregoing article are the following:

Article 4, § 9: "Each house shall determine the rules of its proceedings, and be the judge of the election, returns and qualifications of its members; shall choose its own officers; and the senate shall choose a temporary president to preside when the lieutenant governor shall not attend as president or shall act as governor. . . . No member shall be expelled by either house ex-

cept by a vote of two thirds of all the members elected to that house, and no member shall be twice expelled for the same offense. Each house may punish, by imprisonment, any person not a member, who shall be guilty of disrespect to the house by disorderly or contemptuous behavior in its presence."

Article 6, § 30: "The general assembly may, for cause entered on the journals, upon due notice and opportunity of defense, remove from office any judge, upon concurrence of three fourths of all the members elected, of each house."

The foregoing provisions are the only ones in the Constitution that expressly define the powers of government that are vested in the general assembly, and it cannot transcend the powers thus given in the exercise of its functions of government. Our general assembly may exercise all the legislative power which the Parliament of Great Britain possesses, except as restricted by the Constitution. It cannot, however, exercise any judicial functions except those that are specially permitted or granted by the Constitution, as that power is specially vested in the judiciary of this state. *Re Day*, 181 Ill. 73, 50 L.R.A. 519, 54 N. E. 646. To state it in another way: Our legislature possesses every power not delegated to some other department of the state or to the Federal government, or not denied to it by the Constitution of the state or of the United States. *Winch v. Tobin*, 107 Ill. 212; *People ex rel. Woodyatt v. Thompson*, 155 Ill. 451, 40 N. E. 307. It must also be conceded that a state legislature has power to obtain information upon any subject upon which it has power to legislate, with a view to its enlightenment and guidance. This is essential to the performance of its legislative functions, and it has long been exercised without question. *Ex parte Parker*, 74 S. C. 466, 114 Am. St. Rep. 1011, 55 S. E. 122, 7 Ann. Cas. 874, and note. While this is true, it cannot

violate the constitutional rights of any institution, or of any individual by conducting a public and judicial investigation of any charges made against such person or institution under the pretense or cloak of its power to investigate for the purpose of legislation. This is true no matter whether the investigation be for the purpose of instituting prosecutions, for the aid and benefit of a grand jury in finding indictments, or for the purpose of intentionally injuring or vindicating any institution or individual. All such investigations, when judicial in character, made by the general assembly, are absolutely without authority and in violation of the constitutional rights of the parties whose conduct is so publicly investigated. *Kilbourn v. Thompson*, 103 U. S. 168, 26 L. ed. 377; *State ex rel. Robertson Realty Co. v. Guilbert*, 75 Ohio St. 1, 78 N. E. 931.

There can be no question but that the investigation in question is judicial in character. "The distinction between the functions of the legislative and the judicial departments is that it is the province of the legislature to establish rules that shall regulate and govern in matters or transactions occurring subsequent to the legislative action, while the judiciary determines rights and obligations with reference to transactions that are past or conditions that exist at the time of the exercise of judicial power." 12 C. J. 807; *Newland v. Marsh*, 19 Ill. 376. The declared purpose of the resolution was to investigate charges that had been made against this institution and its overseer, and it was an investigation of all past conduct with reference to the matters heretofore stated. The investigation was not of a character that the legislature could undertake under the provisions of the Constitution. All criminal charges, if any there were against these parties, and all invasions by them of the private rights of others, could only be investigated

legally by a grand jury or a court legally constituted for the purpose. If the rights of private individuals and private institutions could be invaded by the legislature in that manner, their reputation and their character and their business would be greatly endangered if not entirely destroyed, and they would not have or enjoy in such public investigations their constitutional right of answering and making a defense to such charges, however false they might be. This whole investigation may have been started with the very best of motives on the part of the members of the legislature, and it may have been carried out by the committee, so far as it did conduct the investigation, with the utmost fairness possible. Nevertheless, the act of the general assembly in question was not only an invasion of the private rights of the individual and institution investigated, but it was also an invasion of the province of the judiciary. Under such circumstances, it is the duty of the courts to protect the rights of individuals by refusing to permit the legislature to thus invade the jurisdiction of the court. A judicial investigation should at all times proceed in an orderly manner before a tribunal legally constituted to make such investigation, and in such a manner as to give all parties thereby affected a complete and full hearing and an adjudication that will determine and settle the rights of the parties. An investigation by the legislature that can in no way be serviceable to it in future legislation, and that must necessarily endanger the constitutional rights of private individuals, ought never to be made, and such an investigation is prohibited by the Constitution of Illinois.

We have considered the authorities submitted by appellees and find that they are inapplicable to the facts in this case, and discussion of them need not be made. There are a number of cases that recognize that a legislature has a right to in-

Legislature—
power to con-
duct investiga-
tion of private
institution.

Courts—power
to protect
jurisdiction.

investigate the conduct of corporations chartered by it, and the conduct of public officers. In this case such conduct is not in question, as the parties investigated are private parties as distinguished from corporations and public officers.

As the investigation in question was wholly unwarranted and illegal, appellant, as a taxpayer, has a right to resort to a court of equity to prevent the misapplication of public funds in the payment of the expenses of such an investigation. *Fergus v. Russel*, 270 Ill. 304, 110 N. E. 130, Ann. Cas. 1916B, 1120.

Injunction—
against payment
of expenses of
legislative
investigation.

As the entire act of legislation is void, all expenses made in such investigation are illegal, and their payment should be restrained under the allegations of this bill.

There is no charge or intimation in the bill of complaint that any

member of the committee has made or intends to make any charge or claim for his personal expenses, to be paid out of such appropriation. The bill appropriating the money only appropriates money for necessary expenses of the committee, and we are not to understand by that that anything but the necessary and legitimate expenses will be charged for and paid. However, this is immaterial, as, under our holding, the whole expenses of this investigation were unwarranted.

The court erred in refusing to allow the bill to be filed. The decree is therefore reversed, and the cause remanded, with directions to allow the bill to be filed and to permit an amendment as to the second feature of the bill if appellant shall see fit to so amend.

Reversed and remanded, with directions.

ANNOTATION.

Power of legislature to investigate conduct of private person, corporation, or institution.

- I. General rule, 1341.
- II. Investigation within power of legislature, 1342.
- III. Investigation not within power of legislature, 1343.

I. General rule.

The rule deducible from the authorities seems to be that the power of a legislature to investigate, through a committee or commission, the affairs of a private person, corporation, or institution, exists only when such affairs are directly related to the legitimate subjects of legislation. As is said in the reported case (*GREENFIELD v. RUSSEL*, ante, 1334), a legislature has power to obtain information concerning any subject on which it has power to legislate, with a view to its enlightenment and guidance, but it cannot violate the constitutional rights of any institution or individual by conducting a public and judicial investigation of any charges made against such person or institution under the pretense

or cloak of its power to investigate for the purpose of legislation. See the following cases which support the general rule: *Kilbourn v. Thompson* (1881) 103 U. S. 168, 26 L. ed. 377, limiting and partly overruling *Anderson v. Dunn* (1821) 6 Wheat. (U. S.) 204, 5 L. ed. 242; *Re Pacific R. Commission* (1887) 12 Sawy. 559, 32 Fed. 241; *Re Bunkers* (1905) 1 Cal. App. 61, 81 Pac. 748; *Burnham v. Morrissey* (1859) 14 Gray (Mass.) 226, 74 Am. Dec. 676; *Wright v. Lothrop* (1889) 149 Mass. 385, 21 N. E. 963; *Sheppard v. Bryant* (1906) 191 Mass. 591, 78 N. E. 394, 6 Ann. Cas. 802. And see the reported case (*GREENFIELD v. RUSSEL*, ante, 1334). See also *Interstate Commerce Commission v. Harriman* (1908) 211 U. S. 407, 53 L. ed. 253, 29 Sup. Ct. Rep. 115; *Weber v. Lane* (1903) 99 Mo. App. 69, 71 S. W. 1099; *Allen v. Buchanan* (1873) 9 Phila. (Pa.) 283; *Re Railway Porters' Club* (1905) 11 B. C. 398. Compare *Commercial & F.*

Bank v. Worth (1895) 117 N. C. 146, 30 L.R.A. 261, 23 S. E. 160.

II. Investigation within power of legislature.

The affairs of corporations subject to the control of the legislature may be investigated by its committee with a view to the modification or repeal of their charters. *Burnham v. Morrissey* (1859) 14 Gray (Mass.) 226, 74 Am. Dec. 676. Compare *Allen v. Buchanan* (1873) 9 Phila. (Pa.) 283, cited *infra* in subdivision III., "Investigation not within power of legislature."

In *Wright v. Lothrop* (1889) 149 Mass. 385, 21 N. E. 963, it was held that a committee of the state house of representatives had the power to investigate the advisability of making tenants at will liable for damages from fire caused by their carelessness.

So, a legislative committee may be authorized to conduct an investigation concerning the monopoly of the coal market, with a view to remedial legislation. *Sheppard v. Bryant* (1906) 191 Mass. 591, 78 N. E. 394, 6 Ann. Cas. 802, wherein the court said: "The committee was appointed while the community was suffering from the consequences of the great coal strike of 1902. The duties of the committee, as expressed in the joint order under which it was appointed, were 'to investigate the conditions under which coal is received, supplied, and sold in the city of Boston and vicinity. To ascertain if any attempt is being made, or has been made, to prevent coal from being transported to and delivered at its destination, or placed on the market as speedily as it might be, and to determine whether the high prices at which coal is sold and has been sold are unavoidable, or the result of an attempt on the part of the dealers, at wholesale or retail, to make excessive profits.' Subsequently, before the hearing, the committee was ordered to extend the investigation 'throughout the commonwealth,' and 'to investigate and ascertain whether vessels or barges loaded with coal have been held or detained in harbors or at wharves for an unreasonable time before being unloaded.' It is very evident that the legislature, in view of

the state of things then and immediately theretofore existing in this community as to the lack of coal, was thoroughly aroused, and, with a view to some legislation, was determined, if possible, to probe to the bottom the circumstances relating to the supply of coal. The order was very sweeping. Under it the committee properly could inquire into the conduct of every coal dealer in the commonwealth, so far as it related to receiving, supplying, or selling coal, or holding or detaining or unloading coal barges at the harbors or wharves."

In *Re Bunkers* (1905) 1 Cal. App. 61, 81 Pac. 748, it appeared that a certain statute (Civil Code, § 383) provided as follows: "The legislature, or either branch thereof, may examine into the affairs and condition of any corporation in this state at all times; and, for that purpose, any committee appointed by the legislature, or either branch thereof, may administer all necessary oaths to the directors, officers, and stockholders of such corporation, and may examine them on oath in relation to the affairs and condition thereof; and may examine the safes, books, papers, and documents belonging to such corporation, or pertaining to its affairs and condition, and compel the production of keys, books, papers, and documents by summary process, to be issued on application to any court of record or any judge thereof, under such rules and regulations as the court may prescribe." It was held that a committee of the legislature had the power to investigate the affairs of building and loan corporations, and that a member of the committee was acting as a legislator when serving on it to the extent that he might be convicted of bribery as a member of the legislature. The court said: "What the limit is of the powers which may be exercised under these provisions of the Constitution and the statute is not necessary now to prescribe. But whatever that limit may be, we are clearly of the opinion that it was not reached by the committee of the legislature in entering upon an investigation of the affairs of the corporation mentioned in the in-

dictment, which investigation we must presume was either within its regular and ordinary duties under standing rules of the senate, or was specially devolved upon it by that body. If the legislature cannot exercise this power through a committee, it had not the power to create a board of commissioners of loan associations upon which, by the Act of March 23, 1893 (Stat. 1893, p. 299), even greater powers are conferred than were alleged to have been assumed by the legislative committee of which petitioner was a member. Similar powers also are being exercised by the bank commissioners and other bodies created by the legislature. The argument which would destroy the power of the legislature, through its committees, to inquire into the affairs of corporations, with a view to correct corporate abuses, would also destroy the power of the commission created by it for that purpose. But such exercise of legislative power has been long exercised and universally acquiesced in, and is, we think, unquestionably entrenched in our system of government."

Where the board of aldermen of a city appointed a committee to investigate charges made against a dram-shop keeper in such city, it was held that the appointment was within the board's discretion, and that it was not liable for the resulting injury to the plaintiff's business unless the members of the board were actuated by malice. *Weber v. Lane* (1903) 99 Mo. App. 69, 71 S. W. 1099.

In the case of *Re Railway Porters' Club* (1905) 11 B. C. 398, it was held that a commissioner might be appointed by the lieutenant governor in council, under authority of statute, to investigate societies incorporated under the Benevolent Societies Act. The court said: "The power of the lieutenant governor in council to dissolve these societies is one of the powers of government, exercisable—under the authority of a legislative enactment—by the executive of the province. The investigation of the facts, the deliberation on the facts, leading to a conclusion on the question whether the pow-

ers shall be exercised, as well as the determination to exercise it, and the executive act in which the determination culminates, are all matters which, in the language of the section, are 'connected with the good government of this province;' and, in my opinion, are as well matters concerning and connected with the conduct of the 'public business' of the province."

In *Commercial & F. Bank v. Worth* (1895) 117 N. C. 146, 30 L.R.A. 261, 23 S. E. 160, it seems to have been held that a committee of the legislature might be clothed with the power to investigate all matters growing out of litigation and all other troubles between a specific woman and her husband, and all other persons and things concerning or in any other way appertaining to her matters in connection with the litigation.

III. Investigation not within power of legislature.

In *Kilbourn v. Thompson* (1880) 103 U. S. 168, 26 L. ed. 377, it appeared that the firm of Jay Cooke & Company were debtors of the United States, and it was alleged that they were interested in a "real-estate pool" in the city of Washington, and that the trustee of their estate and effects had made a settlement of their interest with the associates of the firm, to the disadvantage and loss of numerous creditors, including the government of the United States. The House of Representatives, by a resolution reciting these facts, authorized the Speaker to appoint a committee of five to inquire into the matter and history of said "real-estate pool," and the character of the settlement, with the amount of the property involved, in which Jay Cooke & Company were interested, and the amount paid, or to be paid, in said settlement, with power to send for persons and papers, and report to the House. The committee was appointed and organized, and proceeded to make the inquiry directed. A subpoena was issued to one Kilbourn, commanding him to appear before the committee to testify and be examined touching the matters to be inquired into, and to bring with him certain designated records, papers, and maps relating to the

inquiry. Kilbourn appeared before the committee, and was asked to state the names of the five members of the real-estate pool, and where each resided, and he refused to answer the question, or to produce the books which had been required. The committee reported the matter to the House, and it ordered the Speaker to issue his warrant, directed to the sergeant at arms, to arrest Kilbourn, and bring him before the bar of the House, to answer why he should not be punished for contempt. On being brought before the House, Kilbourn persisted in his refusal to answer the question, and to produce the books and papers required. He was thereupon held to be in contempt, and committed to the custody of the sergeant at arms until he should signify his willingness to appear before the committee and answer the question and obey the subpoena duces tecum; and it was ordered that, in the meantime, the sergeant at arms should cause him to be confined in the common jail of the District of Columbia. He was accordingly confined in that jail for forty-five days, when he was released on habeas corpus by the chief justice of the supreme court of the District of Columbia. On his release he brought suit against the Speaker of the House the members of the committee, and the sergeant at arms for his forcible arrest and confinement. The defendants pleaded the facts recited, to which plea the plaintiff demurred. The demurrer was overruled, and judgment ordered for the defendants. On a writ of error to the United States Supreme Court the judgment was affirmed as to all the defendants except the sergeant at arms. They, being members of the House, were held to be protected from prosecution for their action. But, as to Thompson, the judgment was reversed, and the cause remanded for further proceedings. In the Supreme Court the questions involved received thorough consideration; and it was held that the subject-matter of the investigation was judicial, and not legislative, and that there was no power in Congress, or in either House, on the allegation that an insolvent debtor

of the United States was interested in a private business partnership, to investigate the affairs of that partnership, and, consequently, no authority to compel a witness to testify on the subject. The court said: "In all the argument of the case no suggestion has been made of what the House of Representatives or the Congress could have done in the way of remedying the wrong or securing the creditors of Jay Cooke & Company, or even the United States. Was it to be simply a fruitless investigation into the personal affairs of individuals? If so, the House of Representatives had no power or authority in the matter more than any other equal number of gentlemen interested for the government of their country. By 'fruitless' we mean that it could result in no valid legislation on the subject to which the inquiry referred. What was this committee charged to do? To inquire into the nature and history of the real-estate pool. How indefinite! What was the real-estate pool? Is it charged with any crime or offense? If so, the courts alone can punish the members of it. Is it charged with a fraud against the government? Here, again, the courts, and they alone, can afford a remedy. Was it a corporation whose powers Congress could repeal? There is no suggestion of the kind. The word 'pool,' in the sense here used, is of modern date, and may not be well understood; but in this case it can mean no more than that certain individuals are engaged in dealing in real estate as a commodity of traffic; and the gravamen of the whole proceeding is that a debtor of the United States may be found to have an interest in the pool. Can the rights of the pool, or of its members, and the rights of the debtor, and of the creditor of the debtor, be determined by the report of a committee or by an act of Congress? If they cannot, what authority has the House to enter upon this investigation into the private affairs of individuals who hold no office under the government? . . . We are of opinion . . . that the resolution of the House of Representatives authorizing

the investigation was in excess of the power conferred on that body by the Constitution; that the committee, therefore, had no lawful authority to require Kilbourn to testify as a witness beyond what he voluntarily chose to tell; that the orders and resolution of the House, and the warrant of the Speaker, under which Kilbourn was imprisoned, are, in like manner, void for want of jurisdiction in that body, and that his imprisonment was without any lawful authority."

The foregoing case was followed in *Re Pacific R. Commission* (1887) 12 Sawy. 559, 32 Fed. 241, wherein the court was called on to consider the right of a legislative commission to investigate the private affairs, books, and papers of the officers and employees of railroads which had received aid from the United States. After discussing the Kilbourn Case, and holding that the commission was without authority to make the investigation, the court said: "This case will stand for all time as a bulwark against the invasion of the right of the citizen to protection in his private affairs against the unlimited scrutiny of investigation by a congressional committee. The courts are open to the United States as they are to the private citizen, and both can there secure, by regular proceedings, ample protection of all rights and interests which are entitled to protection under a government of a written Constitution and laws. The act of Congress not only authorizes a searching investigation into the methods, affairs, and business of the Central Pacific Railroad Company, but it makes it the duty of the railway commission to inquire into, ascertain, and report whether any of the directors, officers, or employees of that company have been, or are now, directly or indirectly, interested, and to what extent, in any railroad, steamship, telegraph, express, mining, construction, or other business company or corporation, and with which any agreements, undertakings, or leases have been made or entered into. There are over 100 officers, principal and minor, of the Central Pacific Railroad Company, and

9 A.L.R.—85.

nearly 5,000 employees. It is not unreasonable to suppose that a large portion of these have some interest, as stockholders or otherwise, in some other company or corporation with which the railway company may have an agreement of some kind, and it would be difficult to state the extent to which the explorations of the commission into the private affairs of these persons may not go if the mandate of the act could be fully carried out. But, in accordance with the principles declared in the case of *Kilbourn v. Thompson*, and the equally important doctrines announced in *Boyd v. United States* (1886) 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524, the commission is limited in its inquiries as to the interest of these directors, officers, and employees in any other business, company, or corporation, to such matters as these persons may choose to disclose. They cannot be compelled to open their books, and expose such other business to the inspection and examination of the commission. They were not prohibited from engaging in any other lawful business because of their interest in and connection with the Central Pacific Railroad Company, and that other business might as well be the construction and management of other railroads as the planting of vines, or the raising of fruit, in which some of those directors and officers and employees have been in fact engaged. And they are entitled to the same protection and exemption from inquisitorial investigation into such business as any other citizens engaged in like business."

In *Interstate Commerce Commission v. Harriman* (1908) 211 U. S. 407, 53 L. ed. 253, 29 Sup. Ct. Rep. 115, the power of Congress to regulate the operation of interstate carriers was considered and the court, in discussing the right of a commission, appointed by Congress, to make investigations, said: "The purposes of the act for which the commission may exact evidence embrace only complaints for violation of the act, and investigations by the commission upon matters that might have been made the object of

complaint. As we already have implied, the main purpose of the act was to regulate the interstate business of carriers, and the secondary purpose, that for which the commission was established, was to enforce the regulations enacted. These, in our opinion, are the purposes referred to; in other words, the power to require testimony is limited, as it usually is in English-speaking countries, at least, to the only cases where the sacrifice of privacy is necessary,—those where the investigations concern a specific breach of the law.”

In the reported case (*GREENFIELD v. RUSSEL*, ante, 1334) it is held that a joint resolution of the Illinois general assembly, providing for the appointment of a committee to investigate a certain church and the overseer or pretended owner thereof, is unconstitutional, it appearing that the resolution was not adopted with a view to have the committee investigate charges of misdoings by the church and its overseer, and for the purpose of future legislation if the same should be deemed advisable.

In *Allen v. Buchanan* (1873) 9 Phila. (Pa.) 283, it appeared that a legislative committee investigated the affairs of a medical college, and, on recommendation of the committee, an

act was passed, repealing the charter of the corporation. In holding that the repeal was void, the court said: “The recital in the preamble of the Act of 1872, that it had been ascertained by evidence produced before a committee of the senate, that the Eclectic Medical College had been guilty of unlawful, discreditable, and dangerous acts, on which the repeal was thereupon declared, does not help the case. The committee had no judicial power, and could not turn itself into a court of justice to take jurisdiction, summon, and try the corporation for its offenses. It was but a portion of the legislative body itself, charged with a function, merely ancillary to legislation. Its judgment was no more than the judgment of the body conferring upon it the power of inquiry. The Act of 1872, repealing the charter, was therefore without legislative force and void. The corporation is entitled to a trial in due course of law, to ascertain its breach of duty, before its charter can be taken away. A franchise is a valuable privilege, and is property in the contemplation of law; and the body possessing it is as much entitled to a judicial determination of its right or want of right, to hold it, as a natural person is of his right to his lands or his goods.” E. C. B.

ADDIS BRYAN, Appt.,

v.

IRA COMSTOCK.

Arkansas Supreme Court — April 12, 1920.

(— Ark. —, 220 S. W. 475.)

Arrest — at night — validity — liability of officer.

The arrest late at night of a reputable citizen of the community for driving his automobile without the necessary lights, refusing to permit him to make bail, and lodging him in jail because of unwillingness to disturb a magistrate, is an abuse of discretion rendering the officer liable in damages.

[See note on this question beginning on page 1350.]

APPEAL by defendant from a judgment of the Circuit Court for Crawford County (Cochran, J.) in favor of plaintiff in an action brought to recover damages for his alleged illegal and wrongful arrest and imprisonment. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. W. H. Neal and Evans & Evans, for appellant:

The provisions of the Motor Vehicle Law are made not only to enable the driver to proceed with safety, but also to protect other users of the public highway.

Babbitt, Motor Vehicles, § 409.

Defendant had the right, and it was his duty, to arrest the plaintiff.

2 Hale, P. C. p. 95; 11 R. C. L. pp. 800, 801; Leger v. Warren, 62 Ohio St. 500, 51 L.R.A. 193, 78 Am. St. Rep. 738, 57 N. E. 506; 3 Cyc. 859; Huber v. Walker, 62 Pa. Super. Ct. 299; Driffoos v. Jonesboro, 107 Ark. 102, 154 S. W. 196; Ex parte Williams, 99 Ark. 476, 138 S. W. 985; Tryon v. Pingree, 112 Mich. 338, 37 L.R.A. 222, 67 Am. St. Rep. 398, 70 N. W. 905; Howard v. State, 137 Ark. 111, 208 S. W. 298; St. Louis, I. M. & S. R. Co. v. Hudson, 95 Ark. 506, 130 S. W. 534.

Messrs. Sam R. Chew and C. M. Wofford for appellee.

Smith, J., delivered the opinion of the court:

Appellant was deputy constable of Van Buren township, Crawford county, and on the night of September 21, 1918, arrested appellee upon the alleged false charge of being drunk and of running his automobile without headlights, and this suit was brought to recover damages on that account. There was a verdict and judgment for \$500, from which comes this appeal.

When appellee was arrested he was carried to jail, and the charge then preferred against him was that of being drunk, but it is not now claimed that he was drunk, and no justification of appellant's action is made on that ground. It is insisted that appellee violated the statute which requires that "every motor vehicle shall carry during the period from sunset to one hour before sunrise, at least two lighted lamps, showing white lights visible at least 200 feet in the direction towards which each motor vehicle is proceeding, and shall also exhibit at least

one lighted lamp, which shall be so situated as to throw a red light visible in the reverse direction." Pub. Acts 1911, p. 94, § 4, Act 134.

It is not denied that the tail light of appellee's car was shining, as was also one of the front lights, but it is said that only one of the front lights was shining, and that appellee was therefore guilty of a misdemeanor, in that both front lights were not shining. It appears, however, that appellee was tried upon this charge and acquitted, and at the trial from which this appeal comes the jury was told that appellant had the right, and that it was his duty, to arrest appellee, and that he would not be liable in damages for such arrest if appellee "was operating an automobile on the streets or highways without having at least two lighted lamps showing white lights visible," etc. We may assume, therefore, that appellee was not, in fact, guilty of that offense alleged to have been committed in appellant's presence.

According to appellee, the circumstances of his arrest were as follows: He and a young lady, who was his fiancée, and who became his wife before the trial in the court below, had read a book upon which a moving picture play was based, which was then being shown in Ft. Smith, and they drove to that city for the purpose of seeing the picture. They arrived somewhat late and were unable to obtain seats, so they waited for and attended the second show. Before the show was over they concluded they might be late in reaching the young lady's home, so they left the theater before the performance was ended. In driving to Van Buren from Ft. Smith appellee discovered that a car was behind him, and during the trip over he several times drove his car over to the side of the road to permit the other car to pass, but it

did not do so. When he arrived in Van Buren he stopped his car for some purpose in front of the courthouse, whereupon appellant, who proved to have been the driver of the car which had followed him, came to his car and pulled him out of it, and told him he was under arrest. Appellee is hard of hearing, and did not at first understand what was happening, but, when told that he was being arrested, demanded to know the cause, but the requested information was not given him. He asked to be allowed to take the young lady to her home, and asked the officer to accompany him to her home for that purpose, but appellant refused to do so, and proceeded to take appellee to jail, while the young lady was left unattended in the car. Appellee asked the privilege of making bond, and also asked that his father, who was then living in Ft. Smith, be telephoned, and his phone number was furnished for that purpose; but neither of these requests was granted. Upon reaching the jail appellant reported to the jailer that he had a drunken man whom he wanted locked up for the night, and that formal charge against the drunken man would be preferred the following morning. Appellee was locked in jail and detained there for from twenty to forty minutes. The jailer knew, when the prisoner's name was furnished and entered by him on the jail books, that his prisoner was a member of a well-known and respectable family which for many years had resided in that county, and having some misgivings about what had happened, he reported the occurrence to the sheriff. Fortunately, the sheriff was a man of discretion, and he went at once to the jail and had appellee released and carried him to his home, where he spent the night, and the next morning gave him his breakfast, after which appellee and the sheriff set out in search of the automobile, which they found in a garage, where it had been taken by appellant after having put appellee in jail.

Appellant attempted to justify his conduct by stating that the traffic laws both of the state and of the city of Van Buren were being flagrantly violated by many autoists at night, and he had been instructed by the justice of the peace of the township to break up this unlawful practice. The court permitted the introduction of this testimony as tending to show appellant's good faith. Appellant admitted that appellee requested to be allowed to make bail, and that he be carried before the justice of the peace for that purpose; but appellant says he did not comply with the request because the hour was late, and he had been instructed by the justice of the peace not to disturb him, and that if any violators of the law were arrested at night to confine them in jail until the following morning. According to appellee, the arrest occurred about 11 P. M., while, according to appellant, the arrest was made shortly after midnight.

Exceptions were saved to the action of the court in giving and in refusing to give different instructions; but all the questions raised are disposed of by the discussion of appellant's instruction numbered 8, which was refused, and appellee's instruction numbered 5, which was given, which instructions read as follows:

"(8) The defendant, Bryan, after he arrested the plaintiff without a warrant, had no authority to admit the plaintiff to bail for said offense, and was not required by law to carry the plaintiff instantly to a magistrate at a late hour of the night in order that the magistrate might allow the plaintiff to give bail to answer the charge for which he had been arrested."

"(5) The defendant, as deputy constable of Van Buren township, of Crawford county, Arkansas, was authorized, under the law, to arrest the plaintiff for any misdemeanor committed in his presence in the county of Crawford and state of Arkansas without a writ of arrest, but upon making his arrest it be-

came and was the duty of the defendant to take plaintiff before some magistrate and obtain from the magistrate a warrant of arrest and a writ of commitment to the county jail in default of bond, the amount of which said bond to be fixed by said magistrate. Unless you find from the evidence in this case that this was done, then you are instructed that the arrest and imprisonment was illegal and actionable."

In testing the correctness of the court's action in refusing one instruction and in giving the other, it will be borne in mind that appellee was not drunk, nor in such condition as to make it probable that he would commit some act of violence, or might disturb the peace, or be injured himself because of his inability to take care of himself; nor was any attempt made to show that unless appellee was immediately taken into custody he would depart the jurisdiction and not be present when his presence was required for trial.

It is because of the contemplation of some one of the matters just mentioned, or of some reason of a similar nature, that the law confers upon a peace officer the authority to make an arrest without a warrant when a public offense has been committed in his presence. Kirby's Dig. § 2119. Where a peace officer makes an arrest, pursuant to the authority of § 2119 of Kirby's Digest, it is his duty to carry the person arrested forthwith before the most convenient magistrate of the county in which the arrest is made, to the end that appropriate action may be had for granting bail, if the offense charged is bailable, and to make any necessary order in regard to a trial of the charge preferred. Kirby's Dig. § 2128.

The purpose of the statute is to promote the orderly enforcement of the law, and it is not to be assumed that, in giving a peace officer the right to arrest when a public offense is committed in his presence, it was

intended to diminish or impair the constitutional right of making bail.

Of course, a peace officer is clothed with certain discretion as to the conditions under which he should make an arrest without a warrant for an offense committed in his presence, and with what expedition he should carry the person arrested before the officer having jurisdiction of the offense. But here there was no exercise of discretion; rather, there was a very gross abuse of discretion. Appellant stood upon the letter of his legal right to make the arrest, without the existence of any necessity for the strict exercise of that right. He should therefore have given appellee the benefit of the strict letter of his right to be carried forthwith before a magistrate; and the only reason given for denying appellee this right was appellant's unwillingness to disturb the justice of the peace. Under the circumstances stated, this was

Arrest—at night
—validity—
—liability of officer.

not a sufficient excuse for subjecting appellee to the humiliation of being arrested and locked in jail.

In 5 C. J. 421, it is said: "But arrests at night and on Sunday, or the eve of Sunday, when it is hard to obtain bail, are deemed oppressive and unjustifiable, except in cases of pressing necessity."

As bearing upon the officer's duty in the circumstances and in the manner of its exercise, see *Sheehan v. Holcomb*, 1 Tex. App. Civ. Cas. (White & W.) 215; *Markey v. Griffin*, 109 Ill. App. 212; *Bishop v. Lucy*, 21 Tex. Civ. App. 326, 50 S. W. 1029; *Moses v. State*, 6 Ga. App. 251, 64 S. E. 699; *Linnen v. Banfield*, 114 Mich. 93, 72 N. W. 1; *Myers v. Dunn*, 126 Ky. 548, 13 L.R.A. (N.S.) 881, 104 S. W. 352; *Wiggins v. Norton*, 83 Ga. 148, 9 S. E. 607; *Malcomson v. Gibbons*, 56 Mich. 459, 23 N. W. 166.

We find no prejudicial error in the record, and the judgment is therefore affirmed.

ANNOTATION.

Time at which an arrest is made as affecting its legality or liability for making it.

The present annotation is confined to cases which pass upon the legality of an arrest or liability for making an arrest, as affected by the hour of the day or the day of the week upon which it was made. This limitation, of course, excludes certain classes of cases which might be regarded as falling within the title outlined, such, for example, as those which pass upon the general question of the right of an officer to make an arrest for a crime not committed in his presence, but which do not involve any question as to hour of day or day of week; those which involve the arrest of a person while in attendance at court as a witness; those where an arrest is made under an execution after the expiration of the time within which it was made returnable, or which pass upon the question whether or not an arrest was made within a reasonable time after the issuing of a warrant; and those where the arrest was made during the vacation of the court, under a warrant commanding the officer to bring the accused forthwith before such court.

The general rule has been declared to be that, in the absence of controlling statute to the contrary, an arrest may be made on a criminal charge on any day of the week and at any time of the day or night. See *Williams v. State* (1870) 44 Ala. 41; *Keith v. Tuttle* (1848) 28 Me. 326; *Ex parte Carroll* (1884) 9 Ohio Dec. Reprint, 261; *State v. Smith* (1818) 1 N. H. 346; and *Mackalley's Case* (1611) 9 Coke, 652, 77 Eng. Reprint, 828, which is set out and approved in *Waite v. Stoke* (1618) Cro. Jac. 496, 79 Eng. Reprint, 423.

In *Mackalley's Case* (Eng.) supra, the defendant contended that his arrest was tortious because it was made in the night, counsel arguing as follows: "The night is a time of rest and repose, and not to arrest any by his body, for thereof would ensue (as in hoc causa accidit) bloodshed; for the

officer and minister cannot have such assistance, nor can the peace be so well kept in the night, that is to say, *intenebris*, as in the day, in *apertaluce*; and the prisoner cannot know the officer or minister of justice in the night; nor can the prisoner so soon find sureties for his appearance in the night, and thereby avoid his imprisonment, as he may in the day;" but the court answered that an arrest in the night is lawful because the officer or minister of justice ought to arrest when the offender can be found, for otherwise he, perhaps, might never be found. It was also said that no inconvenience will ensue upon an arrest in the night, for although the accused cannot see the officer, yet, when he hears him say, "I arrest you," etc., he ought to obey him; and that, "as to the finding of sureties, the law is, that he ought to remain in prison till he finds sureties, be it in the day or in the night." It was also contended in the *Mackalley Case* that an arrest cannot be made on Sunday, since the day is not "*dies juridicus*," to which it was answered and resolved "that no judicial act ought to be done on that day, but ministerial acts [such as the making of a necessary arrest] may be lawfully executed on the Sunday; for otherwise peradventure they can never be executed; and God permits things of necessity to be done that day."

Very often it is expressly declared by statute that an arrest may be made on any day and at any hour. For statutes illustrative of those which expressly provide that an arrest may be made on any day or at any time of the day or night, see Ind. Crim Code, § 36 (2 Ind. Rev. Stat. 1876, p. 379), as set out in *State v. Douglass* (1880) 69 Ind. 544; N. Y. Code Crim. Proc. § 170, as set out in *Murphy v. Kron* (1887) 20 Abb. N. C. (N. Y.) 259; *People v. Howard* (1895) 13 Misc. 763, 35 N. Y. Supp. 233, and *People v. Bradley* (1908) 58 Misc. 507, 111 N. Y. Supp. 625 (provision of New York

statute expressly confined to felonies); and Shannon's Code (Tenn.) §§ 6992-6994, as set out in *McCaslin v. McCord* (1906) 116 Tenn. 693, 94 S. W. 79, 8 Ann. Cas. 245 (Tennessee statute applies to "public offenses," with exception that if the arrest is made by a private person, the offense must have been a felony). And that the Texas Code of Criminal Procedure provides that "an arrest may be made on any day or at any time of the day or night," see *Stinson v. State* (1878) 5 Tex. App. 31. And see *Lindsay v. State* (1898) 39 Tex. Crim. Rep. 468, 46 S. W. 1045, wherein it is in effect said that Texas Code Crim. Proc. art. 275, authorizes an arrest on Sunday. And in Porto Rico, if the offense charged is a felony, the arrest may be made on any day and at any time of day or night; but if a misdemeanor, the arrest cannot be made at night unless upon the direction of a magistrate, indorsed upon the warrant. *People v. Ramos* (1912) 18 P. R. R. 954, quoting the statute (Code Crim. Proc. § 120), and holding that it does not prevent an arrest at night without a warrant for a public offense such as a misdemeanor committed in an officer's presence. And that an officer, in executing a precept commanding him to arrest the body of an individual, has the right to select such particular time of day as he thinks most expedient under the circumstances, see *Johnson v. Scott* (1909) 134 Ky. 736, 121 S. W. 695, and *Wright v. Keith* (1844) 24 Me. 158. In *Wright v. Keith* (Me.) *supra*, the court discussed the right of an officer to choose the time of day for the making of an arrest and said: "The particular moment of time when it should be done, anterior to the return day of the precept, was intrusted to the discretion of the defendant. He would be expected to select the moment when it could best be accomplished. Much precaution would be requisite in arresting some individuals; while, as to others, an officer would know that it could be done at any time, and without difficulty. The dwellings of some individuals must be approached stealthily for the purpose; and hence the evening would be selected, and aid al-

so. The defendant, in making the arrest in question, made use of these precautions; with what propriety may be gathered from the conduct of the plaintiff, the evidence in reference to which comes from his son. The plaintiff objected to going with the defendant that evening, and insisted on a postponement till the next day. It was not for him to control the defendant in this particular." And that in New York an officer may at night, without a warrant, arrest any person whom he has reasonable cause for believing to have committed a felony, see *People v. Ryan* (1890) 28 N. Y. S. R. 489, 8 N. Y. Supp. 369, which applies New York Code. Crim. Proc. § 179. And that, where by statute the service of none but civil process is prohibited on the Lord's Day, "warrants against persons charged with any crimes whatever may be lawfully served on that day," see *Pearce v. Atwood* (1816) 13 Mass. 324. And that in Vermont, by virtue of express statutory provision, a person who wilfully injures sheep may be arrested on the Sabbath, see *Corbett v. Sullivan* (1882) 54 Vt. 619. So in Connecticut the statutes expressly empower peace officers to arrest persons unlawfully traveling on the Sabbath. *Ward v. Green* (1836) 11 Conn. 455. And that in Nova Scotia the statutes permit an arrest on Sunday for violation of the Canada Temperance Act, see *Rex v. McGillivray* (1907) 41 N. S. 321. But that in Nova Scotia an arrest on Sunday for default in payment of a fine for violation of the Canada Temperance Act is void, see *Ex parte Frecker* (1897) 33 Can. L. J. N. S. 248.

And in *Phillips v. Ronald* (1867) 3 Bush (Ky.) 244, 96 Am. Dec. 216, it was held that a statute authorizing a sheriff having an order of arrest to enter any house or inclosure for the purpose of executing it must be regarded as full authority to an officer "having a writ of arrest, for the purpose of executing it at any time, whether night or day, to break into any house or inclosure," so that an officer could not evade liability for failure to make an arrest on the ground that he was not obliged to ex-

ecute process at night, especially where a reasonable discharge of his duty required that the process be executed at night.

The statutes of some jurisdictions expressly provide that no arrests shall be made on Sunday except for treason, felony, or breach of the peace; but the exception includes many public offenses. For instance, under a statute of this character it has been held that every indictable misdemeanor is a "breach of the peace," so that a person can be arrested on Sunday for playing baseball in violation of a statute, which was declared to make such play an indictable misdemeanor. *Ex parte Carroll* (1884) 9 Ohio Dec. Reprint, 261. And in *Com v. Googesky* (1907) 34 Pa. Co. Ct. 197, it was held that a person could be arrested on Sunday on a warrant charging assault upon an officer and obstructing the execution of process, the court saying that a "breach of the peace" was involved. And see *Com. v. Overton* (1914) 42 Pa. Co. Ct. 446, wherein the court refused to quash an indictment for selling liquor on Sunday and keeping a disorderly and gambling house, it appearing that the warrant had been issued, the arrest made, and the hearing had, on Sunday. And in England, under 29 Car. II. chap. 7, § 6, which expressly rendered void the service of any writ, process, warrant, etc., on Sunday, except in cases of treason, felony, or breach of the peace, it has been held that the following offenses were within the statute, and that an arrest therefor could lawfully be made on Sunday: "All indictable offenses," including conspiring to deprive a person of peaceable possession of his house (*Rawlins v. Ellis* (1846) 16 Mees. & W. 172, 153 Eng. Reprint, 1147, 10 Jur. 1039, 16 L. J. Exch. N. S. 5); escape from custody, unless voluntary (*Parker v. More* (1704) 6 Mod. 95, 87 Eng. Reprint, 852, 3 Salk. 148, 91 Eng. Reprint, 744, 2 Ld. Raym. 1028, 92 Eng. Reprint, 183; *Featherstonehaugh v. Atkinson* (1736) Barnes, 373, 94 Eng. Reprint, 961); contempt of court (*Anonymous* (1744) Willes, 459, 125 Eng. Reprint, 1267, and *Ex parte Whitchurch* (1749) 1 Atk. 55, 26 Eng. Re-

print, 37, both of which held that such an offense was a breach of the peace. And see *Cecil v. Nottingham* (1700) 12 Mod. 348, 88 Eng. Reprint, 1371). And that a principal may be taken on Sunday by his bail, see *Anonymous* (1704) 6 Mod. 231, 87 Eng. Reprint, 982; *Ex parte Gibbons* (1747) 1 Atk. 238, 26 Eng. Reprint, 153. But for a holding to the effect that the bail to a sheriff cannot retake and surrender the defendant on a Sunday, see *Brookes v. Warren* (1779) 2 W. Bl. 1273, 96 Eng. Reprint, 748.

And see the following cases, wherein, without setting out the particular statutory provisions involved, it was expressly held that arrests made on Sunday were valid: *Weldon v. Colquitt* (1879) 62 Ga. 449, 35 Am. Rep. 128; *Main v. McCarty* (1854) 15 Ill. 442; *Rice v. Com.* (1867) 3 Bush (Ky.) 14; *Watts v. Com.* (1869) 5 Bush (Ky.) 309; *Kammerer v. Com.* (1910) 137 Ky. 315, 125 S. W. 723; *Reg. v. Ramsay* (1867) 16 Week. Rep. 191 (Irish case).

But where uncontrolled by statute, the general rule that, in the absence of a statute to the contrary, an arrest may be made at any time, is generally regarded as subject to the exception that arrests should not be made at night or on Sunday except in case of pressing necessity. At least it has been so held, the theory being that such an arrest in the absence of necessity is oppressive and unjustifiable because of the difficulty of obtaining bail at such a time. This rule was laid down in the reported case (*BRYAN v. COMSTOCK*, ante, 1346), wherein an arrest made late at night upon a trivial charge was held to be a gross abuse of discretion upon the part of the officer making the same. So, in *Malcolmson v. Gibbons* (1885) 56 Mich. 459, 23 N. W. 166, the court laid down the rule that night arrests and arrests on the eve of Sunday, or when the ordinary resources for immediate deliverance are not at hand, are unjustifiable and oppressive except in case of pressing necessity; and, applying it, held that an arrest made late on Saturday night was cruel and oppressive, it not appearing that there was any reason why it could not have been postponed until

Monday. And in *Keith v. Tuttle* (1848) 28 Me. 326, it was said that an arrest on Sunday is unlawful if it is unnecessary to make it on that day. And that the fact that an arrest is unnecessarily made near midnight and on the eve of Sunday necessarily aggravates the grievance to a man who has no accessible means of relief, counsel, or deliverance at hand, see *Stensrud v. Delamater* (1885) 56 Mich. 147, 22 N. W. 272. And see *Com. v. Eyre* (1815) 1 Serg. & R. (Pa.) 347, wherein the court seems to have been of the opinion that Sabbath-breaking by working without noise or disorder was not an offense of so pressing a nature as to require an immediate and forcible arrest.

And in many jurisdictions express statutory provisions prohibit the making of arrests for certain crimes at night or on Sunday. For example, see N. Y. Code Crim. Proc. § 170, which provides that an arrest for a misdemeanor cannot be made under a warrant on Sunday or at night unless by direction of the magistrate, indorsed upon the warrant, as set out and applied in *MacDonnell v. McConville* (1911) 148 App. Div. 49, 132 N. Y. Supp. 1085, affirmed without opinion in (1913) 210 N. Y. 529, 103 N. E. 1126; *Murphy v. Kron* (1887) 20 Abb. N. C. (N. Y.) 259; *People v. Howard* (1895) 13 Misc. 763, 35 N. Y. Supp. 233; and *People v. Bradley* (1908) 58 Misc. 507, 111 N. Y. Supp. 625. So in Pennsylvania, by the Act of 1705, an arrest cannot be made on Sunday on a warrant charging a mere misdemeanor. *Com. v. DePuyter* (1895) 16 Pa. Co. Ct. 589 (warrant charged selling liquor without a license on Sunday); *Com. ex rel. Volpe v. Superintendent of County Prison* (1896) 5 Pa. Dist. R. 635 (same). At least, unless the warrant also alleged a breach of the peace. *Com. v. DePuyter* (Pa.) supra. And in North Carolina the arrest of a person on Sunday pursuant to process issued in a civil action was held to be unlawful "and in violation of the statute, Rev. Code. chap. 31 § 54, which so expressly declares."

And in New York it has been held that a statute which prohibits the serv-

ice on Sunday of any writ, warrant, or other proceeding of any court or officer of justice, except in cases of "breach of the peace or for the apprehension of persons charged with crimes or misdemeanors," etc., but which does not in terms include arrests without process, nevertheless prohibits arrests without process on Sunday for offenses such as a violation of a municipal ordinance, which offense is neither a "breach of the peace" nor a "crime or misdemeanor." *Wood v. Brooklyn* (1852) 14 Barb. (N. Y.) 425. The court said: "This provision does not include, in terms, arrests without process in the cases not excepted, but they are directly within the evil which was intended to be averted, and are on many accounts more objectionable than where some process warranting them has been issued; and are therefore, upon the principle of construction applied to remedial statutes, included within the prohibition. A violation of the second section of the ordinance in question is neither a breach of the peace, nor, as has been decided by the supreme court in similar cases, a crime or misdemeanor, nor an infraction of either of the two articles specified in the section which I have last quoted. The only other excepted cases are, where the service shall be especially authorized by law. I have not seen any authority which sanctions the arrest, without process, of any person on Sunday, for a violation of a corporation ordinance."

And under general statutes which expressly prohibit arrests on Sunday except in cases of treason, felony, or breach of the peace, various offenses have been held not to be such as permitted the arrest of the perpetrator on Sunday. Thus, in *Com. v. Eyre* (1815) 1 Serg. & R. (Pa.) 347, it was held that Sabbath-breaking by working without noise or disorder was not such an actual breach of the peace as would warrant the making of an arrest therefor on Sunday. And, of course, a statute providing that no writ, process, warrant, etc., shall be executed or served on Sunday except in cases of treason, felony, or breach of peace, as does the English Act of

29 Car. II., chap. 7, § 6, does not permit an arrest on civil process on a Sunday. *Rex v. Myers* (1786) 1 T. R. 265, 99 Eng. Reprint, 1086 (holding that an arrest on Sunday for failure to pay a penalty upon conviction under the English Lottery Act was in the nature of a civil proceeding); *Atkinson v. Jameson* (1792) 5 T. R. 25, 101 Eng. Reprint, 14; *Wells v. Gurney* (1828) 8 Barn. & C. 769, 108 Eng. Reprint, 1229; *Re Eggington* (1853) 2 El. & Bl. 717, 118 Eng. Reprint, 936, 2 C. L. R. 385, 23 L. J. Mag. Cas. N. S. 41, 18 Jur. 224, 2 Week. Rep. 10, 76 (holding that an arrest of a town official for failure to perform a ministerial duty was in the nature of a civil proceeding). And see *Wilson v. Tucker* (1695) 1 Salk. 78, 91 Eng. Reprint, 74; and *Lyford v. Tyrrel* (1794) 1 Anstr. 85, 145 Eng. Reprint, 807, 3 Revised Rep. 553. And in England, by 9 Geo.

IV. chap. 31, § 23, it is expressly made a crime to arrest a clergyman on any civil process while he shall be performing divine service, or while going to or returning from the performance thereof, and an arrest in violation thereof is an abuse of process which entitles the accused to his discharge. *Goddard v. Harris* (1831) 7 Bing. 320, 131 Eng. Reprint, 124, 5 Moore & P. 122, 9 L. J. C. P. 109.

Where the common law as adopted includes both the common law of England as opposed to written or statute law, and the early acts of Parliament, it has been held that the English act, 29 Car. II., chap. 7, § 6, under which arrests on Sunday were prohibited except for treason, felony, and breach of the peace, is a part of the common law, so that an arrest in a civil action on Sunday is void. *Valentine v. Roberts* (1902) 1 Alaska, 536. G. J. C.

BEN CROSS, Plff. in Err.,

v.

STATE OF TENNESSEE.

Tennessee Supreme Court — May 18, 1920.

(— Tenn. —, 221 S. W. 489.)

Evidence — impeachment — evidence of confession.

1. An accused cannot be cross-examined with respect to the making of a confession, for the purpose of impeachment, if the confession itself is inadmissible because induced by hope or fear.

[See note on this question beginning on page 1358.]

— confession — when admissible.

2. A confession induced by hope or fear is not admissible in evidence against an accused.

[See 1 R. C. L. 554, 557.]

— of committing magistrate — failure to warn.

3. The committing magistrate can-

not testify that one brought before him on a murder charge pleaded guilty, if he did not follow the statutory mandate requiring him to give information as to right to counsel and use against him of any statements which he might make.

[See 1 R. C. L. 567.]

ERROR to the Circuit Court for Lauderdale County (Baptist, J.) to review a judgment convicting defendant of murder in the first degree. *Reversed.*

The facts are stated in the opinion of the court.

Mr. W. W. Craig, for plaintiff in error:

An involuntary confession cannot be used to impeach a defendant's testimony.

Harrold v. Oklahoma, 94 C. C. A. 415, 169 Fed. 47, 17 Ann. Cas. 868; 1 R. C. L. § 120, pp. 575, 576; *Morales v. State*, 36 Tex. Crim. Rep. 234, 36 S. W. 435, 846; *Harrold v. Territory*,

17 Ann. Cas. 873, note; *People v. Yeaton*, 75 Cal. 415, 17 Pac. 544; *Shephard v. State*, 88 Wis. 185, 59 N. W. 449; 1 Greenl. Ev. 15th ed. § 449, p. 595.

It was error to admit the testimony of the justice of the peace who held the committing trial, to the effect that he had read the warrant to the defendant when the committing trial was called, and asked him whether he was guilty or not guilty, and that the defendant had said that he pleaded guilty.

Nelson v. State, 2 Swan, 237; *Alfred v. State*, 2 Swan, 581; *State v. Clifford*, 41 Am. St. Rep. 524, note; 1 R. C. L. 551, 553; *Swang v. State*, 2 Coldw. 212, 88 Am. Dec. 593; *Anonymous*, 1 Overt. 437; 1 R. C. L. 571; *Matthews v. State*, 55 Ala. 187, 28 Am. Rep. 699; *Coffee v. State*, 25 Fla. 501, 23 Am. St. Rep. 525, 6 So. 493; *Daniels v. State*, 78 Ga. 98, 6 Am. St. Rep. 242; *McNish v. State*, 45 Fla. 83, 110 Am. St. Rep. 65, 34 So. 219, 12 Am. Crim. Rep. 125.

The effect of the admission of the alleged confession as impeaching testimony of the defendant, and the admission of the evidence of the magistrate as to the statement or plea of the defendant at the committing trial, was far-reaching and led to his conviction.

Decherd v. Morrison, 2 Swan, 305; *Shephard v. State*, 88 Wis. 185, 59 N. W. 449; *Nelson v. State*, 2 Swan, 237; *Riley v. State*, 9 Humph. 651.

Mr. W. W. Swiggart, Assistant Attorney General, for the State.

McKinney, J., delivered the opinion of the court:

The plaintiff in error, Ben Cross, was indicted and convicted of murder in the first degree, and the jury fixed his punishment at twenty-one years in the state penitentiary. He has appealed to this court, and has assigned errors.

On the trial of the case the state undertook to prove that the plaintiff in error, before the trial, had made a written confession of his guilt. In the absence of the jury the court

heard the evidence as to said alleged confession, and it appearing that said confession was not made freely and voluntarily, but was induced by hope or fear, the court, very properly, held that the

evidence as to the confession was incompetent.

In *Deathridge v. State*, 1 Sneed, 79, this court said: "But if the confession be the result of hope or fear, induced or incited by a person having power over the prisoner, it becomes incompetent; for, in such case, it can have no tendency to prove that the prisoner is guilty of the crime."

In *Strady v. State*, 5 Coldw. 307, the court said: "But a confession forced from the mind by the flattery of hope or the torture of fear comes in such a questionable shape, when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected."

In *Self v. State*, 6 Baxt. 253, it was said: "But unless confessions are made freely and voluntarily, without the influence of hope or fear, they are not received as competent evidence."

The state, in its cross-examination of the plaintiff in error, over the objection of his counsel, was permitted by the court to ask him if he had not made a written statement, to which he replied that he did not remember making it. He was then asked, over the objection of his counsel, if he did not make the oral statements admitting his guilt of the murder, committed in the manner detailed in the written confession, and replied that he did not remember making such statement.

The trial judge admitted this evidence as an impeachment of the witness, and in rebuttal, over his objection, permitted the witnesses Wood and Rice to testify that he made said confession to them.

This action of the trial judge is assigned as error, and we think, both upon principle and authority, this evidence was incompetent and highly prejudicial to the plaintiff in error. The effect of its admission was to permit the state to prove indirectly what the court had held it could not prove directly. We are unable to understand how evidence which is entitled

Evidence—con-
fession—when
admissible.

—impeachment—
evidence of
confession.

to no credit, and which does not tend to prove the guilt of the prisoner, can be competent for the purpose of contradicting statements made by the accused on the witness stand. If the statements drawn from the accused, while in custody, by the flattery of hope, or by threats, are entitled to no credit as being truthful statements of what occurred, by the same parity of reasoning such statements can have no force as contradictions of the testimony of the plaintiff in error on the witness stand. The same reasons which forbid their admissibility in the one instance would make them incompetent in the other. It would certainly be unjust to impeach a witness by testimony which had been wrongfully obtained. The exclusion of the confession by the court was, in effect, holding that the same had been improperly obtained. If it were thus obtained,—that is, by force, or by threats, or by influence of hope,—it was not the free, voluntary statement of the accused, and it would be most cruel to say that the witness is discredited, and that he is not entitled to be believed because of the confession made by him under such circumstances.

In *Harrold v. Oklahoma*, 94 C. C. A. 415, 169 Fed. 47, 17 Ann. Cas. 868, Judge Sanborn, in a very able opinion, in which the authorities are reviewed, says:

“A person charged with crime shall, at his own request, but not otherwise, be a competent witness, and his failure to make such request shall not create any presumption against him, nor be mentioned at the trial.”

“Now the confession of this defendant was incompetent evidence against him. Did the fact that he availed himself of the privilege accorded to him by this statute make it competent? If so, did that fact make all incompetent evidence admissible against him? Did it make the confession and all other facts tending to establish his guilt provable against him by hearsay? Did it make his disclosure regarding his guilt, if any, to his attorney, for the

purpose of his defense, admissible in evidence against him? All these questions must be answered in the negative, because the reason of the rule, and, therefore, the rule itself, apply with at least as much force to an involuntary confession after, as before, it is denied by the testimony of the accused. When it is offered by the prosecutor in chief, it is incompetent evidence to overcome the simple presumption of the defendant's innocence, because it is unworthy of belief. It cannot be more worthy of belief, or more competent to overcome both that presumption and the testimony of the defendant, after he has denied that he ever made it.” (Citing authorities.)

“The privilege granted to an accused person of testifying on his own behalf would be a poor and useless one indeed if he could exercise it only on condition that every incompetent confession induced by the promises, or wrung from him by the unlawful secret inquisitions and criminating suggestions, of arresting or holding officers, should become evidence against him.”

In *People v. Yeaton*, 75 Cal. 415, 17 Pac. 544, the holding of the court is succinctly contained in the syllabus (75 Cal.), which is as follows: “The defendant in a criminal prosecution, who is a witness in her own behalf, cannot be compelled, on cross-examination, to testify to statements made by her out of court, which amount to a confession of the crime, unless it be first shown that the confession was voluntary. And this is so, although the evidence be offered by the prosecution, not as a confession, but merely as contradictory statements, for the purpose of impeaching the witness.”

In *Shepherd v. State*, 88 Wis. 185, 59 N. W. 449, the court said: “The confession was rejected because it was extorted. It was unfair to the accused, and should not be proved against him, and is condemned by the court and ruled out. When the defendant was asked if he made that confession, and denied it, the same witnesses who extorted the confession, and whose testimony was dis-

allowed on that account, are allowed to testify to the confession, however wickedly or wrongly it was obtained, on the exceedingly narrow theory that it is not admitted as a confession, but merely to contradict the witness. The confession is allowed to go to the jury, and have its effect in convicting the defendants, and override the ruling of the court that it was inadmissible as evidence against him, and for such a petty reason. The confession is just as objectionable as evidence, and as incompetent and hurtful, when offered in one way as in another. If no other evidence on the ground of contradicting the defendant as a witness could be found, he had better have gone uncontradicted than that his legal rights as a prisoner should be so violated and his conviction obtained by such unlawful testimony. The object is to get the confession in evidence. It cannot be done directly, but it can be done indirectly. It cannot be used to convict, but it can be used to contradict, the defendant, and in that way it is used to convict him all the same. We cannot adopt such a principle or practice in the administration of criminal law. It is unreasonable as well as unjust."

In Greenleaf on Evidence, 15th ed. vol. 1, § 449, it is said: "It is a well-settled rule that a witness cannot be cross-examined as to any fact which is collateral and irrelevant to the issue, merely for the purpose of contradicting him by other evidence, if he should deny it, thereby to discredit his testimony." (Citing authorities.)

We therefore hold that the trial court was in error in permitting the state to cross-examine the witness as to said alleged confession.

It is further assigned as error: "That the trial court erred in admitting the testimony of N. W. Barbour, the justice of the peace who held the committing trial, to the effect that he had read the warrant to the defendant when the committing trial was called, and asked him whether he was guilty or not guilty,

and that the defendant had said that he pleaded guilty."

As to this incident Mr. Barbour testified as follows:

"That when the case was called, he read the warrant to him (the defendant) and called his attention to the fact that he was charged with murder in the first degree, and asked him what his plea was, and he said he was guilty.

"When this warrant was read to Ben Cross, he was not represented by counsel, and W. W. Craig, a member of the Ripley Bar, being present in court upon another matter, arose and stated to the court that the defendant was entitled to have counsel appointed to represent him in this matter, if he wanted it, and to have the advice of counsel in the matter, and thereupon the court appointed the said W. W. Craig to represent the defendant, and after consulting with the defendant, the case was proceeded with, the state witnesses were examined, some exceptions were made by defendant's counsel to the testimony, and the paper writing which the state sought to introduce was excepted to by the defendant to the extent that it was excluded by the court, and the cause was conducted by the defendant's counsel in his defense from then on as any other cause; and that he could not state whether Ben Cross understood the nature and extent of the charge against him nor what his plea meant, and did not know whether he simply meant to admit that he had shot Luther Hartsfield, or what he meant by his plea of guilty."

The plaintiff in error, Ben Cross, testified as follows: "When I was brought to trial before the magistrate, he read some sort of a paper to me and asked me if I was guilty, and I thought he meant to ask if I was guilty of killing Mr. Hartsfield, and I replied that I had shot Mr. Hartsfield, but I did not understand that I was admitting that I did it without any justification. Mr. Craig told the court that I was entitled to have counsel to advise me, and the court appointed him to represent

me, and, after he had talked with me, he went ahead and fought the case for me."

There are several provisions of Thompson's Shannon's Code setting forth the duties of the committing magistrate in a case of this nature as follows:

"Sec. 7008. When the defendant is brought before a magistrate upon arrest, either with or without warrant, on a charge of having committed a public offense, the magistrate shall immediately inform him of the offense with which he is charged, and of his right to aid of counsel in every stage of the proceedings.

"Sec. 7009. The magistrate shall allow the defendant a reasonable time to send for counsel, and, if necessary, shall adjourn the examination for that purpose.

"Sec. 7010. The magistrate shall, as soon as may be after the defendant appears, or, if the defendant require the aid of counsel, after waiting a reasonable time therefor, proceed to examine the case."

"Sec. 7015. At the examination, the magistrate shall examine the witnesses for the prosecution, on oath, in the presence of the defendant, and such other witnesses as may be produced by the defendant.

"Sec. 7016. When the examination of the witnesses on the part of the state is closed, the magistrate shall inform the defendant that it is his right to make a statement in reference to the charge made against him, or that he may waive the same; and such waiver cannot be used against him on the examination before the magistrate or on trial."

In *Nelson v. State*, 2 Swan, 237, and *Alfred v. State*, 2 Swan, 581, it was held that the magistrate must advise the defendant of his rights, and warn him that statements made by him can be used against him on the trial in the circuit court, before they can be introduced against him.

From the foregoing it is apparent that the magistrate did not follow the mandate of the statute above quoted. Hence his testimony that the plaintiff in error said that he was guilty was incompetent.

It is conceded by the state that if the evidence, which we hold was incompetent, is excluded, a case of first-degree murder has not been made out.

Since the case will have to be reversed and remanded for a new trial, we refrain from commenting upon the facts of the case.

ANNOTATION.

Use of confession improperly obtained, for purpose of impeaching defendant as a witness.

While there is a conflict of opinion as to the question under annotation, the great weight of authority seems to support the rule that a defendant in a criminal prosecution who is a witness in his own behalf cannot be compelled on cross-examination to testify to statements made by him out of court which amount to a confession of the crime, unless it be first shown that the confession was voluntary; despite the fact that the evidence is offered by the prosecution not as a confession, but merely as a contradictory statement, for the purpose of impeaching

the defendant as a witness in his own behalf.

Thus, that a confession inadmissible as evidence on behalf of the prosecution, because not obtained properly, cannot be used for the purpose of impeachment, has been held in *People v. Yeaton* (1888) 75 Cal. 415, 17 Pac. 544; *Harrold v. Oklahoma* (1909) 94 C. C. A. 415, 169 Fed. 47, 17 Ann. Cas. 868, reversing (1907) 18 Okla. 395, 10 L.R.A. (N.S.) 604, 89 Pac. 202, 11 Ann. Cas. 818; *Shephard v. State* (1894) 88 Wis. 185, 59 N. W. 449; *Jones v. State* (1914) 97 Neb. 151,

149 N. W. 327; *State v. Wilson* (1916) 39 Nev. 298, 156 Pac. 929; *Cross v. State* (reported herewith) ante, 1354.

The court in *Harrold v. Oklahoma*, said: "Involuntary confessions of accused persons are inadmissible to impeach them as witnesses, on the same ground that hearsay and all other incompetent evidence is inadmissible to impeach other witnesses, because they are unworthy of belief. And right here is the limitation of the waiver by an accused person of his constitutional privilege under the second rule by testifying, and here is the evidence of the violation of that rule in this case. He may not 'be compelled in any criminal case to be a witness against himself.' When he testifies as a witness he waives this privilege of silence and subjects himself to cross-examination and impeachment to the same extent as any other witness would subject himself thereto in the same situation, but no farther. He may be cross-examined upon the subjects of his direct examination, but not upon other subjects; impeaching questions relative to facts not collateral to the issue—that is to say, relative to facts which the prosecutor is entitled to prove as part of his case—may be lawfully propounded to him, . . . but such questions relative to facts that may not be so proved may not be asked him; and he may be impeached by competent proof of statements made by him contradictory to his answers to such lawful questions, but not by proof of answers contradicting unlawful questions. For these are the limits of cross-examination and of the lawful evidence of impeachment of other witnesses. . . . The impeaching questions asked the defendant and the involuntary confession introduced to contradict his answers were beyond the limits of legal cross-examination of him or of any other witness in his situation, because they did not relate to the subjects of his direct examination, and because they were not germane to any fact which the prosecutor was entitled to prove as part of his case. Hence, the defendant did not waive his constitutional and statutory right to refuse to testify concerning

the statements in his confession, and the propounding of the questions concerning them and the introduction of the involuntary confession were violations of that right."

And in *Shephard v. State*, the court said: "The method here adopted to get the confession of Joseph Shephard in evidence after it had been excluded by the court as being incompetent and inadmissible by reason of its having been extorted by promises of immunity and threats of injury and by falsehood was certainly very ingenious and plausible. . . . The confession is just as objectionable as evidence and as incompetent and hurtful when offered in one way as in another. If no other evidence on the ground of contradicting the defendant as a witness could be found, he had better have gone uncontradicted than that his legal rights as a prisoner should be so violated and his conviction obtained by such unlawful testimony. The object is to get the confession in evidence. It cannot be done directly, but it can be done indirectly. It cannot be used to convict, but it can be used to contradict the defendant, and in that way it is used to convict him all the same. We cannot adopt such a principle or practice in the administration of criminal law. It is unreasonable as well as unjust. This evidence was inadmissible on the familiar ground that a witness cannot be cross-examined and contradicted in respect to matters not admissible in evidence as part of the case."

And in *State v. Wilson*, the court said that "the contention of respondent that the defendant, having submitted himself as a witness in his own behalf, thereby subjected himself to cross-examination and impeachment to the same extent as any other witness, is, in our judgment, answered by the familiar rules that a witness can be impeached only as to matters within the legitimate scope of cross-examination, and that no witness may be impeached by incompetent evidence."

On the other hand, it has been held that an accused who offers himself as a witness may be impeached by proof of confessions not shown to have

been voluntary. *Hicks v. State* (1892) 99 Ala. 169, 13 So. 375; *Smith v. State* (1902) 137 Ala. 22, 34 So. 396, 13 Am. Crim. Rep. 410; *State v. Broadbent* (1903) 27 Mont. 342, 71 Pac. 1; *Kelly v. State* (1909) 160 Ala. 48, 49 So. 535 (dictum); *Com. v. Tolliver* (1876) 119 Mass. 312.

The court in the *Tolliver* Case said: "By availing himself of the right to take the stand as a witness, the defendant became a general witness in the case, subject to the same tests of truthfulness and the same rules as to examination and cross-examination as are applicable to all other witnesses. Being sworn to tell the truth, the whole truth, and nothing but the truth, he waived all right to keep anything back, even in the case of questions the answers to which would tend to criminate himself. . . . Among the modes of impeachment, he, like any other witness, may be cross-examined as to a conflicting account of the matter, given by him on some other occasion. Such an inquiry may be gone into not for the purpose of proving the truth of the former account, but as an impeachment of his credit as a witness. . . . He would still be at liberty to testify that his alleged confession was not true, and to offer such explanation as to the inducements and circumstances under which he gave it as he may see fit."

And in *Smith v. State*, the court, stated that a defendant in a criminal case, by exercising the privilege of testifying given him by the statute, waives the constitutional right to protection against compulsion to give evidence against himself, and becomes subject to cross-examination and impeachment, as are other witnesses.

In Texas the earlier decisions followed the rule that a confession of accused, although not admissible as direct evidence, because he had not been cautioned, as required by statute, could be used by the state, not for the purpose of proving guilt, but for the purpose of impeachment. Thus, it was so held in *Rains v. State* (1894) 33 Tex. Crim. Rep. 294, 26 S. W. 398; *Phillips v. State* (1896) 35 Tex. Crim. Rep. 480, 34 S. W. 272;

Thompson v. State (1896) 35 Tex. Crim. Rep. 511, 34 S. W. 629; *Quintana v. State* (1891) 29 Tex. App. 401, 25 Am. St. Rep. 730, 16 S. W. 258. But if inducements were held out to make the confessions, they were inadmissible for purposes of impeachment, even though defendant was warned. *Rains v. State* (1894) 33 Tex. Crim. Rep. 294, 26 S. W. 398.

The rule of the earlier cases, however, was repudiated in *Morales v. State* (1896) 36 Tex. Crim. Rep. 234, 36 S. W. 435, 846, and the rule now followed in that jurisdiction is that confessions made while in custody, without the warning required by statute, are inadmissible for the purpose of impeachment. *Wright v. State* (1896) 36 Tex. Crim. Rep. 427, 37 S. W. 732; *Bailey v. State* (1899) 40 Tex. Crim. Rep. 150, 49 S. W. 102; *Walton v. State* (1900) 41 Tex. Crim. Rep. 454, 55 S. W. 566; *Parker v. State* (1900) — Tex. Crim. Rep. —, 57 S. W. 668; *Johnson v. State* (1902) 43 Tex. Crim. Rep. 476, 66 S. W. 845; *Brown v. State* (1909) 55 Tex. Crim. Rep. 572, 118 S. W. 139 (decided under a new statute in relation to confessions).

The court in *Morales v. State* said: "The statute says that a confession made by a defendant while in jail cannot be used against him unless he was duly warned. This statute is without limitation and apprehends that the confession cannot be used against him for any purpose; and to use it for the purpose of impeaching him would certainly be using it against him. . . . It is true in this case the court limited the purpose of this testimony to the impeachment of the defendant as a witness. While, as stated, there was a limitation, yet it was an authority to the jury to use the confession for a purpose against the defendant. The confession itself was a direct confession of guilt, made by the defendant while in jail and without proper caution. If it had been made out of jail, or under proper warning given, it could have been used as original evidence against the defendant of the most damaging character; and however much the jury may

have felt constrained to regard the testimony only as directed by the court, it would present to them an exceedingly difficult problem to do so. However that may be, in our opinion the testimony could not be used against defendant for any purpose, and whatever is said in the cases above cited that indicates a contrary view is hereby overruled."

So, in *Brown v. State* (1909) 55 Tex. Crim. Rep. 572, 118 S. W. 139, the trial having occurred after the Act of 1907 went into effect, which required that the confession or voluntary statement made by a person under arrest, not

before an examining court, shall be made in writing, which shall show that the person making it had been warned, it was held that the statute not having been complied with in that respect, the alleged statements or confessions could not be used on cross-examination for the purpose of impeaching the defendant as a witness. The court observed that, even before that act, it had been held that confessions of a party under arrest, made without warning, could not be used against him, even for the purpose of impeachment, citing the cases already referred to. J. H. B.

EX PARTE CLIFTON HUDGINS.

West Virginia Supreme Court of Appeals — May 20, 1920.

(— W. Va. —, 103 S. E. 327.)

Constitutional law — universal labor law.

1. Section 2 of chapter 12, Acts 1917, Second Extraordinary Session (Code Supp. 1918, chap. 151, § 16bII. [§ 5457b]), providing that every able-bodied male resident of this state between the ages of sixteen and sixty years, except bona fide students during school term, who shall fail or refuse to regularly and steadily engage for at least thirty-six hours per week in some lawful and recognized business, profession, occupation, or employment, shall be held to be a vagrant, and be guilty of a misdemeanor, and punished as therein provided, regardless of the financial ability of such person to maintain himself and his dependents without performing such labor, and regardless of his ability to obtain such employment, except as therein provided, is unconstitutional and void as imposing unnecessary and unreasonable restraint upon personal liberty, and as having no just or reasonable relation to the things generally comprehended within the police power of the state.

[See note on this question beginning on page 1366.]

Definition — vagrancy.

2. At common law vagrancy consists in going about from place to place by a person without visible means of support, who is idle, and who, though able

to work for his or her maintenance, refuses to do so, but lives without labor, or on the charity of others.

[See 8 R. C. L. 339.]

Headnote 1 by MILLER, J.

APPLICATION for a writ of habeas corpus to secure petitioner's release from custody, to which he had been committed for alleged violation of the Vagrancy Statute. *Petitioner discharged.*

The facts are stated in the opinion of the court.

9 A.L.R.—86.

Messrs. Litz & Harman and Joseph M. Crockett for petitioner.

Mr. G. L. Counts for respondent.

Miller, J., delivered the opinion of the court:

Petitioner seeks his discharge from custody, the petition and return of the officer showing that he is being restrained of his liberty by the judgment of conviction by confession and sentence upon two indictments found by the grand jury on May 13, 1920, the first, number one, charging that being then and there an able-bodied male resident of McDowell county, West Virginia, between the ages of sixteen and sixty years, and not being then and there a bona fide student during school term, he did unlawfully fail and refuse to regularly and steadily engage for at least thirty-six hours for one week, beginning March 29, 1920, and ending April 5, 1920, in some lawful and recognized business, profession, occupation, and employment, whereby he might contribute to the support of himself and those legally dependent upon him; the second, number two, charges him with a like offense committed during the week beginning April 5, 1920, and ending April 12, 1920.

The grounds alleged and relied on are: First, that the time prescribed within which the statute was to remain in effect had expired by limitation when petitioner is alleged to have committed the several offenses; second, that the said act is unconstitutional and void, being violative (1) of the 13th Amendment of the Constitution of the United States, providing that "neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction;" (2) of § 1, article 3, Bill of Rights, of the Constitution of West Virginia, saying that "all men are, by nature, equally free and independent, and have certain inherent rights, of which when they enter into a state of society, they cannot, by any compact, deprive or

devest their posterity, namely: the enjoyment of life and liberty, with the means of acquiring and possessing property, and of pursuing and obtaining happiness and safety;"

(3) § 3, article 1, of the Constitution of West Virginia, providing: "The provisions of the Constitution of the United States, and of this state, are operative alike in a period of war as in time of peace, and any departure therefrom, or violation thereof, under the plea of necessity, or any other plea, is subversive of good government, and tends to anarchy and despotism."

The statute on which the indictments were found is § 2 of chapter 12 of the Acts 1917, Second Extraordinary Session, and, so far as pertinent to the questions presented, is as follows: "Section 2. From the time this act becomes effective, and thenceforward until six months after the termination of the present war between the United States and the Imperial German Government, any able-bodied male resident of this state between the ages of sixteen and sixty, except bona fide students during school term, who shall fail or refuse to regularly and steadily engage for at least thirty-six hours per week in some lawful and recognized business, profession, occupation or employment, whereby he may contribute to the support of himself and those legally dependent upon him, shall be held to be a vagrant within the meaning and effect of this act, and shall be guilty of a misdemeanor, and upon conviction thereof, shall be fined not more than \$100 for each offense, and as a part of such sentence and punishment . . . shall be by the trial court ordered to work not exceeding sixty days upon the public roads or streets, or upon some other public work being done by and in the county in which such person shall be convicted, or by any municipality therein."

The judgment for the first offense was confinement in the jail of the county at hard labor for thirty days, and a fine of \$25, the labor to be

performed on the public roads, and if the fine was not paid, the imprisonment and labor were to continue until the fine should be paid, at the rate of \$1 per day. And for the second offense the judgment of imprisonment was for forty-five days, commencing at the end of the term imposed under the first indictment, and \$35 fine, with like conditions if this fine was not paid.

The petitioner alleges, and there is no traverse of the fact, that at the outbreak of the war he was a soldier in Company "K," Second West Virginia Infantry, and remained there until the summer of 1917, when he was discharged for physical disability; that later, February 4, 1918, he enlisted in the Army of the United States, and was assigned to the Signal Corps, 79th Division, then in training at Camp Meade, Maryland, and in May, 1918, was transported over seas, and was serving in said division and participated in the battle of St. Mihiel, various battles around Verdun, and the Meuse-Argonne offensive, and was with the division at Sedan when actual hostilities between the United States and the Imperial German Government ended November 11, 1918; that in May, 1919, he was discharged, and was informed that all the soldiers who, like himself, had enlisted for the duration of the war, had long since been discharged, and the Army disbanded.

The military services rendered by petitioner are perhaps not very material, but they should not be overlooked in the administration of a law of this nature, limited as it is to the duration of the war, which the petitioner contends had ended before the offenses with which he was charged were committed. Whether the war had then ended within the provisions of this act, we need not decide, for we have reached the conclusion that the act is unconstitutional and ought to be so declared.

The act is not conditioned on whether or not the offender has oth-

er means of support, or dependents, for if no depend-

ents, by the provisions of the act, no payments need be made by the county or municipality on account of his labor. At the common law vagrancy consists in going about from place to place by a person without visible means of support, who is idle, and who, though able to work for his or her maintenance, refuses to do so, but lives, without labor, or on the charity of others. 29 Am. & Eng. Enc. Law, 568; Ex parte Strittmatter, 58 Tex. Crim. Rep. 156, 124 S. W. 906, 137 Am. St. Rep. 937, note 944, id. 21 Ann. Cas. 477, note 478. But as these authorities point out, in the face of the many different statutes in this country, the common-law rule is of little importance; and it is generally conceded that, within certain broad limitations, the legislature may by statute define vagrancy and impose punishment for the offense.

The broad ground taken by petitioner and his counsel is that the statute sought to be enforced against him is an unjust and unreasonable restraint upon his personal liberty, guaranteed by the state and Federal Constitutions. What is personal liberty under the law? As defined by Blackstone, it "consists in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint unless by due course of law." "In organized society," says Cooley, Constitutional Limitations, 7th ed. 483, "liberty is the creature of law, and every man will possess it in proportion as the laws, while imposing no unnecessary restraints, surround him and every other citizen with protections against the lawless acts of others." The qualifications and restraints which the law may properly impose on personal liberty, classed according to their purpose, as said by the same high authority, are, first, those of public, second, those of private nature. The first class involves the

Definition—
vagrancy.

relative duties and obligations of a citizen to society and his fellow citizens, and is subdivided by Mr. Cooley as follows: "(1) Those imposed to prevent the commission of crime which is threatened; (2) those in punishment of crime committed; (3) those in punishment of contempts of court or legislative bodies, or to render their jurisdiction effectual; (4) those necessary to enforce the duty citizens owe in defense of the state; (5) those which may become important to protect the community against the acts of those who, by reason of mental infirmity, are incapable of self-control. . . . The second class are those which spring from the helpless or dependent condition of individuals in the various relations of life." Cooley, *Const. Lim.* 484.

Tested by these general rules, what may be properly determined of the statute here involved? To bring it within these limitations it must have some reasonable relation to one or more of the subjects over which the state may properly exercise its police power. Manifestly the enactment of the statute was intended as a war measure, for it is limited in its effect to the period of the war and six months after termination thereof. The state, under our Constitution, has no power to declare war; the war power, so far as it exists under the Constitution and laws of this state, is in the governor as commander in chief of the military forces, except when called into the service of the United States, to call out such forces to execute the laws, suppress insurrection, and repel invasion. *Const.* § 12, art. 7; *Code*, §§ 5 and 6, chapter 18 (§§ 783, 784). The statute in no way relates to the raising or organization of the military forces of the state, for state or Federal purposes.

It is apparent that the legislature has attempted to justify the measure on the theory that the persons against whom it was directed were, or might become, charges upon the public; but by its terms it is lim-

ited to the period of the war, and six months thereafter; and that during that term the productive resources of the state should be brought up to the highest standard, for war purposes. With the state, however, this could amount only to a semblance of right. While greater production during the period of the war might be desirable, is that a subject with which the state had the right to deal? We think not. Certainly not by accusing all citizens coming within its provisions with vagrancy, and as criminals, without reference to their ability to support and maintain themselves and their dependents without work. And as further evidence that the protection of the state against vagrancy was not the real object of the statute, it elsewhere provides that, "in no case shall the possession by the accused of money, property, or income sufficient to support himself and those legally dependent upon him be a defense to any prosecution under this act;" and furthermore, that "in no case shall the claim by the accused of inability to obtain work or employment be a defense to prosecution hereunder, unless it . . . be proved that the accused promptly notified the proper representative of the state council of defense of his inability to obtain employment, and requested that work or employment be found for him, and that such employment was not furnished him." [*Code Supp.* 1918, § 5457b.] It is suggested in argument that the state council of defense had completed its work and been discharged long before the alleged offenses were committed by defendant. However, that fact does not appear in the record, and it is immaterial in our view of the law.

So the purpose of the statute was not to subserve any of the purposes for which a citizen may rightfully be deprived of his liberty. Its effect was to require every able-bodied male resident of the state, between the ages specified, regardless of his financial ability, to work, not simply long enough each day of the

week to acquire means of support for himself and his dependents, but for the number of hours required. It is made applicable alike to young and old within these ages. If a citizen, say of fifty or fifty-five years of age, had worked diligently earlier in life, and had laid up a competency with which to support himself and his dependents in his or their stations of life, that he might for the rest of his days live in comparative ease and freedom from the burdens of his earlier years, he could not defend himself on that account, nor escape the penalties imposed for a violation of the statute, characterizing him as a vagrant and punishable as such. Can such a statute find justification in the police power of the state? Though this power has never as yet been, and probably never will be, accurately defined, yet, under the Constitution, it is confined to matters relating to the public health, the public morals, and the public safety. *Booth v. People*, 186 Ill. 43, 50 L.R.A. 762, 57 N. E. 798, 78 Am. St. Rep. 229, and note 235; *State v. Peel Splint Coal Co.* 36 W. Va. 802, 17 L.R.A. 385, 15 S. E. 1000. And this power must be exercised so as not to impose unjust or unreasonable restraints, upon personal liberty. *Lawrence v. Barlow*, 77 W. Va. 289, 87 S. E. 380. Where the statute undertakes to impose restraints on liberty, it should be confined to the things generally comprehended within the police power.

Illustrative of unreasonable restraint upon personal liberty, an ordinance which prohibited anyone knowingly to associate with persons having the reputation of being thieves, burglars, pickpockets, pigeon droppers, bawds, etc., or any other person, for the purpose or with the intent to agree, conspire, combine, or confederate, first, to commit any offense, or second, to cheat or defraud any person of any money or property, etc., was held unconstitutional. It was said to be as unjust and unreasonable for a

legislative body to undertake to forbid certain associations as to command with whom one should associate; and that without some overt act done it is beyond the power of human agency to discern and determine with what intent or purpose the human heart is actuated. *Ex parte Smith*, 135 Mo. 223, 33 L.R.A. 606, 36 S. W. 628, 58 Am. St. Rep. 576, note 580. In *People ex rel. O'Connell v. Turner*, 55 Ill. 280, 8 Am. Rep. 645, a statute was declared unconstitutional which authorized the commitment to the reform school of children between the ages of six and sixteen years, "who are destitute of proper parental care and growing up in mendicancy, ignorance, idleness, and vice," but who may have committed no crime. This case was distinguished or not followed in Wisconsin, in construing a similar statute, in *Milwaukee Industrial School v. Milwaukee County*, 40 Wis. 328, 22 Am. Rep. 702. In *Ruling Case Law* it is laid down as the law of the land that liberty as used in the Constitution is not dwarfed into mere freedom from physical restraint of the person of the citizen, but is deemed to embrace the right of a man to be free in the employment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. It includes the right to be free to use his faculties in all lawful ways; to live and work where he will. 6 R. C. L. pp. 259, 260, § 244. In *Bailey v. Alabama*, 219 U. S. 219, 55 L. ed. 191, 31 Sup. Ct. Rep. 145, the Federal anti-peonage acts, founded on the 13th Amendment, inhibiting involuntary servitude, were held to be violated by a statute which sought to compel service of labor by making it a crime to fail or refuse to perform it. It was said in that case that, although the court might not impute to a state an actual motive to oppress by a statute, yet it should consider the material operation of such a statute and strike it down if

it becomes an instrument of coercion forbidden by the Federal Constitution. That decision involved an act of the legislature which made it prima facie evidence of an intent to defraud, forbidden by the statute, for anyone obtaining money from his employer to refuse without cause to perform the labor provided for in the contract, without return

of the money; but the principle involved, we think, has application to the statute involved here, in so far as it imposes an unjust and unreasonable restraint on personal liberty.

*Constitutional
law—universal
labor law,*

Our conclusion is that the petitioner is entitled to be discharged from custody, and it is so ordered.

ANNOTATION.

Constitutionality of statute requiring persons, regardless of financial condition, to engage in some business, profession, occupation, or employment.

A thorough search has disclosed but one case other than the reported case (*EX PARTE HUDGINS*, ante, 1361) discussing the constitutionality of a statute requiring persons, irrespective of their financial means, to engage in some business or employment. Both of these cases consider the validity of the so-called "work or fight" laws, which were enacted in many states for the purpose of stimulating production and preserving order during the recent world war.

In the reported case (*EX PARTE HUDGINS*) wherein the question arose on a petition for a writ of habeas corpus, it appeared that the petitioner was convicted under a statute of West Virginia which provided that any able-bodied male resident of that state between the ages of sixteen and sixty, excepting students, who should fail or refuse to engage regularly for at least thirty-six hours per week in some lawful and recognized business, profession, occupation, or employment, should be held to be a vagrant and punished by fine and by being compelled to labor on some public work. The court, in releasing the prisoner from custody, holds that the act is an unjust and unreasonable restraint of personal liberty as guaranteed by the state and Federal Constitutions. The court, by way of illustration, says that a citizen fifty or fifty-five years of age, who possessed sufficient means to support himself and his dependents for the rest of his life, could not defend himself on that account, or escape the

penalties imposed for a violation of such a statute.

On the other hand, in *State v. McClure* (1919) — Del. —, 105 Atl. 712, a similar statute was upheld on the ground that it was a war measure, tending to aid in the winning of the war by increasing the production of food supplies, and by saving the loss incident to the maintenance of those male citizens between the ages of eighteen and fifty-five, who were engaged in no useful or lawful occupation. The court said: "One of the objects of the act, as expressed in § 1, was to preserve order within the state. The passage of the act compelling male residents of the state between the ages of eighteen and fifty-five to be employed during the period of the war and six months thereafter, we believe was a reasonable exercise, under the circumstances, of the police powers vested in the legislature. In *Webber v. Virginia* (1881) 103 U. S. 344, 26 L. ed. 565, the Supreme Court of the United States defined police powers to be 'those powers by which the health, good order, peace, and general welfare of the community are promoted.' It is generally known that the demands of the national government in waging the present war have greatly curtailed the means of preventing crime, and reduced the number of men available to protect the lives and property of the public. It was proper for the legislature, having this in mind, to pass reasonable and just laws to preserve order within the

state and to protect the lives and property of those within its borders by providing that male residents between

certain ages should be engaged in some useful or lawful occupation."

R. G. R.

CITY OF DERMOTT et al., Appts.,

v.

H. C. STINSON.

Arkansas Supreme Court — May 24, 1920.

(— Ark. —, 222 S. W. 54.)

Adverse possession — of common property — effect.

1. Adverse, open, and continued possession of a public common by an abutting owner for the statutory period vests title in him.

[See note on this question beginning on page 1373.]

— notice of claim.

2. The fencing by a property owner of the portion of a common lying between his property and a public highway as part of his own property is notice to the city authorities of his adverse claim to the property.

[See 1 R. C. L. 698, 736.]

Contract — to repay cost of sidewalk — effect.

3. An agreement between a municipal corporation and a property owner who has fenced as part of his property a portion of a common lying between his property and the highway, that, if he should ever be divested of the

common, it will repay him the cost of a sidewalk laid by him upon the highway, does not affect his adverse claim to the common.

Estoppel — to claim adverse possession — reimbursement of cost of sidewalk.

4. One who has acquired by adverse possession title to a portion of a common lying between his property and a highway is not estopped to rely upon his title by accepting from the municipality the amount which he expended in laying a sidewalk along the highway.

APPEAL by defendants from a decree of the Chancery Court for Chicot County (Scott, Special Ch.) in favor of plaintiff in an action brought to enjoin defendants from opening a certain common within the city limits. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. D. Dudley Crenshaw, for appellants:

Where lands are occupied permissively, and the occupation and use are not manifestly inconsistent with the right of the grantee, notice of the hostility of the claim must in some way be brought home to the grantee before the Statute of Limitations will begin to run.

Stuttgart v. John, 85 Ark. 520, 109 S. W. 541; Graham v. St. Louis, I. M. & S. R. Co. 69 Ark. 562, 65 S. W. 1048, 66 S. W. 344; Little Rock v. Wright, 58 Ark. 142, 23 S. W. 876; 1 Am. & Eng. Enc. Law, 2d ed. 818, 819; Connor v. Bell, 152 Pa. 444, 25 Atl. 802; Lake View v. Le Bahn, 120 Ill. 92,

9 N. E. 269; Paragould v. Lawson, 88 Ark. 478, 115 S. W. 379; Texarkana v. Leach, 66 Ark. 40, 74 Am. St. Rep. 67, 48 S. W. 807; 3 Dill. Mun. Corp. 5th ed. §§ 1102, 1160.

Plaintiff was one of the owners of the land platted, and signed the indenture filed therewith. This was a complete dedication to the public, and a dedication which is not revocable.

Hope v. Shiver, 77 Ark. 177, 90 S. W. 1003; Brewer v. Pine Bluff, 80 Ark. 489, 97 S. W. 1084; Stuttgart v. John, 85 Ark. 520, 109 S. W. 541; Paragould v. Lawson, 88 Ark. 478, 115 S. W. 379; Frauenthal v. Slaten, 91 Ark. 350, 121 S. W. 395; Brookfield v. Block, 123 Ark. 153, 184 S. W. 449; Porter v. Stuttgart,

135 Ark. 48, 204 S. W. 607; 9 Am. & Eng. Enc. Law, 2d ed. 57, 59; 8 R. C. L. 894, 906.

Messrs. Streett & Burnside, for appellee:

If plaintiff had acquired title to the land in controversy by adverse possession for more than thirty-five years, no act or admission on his part at this time could, of itself, divest him of the title, and the title would remain in him until he divested himself thereof by a solemn conveyance, duly executed as required by law.

Hudson v. Stillwell, 80 Ark. 578, 98 S. W. 356; Turquett v. McMurrain, 110 Ark. 197, 161 S. W. 175; Shirey v. Whitlow, 80 Ark. 444, 97 S. W. 444; Hutt v. Smith, 118 Ark. 10, 175 S. W. 399; Clements v. Lampkin, 34 Ark. 598; Parham v. Dedman, 66 Ark. 26, 48 S. W. 673; Broad v. Beatty, 73 Ark. 110, 83 S. W. 339.

Wood, J., delivered the opinion of the court:

The city of Dermott, through its council, passed a resolution to open a certain common within the city limits.

The appellee instituted this action against the appellants to enjoin the opening of the common. He alleged that he is the owner of lots 3 and 4 of the original hamlet of Dermott, as platted by S. A. Duke, March 30, 1882, which plat was duly recorded in Chicot county. He alleged that he occupied these lots, with an additional strip contiguous thereto, as his homestead, and that he and his predecessors in title had been in the continuous, open, and adverse possession of same for more than thirty-five years, claiming to own same. He alleged that the strip of land which adjoined his lots is a part of what was designated in the plat filed by Duke as a "common;" that about the year 1883, by common consent of the owners of the lots adjoining upon said common, the same was inclosed by the respective owners, thus extending their holdings the width of each of their said lots west to the public road, which afterwards was incorporated and became a part of the Main street of the city of Dermott; that until July 8, 1918, no legal steps had ever

been taken to question the appellee's title or right to possession of said tract. But on the above date the city of Dermott caused notice to be served upon the appellee to vacate the property, and that appellants are now threatening to enter upon and tear down the fence, and commit other acts of waste and trespass, to the irreparable damage of the appellee. Appellee prayed that the appellants be enjoined and that his title to the tract of land be quieted.

The appellants answered and denied the allegations of the appellee's complaint, and pleaded that the appellee was estopped by an instrument which he and S. A. Duke, the original owner and dedicator of the lands then constituting the hamlet, now the city, of Dermott, and others, signed on March 30, 1882, and which was duly recorded on March 13, 1883. In that instrument it was recited, among other things, that the original plat filed by Duke was a correct plat of the hamlet of Dermott; that the streets, alleys, and commons as designated on that plat shall forever be common property for the use and benefit of the owners of property in Dermott and the public generally; that the streets, alleys, and commons should never be occupied or used for any other purpose except by the unanimous consent of every owner of real estate in the hamlet.

The appellee testified that he is the owner of lots 3 and 4 in block 4 of the original hamlet of Dermott, abutting on the strip of land in controversy; that he had been in the possession of these lots since March 25, 1882, at which time he purchased the same from S. A. Duke and obtained a warranty deed, which he introduced; that he had been in possession of the strip of land in controversy immediately west of his lots and between them and Main street of the city of Dermott since his acquisition of title to the lots mentioned; that he and other parties joined with Duke, the original owner of the lots, in the deed and plat of original dedication

to the hamlet of Dermott; that the fence at that date was where it is now; that, a short time after this instrument was signed by him and others, the signers thereof agreed to abrogate the deed of dedication and continue their fences out to the boundary of the public road as it then existed; that at the time of dedication and continuously thereafter the strip of land in controversy has remained inclosed; that the strip of property has been inclosed and held as a part of his property ever since that date; that no attempt had been made by the city to oust him from the possession of the strip in controversy until the summer of 1918; that he used the front of his place, the strip in controversy, for a pasture; that January 10, 1910, he accepted a so-called "contract" from the town of Dermott, which is as follows:

"This contract, made and entered into by and between the incorporated town of Dermott and H. C. Stinson, witnesseth:

"Whereas, the said H. C. Stinson has caused to be constructed along the west boundary line of that part of the common lying in front and west of lots 3 and 4 in block 4 in the original town of Dermott, owned by him, concrete sidewalk, and has paid for the same;

"The said town of Dermott hereby agrees to and with the said H. C. Stinson that in the event the said H. C. Stinson should ever be divested of that part of the said common lying west of said lot by any act or consent of said town, then in that event it will repay to said H. C. Stinson any and all sums of money expended in the construction of sidewalk, without interest.

"And the said H. C. Stinson hereby agrees on his part that he will maintain said sidewalk and a reasonably good-looking fence along said western boundary of said common where same is situated in front or west of his lots 3 and 4 in block 4."

Appellee testified with reference to this contract that, when he

signed the agreement about the sidewalk, he did not recognize the town's right to the property; that he knew the town claimed it and he claimed it; that he took the money back as a condition of his surrender of the contract; that he thought as long as the town had used his money six or seven years, he might use the money himself; that he received notice from the town to move his fence back, but did not remember whether it was before or after he accepted the money; that he did not move the fence when he accepted the money or when he received notice to move same; that he got out the injunction because he did not intend to give it up; that the north end of the common is occupied by a brick building, and, so far as he can tell, is standing where the original building stood in 1882 and 1883; that no portion of the common has been open to the public since 1883, and the city has not since that time, until the matter of the sidewalks came up in 1910, sought to eject any of the owners from the strip of land dedicated as the common.

R. A. Buckner testified that he came to Dermott in 1884, and that at that time the common was occupied out to the street and he knew nothing of its existence for several years; that the appellee and other owners of lots abutting the strip in controversy were then and have since been in possession of same; that it was inclosed and had been occupied since 1884; that appellee claimed the common as his property; that he had never heard the title or right to possession of the common called in question until five or six years ago, when witness was employed as town attorney; at that time some of the council wished to take it, others did not; at that time appellee claimed the common abutting his lots as his own, and witness believed other property owners did likewise; that at the time the question of building the sidewalks was up before the council appellee claimed the property and talked to witness about making defense if the

city ever attempted to assert title to the property. Different individuals, among them members of the city council, had talked about whether they ought to take possession of the common or not, but there was never any action taken by the council.

Other witnesses testified substantially corroborating the testimony of the above witnesses. One of the witnesses stated that, so far as he knew, no owner of property in that plat had ever recognized the right of the public in that land; that he had known the property since 1900; that when the town required the property owners, along the strip in controversy, to put down sidewalks, there was a question raised at the time as to the right of the town to require that sidewalks be put down. Witness asked whether, if the property owners should put it down themselves, they could put it back on the line. The city authorities assured witness that there was no danger of the property owners losing their property, but, for their protection, the city would give them a ninety-nine year lease. The town did not claim the title to the land when it offered them the ninety-nine year lease. Witness only wanted it to settle any dispute that there might be as to the title.

Witness J. T. Crenshaw testified for the appellants that he had been a resident of Dermott since 1881; that he had been connected with the city government at various times as alderman, mayor, and recorder, since it was incorporated. The strip in controversy was dedicated to the hamlet of Dermott by Major Duke, who wanted to put out trees on it. Dermott was a small place then, and no one took any interest in it. While witness was a member of the council and had charge of the city business, "the common was recognized as belonging to the town, but the people along there recognized it as belonging to them." There were two opinions about it.

Witness did not know that the property owners claimed the common as their own. The people there

had fenced it and lived there and were using it. The common was always recognized as city property. Witness could not say whether the owners of the lots abutting the common ever recognized it as city property or not. They recognized it as their own property and had it fenced in. There had always been a dispute about it. The city took active steps last year towards the assertion of its rights when they made one Belser move his house up when they found it to be on the parkway. Witness could think of no other assertion of right by the city.

Other witnesses, some of them owners of lots abutting the common, testified that they did not claim the common, and that, in conversation with other abutting owners, the right of the city to the common was recognized.

Witness Rayborn had lived in Dermott since 1880, during which time he had held all of the offices of the city except treasurer. During his administration there were so many discussions concerning the common that he could not name any certain time only when the sidewalk was built; that while he was in office the town authorities were never notified that any of the owners of property abutting the common claimed the property in front of their lots as their own, but they all recognized that the town owned it; that he was mayor a long time, the last time in 1913; that in 1918 the appellee said to witness: "This is where Delaney run the line between our property and the city property. He run it a little too close to my house, a little over the line, because the line is where the cedar trees are, in front of where Petticord used to live, because Petticord set those cedar trees on the line."

Witness further testified that the abutting owners all had good fences on their lines and did not present claim to any of the city property until after the death of Duke; that while witness was connected with the council there was no action taken by the city to open the com-

mon, "because there was an agreement for the people to move when they were dissatisfied and wanted the common opened."

W. D. Trotter testified that he had lived in the community since 1874; that the common since the city was incorporated had been generally regarded as public property; that he had never heard of a controversy about the property until the one came up with Belser; that that part of the common had been inclosed all the time witness had resided in Dermott.

The above are substantially the facts upon which the trial court found that the appellee had been in open, continuous, and adverse possession for more than thirty-five years of the strip of land designated as the common; that appellee was not estopped from setting up title by limitation; and that he had acquired title to the property.

The court thereupon entered a decree perpetually enjoining the appellants from interfering with the appellee's possession. From that decree is this appeal.

The undisputed testimony shows that in 1882 S. A. Duke, the original owner of the land in controversy, owned a farm in Chicot county, Arkansas; that he platted a part of the same into blocks and lots with streets and alleys and a strip of land designated as the public common, of which the land in controversy is a part; that he designated the lands thus platted as the hamlet of Dermott; that on March 25, 1882, he sold lots 3 and 4, block 4, of the hamlet of Dermott, to the appellee. Of the lands thus platted he had sold other lots to A. E. Petticord and C. P. Freeman. On March 30, 1882, all of the then property owners of the lands which had been platted by Duke as the hamlet of Dermott signed the instrument set out in the statement, dedicating the streets, alleys, and common to the public of the hamlet of Dermott. That instrument recites that the common thus donated by Duke should never be "occupied, inclosed, or used for

any other purpose except by the unanimous consent of every owner of real estate in the said hamlet."

The appellee testified that, a very short time after the plat was made and the instrument above mentioned was signed by him, the then owners of the property agreed among themselves to abrogate that contract and continue their fences out to the boundary of the public road as it then existed. He states that the parties interested at that time agreed to take what was designated as the common into their lots and hold it as a part of their property. All the other original signers of the instrument are dead. This testimony of the appellee is undisputed.

The testimony of the appellee is positive to the effect that there had never been a time since he took possession of the strip of land that it had not been inclosed and held by him as a part of his property. The evidence is undisputed that the possession of the strip known as the common was taken and held by the owners of the abutting lots, and a preponderance of the evidence shows that these abutting property owners were holding the common adversely to the city of Dermott. All except one of the owners of lots abutting the strip designated as the common testified corroborating the testimony of the appellee that they went into the possession and were holding as their own, and adversely to the city, the part of the strip abutting their lots, and the width of each lot to the public road which is now Main street of the city of Dermott.

The testimony of the appellee that the strip designated as the common was held adversely by the abutting lot owners is corroborated by witnesses who, it occurs to us, were in the best situation to know the facts, and who gave the most direct and specific testimony concerning the adverse claim. For instance, J. T. Crenshaw, one of the oldest residents of the town, and who had been officially connected with the city government ever since it became an

incorporated town, testified that "the common was recognized as belonging to the town, but the people along there recognized it as belonging to them."

His testimony thus shows that, so far as the city was concerned, it claimed the property as its own; but, so far as the property owners were concerned, they were claiming it as their own property.

Likewise, the testimony of Rayborn, who was an old resident and had held all the offices of the city except treasurer, shows that there had been discussions concerning the common in the city council so many times during his administration that he could not name any certain time.

The testimony of these witnesses proves clearly that, so far as the city was concerned, it did not recognize that the abutting property owners had any title to the common, but it also as clearly shows that the matter was in dispute. It clearly shows that the city fathers must have known the circumstances and have known that the abutting lot owners were holding and claiming to own the property, and yet took no steps to oust them from possession and to open the common to the public until notice was served upon them in 1918 to remove their fences.

The testimony shows that the so-called "common" was not inclosed by the property owners by one common fence, but that each had the part claimed by him in a separate inclosure, extending his lot its entire width to Main street of the city of Dermott. The character of these inclosures and holdings was such as to give notice to the members of the city council that the owners of abutting lots were claiming the strip designated as the common adversely.

The instrument of January 10, 1910, between the appellee and the city, designated as a "contract," concerning the building of sidewalks, is not, as we construe it, a

recognition by the appellee of title in the city of Dermott to the land in controversy. On the contrary, this instrument appears to us to be rather a recognition by the city of Dermott that the appellee was the owner and had a right to the possession of the property.

Contract—to repay cost of sidewalk—effect.

We conclude, therefore, that appellee's occupancy of the land from 1883 to 1918, when he was given notice to remove his fence, was of such a character as to be entirely inconsistent with the idea of mere permissible possession by the city of Dermott. A preponderance of the evidence, on the contrary, shows that it was adverse, open, and continuous for the statutory period, and that he therefore acquired title by adverse possession.

Adverse possession—of common property—effect.

Gee v. Hatley, 114 Ark. 384, 170 S. W. 72. The trial court was correct in so holding.

We are also convinced that, after having acquired such title, appellee was not estopped by accepting from the city of Dermott the amount that had been expended in the construction of the sidewalk, and surrendering the contract concerning same. If we are correct in our view that appellee had acquired title by adverse possession, then appellee's contract with Dermott concerning the sidewalk would

Estoppel—to claim adverse possession—reimbursement of cost of sidewalk.

not operate to divest him of the title and invest title in the city. Such was not the purport, nor the effect, of that "contract." *Hudson v. Stillwell*, 80 Ark. 575-578, 98 S. W. 356. See also *Broad v. Beatty*, 73 Ark. 110, 83 S. W. 339; *Shirey v. Whitlow*, 80 Ark. 444, 97 S. W. 444; *Turquett v. McMurray*, 110 Ark. 197, 161 S. W. 175; *Hutt v. Smith*, 118 Ark. 10, 175 S. W. 399.

The decree is correct.

Affirmed.

Petition for rehearing denied June 14, 1920.

Adverse possession—notice of claim.

ANNOTATION.

Adverse possession of common.

The reader will remember that adverse possession against the public depends in general upon statute and the local view in regard to the maxim, "nullum tempus occurrit regi." Cases decided on the ground that the maxim applies are not included.

It will be seen that in the reported case (*DERMOTT v. STINSON*, ante, 1367), it is held that title to a so-called common could be gained as against a city by adverse, open, and continuous occupancy for the statutory period.

There is very little to be found on the subject of this note.

In *Pella v. Scholte* (1868) 24 Iowa, 283, 95 Am. Dec. 729, where it was held that there had been no dedication of an alleged square to a city, the court held further, assuming there had been dedication, that the statute would have run against the city, the circumstances being as stated by the court: "Defendant . . . was in the open and visible possession of the square, claiming title to it at the time the city was incorporated. He continued in such possession, without any interruption, until . . . slightly less than ten years from the date of the plaintiff's corporate organization, when the city of Pella passed an ordinance 'concerning the Garden square,' directing the marshal of the city 'to take immediate possession of the square,' 'to remove such portion of the fence and hedge around said square, and to train, cut down, or destroy such trees thereon, as the mayor might direct.' The marshal proceeded to execute the ordinance, whereupon the present defendants (*Scholte and wife*) brought their bill to enjoin the officer, and obtained an injunction, and at once resumed possession. Thus the defendant, with the exception of the forcible interruption by the marshal for a few days, continued to remain in possession until this suit was brought by the city." And it was held that the statute did not cease to run when the marshal undertook to execute the ordinance.

In *Rowan v. Portland* (1848) 8 B. Mon. (Ky.) 232, it was held that property on a river bank between a town and a river, and dedicated to the town, may be the subject of adverse possession against the town.

Similarly in *St. Paul v. Chicago, M. & St. P. R. Co.* (1891) 45 Minn. 387, 48 N. W. 17, a railway company was held to have acquired by adverse possession land dedicated to a city for a levee.

But the result was in favor of the town on a bill to restrain a town from removing a boathouse from a landing place, where the statute provided that when the boundaries of a landing place, among other public places mentioned, can be made certain (as here), "no length of time, less than forty years, shall justify the continuance of a fence or building, on any . . . landing place." The court, in dismissing the bill, said: "There is nothing in the evidence in the case at bar to show that the original boathouse was put up under a claim of right, or that it was maintained adversely. But if this were otherwise the judge further found that the plaintiff's devisor made no use of the building during a period of about eight years preceding his death; and that during that time, as admitted at the hearing, he was mentally incapacitated to act or to have a purpose to act or assert; that during that period, and for some years before, the building had been neglected, suffered to fall into decay and substantial ruin; that in the year 1897, when it was contended that the limit of time had run, there was and had been for many years a substantial abandonment of the use to which the building had formerly been put." *Gifford v. Westport* (1906) 190 Mass. 323, 76 N. E. 1042.

In *Reuter v. Lawe* (1896) 94 Wis. 300, 34 L.R.A. 733, 59 Am. St. Rep. 891, 68 N. W. 955, it was held that an equitable estoppel will preclude the public from claiming as a public park land so designated on a recorded plat,

where it made no claim to the land except by failing to assess it for taxes for many years, and then the owner filed a new plat on which the land was described as his own property, after which he continued in possession as he always had done, took down the old fence and made a new one, expended money in other improvements upon it, paid taxes for a series of years upon

it, and built a sidewalk along one side, by order of the city authorities, and there was an express adoption of his new plat about seven years after it was filed by an act incorporating the city.

For encroachment of fence on highway as affecting title or rights of public, see the annotation to *Pine v. Reynolds*, 6 A.L.R. 1210. B. B. B.

JACOB BERSCH

v.

MORRIS & COMPANY, Appt.

Kansas Supreme Court — May 8, 1920.

(106 Kan. 800, 189 Pac. 934.)

Workmen's compensation — meaning of "wilful."

1. The meaning of the word "wilful," as used in the statute denying compensation to a workman injured through wilful failure to use a guard against accident provided by his employer (Laws 1917, chap. 226, § 27), is not necessarily fulfilled by voluntary and intentional omission, but includes the element of intractableness, the headstrong disposition to act by the rule of contradiction.

[See note on this question beginning on page 1377.]

Evidence — sufficiency.

2. Findings of fact and evidence sustaining the general verdict considered, and held, the plaintiff, who was injured because of failure to replace guards

which he had removed from a casing machine which he was cleaning, was not precluded by the statute from recovering compensation.

Headnotes by BURCH, J.

APPEAL by defendant from a judgment of the District Court for Wyandotte County (McCamish, J.) in favor of plaintiff in an action brought under the Workmen's Compensation Act to recover compensation for personal injuries alleged to have been sustained while in the employ of defendant. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. C. W. Trickett, for appellant:

While it may be that in criminal law the word "wilful" is to be construed as something more than an intentional act,—something done with a wrongful purpose, or with a design to injure, or committed out of mere wantonness or lawlessness,—in the Compensation Act the word should not be given any meaning or definition beyond an intentional act.

Roberts v. United States, 61 C. C. A. 427, 126 Fed. 897; *Klenk v. Oregon Short Line R. Co.* 27 Utah, 428, 76 Pac.

214, 16 Am. Neg. Rep. 248; *Re Mallon*, 43 Misc. 569, 89 N. Y. Supp. 554; *State ex rel. Register v. McGahey*, 12 N. D. 535, 97 N. W. 865, 1 Ann. Cas. 650, 14 Am. Crim. Rep. 283; *Haddock v. Northern P. R. Co.* 43 Mont. 8, 113 Pac. 1119; *Atchison, T. & S. F. R. Co. v. State*, 33 Okla. 371, 125 Pac. 721; *Vandalia R. Co. v. Clem*, 49 Ind. App. 94, 96 N. E. 789.

The violation of rules or orders designed especially to safeguard the employee is generally held, as a matter of fact, to constitute serious and wilful

misconduct, and to bar the employee from any right to recover compensation.

Dailly v. Watson, 2 Sc. Sess. Cas. 5th Series, 1044, 37 Scot. L. R. 782, 7 Scot. L. T. 73; Donnachie v. United Collieries [1910] S. C. 503, 47 Scot. L. R. 412; George v. Glasgow Coal Co. [1909] A. C. 123, 99 L. T. N. S. 782, 78 L. J. P. C. N. S. 47, 25 Times L. R. 57, [1909] S. C. 1, 46 Scot. L. R. 28, 2 B. W. C. C. 125; O'Hara v. Cadzow Coal Co. 5 Sc. Sess. Cas. 5th Series, 439; Brooker v. Warren, 23 Times L. R. 201; Bay Shore Laundry Co. v. Industrial Acci. Commission, 36 Cal. App. 547, 172 Pac. 1128.

Mr. W. W. McCanles, for appellee:

Failure of plaintiff to put the guards on before cleaning the machine was not and could not be wilful.

Messick v. McEntire, 97 Kan. 813, 156 Pac. 740.

Burch, J., delivered the opinion of the court:

The action was one for compensation for injuries received by a workman while cleaning a casing machine in the defendant's packing house. The defense was that the plaintiff wilfully failed to use a guard, provided by the employer, which would have prevented the accident. The plaintiff recovered, and the defendant appeals.

A witness for the defendant described the machine as follows: "The machine weighs about 2,500 or 3,000 pounds, and consists of a scraper, a clipper, a drum, a big iron cylinder or roller, a cast-iron roller, and two small rubber rollers. They have got iron through the center, and there is rubber around the outside of them and they are covered with canvas. What we call the scraper and the clipper both revolve the same way around and clean the casing. The casing runs in between the drum and the scraper, and there is where it is cleaned. The small rollers are about 18 inches long and about 4 or 5 inches in diameter. Under these are spray pipes. The machine is run by a belt which runs to another pulley on a shaft line. There is a lever comes down, and you throw the belt from a loose pul-

ley into the pulley that runs the machine."

There is a cover or guard in front of the scraper, another at the rear of the machine, and a piece of sheet iron with a handle is laid over the top.

After a day's work, the operator of a machine cleans it. A witness for the defendant described the method of cleaning the machine as follows: "To clean the machine he has to take a hose and wash the machine off with the hose. Then he is supposed to stop the machine and wipe the knives off, or blades, on the scraper. They are not knives; they are blades. They are hoop iron, rounded off. They are about 1½ inches wide and 18 inches long. He is supposed to stop the machine.

Then after wiping off the blades, we put the guards on, and then start the machine running, and then wipe the drum."

Another witness for the defendant testified as follows: "To clean the machine, when you get done with the casing, we take the top part back behind the guard, you know, take that off, and turn the hose of hot water, and shoot right into the knives, into the blades, in order to wash it all off. When we done washed it, we stop the machine, and take the front guard off. Then we take the front guard off and take a rag and wipe the blade off right clean. When we done wiped it, we put the front guard on and start the machine again and oil the drum, take and oil it like that. After we get done oiling the drum, then we stop the machine again and take the front guards off and oil the blades afterwards; then you done with it."

With a verdict for the plaintiff, the jury returned the following findings of fact:

Q. 1. Did the foreman, L. Roebeling, instruct the plaintiff to never run said machine with the front guard removed?

Answer: Yes.

Q. 2. Did the plaintiff remove the front guard from said machine

shortly before the time of the accident?

Answer: Yes.

Q. 3. Did the plaintiff neglect to replace said guard before starting the machine?

Answer: Yes.

Q. 4. Would this accident have occurred, had the plaintiff replaced the guard on said machine?

Answer: No.

The plaintiff was born in Russia, spoke German, and testified through an interpreter. His meaning is not always clear, but he testified to this effect: The method of cleaning the machine was to take off the guards, wash the machine with the hose, and then use the drying cloth, drying the big drum at the bottom first, and then the blades. The machine was kept running until the time came to dry the blades, when it was stopped. It will be observed that this order of performing the work is quite different from that described by witnesses for the defendant. The plaintiff used a cloth to dry the machine after washing it. The interpreter reported him as saying the cloth got caught while he was drying the small rolls on top. Afterwards he said he was hurt while he was drying the big drum. Of course, that was the account of the injury which he intended to give. The plaintiff said he could not clean the machine with the cover on, and that he took the guards off so he could clean the machine with hose and water. After telling how he washed and dried the machine, the plaintiff said: "I couldn't put the guards back on until it was all done." Of course, he could have stopped the machine and replaced the guards at any time, and he probably meant that replacing the guards was the last act, as taking them off was the first act, performed in the process of cleaning and drying the machine.

Conflicts in the evidence not settled by the findings of fact were resolved by the jury in the plaintiff's favor. The plaintiff was not at fault because the machine was run-

ning. He was wiping the drum, and it was proper, as the defendant's witnesses admitted, that the drum should be revolving, under application of power. If it were irregular for the plaintiff to remove the front guard in order to wash the machine with the hose, removal of the guard did not cause his injury. His fault, if any, lay in not replacing the guard before wiping the drum. To the plaintiff it appeared to be necessary to remove the front as well as the back guard in order to wash the machine. If he measurably comprehended the instruction not to run the machine at all with the front guard off, as the jury may have doubted, it did not seem to him that the instruction applied to the process of flushing the machine, because in his judgment he could not do that with the cover on. If he ought to have replaced the guard before attempting to wipe and oil the drum, he did just what the third finding indicates,—he neglected to replace the guard. While he did this contrary to instruction, and so may be said to have been guilty of conscious, voluntary omission, he did not mean to oppose his will to the will of his employer, in any perverse or refractory sense. At least, the members of the jury, who saw the man, gauged his capacity, formed an opinion of his disposition, and weighed his testimony, were authorized to reach that conclusion.

Evidence—
sufficiency.

In the case of *Thorn v. Edgar Zinc Co.* 106 Kan. 73, 186 Pac. 972, the court's interpretation of the statute, "wilful failure to use a guard or protection against accident required pursuant to any statute and provided for him" (*Laws* 1917, chap. 226, § 27) was foreshadowed: "Nor is it material that the defendant may have been guilty of a high degree of negligence. Mes-

Workmen's
compensation—
meaning of
"wilful."

sick v. McEntire, 97 Kan. 813, 156 Pac. 740. To warrant a reversal the court must declare as a matter of

law that the injury resulted from his wilful failure to use a guard and protection furnished by his employer. It has been said that, in order to defeat an award because of a statutory exception, the case must be brought clearly within it (*Wick v. Gunn*, — Okla. —, 4 A.L.R. 107, 169 Pac. 1087, 17 N. C. C. A. 377), and that the mere voluntary and intentional omission of a workman to use a guard or protection furnished to him is not necessarily to be regarded as wilful (*Ibid.*; also, *General American Tank Car Corp. v. Borchardt*, — Ind. App. —, 122 N. E. 433; to the contrary, see *Bay Shore Laundry Co. v. Industrial Acci. Commission*, 36 Cal. App. 547,

172 Pac. 1128);” *Thorn v. Edgar Zinc Co.* 106 Kan. 73, 75, 186 Pac. 973.

In harmony with the views expressed in the Indiana and Oklahoma cases cited, the court now holds that the meaning of the word “wilful,” as used in the statute, includes the element of intractableness, the headstrong disposition to act by the rule of contradiction. Such is a general and popular signification of the term.

“Governed by will without yielding to reason; obstinate; perverse; stubborn; as, a wilful man or horse.” *Webster’s New Int. Dict.*

The judgment of the District Court is affirmed.

ANNOTATION.

Workmen’s compensation: provision denying compensation for injury through wilful failure to use guard, or safety appliance.

Generally as to serious and wilful misconduct of employee as bar to compensation, see annotation to *Baltimore Car Foundry Co. v. Ruzicka*, 4 A.L.R. 116.

As indicated by the title, this note covers only cases involving provisions of workmen’s compensation acts specifically excluding liability for injuries sustained through wilful failure to use a “guard,” or safety appliance, and does not include cases involving the right to recover under general provisions of such acts, excluding liability in case of serious and wilful misconduct of employee.

The few cases on the above question approve the rule that in order to preclude a recovery under the provisions of the workmen’s compensation acts, excluding liability for injuries through wilful failure to use a guard, or safety appliance, there must be something beside a mere voluntary and intentional failure by the workman to use a guard, and that some element of obstinacy, headstrongness, or intentional wrongdoing must be shown. *Haskell & B. Car Co. v. Kay* (1918) — Ind. App. —, 119 N. E. 811; *General American Tank Car Corp. v. Borchardt* (1919) — Ind. App. —, 122 N. E. 433; 9 A.L.R.—87.

BERSCH v. MORRIS & Co. (reported herewith) ante, 1374; *Messick v. McEntire* (1916) 97 Kan. 813, 156 Pac. 740; *Thorn v. Edgar Zinc Co.* (1920) 106 Kan. 73, 186 Pac. 972; *Wick v. Gunn* (1917) — Okla. —, 4 A.L.R. 107, 169 Pac. 1087, 17 N. C. C. A. 377.

It will be observed that in the reported case (*BERSCH v. MORRIS & Co.* ante, 1374) the word “wilful,” as used in the Kansas Workmen’s Compensation Act, denying a right to compensation where a workman wilfully failed to use a guard provided by the employer, was held to include the element of intractableness, the headstrong disposition to act by the rule of contradiction, so that a right to compensation would not be barred by a mere voluntary and intentional omission, and a judgment for the plaintiff based on a finding that the workman was not guilty of a wilful failure to use a guard was here affirmed.

And in another Kansas case, *Thorn v. Edgar Zinc Co.* (1920) 106 Kan. 73, 186 Pac. 972, where the statute provided that if it was proved that injury to a workman resulted from his wilful failure to use a guard required by statute, or a reasonable and proper guard voluntarily furnished by his employ-

er, any compensation in respect to that injury should be disallowed, and it appeared that the injured employee was engaged in feeding ore into a crusher, and was furnished with a long-handled maul for breaking ore when it clogged the rollers, and was ordered to stop the machine in case a breaker became clogged, and that he was injured while attempting to remove ore which had stuck with a small stick which was drawn into the machine and his hand injured, it was held that he was not precluded from recovering compensation, since he had not wilfully failed to use a guard and protection within the meaning of the act. The court stated that many of the compensation acts deny compensation to a workman whose injury is attributable to his own "serious and wilful misconduct," but that the Kansas statute had never contained this provision, and further said that a mere voluntary and intentional omission of a workman to use a guard furnished him was not necessarily to be regarded as wilful, that neither the maul nor the switch furnished for stopping the crusher constituted a guard and protection furnished by the employer.

And in an earlier Kansas case, *Messick v. McEntire* (1916) 97 Kan. 813, 156 Pac. 740, it was held that the workman's injury did not result from his failure to use a guard provided for his protection within the meaning of a clause of the Workmen's Compensation Act, providing that if an injury resulted from wilful failure to use a guard, or protection against accident required by statute, or furnished by his employer, no compensation should be allowed, where it appeared that in order to clean a belt machine it was necessary to remove safety covers or hoods covering cylinders; that the workman removed such covers and proceeded to clean the machine with compressed air as was customary, except that he put the machine in motion and took the hose and climbed upon the endless belt in the middle of the machine, although he could have stood on the ground, and in some way lost his balance and struck his hand on the

revolving machinery, since the guards were not intended to afford any protection while the machine was being cleaned.

In *Wick v. Gunn* (Okla.) supra, under the Oklahoma Workmen's Compensation Act, relieving the employer from liability to a workman "where the injury results directly from the wilful failure of the injured employee to use a guard, or protection against accident furnished for his use pursuant to any statute, or by order of the state labor commissioner," it was held that the mere voluntary and intentional failure of a workman to use such safety appliance did not necessarily render the omission wilful, but that the wilful failure contemplated carried with it the idea of premeditation, obstinacy, and intentional wrongdoing. The finding of the Commission in this case, that the workman's failure to use the guard on the edger and planer on which he was working was not wilful, was held supported by the evidence, where it tended to show that he was an experienced workman; that he had operated machines the same as that on which he was working without a guard, and that such use was not unusual; that the guard furnished by the employer was out of date and was not as safe or easy to handle as the automatic guard approved by the labor commissioner; that to save time on the short job at which he was injured he ran the piece of timber which caused the injury through without using the guard.

In *Haskell & B. Car Co. v. Kay* (1918) — Ind. App. —, 119 N. E. 811, where the Indiana Workmen's Compensation Act provided that no compensation should be allowed for injury or death due to the employee's "wilful failure or refusal to use a safety appliance," it was held that the statute contemplated the use of a safety appliance proper for the work being done, but that a mere failure to use the proper safety appliance would not defeat a claim for compensation; that to have such effect the failure must amount to wilfulness, or to a refusal within the meaning of the statute; and the evidence in the case was held not

to show as a matter of law that the workman was guilty of "wilful failure or refusal to use a safety appliance," it appearing that he was employed on a drilling machine; that two safety devices had been designed by the employer to prevent the piece being drilled from whirling; that another device was sometimes used by the workmen which was not safe for some kinds of work; that the employee was using the latter device when he was injured by the whirling of the piece being drilled, which was a small job requiring the device of the employer; that it was customary to use one of the devices furnished by the employer where there was danger of the work flying around; it being held that the evidence did not exclude the assumption that it was left to the workmen's judgment when it was necessary to use the devices furnished by the employer. The court said: "In determining the question of wilfulness here, we do not believe that we should be justified in reviewing the decided cases with their respective and characteristic facts. If the evidence here were sufficient to justify a finding that appellant had ordered or directed decedent to use a clamp on the particular kind of work which he was doing when injured, or if by virtue of a custom or otherwise decedent knew that only such an appliance should be used on that kind of work, and if the board had so found, and if under such circumstances and with such knowledge decedent had failed to use such appliance, then under any ordinary circumstances, and unless there was something exceptional in the situation, we should feel impelled to sustain a finding of the board, if made, that such a failure was wilful. But the evidence being insufficient to establish conclusively the existence of any such specific order or direction, or any rule to that effect, or at least being very uncertain and indefinite on that subject, as well as respecting decedent's knowledge, we are not ready to hold as a matter of law, and against the finding of the board, that decedent's failure to use a clamp was characterized by obstinacy or stubbornness, or

a reckless disregard of consequences, and therefore that such failure was wilful. The evidence being uncertain, as indicated, and decedent, shortly prior to his injury, having been engaged in drilling where a clamp was not required, and being directed by the foreman to do a small job that did require a clamp, according to appellant's view of the matter, we cannot say as a matter of law that his conduct amounted to anything more than thoughtlessness. We do not feel that the situation justifies us in going any further than this, even on the assumption that decedent knew that the use of the plug was attended by a degree of danger. As we have said, however, the evidence does not compel a deduction any stronger than that the choice of appliances in any situation was committed to decedent's discretion. At any event, we cannot say as a matter of law that his conduct was anything more reprehensible than mere negligence."

And in *General American Tank Car Corp. v. Borchardt* (1919) — Ind. App. —, 122 N. E. 433, where the Workmen's Compensation Act provided that no compensation should be allowed for an injury or death due to wilful failure or refusal to use a safety appliance, it was held that compensation for death of a painter was not barred on the ground of his wilful failure to use a safety appliance, where it appeared that he was employed to paint the inside of tank cars and furnished with a respirator, which he was told to use, but which, on account of its being defective, he failed to do, and was killed by the poisonous fumes of the paint. The court here said: "'Wilful misconduct' means a deliberate purpose not to discharge some duty necessary to safety. It implies obstinacy, stubbornness, design, set purpose, and conduct quasi criminal in nature. . . . There is no evidence that the deceased ever refused to obey orders or to follow instructions. The fair and reasonable inference to be drawn from the finding of the board, as well as from the evidence, is that, if the respirator had not become out

of order, he would have used it. He put it on and tried to use it, but for some unknown cause it was out of order and would not work. His fail-

ure to use the respirator was not because of wilfulness on his part, but because of the fact that it was out of order." J. T. W.

MRS. OCIA HADDAD, Appt.,
v.
COMMERCIAL MOTOR TRUCK COMPANY.

Louisiana Supreme Court — March 1, 1920.

(146 La. 897, 84 So. 197.)

Workmen's compensation — driving of motor truck — operation of engine.

1. One employed in driving a motor truck is engaged in the operation of an engine within the meaning of the Workmen's Compensation Act, providing compensation for persons injured in such employment.

[See note on this question beginning on page 1382.]

Evidence — judicial notice — operation of motor truck.

2. The court will take judicial notice of the fact that motor trucks are operated or propelled by gasoline engines or motors.

[See 15 R. C. L. 1104.]

Appeal — reversal — remand.

3. Reversal upon appeal from the sustaining of an exception of no cause of action requires a remanding for decision on the merits.

(Provosty, J., dissents.)

APPEAL by plaintiff from a judgment of the Judicial District Court for the Parish of Caddo (Land, J.), sustaining an exception of no cause of action in an action brought under the Employers' Liability Act to recover damages for the death of plaintiff's husband while in the employ of defendant. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Murff & Mabry for appellant.

Messrs. Wise, Randolph, Rendall, & Freyer, for appellee:

The petition of a widow for damages for the death of her husband in service, which does not allege that the death was by accident arising out of and in the course of the employment, shows no cause of action under the Employers' Liability Act.

Arthur v. Alexandria Lumber Co. 143 La. 207, 78 So. 463.

The true test of the application of the Compensation Act is the nature of the work being done by the employee at the time of the accident.

Seaboard Air Line R. Co. v. Koennecke, 239 U. S. 352, 60 L. ed. 324, 36 Sup. Ct. Rep. 126, 11 N. C. C. A. 165; Osborne v. Gray, 241 U. S. 16, 60 L. ed. 865, 36 Sup. Ct. Rep. 486; Chicago,

B. & Q. R. Co. v. Harrington, 241 U. S. 177, 60 L. ed. 941, 36 Sup. Ct. Rep. 517, 11 N. C. C. A. 992; Hooks v. New Orleans & N. E. R. Co. 111 Miss. 743, 72 So. 147.

The burden of proving the facts necessary to justify recovery under the act is upon plaintiff.

Piske v. Brooklyn Cooperage Co. 143 La. 455, 78 So. 734; Mueller Constr. Co. v. Industrial Bd. L.R.A.1918F, 904, note; Rayner v. Sligh Furniture Co. L.R.A.1916A, 39, 40, 134, 213, note.

An accident will not be inferred where there is no evidence of any strain, and the evidence adduced is equally as consistent with the fact of no accident, as with the fact of an accident.

Adams v. Acme White Lead & Color Works, L.R.A.1916A, 294, note; Barnabas v. Bersham Colliery Co. 103 L. T.

(146 La. 897, 84 So. 197.)

N. S. 513, 55 Sol. Jo. 63; Kerr v. Ritchies, 50 Scot. L. R. 434 [1913] S. C. 613, [1913] W. C. & Ins. Rep. 297, 6 B. W. C. C. 419; Beaumont v. Underground Electric R. Co. [1912] W. C. Rep. 123, 5 B. W. C. C. 247.

Dawkins, J., delivered the opinion of the court:

Plaintiff appeals from a judgment sustaining an exception of no cause of action, after a trial on the merits in this case. The exception had formerly been overruled by another judge of the same court, prior to the trial on the merits.

The action was brought under the Employers' Liability Law, and the petition alleges that the husband of plaintiff was killed while in the discharge of his duties, "driving a motor truck, the property of said company, on the public road near Grand Cane, Louisiana. Her husband was killed by falling from said motor truck, some of the wheels of which passed over his body."

Defendant admits the employment of the deceased, but denies that it is engaged in any of the businesses mentioned or contemplated by the Employers' Liability Statute, or that the said Haddad was performing any service which fell within that category.

The question of whether or not the petition discloses a cause of action depends upon the interpretation to be given to the following sentence of subdivision (a) of ¶ 2 of § 1 of Act No. 20 of 1914, to wit:

"Every person performing services arising out of and incidental to his employment in the course of his employer's trade, business or occupation in the following hazardous trades, businesses and occupations:

"The installation, repair, erection, removal or operation of boilers, furnaces, engines and other forms of machinery."

The petition alleges, in addition to the nature of the work which the deceased was performing at the time of his death, "that her said husband was an employee of the Commercial Motor Truck Company

prior to and at the time of his death; said company is a corporation organized under the laws of the state of Louisiana, domiciled at Shreveport, Louisiana, with W. H. Jordan as president; said M. G. Haddad having worked for said company or corporation for some time as a driver of motor trucks, selling and delivering same, and performing any other duties he was called on to do in connection with said company's motor-truck business."

The effect of this and the other allegations of the petition is to charge that the defendant was engaged in the handling, selling, operation, and delivery of motor trucks, and the issue, therefore, is as to whether or not it was operating "engines" or "other forms of machinery," within the meaning and contemplation of the clause of the statute above quoted.

We think we may take cognizance of the fact that motor trucks are operated or propelled by gasoline engines or motors, which, by the use of gasoline, produce their own energy or motive power. The driving of such motor trucks necessarily involves the operation of such engines.

Evidence—
judicial notice—
operation of
motor truck.

Workmen's
compensation—
driving of motor
truck—operation
of engine.

"The word 'engine' is defined as an ingenious or skilful contrivance used to effect a purpose, and is often synonymous with the word 'machine.' Within such definition, an electric passenger elevator is an engine. Lefler v. Forsberg, 1 App. D. C. 41." 3 Words & Phrases, p. 2395.

An engine, according to the Century Dictionary, is: "A skilfully contrived mechanism or machine, the parts of which concur in producing an intended effect; a machine for applying any of the mechanical or physical powers to effect a particular purpose; especially a self-contained, self-moving mechanism for the conversion of energy into useful work; as a hydraulic en-

gine for utilizing the pressure of water; a steam, gas, or air engine, in which the elastic force of steam, gas, or air is utilized."

According to the same authority, machinery is defined as follows: "The parts of a machine considered collectively; any combination of mechanical means designed to work together so as to effect a given end, as the machinery of a watch, or of a canal lock; . . . any complex system of means and appliances, not mechanical, designed to carry on any particular work, or keep anything in action; or to effect a specific purpose or end; as the machinery of government."

There could be but little doubt that if the deceased had been required, in the course of his employment, to operate a stationary gasoline engine on the premises of the defendant, the service would have fallen clearly within the provisions of the Employers' Liability Law, no matter for what purpose its use might have been intended. Can it be said that, because he was required to operate the same character of engine in a self-propelling vehicle, the statute does not apply? We think not. Would the driver of a motor bus for the transportation of freight and passengers be engaged in the operation of an engine or machinery? We think so. Not only does the operation of a motor truck involve the operation of an engine (gasoline), but also the operation of machinery,

in its broader sense, as defined by the authority above cited. It involves the operation of the gasoline engine, as a part of the machinery of the truck, which, in the ordinary, common, and everyday use of the word, is a "machine."

We therefore think that the exception of no cause of action should be overruled.

Inasmuch as the lower court did not pass upon the merits, and the case is before us upon appeal from the judgment sustaining the exception of no cause of action alone, it will be necessary to remand the same for a decision on the merits. *Parks v. Hughes*, 145 La. 221, 82 So. 202.

For the reasons assigned, it is therefore ordered, adjudged, and decreed that the judgment appealed from be, and the same is hereby, annulled and reversed; and it is now ordered and decreed that the exception of no cause of action, filed by defendant, be, and same is hereby, overruled. It is further ordered that this case be, and the same is hereby, remanded to the lower court for a decision upon the merits; the costs of this appeal to be paid by the appellee, and all other costs to await final judgment.

Provosty, J., dissents.

O'Niell, J., concurs in the decree.

Petition for rehearing denied April 5, 1920.

ANNOTATION.

Workmen's compensation: operation of automobile or automobile truck as a hazardous occupation.

It will be observed that in the reported case (*HADDAD v. COMMERCIAL MOTOR TRUCK Co.* ante, 1380), the driver of a motor truck, who was killed by falling from, and being run over by it, was held to be engaged in operating "engines" or "other forms of machinery," within the meaning of a clause of the Louisiana Workmen's Compensation Act, defining hazardous trades and businesses as "the installation, repair,

erection, removal, or operation of boilers, furnaces, engines, and other forms of machinery."

In *Hendricks v. Seeman Bros.* (1915) 170 App. Div. 133, 155 N. Y. Supp. 638, it was conceded that the operation of an automobile delivery truck of wholesale grocers came within the section of the Workmen's Compensation Act defining "the operation of trucks" on the highway as a hazard-

ous employment, and it was held that a helper on such a truck, whom his employers found it necessary to send with the driver, was engaged in the operation of the vehicle, and that a recovery might be had under the act, where he fell and was killed while attempting to drive boys from the back of the truck.

And in *Kennedy v. Loggie Bros.* (1916) 175 App. Div. 957, 161 N. Y. Supp. 1130, under the New York act, classifying as hazardous the operation of trucks and other vehicles, the decision of the Industrial Commission awarding compensation for the death of an employee of automobile dealers, who received injuries while driving an automobile, delivering tires, was affirmed without opinion.

And in *Markham v. United Breeders Co.* (1916) 175 App. Div. 957, 161 N. Y. Supp. 1134, the court unanimously affirmed, without opinion an award of the Industrial Commission to a salesman, who, together with another agent, was going from place to place soliciting orders in an automobile, when he was injured while cranking the machine.

And in *Mulford v. Pettit* (1917) 220 N. Y. 542, 116 N. E. 344, a salesman for a company engaged in the lumber, coal, and feed business, a nonhazardous occupation, was held to be within the protection of a provision of the New York Workmen's Compensation Act, defining as hazardous, "the operation, otherwise than on tracks, on streets, highways, or elsewhere, of cars, trucks, wagons, or other vehicles, and rollers and engines propelled by steam, gas, gasolene, electric, mechanical, or other power," it appearing that he was injured while driving a motorcycle furnished by his employer for the purpose of taking orders and collecting accounts.

But in *Wincheski v. Morris* (1917) 179 App. Div. 600, 166 N. Y. Supp. 873, where the proprietor of a store owned an automobile delivery truck, and also a touring car, used principally for pleasure, but occasionally for delivering goods, the deceased, who was employed as chauffeur to operate both cars, having been killed while

repairing the touring car, preparatory to taking the employer's family for a pleasure ride, it was held that, while engaged in operating the automobile truck, delivering merchandise, he was engaged in a hazardous employment conducted by the employer for pecuniary gain, within the Workmen's Compensation Act; but that, as a chauffeur, operating the touring car for the pleasure of the employer's family, he was not engaged in a hazardous employment conducted for pecuniary gain, and that, as he was engaged in the latter capacity when killed, no liability accrued under the act.

And in *Sickles v. Ballston Refrigerating Storage Co.* (1916) 171 App. Div. 108, 156 N. Y. Supp. 864, an employee was held not to have been injured while engaged in a hazardous employment, within the meaning of a section of the New York Workmen's Compensation Act, classing the storage business as a hazardous employment, where it appeared that the employer was engaged in the storage business, and also in buying and selling fruit, and that, when injured, he was going about in an automobile, inspecting and buying fruit, and was injured when the machine overturned, the court holding that the work he was performing when injured had no connection with the storage business. No mention was made in this case of the provision of the act involved in the preceding cases, defining the operation of vehicles on the highway as hazardous.

And in *Hochspeier v. Industrial Bd.* (1917) 278 Ill. 523, L.R.A.1918F, 227, 116 N. E. 121, it was held that an employer was not engaged in the occupation or business of carriage by land, which was defined as hazardous, where he conducted an undertaking establishment, and maintained automobiles and chauffeurs for carrying people at funerals, and which, when not using them himself, he sometimes rented to other undertakers, and accordingly a chauffeur employed to drive one of the cars was held entitled to no compensation under the act for an injury received while driving the

car for another undertaker, who had rented it.

And it has been held that one employed as a helper of the driver of an automobile truck, and injured while attempting to crank it, after having been ordered to go on a certain trip with it, was not engaged in an employ-

ment which brought him within the provisions of the Washington Workmen's Compensation Act, as the employment in which he was engaged was not classified in the act as extra-hazardous. *Collins v. Terminal Transfer Co.* (1916) 91 Wash. 463, 157 Pac. 1092. J. T. W.

MILLER R. FOULKE, Appt.,

v.

NEW YORK CONSOLIDATED RAILROAD COMPANY, Respt.

New York Court of Appeals—March 19, 1920.

(228 N. Y. 269, 127 N. E. 237.)

Carrier — right to custody of property left by passenger.

1. The carrier has, as against a fellow passenger, the right to custody of property inadvertently left by a passenger in the car.

[See note on this question beginning on page 1388.]

Appeal — review of dismissal of complaint.

2. In reviewing a judgment dismissing a complaint, the court must give plaintiff the advantage of all facts properly presented, and of every favorable inference that can reasonably be drawn therefrom.

Abandonment — leaving in railway car.

3. A package cannot be found to have been abandoned merely because it was left by a passenger on the seat of a railway car.

[See 17 R. C. L. 1199.]

Lost property — package left in train.

4. A package left by a passenger on the seat of a railway train is not lost property.

[See 17 R. C. L. 1199.]

Bailment — creation — package left in car.

5. A carrier in whose car a package

is inadvertently left by a passenger may assert in it the right of a gratuitous bailee, although no contractual relation establishing a bailment exists.

[See 3 R. C. L. 83, 95.]

Larceny — taking package from car.

6. One who takes from a car a package inadvertently left by a fellow passenger, and who refuses to surrender it to the carrier on demand, may be charged with petit larceny.

[See 17 R. C. L. 39, 40.]

False imprisonment — charging passenger with larceny.

7. A carrier is not liable for false imprisonment and malicious prosecution in lodging a charge of larceny against a passenger who takes from the car a package left by another passenger, and refuses to surrender it to the carrier upon demand.

(Hogan and Elkus, JJ., dissent.)

APPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, Second Department, affirming a judgment of a Trial Term, Part I., for Kings County (Manning, J.), dismissing a complaint, and from an order denying a new trial, in an action brought to recover damages for alleged false imprisonment and malicious prosecution. *Affirmed.*

The facts are stated in the opinion of the court.

(228 N. Y. 269, 127 N. E. 237.)

Mr. George P. Foulk, for appellant:

Upon an appeal from a judgment dismissing the complaint at the close of plaintiff's case, the testimony given by plaintiff must be taken as true.

McNally v. Phoenix Ins. Co. 137 N. Y. 389, 33 N. E. 475; *Pierce v. Atlantic, G. & P. Co.* 216 N. Y. 209, 110 N. E. 437, reversing 159 App. Div. 258, 144 N. Y. Supp. 330.

The evidence established that the plaintiff had been illegally arrested and imprisoned, and the burden of proof was upon the defendant to show that the plaintiff was arrested under circumstances justifying the arrest.

McDonald v. Metropolitan Street R. Co. 167 N. Y. 70, 60 N. E. 282; *Gillespie v. Brooklyn Heights R. Co.* 178 N. Y. 358, 66 L.R.A. 618, 102 Am. St. Rep. 503, 70 N. E. 857, 16 Am. Neg. Rep. 181; *Smith v. New York Anti-Saloon League*, 121 App. Div. 600, 106 N. Y. Supp. 251; *Snead v. Bonnoil*, 166 N. Y. 325, 59 N. E. 899; *Mandeville v. Guernsey*, 51 Barb. 99, affirmed in 50 N. Y. 669; *Schultz v. Greenwood Cemetery*, 190 N. Y. 276, 83 N. E. 41; *Parke v. Fellman*, 145 App. Div. 836, 130 N. Y. Supp. 361; *Scott v. Dennett Surpassing Coffee Co.* 51 App. Div. 326, 64 N. Y. Supp. 1016.

A criminal prosecution was instituted and carried on against the plaintiff without legal authority or justification, and it cannot be said, as matter of law, that there was probable cause for the prosecution.

New York & H. R. Co. v. Haws, 56 N. Y. 178; *People v. Anderson*, 14 Johns. 295, 7 Am. Dec. 462; *Reg. v. Dixon*, 7 Cox, C. C. 35, *Dears. C. C.* 580, 25 L. J. Mag. Cas. N. S. 39; *Cooley, Torts*, p. 367; *Hazzard v. Flury*, 120 N. Y. 223, 24 N. E. 194; *Long Island Bottlers' Union v. Seitz*, 180 N. Y. 243, 73 N. E. 20; *Nicholson v. Sternberg*, 61 App. Div. 51, 70 N. Y. Supp. 212; *Ross v. Hixon*, 46 Kan. 550, 12 L.R.A. 760, 26 Am. St. Rep. 123, 26 Pac. 955; *People ex rel. Perkins v. Moss*, 187 N. Y. 419, 11 L.R.A. (N.S.) 528, 80 N. E. 383, 10 Ann. Cas. 309; *Parr v. Loder*, 97 App. Div. 218, 89 N. Y. Supp. 823; 2 *Wharton, Crim. Law*, p. 136, § 1140; *People v. Cogdell*, 1 Hill, 94, 37 Am. Dec. 297; *Newell, Malicious Prosecution*, p. 237; *Tatum v. Sharpless*, 6 Phila. 18; *Hamaker v. Blanchard*, 90 Pa. 379, 35 Am. Rep. 664; *Hoagland v. Forest Park Highlands Amusement Co.* 170 Mo. 335, 94 Am. St. Rep. 740, 70

S. W. 878; *Bowen v. Sullivan*, 62 Ind. 281, 30 Am. Rep. 172.

The defendant did not have a special property in the article left on its car, nor was it liable to the owner for its loss.

2 *Parsons, Contr.* p. 96; *Tower v. Utica & S. R. Co.* 7 Hill, 47, 42 Am. Dec. 36; *Weeks v. New York, N. H. & H. R. Co.* 9 Hun, 671.

Mr. H. L. Warner, with **Mr. George D. Yeomans**, for respondent:

The complaint was properly dismissed as to the cause of action for false imprisonment.

Hopkins v. Crowe, 7 Car. & P. 373, 4 Ad. & El. 774, 111 Eng. Reprint, 974, 2 Harr. & W. 21, 5 L. J. K. B. N. S. 147; *Newman v. New York, L. E. & W. R. Co.* 54 Hun, 335, 7 N. Y. Supp. 560; *Hyatt v. New York C. & H. R. R. Co.* 162 App. Div. 367, 147 N. Y. Supp. 810; *Lubliner v. Tiffany & Co.* 54 App. Div. 326, 66 N. Y. Supp. 659; *Mulligan v. New York & R. B. R. Co.* 129 N. Y. 511, 14 L.R.A. 791, 26 Am. St. Rep. 539, 29 N. E. 952.

The complaint was properly dismissed as to the cause of action for malicious prosecution.

Schultz v. Greenwood Cemetery, 190 N. Y. 276, 83 N. E. 41; *Kutner v. Fargo*, 34 App. Div. 317, 54 N. Y. Supp. 832; *Rawson v. Leggett*, 184 N. Y. 504, 77 N. E. 662; *Burt v. Smith*, 181 N. Y. 1, 73 N. E. 495, 2 Ann. Cas. 576; *Willard v. Holmes, Booth & Haydens*, 142 N. Y. 497, 37 N. E. 480; *Freer v. Schmitt*, 116 App. Div. 462, 101 N. Y. Supp. 737; *Clark v. Palmer*, 116 App. Div. 117, 101 N. Y. Supp. 759; *People v. M'Garren*, 17 Wend. 460; *Loucks v. Gallogly*, 1 Misc. 22, 23 N. Y. Supp. 126; *McAvoy v. Medina*, 11 Allen, 548, 87 Am. Dec. 733; *Kincaid v. Eaton*, 98 Mass. 139, 93 Am. Dec. 142; *Smith v. Bell & F. Foundry Co.* 127 App. Div. 278, 111 N. Y. Supp. 202.

Collin, J., delivered the opinion of the court:

The complaint alleges two causes of action to recover damages for (a) false imprisonment and (b) a malicious prosecution, arising out of the same transactions. The trial justice dismissed the complaint, and the appellate division unanimously affirmed the consequent judgment. We are to determine whether or not the evidence presented an issue of

fact. In reviewing it we must give the plaintiff the advantage of all the facts properly presented and of every favorable inference that can reasonably be drawn.

Appeal—review of dismissal of complaint.

The cardinal facts, as the jury might have found them, are: In July, 1915, the defendant was operating a subway railway. The plaintiff, while a passenger on the railway, saw a package on a seat opposite him, left by a passenger who had alighted. He went to and picked up the package. He examined it and found no name or mark upon it. He had not an idea as to who owned it. He disembarked at the first subsequent station stop of the train, taking the package with him. He was about 10 feet from the car when a railway guard in whose charge the car was touched him on the shoulder and said, "What are you going to do with that package?" to which he replied, "I am going to keep this and advertise for the owner." Forthwith the general train master of the defendant, Mr. Blewitt, asked the same question, to which he replied, "What authority have you?" and Blewitt stated, "I am the superintendent of this line." The plaintiff then said, "I guess that is immaterial; I am going to keep this package and advertise for the owner; I will give you my name and address." Blewitt said, "No; I don't want anything like that; either turn the package over to the railroad company or I will have you arrested." The plaintiff replied, "If you have made up your mind to do that, I will go with you to an officer." Thereupon Blewitt started toward and went through the waiting room of the station, followed by the plaintiff at some little distance behind him. Blewitt reached and spoke to a police officer and returned with the officer to the plaintiff, and then told the officer, "This man found a package on the train and refuses to turn it over to the company." After a brief conversation the plaintiff, the officer, and Blewitt went to the

police station, where Blewitt made the charge or complaint that the plaintiff found the package on the train of the defendant and refused to surrender same to officials of the railroad company. The police captain in charge of the station then held the plaintiff in \$500 bail, and he was put and remained in a cell until the bail was furnished. In the meantime the package had been opened and found to contain a loaf of bread. The next morning the plaintiff appeared in the magistrate's court. Blewitt then and there verified a written complaint which stated that the plaintiff, "with intent to deprive the true owner of his property in the view and presence of complainant, did wilfully steal, take, and carry away from a car of the Sea Beach Line a parcel containing a loaf of bread of the value of about 5 cents, the property of a passenger who had left said car at Fifty-ninth street station and had left said parcel behind him. Wherefore deponent charges said defendant with the crime of petit larceny." The plaintiff was held to answer in bail for the court of special sessions. In the court of special sessions the plaintiff was tried and acquitted. Thereupon this action was brought.

The evidence did not permit the jury to find that the package was abandoned. The abandonment of property is the relinquishing of all title, possession, or claim to or of it,—a virtual intentional throwing away of it. It is not presumed. Proof supporting it must be direct or affirmative, or reasonably beget the exclusive inference of the throwing away. Abandoned property is owned by him who takes it into his ownership. *Eads v. Brazelton*, 22 Ark. 499, 79 Am. Dec. 88; *Livermore v. White*, 74 Me. 452, 43 Am. Rep. 600; *Kuykendall v. Fisher*, 61 W. Va. 87, 8 L.R.A. (N.S.) 94, 56 S. E. 48, 11 Ann. Cas. 700.

The package was not "lost property." It was "misplaced property"

Abandonment—leaving in railway car.

or "left property." In *Lawrence*

Lost property— v. State, 1 Humph.
package left in 228, 34 Am. Dec.
train. 644, is this dec-

laration: "To lose is not to place or put anything carefully and voluntarily in the place you intend and then forget it; it is casually and involuntarily to part from the possession; and the thing is then usually found in a place or under circumstances to prove to the finder that the owner's will was not employed in placing it there. To place a pocketbook, therefore, upon a table, and to omit or forget to take it away, is not to lose it in the sense in which the authorities referred to speak of lost property."

Other cases we will cite declare the same doctrine. In several cases which are not cited it is recognized, though the facts did not permit its application, as in *Bowen v. Sullivan*, 62 Ind. 281, 287, 30 Am. Rep. 172. We hold it is well founded and sound.

While the presumptive owner of the package in question was in the car with it and it was in his possession, the defendant had a certain responsibility concerning it. The defendant was obligated to use reasonable and ordinary care and watchfulness to protect the possession of the owner as against the plaintiff and other passengers or persons. The guards and conductor of the train or car could not stand by idly or negligently and see the plaintiff or other person take it from the car or from the owner. *Sperry v. Consolidated R. Co.* 79 Conn. 565, 10 L.R.A.(N.S.) 907, 65 Atl. 962, 118 Am. St. Rep. 169, 9 Ann. Cas. 199; *Carpenter v. New York, N. H. & H. R. Co.* 124 N. Y. 53, 11 L.R.A. 759, 21 Am. St. Rep. 644, 26 N. E. 277; *Whicher v. Boston & A. R. Co.* 176 Mass. 275, 79 Am. St. Rep. 314, 57 N. E. 601, 8 Am. Neg. Rep. 48.

After the passenger owner had left the car, forgetting to take the package with him, the plaintiff knew the package was not lost property. It or the custody of it did not belong to him then any more than it

did while its owner was in the car. He saw and knew the owner had forgotten it, had left it by mistake. It then had become in the custody and the potential actual possession of the defendant. It was the right of the defendant, and its duty, to become as to it and its owner a gratuitous bailee. It was its right and duty to possess and use the care of a gratuitous bailee for the safe-keeping

Carrier—right to custody of property left by passenger.

of the package until the owner should call for it. *Reg. v. Pierce*, 6 Cox, C. C. 117; *State v. Courtsol*, 89 Conn. 564, L.R.A.1916A, 465, 94 Atl. 973; *Reg. v. West*, 6 Cox, C. C. 415, *Dears. C. C.* 402, 3 C. L. R. 86, 24 L. J. Mag. Cas. N. S. 4, 18 Jur. 1030, 3 Week. Rep. 21; *Kincaid v. Eaton*, 98 Mass. 139, 93 Am. Dec. 142; *McAvoy v. Medina*, 11 Allen, 548, 87 Am. Dec. 733; *Foster v. Fidelity Safe Deposit Co.* 264 Mo. 89, L.R.A.1916A, 655, 174 S. W. 376, Ann. Cas. 1917D, 798; *Hoagland v. Forest Park Highlands Amusement Co.* 170 Mo. 335, 94 Am. St. Rep. 740, 70 S. W. 878; *Ferguson v. Ray*, 44 Or. 557, 1 L.R.A.(N.S.) 477, 102 Am. St. Rep. 648, 77 Pac. 600, 1 Ann. Cas. 1; *Hamaker v. Blanchard*, 90 Pa. 377, 35 Am. Rep. 664; *Deaderick v. Oulds*, 86 Tenn. 14, 6 Am. St. Rep. 812, 5 S. W. 487; *Griggs v. State*, 58 Ala. 425, 29 Am. Rep. 762; *Reg. v. Moore*, 8 Cox, C. C. 416, *Leigh & C. C. C. 1*, 30 L. J. Mag. Cas. N. S. 77, 7 Jur. N. S. 172, 3 L. T. N. S. 710, 9 Week. Rep. 276; *People v. M'Garren*, 17 Wend. 460; *State v. McCann*, 19 Mo. 249.

In case the plaintiff had, through the inattention or noninterference of the defendant, with the honest intention of endeavoring to deliver it to the owner, carried the package away, he would have been a mere custodian of it for the owner. The right of the defendant to the custody and actual possession of the package was superior and paramount to the taking of the plaintiff.

The package having been left, though inadvertently, in the car of

the defendant, while the owner was still constructively in possession of it, the defendant had the right to and did assert in it the special or actual possession of a gratuitous bailee. Bailment does not necessarily and always, though generally, depend upon a contractual relation. It is the element of lawful possession, however created, and duty to account for the thing as the property of another, that creates the bailment, regardless of whether such possession is based on contract in the ordinary sense or not. *Phelps v. People*, 72 N. Y. 334, 357; *Burns v. State*, 145 Wis. 373, 140 Am. St. Rep. 1081, 128 N. W. 987. As to everybody except the true owner of the package, the defendant had the right of the owner to have and defend its custody and direct possession. *Phelps v. People*, supra; *Osgoodby v. Liemberner*, 22 Albany L. J. 114, and cases above cited.

The facts were sufficient to constitute a legal ground for an accusation of petit larceny against the plaintiff. The superior and paramount right of the

defendant to the direct possession of the package,—indeed, its absolute right as to all except the owner,—its physical possession of the package through the fact it was in its car, and its asserted claim of possession, the taking by the plaintiff, his refusal to surrender, his felonious intent to deprive the true owner of it, as a jury or trial court might find, constituted lawful grounds for an accusation, arrest, and prosecution. It is sufficient if the package was taken from the possession of the defendant by the plaintiff with the intent of depriving the true owner thereof. Whether or not the felonious intent existed was a question of fact, to be determined upon the trial of the accusation. Penal Law (Consol. Laws, chap. 40) §§ 1290, 1294, 1296, 1298; *State v. Tillett*, 173 Ind. 133, 140 Am. St. Rep. 246, 89 N. E. 589, 20 Ann. Cas. 1262; *State v. South*, 28 N. J. L. 28, 75 Am. Dec. 250.

The judgment should be affirmed, with costs.

Hiscock, Ch. J., and Pound, McLaughlin, and Andrews, JJ., concur.

Hogan and Elkus, JJ., dissent.

ANNOTATION.

Respective rights of carrier, or of one in similar relation to owner, and of finder of property lost or mislaid.

- I. Introductory, 1388.
- II. Right to mislaid property, 1390.
- III. Right to lost property, 1392.

I. Introductory.

Where the owner of personal property unintentionally leaves it on premises to which he has resorted for some business purpose, or in a vehicle in which he has been riding, and it is there found by a third person, the question necessarily arises whether the right to its custody and control is in the finder or in the owner of the premises. This question, to the discussion of which the present annotation is devoted, is determined by the

courts according to whether the property has been lost by the owner or mislaid by him. Lost property, for this purpose, may be defined as property which unwittingly passes out of the possession of its owner, and the whereabouts of which he does not at any time thereafter know. Mislaid property is that which the owner intentionally places where he can again resort to it, and then forgets. As was stated in *Loucks v. Gallogly* (1892) 1 Misc. 22, 23 N. Y. Supp. 126: "Whilst the place of finding is held immaterial if the property be actually lost, yet it is of importance as bearing on the question whether the property was

Bailment—
creation—
package left in
car.

False im-
prisonment—
charging pas-
senger with
larceny.

Larceny—
taking package
from car.

really lost or merely left. In the cases last cited, where the money or property was found on the table of a barber shop, on the desk of the banking house, on the counter of a store, the property was not considered lost, on the ground that the place where it was found indicated that the owner had put it there purposely and voluntarily; therefore it was not lost and could not be found, in the legal sense. As to the roll of bills in question, found by plaintiff on the banking-house desk (one at which persons stand to write), what, in the absence of any direct proof, are we to conclude as an inference of fact from the situation of the money when discovered by him? Is not the inference stronger and more reasonable than any other that it was consciously and voluntarily placed there by the owner while temporarily engaged, writing or otherwise, at the desk, and then inadvertently or thoughtlessly left? Does not the fact that the money was discovered on the desk, and not on the floor, indicate that it had been voluntarily placed there with the intention of retaking it, rather than that it had unconsciously and accidentally fallen from the person of the owner? If it had been found on the floor, as in the cases referred to, where a customer found a purse on the shop floor, and where the servant in a hotel found a roll of bank notes on the floor of the public parlor, that fact would lead to the conclusion that it had been involuntarily dropped by the owner, and hence lost."

The distinction appears to have been recognized in the leading case of *Bridges v. Hawkesworth* (1851) 15 Jur. (Eng.) 1079, wherein Patteson, J., said: "The notes which were the subject of this action were incidentally dropped, by mere accident, in the shop of the defendant by the owner of them. The facts do not warrant the supposition that they had been deposited there intentionally, nor has the case been put at all on that ground. The plaintiff found them on the floor. . . . The notes never were in the custody of the defendant, nor within the protection of his house, before they were found, as they would have

been had they been intentionally deposited there; and the defendant has come under no responsibility, except from the communication made to him by the plaintiff, the finder, and the steps taken by way of advertisement."

In *Foster v. Fidelity Safe Deposit Co.* (1915) 264 Mo. 89, L.R.A.1916A, 655, 174 S. W. 376, Ann. Cas. 1917D, 798, the distinction was discussed more fully as follows: "Property," said the court, "may be separated from the owner by being abandoned, or lost, or mislaid. In the first instance, it goes back into a state of nature; or, as is most commonly expressed, it returns to the common mass, and belongs to the first finder, occupier, or taker. In the second instance, to be lost, it must have been unintentionally or involuntarily parted with; in which case it is also an object which may be found, and the finder is entitled to the possession against everyone but the true owner. But, if it is intentionally put down, it is not lost in a legal sense, though the owner may not remember where he left it, and cannot find it. For 'the loss of goods, in legal and common intendment, depends upon something more than the knowledge or ignorance, the memory or want of memory, of the owner, as to their locality at any given moment.' *Lawrence v. State* (1839) 1 Humph. (Tenn.) 228, 34 Am. Dec. 644. From these uniformly recognized rules of law on the subject of lost property has naturally sprung the importance of the condition or situation in which property is alleged to have been found. And the law in this instance, as in so many others, founds its rule upon the natural action of men, and not upon a possibility. Thus, articles of property may be such and circumstances may be such as to make clear they have been voluntarily abandoned by the owner. But, normally, men do not voluntarily abandon their money. Therefore if money be discovered in the highway, or on the ground, or on the floor, it will not be considered as abandoned, nor will it be considered as placed there voluntarily, for that would be unnatural, but as having been lost,—that is, casually and unknowing-

ly dropped. But if it be discovered in a drawer or on a table, it will be considered as having been placed there purposely by the owner, and it is not classed by the law as lost property. The circumstance of it being afterwards forgotten does not go back and characterize the original act."

II. *Right to mislaid property.*

As to property which has been mislaid, that is, intentionally placed by the owner where he can again obtain custody of it, but afterward forgotten, a finder acquires no right to its possession. The right of possession as against all except the true owner is in the owner or occupant of the premises where the property is discovered, since he has custody of the property, and owes a duty to the owner as a gratuitous bailee, with respect thereto.

United States.—See *Gardner v. 99 Gold Coins* (1899) 111 Fed. 552.

Connecticut.—*State v. Courtsol* (1915) 89 Conn. 564, L.R.A.1916A, 465, 94 Atl. 973.

Massachusetts.—*McAvoy v. Medina* (1865) 11 Allen, 548, 87 Am. Dec. 733; *Kincaid v. Eaton* (1867) 98 Mass. 139, 93 Am. Dec. 142.

Missouri.—*Foster v. Fidelity Safe Deposit Co.* (1915) 264 Mo. 89, L.R.A. 1916A, 655, 174 S. W. 376, Ann. Cas. 1917D, 798.

New York.—*Loucks v. Gallogly* (1892) 1 Misc. 22, 23 N. Y. Supp. 126. And see the reported case (*FOULKE v. NEW YORK CONSOL. R. Co.* ante, 1384). See also *New York & H. R. Co. v. Haws* (1874) 56 N. Y. 175.

Pennsylvania.—*Commercial Bank v. Pleasants* (1841) 6 Whart. 375. Compare *Tatum v. Sharpless* (1865) 6 Phila. 18; *Batteiger v. Pennsylvania Co.* (1916) 64 Pa. Super. Ct. 195.

Rhode Island.—See *Durfee v. Jones* (1877) 11 R. I. 588, 23 Am. Rep. 528.

England.—*Reg. v. Pierce* (1852) 6 Cox, C. C. 117.

Canada.—*Heddl v. Bank of Hamilton* (1912) 17 B. C. 306, 6 B. R. C. 256, 5 D. L. R. 11.

Thus, in *Heddl v. Bank of Hamilton* (1912) 17 B. C. 306, 6 B. R. C. 256, 5 D. L. R. 11, it appeared that the plaintiff, a clerk in a bank, discovered a wallet containing \$800 on a desk

in the bank. He delivered the money to the defendant bank for the purpose of holding it for the owner. The owner never appeared. Thereafter, the plaintiff claimed the money as finder thereof. It was held that he was not entitled to it. The court said: "The English courts, as well as the American courts, distinguish between things lost and things mislaid or forgotten; as, see *Cartwright v. Green* (1803) 8 Ves. Jr. 405, 32 Eng. Reprint, —, 2 Leach, C. C. 952, 7 Revised Rep. 91, and *Merry v. Green* (1841) 7 Mees. & W. 623, 151 Eng. Reprint, 916, 10 L. J. Mag. Cas. N. S. 154; and, having regard to this distinction and the evidence and circumstances detailed in the case at bar, I cannot find that the wallet with its contents can be designated 'lost property,' so as to give the plaintiff possession thereto against all the world except the rightful owner. The location where the wallet was discovered evidenced that it was not involuntarily dropped, but placed there intentionally by some person; and under such circumstances, as I understand the law, the discoverer of the wallet has no right of possession as against the bank, within whose premises it was found." In *Loucks v. Gallogly* (1892) 1 Misc. 22, 23 N. Y. Supp. 126, it was also held that one who found bank notes lying on a desk used by customers of a bank was not entitled to the notes as against the bank. So, in *Foster v. Fidelity Safe Deposit Co.* (1915) 264 Mo. 89, L.R.A. 1916A, 655, 174 S. W. 376, Ann. Cas. 1917D, 798, it was decided that one who found money on a desk in a private room of a safe deposit company had no right to possession of the money as against the company. And in *Kincaid v. Eaton* (1867) 98 Mass. 139, 93 Am. Dec. 142, it was decided that the officers of a bank were the proper custodians of an article voluntarily placed in a banking house on a desk provided for the use of persons having business with the bank, and that the finder of the article was not entitled to a reward for the return thereof.

In *Commercial Bank v. Pleasants* (1841) 6 Whart. (Pa.) 375, it appeared

that one Cist, an agent of the Commercial Bank of Cincinnati, had in his possession a package containing \$100,000. He placed this package in a fireproof vault in the office of one Macalister. Thereafter Cist made arrangements with a bank in Philadelphia for the deposit of the money. When he started for the bank he thought that he had the money with him, but later discovered that he did not have it, and thought that he had lost it. He communicated with the officers of the Bank of Cincinnati, who offered a reward of \$10,000 to the finder of the package. Pleasants, who was an employee of Macalister, discovered the package in a corner of the fireproof vault, where it had been placed by Cist, and claimed the reward. It was held that he was not entitled to it, as the package was not lost property.

In *McAvoy v. Medina* (1866) 11 Allen (Mass.) 548, 87 Am. Dec. 733, it appeared that the plaintiff discovered a pocketbook containing money which had been left by a third person on a table in the defendant's barber shop. It was held that, as between the plaintiff and the defendant, the former had no right to the pocketbook. The court said: "But this property is not, under the circumstances, to be treated as lost property in that sense in which a finder has a valid claim to hold the same until called for by the true owner. This property was voluntarily placed upon a table in the defendant's shop by a customer of his who accidentally left the same there and has never called for it. The plaintiff also came there as a customer, and first saw the same and took it up from the table. The plaintiff did not by this acquire the right to take the property from the shop, but it was rather the duty of the defendant, when the fact became thus known to him, to use reasonable care for the safe-keeping of the same until the owner should call for it." See also *Lawrence v. State* (1839) 1 Humph. (Tenn.) 228, 34 Am. Dec. 644.

In *State v. Courtsol* (1915) 89 Conn. 564, L.R.A.1916A, 465, 94 Atl. 973, the court said: "The evidence shows that it [a package of money] was left upon

a public conveyance by its owner upon a bench or seat where he had placed it. He remembered where he left it, and speedily sought it, and found that the accused had taken it. It is well settled that property so left is not lost, but is mislaid property. The owner is treated as still constructively in possession of it, although its custody may be in another, in whose shop or car it has been left." In *nisi prius* case, *Reg. v. Pierce* (1852) 6 Cox, C. C. (Eng.) 117, it was held to be the duty of a defendant who found a dressing case in a railway coach to take it to an officer of the railway company. In summing up, Williams, J., observed: "It was absurd to say that this case was analogous to that of the finder of lost property. It was nothing like lost property." So, in the reported case (*FOULKE v. NEW YORK CONSOL. R. CO.* ante, 1384), it is held that a carrier owes a duty to the owner of a parcel left on the seat of one of its cars to use reasonable and ordinary care for the protection thereof; and that, therefore, the carrier has a right to the parcel superior to that of a finder.

In *Gardner v. 99 Gold Coins* (1899) 111 Fed. 552, a doubt was expressed as to whether, if a person whose identity could not be discovered, died in a hotel, a chambermaid who found money on his person would be entitled to retain it.

Two Pennsylvania cases appear to be in conflict with the rule as heretofore stated. In *Tatum v. Sharpless* (1865) 6 Phila. (Pa.) 18, it appeared that a conductor found a pocketbook on one of the seats of a railway coach. It was the custom of employees to hand in articles so found at the office of the company, and if, after the lost article had been advertised, the owner did not claim it, the property was returned to the finder. Accordingly the pocketbook was placed in the hands of the receiver of the railroad company, and, after efforts to find the owner proved unsuccessful, was claimed by the conductor. On the refusal of the receiver to surrender the purse, an action was brought for conversion. It was decided that the conductor was entitled to recover the value of the purse

and contents from the receiver. Similarly, in *Batteiger v. Pennsylvania Co.* (1916) 64 Pa. Super. Ct. 195, it was held that a passenger who found a purse on a seat as he was about to sit down was entitled to the purse and contents, as against the carrier company, advertisements for the owner having failed to disclose his identity. "The facts in this case," said the court, "do not aid us in drawing any satisfactory conclusion as to whether this purse was lost or mislaid, even if such distinction would be necessary to be made. It was found by a passenger in a conveyance to which the traveling public was invited, and in a place accessible to all classes of persons, and for the occupancy of anyone liable to use it. The finder, as to this article, was not the servant of the owner of the public vehicle, and there is nothing to indicate whether it was involuntarily lost or temporarily mislaid by the real owner, or designedly placed by an alarmed thief, where it would likely be found. . . . The real owner has not claimed it. . . . So far as this case is concerned, he must be treated as having lost his purse, and cannot urge that the carrier has not discharged its duty to him. . . . The railroad company, in whose possession the lost purse now is, as bailee of the plaintiff, owed to the real owner no higher or greater duty than the plaintiff. The law fixes the responsibility of each to account to the real owner for the found article."

III. *Right to lost property.*

With respect to lost property, that is, property which the owner has parted with accidentally, and of which he does not at any time know the location, the finder has a right superior to that of the owner or occupant of the premises where the property is found.

Arkansas.—*Eads v. Brazelton* (1860) 22 Ark. 501, 79 Am. Dec. 88. See also *Brewer v. State* (1910) 93 Ark. 479, 30 L.R.A.(N.S.) 339, 125 S. W. 127, 20 Ann. Cas. 1378.

Indiana.—*Bowen v. Sullivan* (1878) 62 Ind. 281, 30 Am. Rep. 172.

Missouri.—*Hoagland v. Forest Park Highlands Amusement Co.* (1902) 170

Mo. 335, 94 Am. St. Rep. 740, 70 S. W. 878.

Oregon.—See *Sovern v. Yoran* (1888) 16 Or. 269, 8 Am. St. Rep. 293, 20 Pac. 100; *Danielson v. Roberts* (1904) 44 Or. 108, 65 L.R.A. 526, 102 Am. St. Rep. 627, 74 Pac. 913; *Roberston v. Ellis* (1911) 58 Or. 219, 35 L.R.A.(N.S.) 979, 114 Pac. 100.

Pennsylvania.—*Hamaker v. Blanchard* (1879) 90 Pa. 379, 35 Am. Rep. 664.

Tennessee.—*Deaderick v. Oulds* (1887) 86 Tenn. 14, 6 Am. St. Rep. 812, 5 S. W. 487.

England.—*Bridges v. Hawkesworth* (1851) 7 Eng. L. Eq. Rep. 424, 15 Jur. 1079, 21 L. J. Q. B. N. S. 75.

Thus, a servant of a hotel is entitled, as against the proprietor, to money found in the parlor of the hotel, where no owner is found and there is nothing to show that it is the property of a guest. *Hamaker v. Blanchard* (1879) 90 Pa. 377, 35 Am. Rep. 664.

So, in *Bridges v. Hawkesworth* (1851) 15 Jur. 1079, 21 L. J. Q. B. N. S. 75, 7 Eng. L. & Eq. Rep. 424, it was held that a finder of bank notes on a shop floor was entitled to the notes as against the shopkeeper.

An employee, in *Bowen v. Sullivan* (1878) 62 Ind. 281, 30 Am. Rep. 172, was allowed to recover the amount of certain bank notes which she found on the floor of a paper factory, and which she handed to the proprietor to find out if they were genuine.

A pocketbook found on the ground near a train must be considered lost, and if, at the time of finding it, the finder has no intent to convert it or its contents, a subsequent conversion does not constitute larceny. *Brewer v. State* (1910) 93 Ark. 479, 30 L.R.A.(N.S.) 339, 125 S. W. 127, 20 Ann. Cas. 1378.

Likewise in *Deaderick v. Oulds* (1887) 86 Tenn. 14, 6 Am. St. Rep. 812, 5 S. W. 487, a log which had drifted downstream and was found deposited among the rocks and drift in a gorge was held to be lost property, and to belong to one who found it, as against the riparian owner, since the latter was not a bailee, and owed no duty with respect to the log to its original owner.

There are two Oregon decisions to the effect that money hidden in a building becomes the property of the finder, as against the owner of the premises where it is found. *Danielson v. Roberts* (1904) 44 Or. 108, 65 L.R.A. 526, 102 Am. St. Rep. 627, 74 Pac. 913; *Roberson v. Ellis* (1911) 58 Or. 219, 35 L.R.A.(N.S.) 979, 114 Pac. 100. The decisions in these cases, however, appear to be based on the doctrine of treasure trove. In *Roberson v. Ellis* (Or.) *supra*, the court made the following explanation: "There is testimony in this case that the comb cases in which the money was found were moldy and covered with dust, indicating that the money had been placed where found within no very recent period. We cannot say as a matter of law how ancient the deposit must be in order to include it within the rule of *Danielson v. Roberts*, or how recent it must be to take it out of the operation of that decision. It is sufficient to say that there is evi-

dence on that question which must be left to the jury as against the motion for nonsuit. The case is distinguishable from *Ferguson v. Ray* (1904) 44 Or. 557, 1 L.R.A.(N.S.) 477, 102 Am. St. Rep. 648, 77 Pac. 600, 1 Ann. Cas. 1. That case was concerning gold-bearing quartz which had been mined and buried on the property of a landlord, who, when nothing else was shown, was declared to be entitled to its possession as against his tenant. The quartz was not treasure trove, which alone would serve to distinguish that case from this." See also *Sovern v. Yoran* (1888) 16 Or. 269, 8 Am. St. Rep. 293, 20 Pac. 100, wherein it was held that the administrator of the original owner of money hidden in a building could not recover it from the purchaser of the premises, who, in conformity with the requirements of a statute relating to lost property, had paid half of the amount found to the finders and the other half to the county. W. S. R.

ESPERANZA LEON, Appt.,

v.

STATE OF ARIZONA, Respt.

Arizona Supreme Court — April 28, 1920.

(— Ariz. —, 189 Pac. 433.)

Criminal law — thief as accomplice of one receiving stolen goods.

1. The thief is not an accomplice of the one receiving the stolen goods within the rule requiring corroboration to convict.

[See note on this question beginning on page 1397.]

Receiving stolen goods — liability of thief.

2. One committing a larceny by caption and asportation cannot be convicted of receiving stolen goods.

[See 17 R. C. L. 84.]

— receiving property stolen under directions.

3. One who, after directing another to steal money, receives it from him with knowledge that it was stolen, may be convicted of receiving stolen goods.

[See 17 R. C. L. 83.]

APPEAL by defendant from a judgment of the Superior Court for Santa Cruz County (O'Conner, J.) convicting her of receiving stolen goods. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Frank J. Barry, S. F. Noon, and Warren Lee Kinder, for appellant:

Where one receives stolen goods di-

9 A.L.R.—88.

rectly from the thief, the thief is an accomplice of the person so receiving the stolen goods, and the uncorroborated

testimony of the thief is not sufficient to establish the defendant's guilt.

34 Cyc. 529; *Murphy v. State*, 130 Ark. 353, 197 S. W. 585; *People v. Kraker*, 72 Cal. 459, 1 Am. St. Rep. 65, 14 Pac. 196; *Moynahan v. People*, 63 Colo. 433, 167 Pac. 1175; *Cohn v. People*, 197 Ill. 482, 64 N. E. 306; *Com. v. Savory*, 10 Cush. 535; *People v. Ansteth*, 84 Misc. 356, 146 N. Y. Supp. 73; *Com. v. Poots*, 18 Phila. 477; *Polk v. State*, 60 Tex. Crim. Rep. 150, 131 S. W. 580; *Hanks v. State*, 55 Tex. Crim. Rep. 451, 117 S. W. 150; *Johnson v. State*, 42 Tex. Crim. Rep. 440, 60 S. W. 667; *Morris v. State*, — Ala. App. —, 82 So. 574; *People v. Solomon*, 6 Cal. Unrep. 305, 58 Pac. 55; *People v. Clausen*, 120 Cal. 381, 52 Pac. 658; *State v. Greenburg*, 59 Kan. 404, 53 Pac. 61; *People v. Kudon*, 173 App. Div. 342, 158 N. Y. Supp. 817.

The corroboration of an accomplice in the crime of receiving stolen property is to be viewed in a dual aspect,—the corroboration as to the theft and the receiving of the stolen property.

Johnson v. State, 42 Tex. Crim. Rep. 440, 60 S. W. 667; *Hanks v. State*, 55 Tex. Crim. Rep. 451, 117 S. W. 150.

In a prosecution for receiving stolen property, where an alleged accomplice testified as to the theft and the receiving of the stolen property, the accused is entitled to an instruction as to the necessity of corroboration of such testimony; and the refusal of an instruction as to the law of accomplices is error.

Moynahan v. People, 63 Colo. 433, 167 Pac. 1175; *People v. Kraker*, 72 Cal. 459, 1 Am. St. Rep. 65, 14 Pac. 196; *Hanks v. State*, 55 Tex. Crim. Rep. 405, 117 S. W. 149; *Polk v. State*, 60 Tex. Crim. Rep. 150, 131 S. W. 580.

The crimes of larceny and receiving stolen property are separate and independent crimes, requiring different facts to prove them; and a charge of larceny will not be sustained by proof of receiving stolen goods.

People v. Ward, 105 Cal. 659, 39 Pac. 33; *People v. Disperati*, 11 Cal. App. 469, 105 Pac. 617; *People v. Friedman*, 149 App. Div. 873, 134 N. Y. Supp. 153.

Conversely, a charge of receiving stolen property cannot be sustained by proof of facts showing larceny.

State v. Willner, — Mo. —, 199 S. W. 126; *State v. Fink*, 186 Mo. 50, 84 S. W. 921; *State v. Smith*, 37 Mo. 58; *State v. Honig*, 78 Mo. 249, affirming 9 Mo. App. 298; *State v. Kinder*, 22 Mont.

516, 57 Pac. 94; *Territory v. Graves*, 17 N. M. 241, 125 Pac. 604; *People v. Pollack*, 154 App. Div. 716, 139 N. Y. Supp. 831; *People v. Brien*, 53 Hun. 496, 6 N. Y. Supp. 198; *Bloch v. State*, 81 Tex. Crim. Rep. 1, 193 S. W. 303; *Stone v. Com.* 24 Ky L. Rep. 10, 67 S. W. 841.

Messrs. *Wiley E. Jones*, Attorney General, and *Louis B. Whitney* and *F. J. K. McBride*, Assistant Attorneys General, for the State:

The statute makes the receiving of stolen goods, knowing them to be stolen, and with intent to prevent the owner from recovering their full enjoyment, a substantive offense, and a conviction may be had without regard to the person who stole the goods, or from whom they were stolen.

Re Loomis, 84 Neb. 493, 28 L.R.A. (N.S.) 750, 121 N. W. 456, 18 Ann. Cas. 1024.

The receiving of stolen property, knowing it to have been stolen, is a crime distinct from the original larceny of the property; and a party committing the larceny is not an accomplice of one who received the property from him, knowing it to have been stolen.

Newman v. People, 55 Colo. 374, 135 Pac. 460; *Springer v. State*, 102 Ga. 447, 30 S. E. 971; *Mayes v. State*, 11 Okla. Crim. Rep. 61, 142 Pac. 1049; 12 Cyc. 445; *Bailey v. State*, 76 Fla. 103, 79 So. 748.

Mr. *Leslie C. Hardy* also for the State.

Baker, J., delivered the opinion of the court:

The defendant was convicted of the crime of receiving stolen goods, knowing them to have been stolen. Penal Code, § 493. The specific charge in the information was the felonious receiving of \$3,200, the same being the property of one *Dolores De Valenzuela*.

It appears, from the evidence adduced at the trial on the part of the prosecution, that on or about March 17, 1919, the defendant moved into a house belonging to the said *Dolores De Valenzuela*, and that the latter lived in an adjoining house in the same yard, together with her granddaughter, *Rosa Rabago*. The granddaughter was the sole witness testifying to the commission of the alleged crime, and she testifies that

the defendant, soon after moving in to the adjoining house, told her to look for money in her grandmother's house, and not to quit looking for it, and, if she found any, to bring it to her (the defendant), so that she could keep it at her house, in case the granddaughter was run out of her grandmother's house. The granddaughter further testified that the matter of searching for the money was talked over on numerous occasions by her and the defendant, and that, acting on the advice and suggestion of the defendant, she looked for the money on different occasions and in various places, and finally, on June 24, 1919, she found the money in two wallets in a bed in her grandmother's house, and that she immediately took the money and carried it to the defendant to keep for her. The grandmother, the owner of the money, testified that she had \$3,200 in paper money in two wallets in a pillow on her bed; that she last saw the money in the latter part of June, 1919, and that when she looked in the pillow in the month of August, 1919, she found the money was gone; and that she asked her granddaughter about the matter, and the latter confessed at once that she had taken the money and had given it to the defendant. No evidence was introduced on the part of the defendant. She did not take the stand in her own behalf.

Counsel for the defendant insist that there was a variance between the allegations in the information and the proof. The argument is made that, admitting the testimony of the girl, Rosa Rabago, to be true, it shows that the defendant was guilty of larceny, and not of receiving stolen property; that larceny and receiving stolen goods, knowing the same to have been stolen, are two separate and distinct offenses; and that the defendant could not be charged with one offense, and convicted upon evidence establishing another. The rule seems to be well settled that, where a larceny has been committed, the principal thief

—that is, the one who is guilty of the actual caption and asportation of the property—cannot be adjudged ^{Receiving stolen goods—liability of thief.} guilty of criminally receiving the thing stolen, for the reason that he cannot receive from himself. 2 Bishop, New Crim. Law, ¶ 1140; People v. Brien, 53 Hun, 496, 635, 6 N. Y. Supp. 198; Territory v. Graves, 17 N. M. 241, 125 Pac. 604. But the reason for the rule disappears where the receiving of the stolen property is not embraced in the caption and asportation.

This distinction is illustrated in People v. Rivello, 39 App. Div. 454, 57 N. Y. Supp. 420, a case arising under a statute similar to ours, making accessories before the fact principals in the crime. The New York Penal Code provides as follows: "A person concerned in the commission of a crime, whether he directly commits the act constituting the offense, or aids and abets in its commission, and whether present or absent, a person who directly or indirectly counsels, commands, induces or procures another to commit a crime, is a principal." Section 29.

In the case above cited it appeared, on the trial of the defendant for receiving stolen goods, that one L., who had been in the employ of one P., a cap manufacturer, testified that it had been arranged between him and the defendant, who had the privilege of removing the waste paper and rags from P.'s place of business, that he (L.) was to take P.'s goods, consisting of silks and satins, from the office floor, where they were kept, and put them in a box on the next floor, wherefrom the defendant took the rubbish, and that defendant in this way had received divers pieces of goods, and L. had received money from the defendant on account thereof. It was held that while, under the provisions of the Code above quoted, the defendant could be convicted of larceny, yet this did not bar a prosecution for receiving stolen goods, for the reason that the moment L. took the

goods of P. for the purpose of transportation to the place of concealment, the larceny was complete, and therefore a person receiving the goods, knowing they had been taken with felonious intent, would be guilty of receiving stolen goods.

The California Penal Code provides as follows: "All persons concerned in the commission of a crime, whether it be a felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, . . . are principals in any crime so committed." Section 31.

In *People v. Day*, 30 Cal. App. 762, 159 Pac. 457, the supreme court said: "Even if the evidence warranted and would have supported a charge of burglary upon the theory that the defendant was an accessory thereto, nevertheless it . . . shows that the defendant subsequently received the fruits of the burglary from the actual perpetrator thereof, knowing them to be stolen; that as a consequence he was guilty of receiving stolen goods; that therefore he cannot be heard to complain that the people elected to charge him with the latter offense rather than with the former."

In *People v. Feinberg*, 237 Ill. 348, 86 N. E. 584, it was held that, when the proof shows that a defendant, indicted for receiving stolen goods, was also an accessory before the fact, but was not present at the actual conversion of the goods by the thief, the defendant could be held for receiving stolen goods; the offense of larceny being so distinct from that of receiving stolen goods that one cannot merge into the other, nor the defendant's conviction of the one prevent a conviction of the other. A like ruling was made in *People v. Thompson*, 274 Ill. 214, 113 N. E. 322. See also *Delahoyde v. People*, 212 Ill. 554, 72 N. E. 732.

Mr. Wharton, in his work on Criminal Law (vol. 2, 11th ed. ¶

1232), lays down what we believe is the correct rule upon the subject: "As an elementary principle, if larceny by the defendant be proved, though the offender appear only to be a principal in the second degree, the charge of receiving falls, because the offenses are substantially distinct, and because there can be no guilty reception unless there be a prior stealing by another. But this reasoning fails, when, on an indictment for receiving, proof transpires to show that the defendant was also an accessory before the fact. The offenses are so distinct that one cannot be said to merge in the other, nor is conviction of the one in any way incompatible with conviction of the other. Hence, in defiance of such testimony, the defendant, if there be sufficient evidence of guilty receiving, may be convicted of such receiving."

The facts of the present case distinguish it from several of the cases cited by counsel for the defendant. For instance, in the *Brien Case*, the act of the defendant was a part of the larceny, and necessary to its consummation, he having directly aided and abetted the thief by furnishing him with a forged order, by means of which possession of the goods was obtained; and in the *Graves Case* the evidence tends to show the defendant was the original thief. Here the larceny was complete when the money was removed by the witness Rosa Rabago from the place where her grandmother had placed it. The defendant had no part in the caption and asportation. Her subsequent act of receiving the money, ^{—receiving property stolen under directions.} knowing it was stolen, made her guilty of criminally receiving. We do not think there was a variance.

Counsel for the defendant insist that the witness Rosa Rabago was an accomplice, and that her testimony was uncorroborated, and therefore the conviction cannot stand. Penal Code, § 1051. It may be conceded that Rosa Rabago was the only witness testifying to the

commission of the crime charged, but we do not believe that she was an accomplice. The general test to determine whether a witness is or is not an accomplice is: Could he himself have been indicted for the offense, either as principal or as accessory? If he could not, then he is not an accomplice. 16 C. J. 671. Rosa Rabago could not receive the money from herself, she having stolen it; therefore she could not be convicted of receiving the stolen money. A person who steals property and one who afterwards receives it from him, knowing it to have been stolen, are guilty of separate offenses, and, without more, neither is an accomplice of the other. *State v. Gordon*, 105 Minn. 217, 117 N. W. 483, 15 Ann. Cas. 897; *Mayes v. State*, 11 Okla. Crim. Rep. 61, 142 Pac. 1049; *Springer v. State*, 102 Ga. 447, 30 S. E. 971; *Miller v. State*, 165 Ind. 566, 76 N. E. 245; *State v. Kuhlman*, 152 Mo. 100, 75 Am. St. Rep. 438, 53 S. W.

Criminal law—
thief as accomplice of one receiving stolen goods.

416. The authorities, however, are not in accord as to whether the thief is or is not an accomplice of the one criminally receiving the stolen goods, within the rule that the testimony of an accomplice must be corroborated. *Moynahan v. People*, 63 Colo. 433, 167 Pac. 1175; *People v. Kraker*, 72 Cal. 459, 1 Am. St. Rep. 65, 14 Pac. 196; *People v. Kudon*, 173 App. Div. 342, 158 N. Y. Supp. 817.

We frankly confess that the argument embraced in the well-prepared brief of counsel for the defendant upon both of the points discussed in this opinion has caused us, at times, to waver in our judgment; but we believe, after much reflection, that the conclusions reached are in accord with the best interests of the law-abiding public and the orderly administration of justice, and do not deprive the defendant of any legal rights.

Finding no reversible error in the record, the judgment is affirmed.

Cunningham, Ch. J., and Ross, J., concur.

ANNOTATION.

Thief as accomplice of one charged with receiving stolen property, or vice versa, within rule requiring corroboration.

View that corroboration is not required.

In the majority of the jurisdictions which have passed on the question, the rule is that a thief is not an accomplice of one subsequently receiving the stolen goods, and, vice versa, the receiver is not an accomplice of the thief, within the rule requiring corroboration of the testimony of an accomplice.

Arizona.—See the reported case (*LEON v. STATE*, ante, 1393).

California.—*People v. Evans* (1917) 34 Cal. App. 284, 167 Pac. 190. Compare *People v. Solomon* (1899) 6 Cal. Unrep. 305, 58 Pac. 55; *People v. Kraker* (1887) 72 Cal. 459, 1 Am. St. Rep. 65, 14 Pac. 196; *People v. Ribolsi* (1891) 89 Cal. 492, 26 Pac. 1082; *Peo-*

ple v. Clausen (1898) 120 Cal. 381, 52 Pac. 658.

Georgia.—*Springer v. State* (1897) 102 Ga. 447, 30 S. E. 971; *Birdsong v. State* (1904) 120 Ga. 850, 48 S. E. 329; *Bradley v. State* (1907) 2 Ga. App. 622, 58 S. E. 1064. See also *Roberts v. State* (1875) 55 Ga. 220.

Iowa.—*State v. Jones* (1901) 115 Iowa, 113, 88 N. W. 196. See also *State v. Feinberg* (1910) 145 Iowa, 329, 124 N. W. 208; *State v. Feuerhaken* (1895) 96 Iowa, 299, 65 N. W. 299; *State v. Ozias* (1907) 136 Iowa, 175, 113 N. W. 761. Compare *State v. Hayden* (1876) 45 Iowa, 11.

Minnesota.—*State v. Gordon* (1908) 105 Minn. 217, 117 N. W. 483, 15 Ann. Cas. 897.

Missouri.—*State v. Kuhlman* (1899) 152 Mo. 100, 75 Am. St. Rep. 438, 53

S. W. 416; *State v. Shapiro* (1908) 216 Mo. 359, 115 S. W. 1022; *State v. Cohen* (1913) 254 Mo. 437, 162 S. W. 216, Ann. Cas. 1915C, 86.

New York.—*People v. Cook* (1862) 5 Park. Crim. Rep. 351; *People v. Dunn* (1889) 53 Hun, 381, 6 N. Y. Supp. 805. See also *People v. Ammon* (1904) 92 App. Div. 205, 87 N. Y. Supp. 358, affirmed in (1904) 179 N. Y. 540, 71 N. E. 1135.

Oklahoma.—*Mayes v. State* (1914) 11 Okla. Crim. Rep. 61, 142 Pac. 1049.

Oregon.—*State v. Moxley* (1909) 54 Or. 409, 103 Pac. 655, 20 Ann. Cas. 593.

South Dakota.—*State v. Phillips* (1904) 18 S. D. 1, 98 N. W. 171, 5 Ann. Cas. 760.

Tennessee.—*Harris v. State* (1881) 7 Lea, 124.

Thus, in *State v. Gordon* (1908) 105 Minn. 217, 117 N. W. 483, 15 Ann. Cas. 897, the appellant contended that he had been convicted of the crime of receiving stolen property on the uncorroborated testimony of two boys, insisting that they were accomplices. It was held that one who steals property and one who afterwards receives it from him, knowing it to have been stolen, are guilty of separate offenses, and neither is an accomplice of the other. Quoting from *State v. Lawlor* (1881) 28 Minn. 224, 9 N. W. 702, the court said: "The general test to determine whether a witness is or is not an accomplice is, Could he himself have been indicted for the offense, either as principal or as accessory? If he could not, then he is not an accomplice."

So, in *State v. Kuhlman* (1899) 152 Mo. 100, 75 Am. St. Rep. 438, 53 S. W. 416, wherein the defendant was convicted of knowingly receiving and buying a stolen horse from one William Van Leuven, the question arose on the court's refusal of the following instruction asked by the defendant: "The jury are instructed that, in considering the testimony of the witness Van Leuven, they should take into consideration the fact that he is the self-confessed thief of the property mentioned, and you should consider this in passing upon the credibility of said witness."

The court said: "The defendant, however, could not have been convicted of the crime of larceny, of which Van Leuven was guilty and of which he was convicted. The evidence would not have justified an indictment against him as a principal offender in the indictment against Van Leuven. He was not guilty of larceny. He stands charged with another and distinct offense, to wit, that of buying and receiving stolen property, knowing it had been stolen. . . . We hold that Van Leuven was not an accomplice with defendant in the contemplation of law, and that the court did not err in refusing the instruction asked."

In *Bradley v. State* (1907) 2 Ga. App. 622, 58 S. E. 1064, the facts and the holding of the court were stated as follows: "The defendant was convicted of burglary. The witnesses upon whose testimony the conviction rested were his accomplice, House, and the latter's wife. Certain assignments of error raise the question as to whether Mrs. House was not also an accomplice. She heard the defendant and her husband planning the burglary and advised them against it; but after the crime had been committed and a portion of the stolen money had been left in her house, she attempted to secrete it from the officers who were searching for it. She was not a principal, for she did not directly or indirectly participate in the crime. She was not an accessory before the fact, because she did not procure, counsel, or command it to be done. She may have become an accessory after the fact, or may have been guilty of the independent offense of receiving stolen goods; but neither of these relations to the case make her an accomplice."

So, in *People v. Ammon* (1904) 92 App. Div. 205, 87 N. Y. Supp. 358, affirmed in (1904) 179 N. Y. 540, 71 N. E. 1135, the defendant, the legal adviser of the well-known "520 per cent Miller," was convicted of receiving stolen property, to wit, \$30,500, which had been stolen or wrongfully appropriated from various persons by the said Miller. Miller, who was serving his sentence in state's prison (having

been convicted of larceny), was produced as a witness on the trial of the defendant. On appeal from a judgment of conviction, the defendant's counsel claimed that Miller was an accomplice, and his testimony could be received as against the defendant only when corroborated by independent testimony. The court said obiter that it could not see, strictly speaking, how Miller, in delivering the property to the defendant, became an accomplice with the defendant in the crime, which consisted in the receipt of the money. But the court held that, assuming that Miller was an accomplice, there was other evidence sufficiently corroborating him.

Similarly, in *State v. Moxley* (1909) 54 Or. 409, 103 Pac. 655, 20 Ann. Cas. 593, wherein the defendant was convicted of larceny, the question arose as to the corroboration of one Stevens, who received the stolen property. The court said: "There is no evidence to indicate that Stevens took this horse for any other purpose than to detect and punish the men who stole it; but, if the fact were otherwise, he would have been guilty of the substantive crime of receiving stolen goods, and not of larceny. We are aware that there are respectable authorities that hold that a receiver of stolen goods is an accessory after the fact of the principal felon, and therefore an accomplice; but we think that logic and the better authority sustain the opposite view, especially in a state like ours, where the statute by its terms has made larceny and the receiving of stolen goods distinct and substantive offenses."

In California, prior to an amendment to the Penal Code in 1915, defining an accomplice, the courts apparently regarded the thief and the receiver of stolen goods as accomplices. See *People v. Solomon* (1899) 6 Cal. Unrep. 305, 58 Pac. 55; *People v. Kraker* (1887) 72 Cal. 459, 1 Am. St. Rep. 65, 14 Pac. 196; *People v. Ribolsi* (1891) 89 Cal. 492, 26 Pac. 1082; *People v. Clausen* (1898) 120 Cal. 381, 52 Pac. 658. The amendment referred to reads as follows: "An accomplice is hereby defined as one

who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." Accordingly, in *People v. Evans* (1917) 34 Cal. App. 284, 167 Pac. 190, where the defendant was convicted of burglary, it was held that a witness who afterwards received some of the stolen goods and in whose possession some of them were found, was not an accomplice as defined by the amendment. But the court also said that even if the witness was an accomplice, there was other evidence sufficiently corroborating her testimony.

In Iowa it was held in *State v. Jones* (1901) 115 Iowa, 113, 88 N. W. 196, that an accessory after the fact was not an accomplice of the thief. In two later cases wherein the contention was made that corroboration was necessary, the court, without passing on the necessity of corroboration, held that the testimony of the thief was sufficiently corroborated. *State v. Ozias* (1907) 136 Iowa, 175, 113 N. W. 761; *State v. Feinberg* (1910) 145 Iowa, 329, 124 N. W. 208. See also *State v. Feurhaken* (1895) 96 Iowa, 299, 65 N. W. 299. But in the earlier case of *State v. Hayden* (1876) 45 Iowa, 11, in holding that a receiver of goods stolen by a burglar was not an accomplice of the burglar, it was said obiter: "It may be conceded that the receiver of stolen goods is an accomplice in the simple larceny."

View that corroboration is required.

In some jurisdictions it is held that the thief is an accomplice of a person who afterwards knowingly receives the stolen goods, and conversely, that the receiver is an accomplice of the thief, so that a conviction of the one cannot be sustained on the uncorroborated testimony of the other.

Arkansas.—*Murphy v. State* (1917) 130 Ark. 353, 197 S. W. 585.

Colorado.—*Moynahan v. People* (1917) 63 Colo. 433, 167 Pac. 1175. Compare *Newman v. People* (1913) 55 Colo. 374, 135 Pac. 460.

Illinois.—*Cohn v. People* (1902) 197 Ill. 482, 64 N. E. 306.

Kentucky.—See *Short v. Com.*

(1903) 25 Ky. L. Rep. 451, 76 S. W. 11; *Oakley v. Com.* (1914) 158 Ky. 474, 165 S. W. 691; *Richardson v. Com.* (1915) 166 Ky. 570, 179 S. W. 458.

Massachusetts.—See *Com. v. Savory* (1852) 10 Cush. 535.

Montana.—*State v. Slothower* (1919) 56 Mont. 230, 182 Pac. 270.

New Jersey.—See *State v. Rachman* (1902) 68 N. J. L. 120, 53 Atl. 1046; *State v. Simon* (1904) 71 N. J. L. 142, 58 Atl. 107.

Texas.—*Miller v. State* (1878) 4 Tex. App. 251; *Kelley v. State* (1895) 34 Tex. Crim. Rep. 412, 31 S. W. 174; *Crawford v. State* (1896) — Tex. Crim. Rep. —, 34 S. W. 927; *Walker v. State* (1896) — Tex. Crim. Rep. —, 37 S. W. 423; *Young v. State* (1898) — Tex. Crim. Rep. —, 44 S. W. 835; *Unsell v. State* (1898) — Tex. Crim. Rep. —, 45 S. W. 902; *Johnson v. State* (1901) 42 Tex. Crim. Rep. 440, 60 S. W. 667; *Richard v. State* (1905) 49 Tex. Crim. Rep. 192, 90 S. W. 1017; *Shilling v. State* (1907) 52 Tex. Crim. Rep. 326, 106 S. W. 357; *Wyatt v. State* (1908) 55 Tex. Crim. Rep. 73, 114 S. W. 812; *Johnson v. State* (1910) 58 Tex. Crim. Rep. 244, 125 S. W. 16; *Kaufman v. State* (1913) 70 Tex. Crim. Rep. 438, 159 S. W. 58; *Jobe v. State* (1913) 72 Tex. Crim. Rep. 163, 161 S. W. 966; *Gutierrez v. State* (1915) 76 Tex. Crim. Rep. 189, 173 S. W. 1025; *Davidson v. State* (1919) — Tex. Crim. Rep. —, 208 S. W. 664; *Hornbuckle v. State* (1919) — Tex. Crim. Rep. —, 216 S. W. 880; *Cummings v. State* (1920) — Tex. Crim. Rep. —, 219 S. W. 1104. See also *Nourse v. State* (1877) 2 Tex. App. 304; *Boyd v. State* (1888) 24 Tex. App. 570, 5 Am. St. Rep. 908, 6 S. W. 853.

England.—*Rex v. Norris* (1916) 86 L. J. K. B. N. S. 810, 116 L. T. N. S. 160; *Reg. v. Robinson* (1864) 4 Fost. & F. 43; *Reg. v. Pratt* (1865) 4 Fost. & F. 315.

Thus, in *Moynahan v. People* (1917) 63 Colo. 433, 167 Pac. 1175, the defendant was convicted of buying ore known to have been stolen. Jones, the prosecuting witness, testified that at different times he had stolen the ore from a mining company where he was employed, and had sold it to the de-

fendant. The trial court refused to instruct the jury as to the necessity for the corroboration of an accomplice. On appeal it was held that the defendant was entitled to this instruction, and the judgment of conviction was reversed, the court saying: "A person knowingly selling stolen goods to one unauthorized to buy is an accomplice of the buyer, because the seller aids and abets in the commission of the crime. In the light of the authorities cited, it follows that Jones was an accomplice of the defendant, if the crime of buying stolen ores from Jones by the defendant was committed. We agree with the attorney general that the mere fact that Jones stole these ores from the owner did not make him an accomplice of the defendant; but the theft of ores is one offense; buying them, knowing that they have been stolen, is another. It is a familiar principle of law, however, that one may be both a principal and an accomplice by the doing of separate and distinct acts with the same property. There is nothing which prevents Jones, who stole the ore, from afterwards, by a separate and distinct act, becoming an accomplice of the one who purchased it from him, knowing it to have been stolen." In the *Moynahan* Case, however, no reference was made to the earlier case of *Newman v. People* (1913) 55 Colo. 374, 135 Pac. 460, wherein the court said: "The receiving of stolen goods, knowing them to have been stolen, is a distinct crime, under our statute, from the original larceny of the property. A party committing the larceny is not an accomplice of one who purchased the goods from him, knowing them to have been stolen."

So, in *Cohn v. People* (1902) 197 Ill. 482, 64 N. E. 306, wherein the plaintiffs in error were convicted of receiving stolen property, the substance of the charge was that they had bought from one Vance certain jewelry and silver spoons, knowing the same to have been stolen. The only evidence of the sale to the plaintiffs in error was the testimony of Vance. The court, reversing the judgment of conviction, said: "If this conviction is

sustained, it must be upon the uncorroborated testimony of Vance, a confessed criminal and accomplice in the transaction with the defendants; and while, under the rule in this state, that may be done, we have always held such evidence to be of doubtful integrity, and to be received only with the greatest caution."

Likewise, in *Johnson v. State* (1910) 58 Tex. Crim. Rep. 244, 125 S. W. 16, the defendant was charged with burglary, and on the trial the chief witness for the prosecution was one McCormick, who testified that he bought from the defendant a set of harness, but denied that he knew the same was stolen. It appeared, however, that he was acquainted with the value of harness, and had paid only \$2 for the harness in question, which was worth from \$25 to \$35. The court held that it was error to refuse an instruction that if the jury found that the witness, at the time he bought the harness, believed the same had been stolen, he was an accomplice, and the defendant could not be found guilty on his testimony unless corroborated.

Similarly, in *Reg. v. Robinson* (1864) 4 Fost. & F. (Eng.) 43, the jury were directed to return a verdict of not guilty, Pollock, C. B., saying it was perilous to convict a person as receiver of stolen goods on the sole evidence of the thief.

See also *Com. v. Savory* (1852) 10 Cush. (Mass.) 535, where, on a trial for feloniously receiving stolen goods, one Dorman testified that he had stolen part of the goods, for the receiving of which the defendant was on

trial. It was held that it was for the jury to determine whether the accomplice Dorman was sufficiently corroborated. To the same effect, see *Kaufman v. State* (1913) 70 Tex. Crim. Rep. 438, 159 S. W. 58.

But one who cashes a stolen check for the accommodation of the thief is not an accomplice of the latter. *Worsham v. State* (1909) 56 Tex. Crim. Rep. 253, 120 S. W. 439, 18 Ann. Cas. 134.

In Kentucky it seems that a thief and a receiver of the goods stolen by him are regarded as accomplices. Such a rule was apparently assumed in *Short v. Com.* (1903) 25 Ky. L. Rep. 451, 76 S. W. 11, wherein, however, it was held that the evidence was insufficient to show that the goods were received with guilty knowledge. See to the same effect, *Oakley v. Com.* (1914) 158 Ky. 474, 165 S. W. 691. The same view was also apparently taken in *Richardson v. Com.* (1915) 166 Ky. 570, 179 S. W. 458, wherein it was laid down by way of exception to the rule that one receiving goods with knowledge that they had been stolen, but not with knowledge that they had been obtained by burglary, was not an accomplice of the burglar.

In New Jersey the thief is apparently regarded as an accomplice of a receiver of stolen goods. See *State v. Rachman* (1902) 68 N. J. L. 120, 53 Atl. 1046; *State v. Simon* (1904) 71 N. J. L. 142, 58 Atl. 107. In each of those cases a conviction without corroboration was sustained on the ground that corroboration of an accomplice is not necessary. R. G. R.

CHICAGO, MILWAUKEE, & ST. PAUL RAILWAY COMPANY, Plff. in Err.,

v.

JOHN HOLVERSON.

United States Circuit Court of Appeals, Eighth Circuit—April 7, 1920.

(264 Fed. 597.)

Evidence — damages — habits of intoxication.

1. Upon the question of damages to be allowed for personal injuries, plaintiff may be cross-examined as to his habits with respect to drinking

intoxicating liquor, as bearing upon his physical condition, earning capacity, and life expectancy.

[See note on this question beginning on page 1405.]

Appeal — permitting jury to find without evidence.

2. It is error to permit the jury to consider the possibility of injuries to the spine of one seeking damages

for personal injuries, apart from the showing of an X-ray plate, which is the only evidence which has been introduced upon the subject.

[See 14 R. C. L. 786.]

ERROR to the District Court of the United States for the Northern District of Iowa (Reed, J.) to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by the negligence of defendant's agents and employees. *Reversed.*

The facts are stated in the opinion of the court.

Argued before Sanborn and Carland, Circuit Judges, and Van Valkenburgh, District Judge.

Messrs. John N. Hughes, Charles R. Sutherland, and Willis J. O'Brien, for plaintiff in error:

It was error to receive in evidence over defendant's objection the alleged X-ray picture of the lumbar vertebra of plaintiff's spine, the same being incapable of interpretation by the jurors, and in no way an aid to them in determining whether or not plaintiff had had an injury.

Mauch v. Hartford, 112 Wis. 40, 87 N. W. 816, 11 Am. Neg. Rep. 63; *Bruce v. Beall*, 99 Tenn. 303, 41 S. W. 445; *Selleck v. Janesville*, 104 Wis. 570, 47 L.R.A. 691, 76 Am. St. Rep. 892, 80 N. W. 944; *Baustian v. Young*, 152 Mo. 317, 75 Am. St. Rep. 462, 53 S. W. 921; 17 Cyc. 414; 1 *Wigmore*, Ev. 792; *O'Neil v. Potts*, 130 Minn. 353, 153 N. W. 856, 10 N. C. C. A. 562; *Carlson v. Benton*, 66 Neb. 486, 92 N. W. 600, 10 Ann. Cas. 159; *Prescott & N. W. R. Co. v. Franks*, 111 Ark. 83, 163 S. W. 180, Ann. Cas. 1916A, 773; *Chesapeake & O. R. Co. v. Kornhoff*, 167 Ky. 353, 180 S. W. 523.

The court, having permitted the plaintiff to introduce in evidence the skiagraph, exhibit "A," erred in refusing to allow the defendant to introduce by way of illustration other X-ray pictures showing how a fracture of a bone would appear therein.

Bruce v. Western Pipe & Steel Co. 177 Cal. 25, 169 Pac. 660; *Chicago, R. I. & G. R. Co. v. Smith*, — Tex. Civ. App. —, 197 S. W. 615; *Boddington v. Kansas City*, 95 Kan. 189, 148 Pac. 252.

Cross-examination of the plaintiff as regards his becoming intoxicated, and generally as to his use of intoxicants, was proper.

Hough v. Illinois C. R. Co. 169 Iowa, 226, 149 N. W. 885; *Wheelan v. Chicago, M. & St. P. R. Co.* 85 Iowa, 167, 52 N. W. 119; *Chicago, R. I. & P. R. Co. v. Morris*, 26 Ill. 400.

Permitting the jury to find an injury to the spine without considering the expert testimony and the X-ray plate offered in evidence by the plaintiff was error.

Van Doren v. Wright, 65 Minn. 80, 67 N. W. 668, 68 N. W. 22; *Dolson v. Dunham*, 96 Minn. 227, 104 N. W. 964; *Morrow v. St. Paul City R. Co.* 65 Minn. 382, 67 N. W. 1002; *Robertson v. Burton*, 88 Minn. 151, 92 N. W. 538; *Johnson v. Sartell Bros. Co.* 123 Minn. 239, 150 N. W. 784; *Burmister v. Giguere*, 130 Minn. 28, 153 N. W. 134; *Northwestern Theatrical Asso. v. Hannigan*, 134 C. C. A. 167, 218 Fed. 359; *Patton v. Texas & P. R. Co.* 179 U. S. 658, 45 L. ed. 361, 21 Sup. Ct. Rep. 275; *Day v. Boston & M. R. Co.* 96 Me. 207, 90 Am. St. Rep. 335, 52 Atl. 771, 12 Am. Neg. Rep. 452; *Virginia & S. W. R. Co. v. Hawk*, 87 C. C. A. 300, 160 Fed. 348.

If the court was right in permitting the use of the X-ray picture at all, then he was clearly wrong in refusing to permit the defendant's witness to give an interpretation of the cause for a difference in the degree of shadow shown on the negative.

Hill v. Hart, 23 N. M. 226, 167 Pac. 710.

Messrs. F. A. O'Connor, T. H. Goheen, L. G. Hurd, D. J. Lenehan, and W. A. Smith for defendant in error.

Van Valkenburgh, District Judge, delivered the opinion of the court:
This is a suit to recover for per-

sonal injuries; the cause of action being thus stated in the petition:

"That on the 5th day of June, 1917, plaintiff was employed by Myer & Company, at their elevators in Calmar, Iowa, and that at or about 3 o'clock in the afternoon of said day, while said plaintiff was engaged in unloading feed from a car standing on the railway side tracks to the elevator aforesaid, as was directed by his employer, and which was in the regular course of his business, and while plaintiff was thus engaged, the defendant, through the negligence and carelessness of its agents and employees, without giving the plaintiff any proper or due notice or warning thereof, or time to move away from said car, began to push, shove, and throw with their locomotive engine, in a careless and negligent manner, other cars back to and in the direction of the said car in which this plaintiff was then and there employed and engaged as aforesaid. That by reason of such careless and negligent conduct on the part of the defendant, as above described, the said cars thus thrown and pushed came in the direction of the car in which plaintiff was thus engaged, with great force and violence, and struck it. That at the same moment plaintiff, with all due care and without fault or negligence on his part, was passing from the elevator to the car, as the nature of the employment demanded, and as the car struck, he was suddenly thrown with great force and violence into the air, falling and striking his head and shoulders and back heavily upon the ground between the car and elevator. That as a result of such fall he suffered great bodily injury, particularly as follows:

"Plaintiff was severely and permanently injured about the head, back, and lower limbs; also sustaining a hernia or rupture. He also received a severe injury to his spine, and was otherwise permanently injured about his person.

"That by reason of said injuries plaintiff became sick, sore, and

bruised, and was confined to bed in the hospital, where he was operated upon for hernia or rupture; all the time enduring great physical pain and mental suffering. That by reason of said injuries plaintiff's spine and lower limbs are permanently injured and affected to such an extent as to make it difficult for him to walk; also causing him to become tired and exhausted upon the slightest exertion; also by reason of said injuries plaintiff is unable to attend to his usual duties or to do work."

The jury returned a verdict in the sum of \$6,150. No point is made that, upon the pleadings and evidence, the plaintiff was not entitled to recover. Complaint is made because of alleged errors in the progress of the trial, involving the admission and rejection of evidence and the submission of the case, including the charge of the court.

Counsel for plaintiff in error file fourteen assignments of error, discuss six in their brief, and feature five in argument. In our opinion, but two of these are entitled to consideration, to wit:

"(3) The court erred in sustaining plaintiff's objection to question propounded to the plaintiff as to whether or not he had frequently been under the influence of liquor and was in the habit of becoming intoxicated, and in sustaining objections to such testimony that it was not cross-examination and was not in issue, because defendant had not alleged in its answer that the plaintiff was in the habit of becoming intoxicated."

"(10) The court erred in giving the following instruction to the jury: 'In addition to the fact as to whether or not the picture does show a fracture in the lumbar vertebra, as claimed, and you should find it did not, the question still remains whether or not the accident that resulted to Mr. Holverson at that time caused an injury to the spine, and the extent of the injury, even though the picture should not show it. If, from the evidence, you find there was an injury to the spine

of the plaintiff, you should determine from the evidence what the extent of the injury was, and if it impaired the earning ability of Mr. Holverson to do manual labor in his ordinary occupation; if he has endured pain and suffering, and will continue to do so in the future, and, even though you find his injury does not amount to a fracture of the spine, you should make proper allowance therefor.' "

Counsel for plaintiff in error sought to elicit from defendant in error the extent to which he had been in the habit of using intoxicating liquor throughout his life. Objections were made and sustained:

"The court: I think it is a matter that is not in issue here, Mr. Hughes. Of course, ordinarily to a certain extent it might be permissible to ask him about his habits; but there is no issue here in regard to these habits for any purpose.

"Mr. Hughes: If your Honor will permit me to state this, and I am doing it in the best of faith, what I was going to show was this: That I can and will bring in a whole cloud of expert testimony to show that rheumatic conditions, and the very thing he has described that he has, is the common and the usual and almost invariable result of the continued use of intoxicating liquors.

"The court: There is no use talking about this. If you wish to produce your witnesses, you may do so. I have ruled upon this question; I don't think it is legitimate cross-examination. Now, if you think you can show the symptoms he has described here, you can show what they represent by other witnesses; but it is quite improper under the cross-examination of this witness upon that ground, especially under the issues that you have got here.

"Mr. Hughes: At this time we ask the court for permission to continue this cross-examination. I desire to state that, in addition to the reasons I have suggested, it is material as bearing on his earning capacity, and on his own testimony as to his earning capacity.

"The court: You can cross-examine him in certain limits, but to go into the question as to whether or not he is in the habit of getting intoxicated, you cannot be permitted to do that. You might have alleged that in your answer, but you have not done so. . . . Let that dispose of it, gentlemen. The objection is sustained."

The trial court conceded that "ordinarily to a certain extent it might be permissible to ask him about his habits." Such an inquiry was obviously pertinent, not only as bearing upon the possible cause of the physical condition shown, and upon the earning capacity of the plaintiff below, as suggested by counsel, but also upon the further ground that the habit, if established, might be considered by the jury as bearing upon the expectancy of life of the defendant in error, as conditioning, to some extent, the amount of legitimate recovery. It was stipulated that the plaintiff below was sixty-seven years of age at the time of the trial, and that certain life tables show the expectancy of life in a man of that age to be ten and three quarter years. His maximum earning capacity was placed at \$600 per year. The court excluded the testimony for the stated reason that this element of defense was not set up in the answer. The exclusion cannot be sustained. The burden was upon the plaintiff to make his case. The general issue was tendered. Under it, any matter of this nature, affecting the right of plaintiff to recover, or conditioning the amount of his recovery, could properly be shown.

Upon the injuries received the defendant in error introduced Dr. A. H. Blocklinger, who testified that he met Holverson a week or ten days before, and was called upon to make an examination of him and take an X-ray picture. This witness declared that the picture, which was introduced in evidence, disclosed a fracture of the fourth lumbar vertebra,—in other words, a permanent

Evidence—
damages—habits
of intoxication.

injury to the spine. This X-ray picture was the subject of much controversy, and experts introduced on behalf of plaintiff in error were in direct conflict with Dr. Blocklinger upon the matter of its interpretation. Dr. Blocklinger was the only witness who testified to injury to the spinal column, and his testimony was based entirely upon the disclosure made by the X-ray picture. The defendant in error had refused to submit to a physical examination. No medical expert testified to injury to the spine, nor that the symptoms disclosed in the testimony of the plaintiff could properly be assigned to spinal trouble. Dr. Kessle, a physician who saw him shortly after the accident, says: "I found him suffering from an inguinal hernia on the right side. I didn't make any particular examination of his back under the history; but, under the general examination I always make, I found nothing wrong with his back. I don't recall any complaint that he made at the hospital of injury to his back, or to his ear or head. The hernia was about the size of a large walnut, possibly a little larger. The examination was made a few days before the operation, two or three weeks after the accident happened. I made an examination of his heart and kidneys, etc., and I determined that it was reasonably wise to operate. The operation was performed on the 6th of July, about ten days after he first called at the hospital. He stayed in the hospital about two weeks. His condition was good

when he was discharged, and the operation was a complete success. I don't recall any complaint that he made of injury to his back while I was in the hospital, and I don't recall any statement made by him regarding injury to his back or ear."

There is positively no evidence in the record, outside of this X-ray plate, of any injury to the spine. The plaintiff complains of pains in his back. This might be muscular, as well as spinal; it might be rheumatism; it might be traumatic neuritis, secondary to the operation for hernia. In fact, it might proceed from any number of causes wholly unrelated to the spine. But the court, in that portion of its charge which is complained of, invited the jury to determine "whether or not the accident that resulted to Mr. Holverson at that time caused an injury to the spine, and the extent of that injury, even though the picture should not show it." This ushered the jury into the realm of speculation, and permitted a finding based upon practically no evidence at all. It is true that the petition alleges an injury to the back, but this does not necessarily involve the spine itself, and it is well known that an injury to the spinal column is commonly regarded as of special seriousness and permanency.

**Appeal—
permitting jury
to find without
evidence.**

For the errors specified, it is our conclusion that the judgment must be reversed, and the cause remanded for a new trial. It is so ordered.

ANNOTATION.

Evidence of intemperate habits on question of damages from death or personal injuries.

- I. In general, 1405.
- II. Elements of damages upon which evidence is competent, 1407.

This note does not include cases involving the admissibility of evidence of intemperate habits as bearing upon the probable cause of the physical condition of the one injured, or as tend-

ing to explain symptoms claimed to have resulted from the injury, although such proof may ultimately affect the amount of damages recoverable.

I. In general.

The plaintiff in an action for personal injuries or for death may show

the habits of sobriety and industry of the person injured or killed.

United States.—Hall v. Galveston, H. & S. K. R. Co. (1889) 39 Fed. 18; Metropolitan Street R. Co. v. Kennedy (1897) 27 C. C. A. 136, 51 U. S. App. 503, 82 Fed. 158.

Alabama.—Richmond & D. R. Co. v. Hammond (1890) 93 Ala. 181, 9 So. 577.

Arkansas.—Biddle v. Riley (1915) 118 Ark. 206, L.R.A.1915F, 992, 176 S. W. 134.

California.—Taylor v. Western P. R. Co. (1873) 45 Cal. 323; Barboza v. Pacific Portland Cement Co. (1912) 162 Cal. 36, 120 Pac. 767.

Illinois.—Chicago v. Scholten (1874) 75 Ill. 468.

Indiana.—Pittsburgh, C. C. & St. L. R. Co. v. Parish (1902) 28 Ind. App. 189, 91 Am. St. Rep. 120, 62 N. E. 514.

Iowa.—Van Gent v. Chicago, M. & St. P. R. Co. (1890) 80 Iowa, 526, 45 N. W. 913; Wheelan v. Chicago, M. & St. P. R. Co. (1892) 85 Iowa, 167, 52 N. W. 119.

Kentucky.—Louisville & N. R. Co. v. Gardner (1910) 140 Ky. 772, 131 S. W. 787.

Michigan.—Felske v. Detroit United R. Co. (1911) 166 Mich. 367, 130 N. W. 676.

Missouri.—Wolters v. Chicago & A. R. Co. (1917) — Mo. App. —, 193 S. W. 877.

Montana.—Osterholm v. Boston & M. Consol. Copper & S. Min. Co. (1910) 40 Mont. 509, 107 Pac. 499.

North Carolina.—Coléy v. Statesville (1897) 121 N. C. 301, 28 S. E. 482; Hollifield v. Southern Bell Teleph. & Teleg. Co. (1916) 172 N. C. 714, 90 S. E. 996.

Oregon.—Dietrich v. Giebisch (1919) 88 Or. 418, 171 Pac. 1177.

Tennessee.—East Tennessee, V. & G. R. Co. v. Gurley (1883) 12 Lea, 46.

Texas.—Texas Mexican R. Co. v. Douglas (1889) 73 Tex. 325, 11 S. W. 333; Beaumont Traction Co. v. Dilworth (1906) — Tex. Civ. App. —, 94 S. W. 352; Ft. Worth & D. C. R. Co. v. Stalcup (1914) — Tex. Civ. App. —, 167 S. W. 279.

Utah.—Wells v. Denver & R. G. W. R. Co. (1891) 7 Utah, 482, 27 Pac. 688.

Conversely, the defendant may show that plaintiff was a person of intemperate habits, in order to decrease the damages.

United States.—The reported case (CHICAGO, M. & St. P. R. Co. v. HOLVERSON, ante, 1401).

Alabama.—Alabama Steel & Wire Co. v. Griffin (1907) 149 Ala. 423, 42 So. 1034.

Indiana.—Wright v. Crawfordsville (1895) 142 Ind. 636, 42 N. E. 237.

Kentucky.—Louisville & N. R. Co. v. Daniel (1906) 122 Ky. 256, 3 L.R.A. (N.S.) 1190, 91 S. W. 691.

Massachusetts.—Ceresola v. Joseph F. Paul Co. (1916) 224 Mass. 395, 113 N. E. 358; Morrissey v. Connecticut Valley Street R. Co. (1919) 233 Mass. 554, 124 N. E. 435.

Michigan.—Kingston v. Ft. Wayne & E. R. Co. (1897) 112 Mich. 40, 40 L.R.A. 131, 70 N. W. 315, 74 N. W. 230, 1 Am. Neg. Rep. 467.

New York.—Devoe v. Van Vranken (1883) 29 Hun, 201; McIlwaine v. Metropolitan Street R. Co. (1902) 74 App. Div. 496, 77 N. Y. Supp. 426; Fearon v. New York L. Ins. Co. (1914) 162 App. Div. 560, 147 N. Y. Supp. 644.

Ohio.—Cleveland & P. R. Co. v. Sutherland (1869) 19 Ohio St. 151.

Tennessee.—Nashville & C. R. Co. v. Prince (1871) 2 Heisk, 580.

There is, however, some authority to the contrary; thus, it was held in Baltimore & O. R. Co. v. Boteler (1873) 38 Md. 568, that evidence that plaintiff was an habitual drunkard both before and after his injury, and when intoxicated was unable to transact business, was not admissible on the question of damages, to enable the jury to ascertain the loss suffered by the plaintiff and the amount of compensation to which he was entitled, the court stating that such evidence could not tend to elucidate the question of damages, and was not admissible for that purpose.

And in Sullivan v. Marin (1900) 175 Mass. 422, 56 N. E. 600, 7 Am. Neg. Rep. 261, where the lower court refused to allow the defendant to show, as affecting the damages only, that prior and up to the time of the accident the plaintiff had been

addicted to the excessive use of intoxicating liquors, but allowed the defendant to offer evidence that since the time of the injury, the plaintiff had been addicted to the use of intoxicating liquors, the court held that the former evidence was rightly rejected, saying, in this connection, that there was no reason shown why the value of the plaintiff's time and labor could not be proved by the evidence commonly introduced to prove such values, and that if her previous habits had been such as to lessen the probability of her complete recovery, or to prolong or aggravate the suffering caused by her injury, that fact could not be shown in mitigation of damages.

And it was held in *Union P. R. Co. v. Reese* (1898) 5 C. C. A. 510, 15 U. S. App. 92, 56 Fed. 288, that evidence that plaintiff was intoxicated several times before the injury was inadmissible in mitigation of damages, where there was no issue as to his incapacity to earn a living or to attend to his business.

Proof of the habits of deceased as a drinking man is competent on the question of damages in an action for the death of a person under a civil damage act, since in cases of such kind it must be conceded that the loss to the wife of a sober and industrious husband must necessarily be greater in a pecuniary sense than the loss of one who is the opposite. *Brockway v. Patterson* (1888) 72 Mich. 122, 1 L.R.A. 708, 40 N. W. 192; *Whipple v. Rosenstock* (1915) 99 Neb. 153, L.R.A. 1916D, 940, 155 N. W. 898.

But in an action of assault and battery, in which it appears that the defendant bit the finger of the plaintiff so that it became necessary to amputate it, the defendant cannot introduce evidence in mitigation of damages to the effect that the plaintiff was a man of drunken and dissipated habits about and after the time of the assault. *Wheat v. Lowe* (1844) 7 Ala. 311.

II. *Elements of damages upon which evidence is competent.*

The intemperate habits of one negligently injured or killed may affect the damages sustained by him or his next

of kin in several ways. First, they may account, in whole or in part, for the physical condition and suffering claimed to have resulted from the accident (cases on this point, as hereinbefore explained, are excluded from the note). Second, they may decrease his earning capacity. Third, they may shorten his expectancy of life. Fourth, they may lessen his usefulness to and protection and support of his family. Thus, in the following cases evidence of the habits of the plaintiff or the deceased in the use of intoxicants was held competent upon the question of his earning capacity, his probable future earnings being an important element in estimating the damages:

United States.—*Metropolitan Street R. Co. v. Kennedy* (1897) 27 C. C. A. 136, 51 U. S. App. 503, 82 Fed. 158.

Alabama.—*Alabama Steel & Wire Co. v. Griffin* (1907) 149 Ala. 423, 42 So. 1034.

Arkansas.—*Biddle v. Riley* (1915) 118 Ark. 206, L.R.A. 1915F, 992, 176 S. W. 134.

California.—*Taylor v. Western P. R. Co.* (1873) 45 Cal. 323.

Indiana.—*Pittsburgh, C. C. & St. L. R. Co. v. Parish* (1902) 28 Ind. App. 189, 91 Am. St. Rep. 120, 62 N. E. 514.

Kentucky.—*Louisville & N. R. Co. v. Daniel* (1906) 122 Ky. 256, 3 L.R.A. (N.S.) 1190, 91 S. W. 691; *Louisville & N. R. Co. v. Gardner* (1910) 140 Ky. 772, 131 S. W. 787; *Louisville & N. R. Co. v. Scott* (1920) — Ky. —, 220 S. W. 1066.

Montana.—*Osterholm v. Boston & M. Consol. Copper & S. Min. Co.* (1910) 40 Mont. 509, 107 Pac. 499.

New York.—*Devoe v. Van Vranken* (1883) 29 Hun, 201; *McIlwaine v. Metropolitan Street R. Co.* (1902) 74 App. Div. 496, 77 N. Y. Supp. 426; *Fearon v. New York L. Ins. Co.* (1914) 162 App. Div. 560, 147 N. Y. Supp. 644.

North Carolina.—*Hollifield v. Southern Bell Teleph. & Teleg. Co.* (1916) 172 N. C. 714, 90 S. E. 996.

Ohio.—*Cleveland & P. R. Co. v. Sutherland* (1869) 19 Ohio St. 151.

Tennessee.—East Tennessee, V. & G. R. Co. v. Gurley (1883) 12 Lea, 46.

In Ohio & M. R. Co. v. Voight (1890) 122 Ind. 288, 23 N. E. 774, the court upheld an instruction as to the manner of determining the probable earnings of deceased, to the effect that the jury should be governed by ordinary human knowledge and experience as to the age at which he would likely have remained capable of labor or of doing business, considering the evidence concerning his health, his habits of sobriety, industry, and personal merits and demerits, as shown by the evidence.

Either party may show the deceased's habits in regard to the use of intoxicating liquor and in regard to anything else which affects his prospective earnings and savings. Simonson v. Chicago, R. I. & P. R. Co. (1878) 49 Iowa, 87.

Testimony that the plaintiff's intestate, ten months after his injury, in response to a question as to his habits, said that he drank daily twelve whiskies and twelve beers, and used from one to two boxes of cigarettes a day is material and relevant upon the issue of damages, as it tends to show that the inability to labor of the intestate was not attributable entirely to the accident, but in part was due and chargeable to voluntary and reprehensible self-inflicted physical harm. Ceresola v. Joseph F. Paul Co. (1916) 224 Mass. 395, 113 N. E. 358.

In defense of a claim for loss of wages and future earnings in an action for personal injuries, defendant may show that plaintiff was in the habit of getting intoxicated, as such evidence throws light upon the probability of his procuring employment, and the character and continuity of the same. Kingston v. Ft. Wayne & E. R. Co. (1897) 112 Mich. 40, 40 L.R.A. 131, 70 N. W. 315, 74 N. W. 230, 1 Am. Neg. Rep. 467.

The habits of the deceased as to sobriety and industry may be considered by the jury in connection with his expectancy of life in ascertaining the amount of damages. Citizens' Light Heat & P. Co. v. Lee (1913) 182 Ala. 561, 62 So. 199.

Evidence to the effect that the deceased was not addicted to drink is competent and pertinent, as it has some bearing upon the value of his life to his wife and children, as showing the extent of his probable usefulness to his beneficiaries. Barboza v. Pacific Portland Cement Co. (1912) 162 Cal. 36, 120 Pac. 767.

And in Wright v. Crawfordsville (1895) 142 Ind. 636, 42 N. E. 227, holding evidence of specific acts of intoxication on the part of the deceased admissible, the court said: "This evidence . . . shows that, for a period of a year and over prior to his alleged death, he was repeatedly seen in a state of intoxication. The complaint alleged that 'the deceased was thirty-eight years old, and that he was a sober and industrious man, in good health, and able to earn a livelihood for himself and those dependent upon him.' We must presume, in the absence of anything in the record showing the contrary, that appellant introduced evidence tending at least to establish the averment that decedent was a sober and industrious man, for the purpose of showing that he was more valuable to his dependent family as a protector and in rendering services for their support than if he had been an idle and dissolute person, and that the evidence in controversy was admitted by the court to rebut that given by appellant under the averment in the complaint. . . . But, aside from this presumption, we think that the evidence was legitimate, under the issues, to be considered by the jury upon the question of the amount of damages to be awarded. The repeated acts of drunkenness disclosed by the evidence tended to prove that the deceased was addicted to the vicious habit of becoming intoxicated to an extent that, had he lived, would have tended to impair his ability to earn money, and so use it in a manner as would contribute to the proper support of his family. It is a fact generally conceded and recognized that drunkenness, as a habit, tends to absorb the earnings of the person addicted thereto, and renders him less fit to accom-

plish that which he might if he were of temperate habits. In actions of the character of the one under consideration, the jury is authorized, in awarding damages, to take into consideration the pecuniary loss or injury resulting to those most nearly related to the deceased; and it is obvious, we think, that where it is made to appear that the decedent was addicted to the habit of intoxication, and in spending his earnings in whole or in part, as the case might be, for intoxicating

liquors, the loss resulting from his death to those dependent upon him for support and protection in the future would not be as great as in a case where it appeared that the deceased was a sober and industrious man."

Defendant may show that the deceased was a drunken, worthless, man, and provided nothing for his family, and consumed what his family supplied. *Nashville & C. R. Co. v. Prince* (1871) 2 Heisk. (Tenn.) 580.

G. V. I.

W. C. WELCH et al., Plffs. in Err.,

v.

GEORGE W. KIRBY, Admr., etc., of Mary E. Scott, Deceased, et al.

United States Circuit Court of Appeals, Eighth Circuit—November 18, 1918.

(166 C. C. A. 527, 255 Fed. 451.)

Will — execution for blind person.

1. The statutory requirement that a signature of a will by proxy must be by some person by direction of the testator is met in case of a blind testator by sending for a certain person to affix the signature, and having it done by him with the understanding by all present that he was carrying out the wishes of testator.

[See note on this question beginning on page 1416.]

Evidence — burden of proof — execution of will.

2. In Missouri proponents of a will assume the burden of proving its proper execution.

Will — execution by proxy.

3. A statute providing that in case of execution of a will by proxy, it must be done "by some person by testator's direction," means that testator shall by word of mouth or action clearly indicate to the proxy a desire to have his name signed to the instrument, although any signifying of such desire will suffice.

— acknowledgment — sufficiency.

4. A blind testator who has asked a person to affix testator's signature to a will need not acknowledge the paper to be his will to the witnesses after the signature, if, prior thereto, the attorney who drew the will had stated to testator, in the presence of the witnesses, that he had the will, and asked

if testator desired the two persons present to witness the will, to which testator expressed assent.

— signing in adjoining room — presence of testator.

5. A signature is affixed to a will in the presence of testator, within the meaning of the statute, in case of a person who can see, although it is done on a table in an adjoining room, connected by an archway with that in which testator is, the table being about 10 feet from testator, and in plain sight by him.

— attesting of will of blind person.

6. The rule required by statute, that the signatures of the witnesses to a will must be affixed in the presence of the testator, has the same application in case of a blind testator as in case of one with sight, so that, if the signature would have been sufficient if testator could have seen, it will also be sufficient if he is blind.

Trial — question for court — credibility of witnesses.

7. The credibility of witnesses as to the execution of a will whose testimony is undisputed is a question primarily for the trial judge.

— direction of verdict.

8. The Federal court will, by direction, prevent a verdict which it would set aside as unsupported by substantial evidence.

(Wade, District Judge, dissents.)

ERROR to the District Court of the United States for the Western District of Missouri (Van Valkenburgh, District Judge) to review a judgment in favor of defendants in a suit to contest the validity of a will. *Affirmed.*

The facts are stated in the opinion of the court.

Argued before Hook and Stone, Circuit Judges, and Wade, District Judge.

Messrs. I. N. Watson, John B. Gage, and Raymond E. Watson for plaintiffs in error.

Messrs. Dorsey A. Jamison, William T. Jamison, and Howard L. Jamison, for defendants in error:

The will in question was executed according to the statutes and laws of the state of Missouri.

Lindsey v. Stephens, 229 Mo. 600, 129 S. W. 641; *Bingaman v. Hannah*, 270 Mo. 611, 194 S. W. 276; *Thomas v. English*, 180 Mo. App. 358, 167 S. W. 1147; *Hughes v. Rader*, 183 Mo. 630, 82 S. W. 32; *Martin v. Bowdern*, 158 Mo. 379, 59 S. W. 227; *Beyer v. Schlenker*, 150 Mo. App. 671, 131 S. W. 465; *Tschuback v. McLaughlin*, 209 Mo. 533, 103 S. W. 46; *Southworth v. Southworth*, 173 Mo. 59, 73 S. W. 129; *Schierbaum v. Schemme*, 157 Mo. 1, 80 Am. St. Rep. 604, 57 S. W. 526; *Carlson v. Lafgran*, 250 Mo. 527, 157 S. W. 555; *Montgomery's Manual of Fed. Proc.* § 748, p. 373; *Herbert v. Butler*, 97 U. S. 319, 320, 24 L. ed. 958; *Marion County v. Clark*, 94 U. S. 278-284, 24 L. ed. 59, 61; *McGuire v. Blount*, 199 U. S. 142, 50 L. ed. 125, 26 Sup. Ct. Rep. 1; *Dernberger v. Baltimore & O. R. Co.* 234 Fed. 405.

Mrs. Elzie Fulton did have the legal capacity to make the will in question.

Hahn v. Hammerstein, 272 Mo. 248, 198 S. W. 833; *Winn v. Grier*, 217 Mo. 420, 117 S. W. 48; *Sayre v. Princeton University*, 192 Mo. 95, 90 S. W. 787; *Thomas v. English*, 180 Mo. App. 358, 167 S. W. 1147; *Hughes v. Rader*, 183 Mo. 630, 82 S. W. 32; *Bowdoin College v. Merritt*, 75 Fed. 480; *Sehr v. Lindemann*, 153 Mo. 276, 54 S. W. 537; *Cash v. Lust*, 142 Mo. 630, 64 Am. St. Rep. 576, 44 S. W. 724; *Gibony v. Foster*, 230 Mo. 106, 130 S. W. 314; *Wood v. Carpenter*, 166 Mo. 465, 66 S. W. 172; *Conner v. Skaggs*, 213 Mo. 834, 111 S.

W. 1132; *Weston v. Hanson*, 212 Mo. 248, 111 S. W. 44; *Archambault v. Blanchard*, 198 Mo. 384, 95 S. W. 834; *Catholic University v. O'Brien*, 181 Mo. 68, 79 S. W. 901; *Hamon v. Hamon*, 180 Mo. 685, 79 S. W. 422; *Southworth v. Southworth*, 173 Mo. 59, 73 S. W. 129; *Crowson v. Crowson*, 172 Mo. 691, 72 S. W. 1065; *Riggin v. Westminster College*, 160 Mo. 570, 61 S. W. 803; *Martin v. Bowdern*, 158 Mo. 379, 59 S. W. 227.

There was no undue influence exercised by James P. Tucker, or anyone else, upon Elzie Fulton in the execution of the will.

Hahn v. Hammerstein, 272 Mo. 248, 198 S. W. 833; *Winn v. Grier*, 217 Mo. 420, 117 S. W. 48; *Bennett v. Ward*, 272 Mo. 671, 199 S. W. 945; *Robinson v. Davenport*, 179 Ky. 598, 201 S. W. 28; *Beyer v. Le Fevre*, 186 U. S. 114, 46 L. ed. 1080, 22 Sup. Ct. Rep. 765; *Meyer v. Jacobs*, 123 Fed. 900; *Throckmorton v. Holt*, 180 U. S. 552, 45 L. ed. 663, 21 Sup. Ct. Rep. 474; *Hayes v. Hayes*, 242 Mo. 155, 145 S. W. 1155; *Cash v. Lust*, 142 Mo. 630, 64 Am. St. Rep. 576, 44 S. W. 724; *Sehr v. Lindemann*, 153 Mo. 276, 54 S. W. 537; *Martin v. Bowdern*, 158 Mo. 379, 59 S. W. 227; *Tibbe v. Kamp*, 154 Mo. 545, 54 S. W. 879, 55 S. W. 440; *Campbell v. Carlisle*, 162 Mo. 634, 63 S. W. 701; *Weber v. Strobel*, 236 Mo. 649, 139 S. W. 188; *Gibony v. Foster*, 230 Mo. 106, 130 S. W. 314; *Wood v. Carpenter*, 166 Mo. 465, 66 S. W. 172; *Current v. Current*, 244 Mo. 429, 148 S. W. 860; *Fulton v. Freeland*, 219 Mo. 494, 131 Am. St. Rep. 576, 118 S. W. 12; *Jackson v. Hardin*, 83 Mo. 175; *Ryan v. Rutledge*, — Mo. —, 187 S. W. 877; *Conner v. Skaggs*, 213 Mo. 834, 111 S. W. 1132; *Weston v. Hanson*, 212 Mo. 248, 111 S. W. 44; *Crowson v. Crowson*, 172 Mo. 691, 72 S. W. 1065; *Kischman v. Scott*, 166 Mo. 214, 65 S. W. 1031; *Schierbaum v. Schemme*, 157 Mo. 1, 80 Am.

St. Rep. 604, 57 S. W. 526; Defoe v. Defoe, 144 Mo. 458, 46 S. W. 433; McFadin v. Catron, 138 Mo. 197, 38 S. W. 932, 39 S. W. 771.

There was no substantial evidence of mental incapacity of Mrs. Fulton to execute the will, and there was no substantial proof that she was unduly influenced in the execution thereof. It was, therefore, within the province and duty of the trial judge to give the peremptory instruction.

Hahn v. Hammerstein, 272 Mo. 248, 198 S. W. 833; Winn v. Grier, 217 Mo. 420, 117 S. W. 48; Sayre v. Princeton University, 192 Mo. 95, 90 S. W. 787; Thomas v. English, 180 Mo. App. 358, 167 S. W. 1147; Martin v. Bowdern, 158 Mo. 379, 59 S. W. 227; Sehr v. Lindemann, 153 Mo. 276, 54 S. W. 537; Cash v. Lust, 142 Mo. 630, 64 Am. St. Rep. 576, 44 S. W. 724; Gibony v. Foster, 230 Mo. 106, 130 S. W. 314; Wood v. Carpenter, 166 Mo. 465, 66 S. W. 172; Conner v. Skaggs, 213 Mo. 334, 111 S. W. 1132; Weston v. Hanson, 212 Mo. 248, 111 S. W. 44; Archambault v. Blanchard, 198 Mo. 384, 95 S. W. 834; Catholic University v. O'Brien, 181 Mo. 68, 79 S. W. 901; Hamon v. Hamon, 180 Mo. 685, 79 S. W. 422; Southworth v. Southworth, 173 Mo. 59, 78 S. W. 129; Crowson v. Crowson, 172 Mo. 691, 72 S. W. 1065; Riffin v. Westminster College, 160 Mo. 570, 61 S. W. 803; Weber v. Strobel, 235 Mo. 649, 139 S. W. 188; Current v. Current, 244 Mo. 429, 148 S. W. 860; Fulton v. Freeland, 219 Mo. 494, 131 Am. St. Rep. 576, 118 S. W. 12; Jackson v. Hardin, 83 Mo. 175; Ryan v. Rutledge, — Mo. —, 187 S. W. 877; Kischman v. Scott, 166 Mo. 214, 65 S. W. 1031; Schierbaum v. Schemme, 157 Mo. 1, 80 Am. St. Rep. 604, 57 S. W. 526; Defoe v. Defoe, 144 Mo. 458, 46 S. W. 433; McFadin v. Catron, 138 Mo. 197, 38 S. W. 932, 39 S. W. 771; Lindsey v. Stephens, 229 Mo. 600, 129 S. W. 641; Bingaman v. Hannah, 270 Mo. 611, 194 S. W. 276; Hughes v. Rader, 188 Mo. 630, 82 S. W. 32; Beyer v. Schlenker, 150 Mo. App. 671, 131 S. W. 465; Teckenbrock v. McLaughlin, 209 Mo. 533, 108 S. W. 46; Montgomery's Manual, Fed. Proc. § 748, p. 373; Herbert v. Butler, 97 U. S. 319, 320, 24 L. ed. 958; Marion County v. Clark, 94 U. S. 278-284, 24 L. ed. 59, 61; McGuire v. Blount, 199 U. S. 142, 50 L. ed. 125, 26 Sup. Ct. Rep. 1; Dernberger v. Baltimore & O. R. Co. 284 Fed. 405.

Stone, Circuit Judge, delivered the opinion of the court:

Suit attacking validity of will subject to the laws of the state of Missouri. From a judgment on a direct verdict at close of plaintiffs' evidence, upholding the will, plaintiffs bring writ of error.

The peremptory instruction is attacked on the three grounds that the legal execution of the will was not so clearly shown as to justify a withdrawal of that question from the jury, and that the evidence of both mental incapacity and of undue influence was sufficiently substantial to require the finding of the jury upon each of those issues.

Under the Missouri practice, in a cause of this character the proponents of the will (defendants) assume the burden of proving the proper execution of the will. At the conclusion of defendants' proof upon this phase of the case plaintiffs demurred and were overruled, after which they put in their evidence of incapacity and undue influence.

The statutes of Missouri (Mo. Rev. Stat. 1909, § 537) provide that "every will shall be in writing, signed by the testator, or by some person, by his direction, in his presence, and shall be attested by two or more competent witnesses subscribing their names to the will in the presence of the testator."

This will was not signed by the testatrix in person, but by another. Plaintiffs claim that the proof fails to show that such signature was by her express direction or adopted by her; that she acknowledged the paper after such signature to be her will to the attesting witnesses; that such signature or those of the attesting witnesses were made in her "presence."

A distinction is to be observed between a challenge of the paper presented as the will on the ground of fraud, because it was not the paper intended to be executed, on account of substitution, alteration, or deception, and between a challenge of it

Evidence—
burden of proof
—execution
of will.

because not executed in the manner required by the statute. Here the sole attack in this respect is that the statutory requirements were not met. It is therefore a question of what the above statute requires and what was done in this instance. Where the signature is by proxy, as here, the statute requires that it be "by some person by his direction."

**Will—execution
by proxy.**

The obvious construction of "by his direction" is that the testator shall by word or action clearly indicate to the proxy a desire to have his name signed to the instrument. The statute requires no particular expression or acts. Any signifying the above desire suffice. *St. Louis Hospital Asso. v. Williams*, 19 Mo. 609, 612. Here the testimony is that the testatrix, who was blind, in the presence of the two witnesses and her attorney, who had drawn the will, suggested that a Mr. Hamilton be requested to sign for her. One of the witnesses endeavored to find Mr. Hamilton, and ascertained that he was not in town. There was then some discussion between the attorney and testatrix, resulting in the suggestion that Dr. Ford be called. The witnesses are not clear as to the details of this discussion; one of them stating that the attorney suggested Ford, and asked the testatrix if he would be acceptable; the other stating that either the attorney or the testatrix made the suggestion. Both are clear that Dr. Ford was acceptable, and one of them went for him and brought him. Ford, who was a witness hostile to the will, testified that he had no knowledge of being wanted to sign for the testatrix until one of the witnesses came for him; that the attorney, in the presence of the witnesses and testatrix, explained that he was wanted to sign her name to a paper which was her will, because she could not do so; that he did so without hesitation. Dr. Ford was the husband of the niece of the testatrix, who was a guest in their home at the time.

There can be no question that all four men understood there in her presence at that time that Dr. Ford was carrying out the wishes of the testatrix. We think they were justified in so believing, and that the statute was in that respect fully met.

**—execution for
blind person.**

We are not impressed by the contention that it was necessary for the testatrix, after such signature, to acknowledge the paper as her will to the witnesses. Before Mr. Hamilton was sought, the attorney had, in the presence of the witnesses, stated to testatrix that he had her will, and asked if she desired the two persons present to witness it for her, to which she expressed assent. He then stated that, as she was blind, it would be necessary to read the will. This he did to her and the two witnesses; testatrix requesting the rereading of that portion thereof which is the cause of the present suit. It was also later stated in her presence to Dr. Ford, when he came, that the instrument was her will. There can be no doubt that everyone present clearly understood what the instrument was, and all but Ford had just heard its contents. It is difficult to see what purpose would be served by a formal declaration by testatrix after signature, unless the signature had been made outside her presence, so that a declaration afterwards could operate as an adoption thereof.

**—acknowledg-
ment—
sufficiency.**

The final contention upon this part of the case is that the signatures by Ford and the two witnesses were not in the "presence" of the testatrix within the statutory meaning. The facts are that there were two small rooms about 12 feet square, connected by an open archway of about half that width; that testatrix was in one room, and the signatures were written on a dining-room table standing 3 or 4 feet beyond the archway, in the other room; that, had testatrix had her eyesight, she could have seen the at-

taching of the signatures from where she was sitting, about 10 feet away. Under the circumstances we

—signing in adjoining room—
presence of
testator.

think the two rooms were, for practical purposes, one. Unquestionably the

statute would have been satisfied, had she been able to see. No case in Missouri has directly defined the statutory "in the presence" of the testator. In two cases there are obiter statements as follows:

"The witnesses must subscribe their names in the presence of the testator, in order that they may not impose a different will on him.

" Cravens v. Faulconer, 28 Mo. 19, 21.

"Of course, the word 'presence' necessarily includes knowledge of the act and acquiescence thereto upon the part of the testator." Bingham v. Hannah, 270 Mo. 611, 628, 194 S. W. 281.

The prime reason for requiring the signatures to be attached in the presence of the testator is that he may have knowledge that the witnesses have actually signed the instrument he intends as his will. Therefore this protection is ordinarily afforded when, and only when, the witnesses are near enough to and within the view of the testator for him to gain this knowledge by observation. But how can this knowledge be gained by a blind person? Such a one has to rely upon touch and hearing. Together they would be little protection, as it would be easy to substitute papers in the presence of a blind person without his knowledge. There is but one way in which a blind person could gain that security which the statute easily gives a normal person. That would be by writing his own will, signing it himself, and having it witnessed, all without letting it leave his own manual possession. This would mean that most blind persons, particularly if otherwise enfeebled, through lack of ability to write, or through failure to exercise the above excessive degree of caution, could not make a valid will. Surely the legislature did not

intend by a provision of this character to debar the blind from making wills. At the same time, there was no intention to except the wills of blind persons from the statutory requirement.

The statute must receive a rational, practical construction, which will enable reasonably careful blind people to execute wills. The statutory "presence" certainly requires as much in the case of a blind testator as of one who can see. Does it require more? If, it does, it must require at least that the testator hear the act of writing the signatures, for that act is the only one covered by the statute. It may be considered that, at best, all that the testator could know by ear would be that someone was writing something upon some paper near him; that the writing of a signature involves little or no sound; that ordinarily careful people would rarely think to witness or sign wills so close to the testator's ear as to remove all doubt as to his having heard it, and few such testators would think to require such; that most wills are made in middle or advanced life, when the hearing is naturally often defective. The legislature's object was to protect testators in disposing of their property, not to make it impossible or precarious for them to attempt to do so. In our judg-

—attesting of
will of blind
person.

ment, the rule for a blind testator is the same as that which would be applied to him if he had sight. The execution of the will now involved complied with the statute.

The claim that the matter of proper execution was for the jury is not well founded. The testimony was sufficient and undisputed. It is true that even undisputed testimony depends upon the credibility of the witnesses and may be disbelieved. But the credibility of the witnesses in such a situation as here is a question primarily for the trial judge. Whatever the rule may be in the Missouri state courts, the rule of the

Trial—question
for court—
credibility of
witnesses.

Federal courts is that the court will, by direction, prevent a verdict which it would set aside as unsupported by substantial evidence. *McGuire v. Blount*, 199 U. S. 142, 148, 50 L. ed. 125, 130, 26 Sup. Ct. Rep. 1.

The matter of testamentary capacity is whether the testimony here reveals any substantial doubt as to this testatrix possessing that standard of mentality required by the settled adjudicated rule in Missouri. The entire testimony has been carefully read and considered. In our judgment it establishes beyond substantial question the capacity required by the Missouri decisions. *Southworth v. Southworth*, 178 Mo. 59, 73 S. W. 129.

A careful study of all of the evidence reveals no substantial testimony of any undue influence.

The judgment is affirmed.

Wade, District Judge, dissenting:

The majority opinion announces: "In our judgment, the rule for a blind testator is the same as that which would be applied to him if he had sight. The execution of the will now involved complied with the statute."

With this statement I cannot agree. The statute requires that the will "shall be attested by two or more competent witnesses subscribing their names to the will in the presence of the testator." I agree that "the statute would have been satisfied, had she [the testatrix] been able to see;" but, as stated in the majority opinion, "the prime reason for requiring the signatures to be attached in the presence of the testator is that he may have knowledge that the witnesses have actually signed the instrument he intends as his will." I cannot agree that this protection against possible imposition is secured by having the will attested under conditions which would bring the witnesses within the "presence" of the testator if able to see. Not that a more strict requirement would absolutely preclude every possible chance for sub-

stitution of some other document, but that it would minimize, so far as practicable, such opportunity.

In *Calkins v. Calkins*, 216 Ill. 458, 1 L.R.A. (N.S.) 393, 108 Am. St. Rep. 233, 75 N. E. 182, the supreme court of Illinois, expressing the meaning of the phrase "in the presence of, the testator" says:

"An attestation is not in the presence of the testator" although the witnesses are in the same room and close to him, if some material obstacle prevents him from knowing of his own knowledge, or perceiving by his senses, the act of attestation.

"In case of a blind person, his will would be attested in his presence if the act was brought within his personal knowledge through the medium of other senses. But whether a person is blind or can see, an attestation is certainly not in his presence if he has no conscious personal knowledge of the act, and is merely told that it has been performed in another room." *Drury v. Connell*, 177 Ill. 43, 52 N. E. 368.

In *Page on Wills*, § 214, it is said:

"(a) It has been held by some authorities that the act, if done so that it would be in the presence of one who could see, situated in the place of the blind person, is done in the presence of such person.

"(b) A safer test, and one indorsed by the better line of authorities, is that the act must be done in such proximity to the blind person that he can, by means of his remaining senses, know what is being done."

In 1 *Underhill on Wills*, § 196, in speaking of the meaning of the word "presence," it is said: "In order that a signing shall be in the presence of the testator, in the statutory sense of the word, he must be mentally conscious of what is going on about him. He must have the power to recognize the acts of the witnesses, if not by sight, then by and through the avenue of some other sense."

In *Ray v. Hill*, 34 S. C. L. (3 Strobb.) 297, 49 Am. Dec. 647, in speaking of the capacity of a blind

man to make a will, the court says: "If the witnesses to the will of a blind man attest and subscribe the will within the reach of the testator's remaining senses, when he is conscious of what they are doing, and may, if he choose, ascertain that they are subscribing the same will that he had signed, the subscribing will be 'in the presence of the testator.' "

The court further says: "In the case of a blind man, the superintending control which, in other cases, is exercised by sight, must be transferred to the other senses; and if they are, or may, at his discretion, be made sensible that the witnesses are subscribing the same will that he had signed, I should think it ought to suffice. . . . According to the evidence, the subscription by the witnesses was within 2 feet of the testator. Robinson says, 'I think the testator knew what we were doing when we signed—he might have heard the scratching of the pen.' "

It is solely a question as to whether or not the blind person knows what is being done. Not being able to see what is being done, the act must be done in such proximity to the testator that he "can by means of his remaining senses" have a knowledge of what is being done. His source of knowledge need not necessarily be his hearing. A person deprived of sight has a certain capacity for "sensing" what is going on about him, not possessed by those who see. In truth, his sense of hearing, so far as movement of the pen upon the paper is concerned, would be of little value in the way of protection. Even if the testator heard the scratching of the pen, it might not, in my judgment, serve the purpose of the statute, because such sound would be the same, whether the witnesses were signing the document read to the testator, or a substituted document. But, if the parties are in close proximity to the testator, it would at least materially minimize the opportunity to substitute some other paper, which is the main purpose of the requirement that it shall be in the presence of the

testator. Such substitution could not well be made without some movement which might be clearly discernible,—such as the withdrawing of another document from the pocket, or from some other place; the incident of delay might be suggestive; the movement of the parties about the table might have some suspicious significance; and if the capacity of the testator to "sense" these things failed to furnish the protection which the statute contemplates, I would go to the extent of holding that a document must be signed upon a table or stand, sufficiently close to the testator, so that he might hold his hand upon the paper during the attestation.

If the statute were construed to require that the testator, after the reading of the document, should place his hand upon some portion of it as it rested upon a table in front of him while his signature was being written, and while the witnesses attached their signatures, it would in no manner furnish an obstacle to the execution of a will by a person deprived of sight. It would be as easy to execute it in such manner as in the manner shown by the testimony in this case. The only burden it would put upon the parties would be to have the table moved to the testator, or have the testator sit at the table with the witnesses.

I am afraid that the rule of the majority opinion will leave the blind, desiring to execute a will, to the mercy of designing persons; and inasmuch as this establishes a rule of law, not only applicable to this case, but to all other cases, I cannot concur in the majority opinion upon this point. I feel that at least it was a question for the jury, under proper instructions as to the purpose of the statute, to determine whether the acts done were such as to enable testatrix to be conscious of such acts in such detail as to furnish her the protection which the law provides.

I concur with the majority in holding that the "direction" that Ford attach the name of the testatrix to her will was proven, but for

the foregoing reasons I do not believe that he attached such signature in the "presence" of testatrix.

Assuming (without reference to the facts in this case) that there was a conspiracy to substitute a will, there would not be the slightest difficulty in slipping a spurious document from the pocket of any of the parties as they walked from the testatrix to the adjoining room. The act of such substitution, or any noise incident thereto, would be covered by the movement of the parties across the floor. I think it is fair to assume that the purpose of the statute requiring attestation in the presence of the testator is not only in-

tended to enable the testator to know what is being done, but that it contemplates that such requirement may be a restraint upon those who might be inclined to perpetrate such a fraud. The psychology of the matter must not be overlooked.

I concur in the conclusion of the majority that the plaintiff failed to establish by the testimony that testatrix lacked testamentary capacity.

Petition for rehearing denied.

Petition for writ of certiorari denied by the Supreme Court of the United States, April 14, 1919 (249 U. S. 612, 63 L. ed. 801, 39 Sup. Ct. Rep. 386).

ANNOTATION.

Will of blind person.

- I. Testamentary capacity, 1416.
- II. Signature by proxy, 1416.
- III. Knowledge of contents, 1416.
- IV. Attestation in presence of testator, 1418.

I. Testamentary capacity.

It is well settled at the common law and under modern statutes that testamentary capacity, depending, as it does, on soundness of mind and memory, is not affected by the fact that the testator is blind. *King v. Berry* (1871) 1r. Rep. 5 Eq. 309; *Davis v. Rogers* (1855) 1 Houst. (Del.) 44; *Elliott v. Elliott* (1902) 3 Neb. (Unof.) 832, 92 N. W. 1006; *Weir v. Fitzgerald* (1851) 2 Bradf. (N. Y.) 42; *Re McCabe* (1911) 75 Misc. 35, 134 N. Y. Supp. 682; *Re Pickett* (1907) 49 Or. 127, 89 Pac. 377; *Wilson v. Mitchell* (1882) 101 Pa. 495; *Ray v. Hill* (1848) 34 S. C. L. (3 Strobb.) 297, 49 Am. Dec. 647.

"The fact that testatrix was aged and deaf . . . and was also blind does not render her incapable of making her will. A blind person may make a will." *Re McCabe* (1911) 75 Misc. 35, 134 N. Y. Supp. 682, supra.

While the Roman law admitted of but a limited capacity in the blind (see dictum in *Weir v. Fitzgerald* (1851) 2 Bradf. (N. Y.) 42), the civil law was, in *State v. Martin* (1847) 2

La. Ann. 667, held not to differ from the common law, the court sustaining in that case the will of Francois Xavier Martin, who had served for thirty-one years on the supreme bench of Louisiana, during the last eight years of which time he was totally blind.

II. Signature by proxy.

It is held in the reported case (*WELCH v. KIRBY*, ante, 1409) that a blind person may have his will signed for him by another. See to the same effect, *Pickett's Will* (1907) 49 Or. 127, 89 Pac. 377.

III. Knowledge of contents.

The blindness of the testator overthrows the presumption otherwise arising from the due execution of a will that the testator knew its contents, and casts on the proponent the burden of establishing that fact. *Harrison v. Rowan* (1820) 3 Wash. C. C. 580, Fed. Cas. No. 6141; *Davis v. Rogers* (1855) 1 Houst. (Del.) 95; *Day v. Day* (1831) 3 N. J. Eq. 549; *Weir v. Fitzgerald* (1851) 2 Bradf. (N. Y.) 42; *Re McCabe* (1911) 75 Misc. 35, 134 N. Y. Supp. 682. And see *Dufaur v. Croft* (1840) 3 Moore, P. C. C. 136, 13 Eng. Reprint, 59; *Harden v. Hays* (1848) 9 Pa. 163; *Lewis v. Lewis* (1821) 6 Serg. & R. (Pa.) 496;

Hess's Appeal (1862) 43 Pa. 73, 82 Am. Dec. 551. Compare Hemphill v. Hemphill (1830) 13 N. C. (2 Dev. L.) 291, 21 Am. Dec. 331, wherein it was said that it will be presumed that the will of a blind testator was correctly read to him before execution.

In *Day v. Day* (1831) 3 N. J. Eq. 549, *supra*, the court said: "So, if the testator is incapable of reading the will, whether the incapacity arise from blindness, sickness, or any other cause, the rule is the same, and the burden of proof is thrown on the person offering the will."

In *Weir v. Fitzgerald* (1851) 2 Bradf. (N. Y.) 42, *supra*, it was said: "The statute is satisfied by the subscription of the testator, at the end of the will, in the presence of two witnesses, or the acknowledgment of such subscription; the testamentary declaration of the testator; and the signature by the witnesses, of their names at the end of the will, at the request of the testator. These forms are necessary, but, even when satisfied by the evidence, do not always entitle the will to be admitted to proof. Something more is necessary to establish the validity of the will, in cases where, from the infirmities of the testator, his impaired capacity, or the circumstances attending the transaction, the usual inference cannot be drawn from the mere formal execution. Additional evidence is therefore required that the testator's mind accompanied the will, that he knew what he was executing, and was cognizant of the provisions of the will. I think that is all that ought to be required in the proof of the will of a blind person." So in the case of *Re McCabe* (1911) 75 Misc. 35, 134 N. Y. Supp. 682, *supra*, the court said: "Such a condition as that of testatrix merely casts upon the proponents the burden of proving, with greater particularity, that the paper propounded was the conscious act of a free and capable testatrix, and that no imposition was practised on her. It seems to me that the proponents have discharged this burden resting upon them sufficiently in this cause. That the provisions of the will were dictated by testatrix her-

self, and that the will was read over to her before execution, is established, and it is not contradicted."

While some early text-writers were of the contrary opinion, it is well settled that the will of a blind person is valid though it is not read to him at the time of its execution. It is sufficient if he, in any manner, is aware of its contents. *Edwards v. Fincham* (1842) 4 Moore, P. C. C. 198, 13 Eng. Reprint, 277; *Davis v. Rogers* (1855) 1 Houst. (Del.) 44; *Clifton v. Murray* (1849) 7 Ga. 564, 50 Am. Dec. 411; *Wampler v. Wampler* (1856) 9 Md. 540; *Weir v. Fitzgerald* (1851) 2 Bradf. (N. Y.) 42; *Pickett's Will* (1907) 49 Or. 127, 89 Pac. 377; *Harleston v. Corbett* (1860) 46 S. C. L. (12 Rich.) 604; *Boyd v. Cook* (1831) 3 Leigh (Va.) 32.

Thus, in *Clifton v. Murray* (1849) 7 Ga. 564, 50 Am. Dec. 411, *supra*, the court said: "This case is narrowed down to a single point. When a testator is blind, or so illiterate as not to be able to read or write, is it indispensable to the validity of his will that it be read over to him, at the time of its execution, in the presence of the subscribing witnesses? Swinburne intimates that it is. He says that 'a blind man may make his testament in writing, provided the same be read over before witnesses, and in their presence acknowledged by the testator for his will. But if a writing were delivered to the testator, and he, not hearing the same read, acknowledged the same for his will, this would not be sufficient; for it may be that, if he should hear the same read, he would not acknowledge the same to be his will.' Vol. 1, p. 166. This may be the rule of the civil law; it would seem, however, never to have been adopted as that of the common law. For Lord Coke says: 'If the party who should deliver the deed doth not require it to be read, he shall be bound by it, though he be blind or illiterate.' *Thoroughgood's Case* (1584) 2 Coke, 9, 76 Eng. Reprint, 408, 6 Eng. Rul. Cas. 202; *Shulters Case* (1611) 12 Coke, 90, 77 Eng. Reprint, 1866. And Lord Coke goes so far as to hold that the deed is good, not only where it is

presumed that it was read, from the contrary not appearing, but that it is good where the contrary doth actually appear. And there is, we apprehend, no distinction between wills and deeds, in this particular. . . . It is, after all, an issue of fraud; and the question as to whether or not the testator has been imposed on is one of fact, to be left to the jury. And the circumstance that the will was not read will be weighed by them in coming to a conclusion. We cannot get our consent, however, to lay it down as an inflexible rule of law that the validity of the instrument depends, in every case, upon its being proved that it was read in the presence of the witnesses previous to its execution. It would deprive testators of the privilege secured to them, upon sufficient reasons, of secreting the contents of testaments until after their death, in order to insure their peace. This very controversy shows the importance and necessity of such a doctrine; and none stand more in need of its benefits than this class of persons; for none are more dependent on the kindly offices of others. And how easy it would be to evade the rule, even if it were established. A party intending to perpetrate a fraud would have it in his power just as easily to palm a falsely read will upon the testator, as one that was falsely written."

So, in *Harleston v. Corbett* (1860) 46 S. C. L. (12 Rich.) 604, it was said: "The principle, in the case of a blind testator, is that proof is competent to show that he was aware of what his will contained, when he executed it. The mode of his having become cognizant of its contents is not restricted; any proof which satisfactorily shows this is competent."

The communication to a blind testator of the contents of his will is no part of the execution, and accordingly need not be done in the presence of the subscribing witnesses. *Longchamp v. Fish* (1807) 2 Bos. & P. N. R. 415, 127 Eng. Reprint, 690, 9 Revised Rep. 670; *Re Menchinton* (1866) Newfound. Rep. 159; *Martin v. Mitchell* (1859) 28 Ga. 382; *Hemphill v. Hemphill* (1829) 13 N. C. (2 Dev. L.) 291,

21 Am. Dec. 331; *Re Mealey* (1876) 11 Phila. (Pa.) 161. In *Longchamp v. Fish* (Eng.) supra, it was said: "In the case of a blind man, stronger evidence would be required than the mere attestation of signature; but in this case there was that stronger evidence which the peculiarity of the case seems to call for. In the course of the argument sufficient attention has not been paid to the distinction between what shall be deemed a literal compliance with the provisions of the statute and what sufficient proof to rebut any imputation of fraud. The question of fraud is for the jury entirely, and here they found the will to be a valid will. The Lord Chief Baron was of that opinion at the trial, and I agree with him. Great inconvenience would arise from any rule requiring the wills of blind men to be read over in the presence of the attesting witnesses, nor would the mere reading it aloud to them be a certain guard against fraud, since it might be read falsely. No authorities from the civil law have any force or application in this case."

In *Faulkner v. Faulkner* [1920] 2 West. Week. R. (Can.) 307, the court sustained a will signed at a time when the testator had become blind from disease. The will was prepared from instructions given by him to his solicitor. It was held that it was sufficient if he accepted the will in the belief that it conformed to his instructions, though he was unable to read it in order to verify that fact.

IV. Attestation in presence of testator.

It has been laid down in some cases that in the case of a blind person it is sufficient if the witnesses sign in such proximity to the testator that he can discern their presence by the use of his remaining senses. *Re Ellred* (1915) 170 N. C. 153, L.R.A.1916C, 946, 86 S. E. 1047, Ann. Cas. 1916D, 788; *Ray v. Hill* (1848) 34 S. C. L. (3 Strobb.) 297, 49 Am. Dec. 647; *Reynolds v. Reynolds* (1843) 28 S. C. (1 Speers) 253, 40 Am. Dec. 599.

In *Ray v. Hill* (S. C.) supra, it was said: "In the case of a blind man, the superintending control which, in other cases, is exercised by sight, must be

transferred to the other senses; and if they are, or may, at his discretion, be made sensible that the witnesses are subscribing the same will that he had signed, I should think it ought to suffice. This is in accordance with the charge of the circuit judge. He says the question submitted to the jury was, 'whether the witnesses attested and subscribed the will within the reach of the testator's remaining senses, when he was conscious of what they were doing, and might, if he chose, have ascertained they were subscribing his will.' According to the evidence the subscription by the witnesses was within 2 feet of the testator. Robinson says: 'I think the testator knew what we were doing when we signed,—he might have heard the scratching of the pen.' Dickson says the signing was 'so near that the testator must have been aware of what we were doing.' 'He did not touch them, but he might easily have done so.' "

In the case of *Re Allred* (N. C.) *supra*, it appeared that the will of a blind man was signed by him and was then placed on a table in the same room, and there subscribed by the witnesses, their backs being to the testator. It was held that the witnesses signed "in the presence" of the testator.

In *Riggs v. Riggs* (1883) 135 Mass. 238, 46 Am. Rep. 464, the court said, obiter: "It is true that it is stated, in many cases, that witnesses are not in the presence of a testator unless they are within his sight; but these statements are made with reference to testators who can see. As most men can see, vision is the usual and safest test of presence, but it is not the only test. A man may take note of the presence of another by the other senses, as hearing or touch. Certainly, if two blind men are in the same room, talking together, they are in each other's presence. If two men are in the same room, conversing together, and either or both bandage or close their eyes, they do not cease to be in each other's presence. In England, where the tendency of the courts has been to construe the statute with great strictness, it has always been held that a blind man

can make a valid will, although, of course, he cannot see, if he is sensible of the presence of the witnesses through the other senses. *Piercy's Goods* (1845) 1 Rob. Eccl. Rep. (Eng.) 278; *Fincham v. Edwards* (1842) 3 Curt. Eccl. Rep. (Eng.) 63. It would be against the spirit of our statutes to hold that, because a man is blind, or because he is obliged to keep his eyes bandaged, or because, by an injury, he is prevented from using his sight, he is deprived of the right to make a will. The statute does not make the test of the validity of a will to be that the testator must see the witnesses subscribe their names; they must subscribe 'in his presence;' but in cases where he has lost or cannot use his sense of sight, if his mind and hearing are not affected, if he is sensible of what is being done, if the witnesses subscribe in the same room or in such close proximity as to be within the line of vision of one in his position who could see, and within his hearing, they subscribe in his presence." See to the same effect the dictum in *Calkins v. Calkins* (1905) 216 Ill. 458, 1 L.R.A. (N.S.) 393, 108 Am. St. Rep. 233, quoted in the dissenting opinion in the reported case (*WELCH v. KIRBY*, ante, 1409).

A more liberal rule is laid down in the reported case (*WELCH v. KIRBY*). The will involved in that case was signed by a blind testatrix, and then signed by the witnesses in an adjoining room, separated from that in which the testatrix was by an open archway. The testatrix sat about 10 feet from the table on which the will was signed, and if she had had her sight, she could have seen the witnesses sign. It is held that the will was properly executed, the court saying that the rule requiring signature in the presence of the testator is satisfied by a signing which would be good in the case of a person having sight.

A like holding was made in *Piercy's Goods* (Eng.) *supra*, wherein it appeared that the will of a blind person was subscribed by the witnesses on a table in an adjoining room, which was visible through an open door from the bed on which the testatrix lay.

W. A. S.

**UNION DRY GOODS COMPANY, Plff. in Err.,
v.
GEORGIA PUBLIC SERVICE CORPORATION.**

United States Supreme Court—January 7, 1919.

(248 U. S. 372, 63 L. ed. 309, 39 Sup. Ct. Rep. 117.)

Constitutional law — due process of law — impairing contract obligations — rate regulations.

1. Reasonable rates for electric light and power, prescribed by a state in the exercise of its police power, through the instrumentality of a railroad commission, are not repugnant to the contract or due process of law clauses of the Federal Constitution merely because, if given effect, they will supersede the rates designated in a private contract between the electric light company and a customer, entered into prior to the making of the order by the commission.

[See note on this question beginning on page 1423.]

— police power — contract rights.

2. Private contract rights must yield to the public welfare where the latter

is appropriately declared and defined and the two conflict.

[See 6 R. C. L. 199.]

ERROR to the Supreme Court of the State of Georgia to review a decree affirming a decree of the Superior Court for Bibb County refusing to enjoin defendant from charging increased rates for electric light and power, as fixed by the state Railroad Commission. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. R. Douglas Feagin, Rudolph S. Wimberly, and Oliver S. Hancock, for plaintiff in error:

The contract, being valid when it was made, could not be impaired or destroyed by any subsequent action of the legislature, the Railroad Commission, or the courts.

Chicago v. Sheldon, 9 Wall. 50, 19 L. ed. 594; White v. Hart, 13 Wall. 646, 20 L. ed. 685; Delmas v. Merchants' Mut. Ins. Co. 14 Wall. 670, 20 L. ed. 760; Detroit v. Detroit Citizens' Street R. Co. 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410; Minneapolis v. Minneapolis Street R. Co. 215 U. S. 417, 54 L. ed. 259, 30 Sup. Ct. Rep. 118; Dill. Mun. Corp. 5th ed. § 1326; New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; New Orleans Waterworks Co. v. Rivers, 115 U. S. 674, 29 L. ed. 525, 6 Sup. Ct. Rep. 273; Vicksburg v. Vicksburg Waterworks Co. 206 U. S. 497, 51 L. ed. 1155, 27 Sup. Ct. Rep. 762; Bridge Proprs. v. Hoboken Land & Improv. Co. 1 Wall. 116, 17 L. ed. 571; Binghamton Bridge, 3 Wall. 51, 18 L. ed. 137; Koshkonong v. Burton, 104 U. S. 668, 26 L. ed. 886;

Farrington v. Tennessee, 95 U. S. 679, 24 L. ed. 558; Bronson v. Kinzie, 1 How. 311, 11 L. ed. 143; St. Tammany Waterworks Co. v. New Orleans Waterworks Co. 120 U. S. 64, 30 L. ed. 563, 7 Sup. Ct. Rep. 405.

Messrs. Roland Ellis, C. A. Glawson, and Thomas W. Harwick, for defendant in error:

Constitutional restraints upon the impairment of the obligation of contracts do not prevent the state from exercising such powers as are necessary in the exercise of its sovereign right to protect the lives, health, morals, comfort, and general welfare of the public, though contracts previously entered into between individuals may thereby be affected.

Union Dry Goods Co. v. Georgia Pub. Serv. Corp. 142 Ga. 841, L.R.A.1916E, 358, 83 S. E. 946; Railroad Commission v. Louisville & N. R. Co. 140 Ga. 817, L.R.A.1915E, 902, 80 S. E. 327. Ann. Cas. 1915A, 1018; Hudson County Water Co. v. McCarter, 209 U. S. 349, 357, 52 L. ed. 828, 832, 28 Sup. Ct. Rep. 529, 14 Ann. Cas. 560; Armour Packing Co. v. United States, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428; Louis-

UNION DRY GOODS CO. v. GEORGIA PUBLIC SERVICE CORP. 1421
(248 U. S. 372, 65 L. ed. 309, 39 Sup. Ct. Rep. 117.)

ville & N. R. Co. v. Mottley, 219 U. S. 467, 55 L. ed. 297, 34 L.R.A. (N.S.) 671, 31 Sup. Ct. Rep. 265; Dawson v. Dawson Teleph. Co. 137 Ga. 62, 72 S. E. 508; Manigault v. Springs, 199 U. S. 473, 480, 50 L. ed. 274, 278, 26 Sup. Ct. Rep. 127.

Freedom of contract is a qualified and not an absolute right.

Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259.

Unless regulations respecting the pursuit of a lawful trade or business are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizens are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the state to pass, and they form no subject for Federal interference.

Gundling v. Chicago, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633.

Mr. Justice Clarke delivered the opinion of the court:

The Georgia Public Service Corporation and the Union Dry Goods Company, both corporations organized under Georgia law and doing business in Macon, on July 18, 1912, contracted together in writing for the term of five years, the former to supply electric light and power to the latter, which agreed to pay stipulated rates for the service.

The contract was performed for almost two years until in April, 1914, when the dry goods company refused to pay a bill for service rendered during March, in which a rate higher than that of the contract was charged. The service corporation claimed that this rate was authorized and required by an order of the Railroad Commission of Georgia, entered after investigation and hearing.

Soon thereafter the dry goods company commenced this suit to compel specific performance of its contract, which had three years yet to run; to enjoin the service corporation from charging the higher rate, and from executing a threat to cut it off from a supply of electricity, because of failure to pay the increased rate.

The trial court and the supreme court of Georgia both held against the claims of the dry goods company, and the case is here for review on writ of error.

The order of the Railroad Commission of Georgia, entered on February 24, 1914, reads:

"Ordered: That on and after March 1, 1914, and until the further order of the Commission, the following schedule of rates shall be the maximum schedule of rates to be charged by the Georgia Public Service Corporation."

Then follow the rates complained of.

No opinion was rendered in this case, but on the same date, in prescribing the same rates in a proceeding instituted by the Macon Railway & Light Company, also of Macon, the Commission said:

"The rates prescribed herein are, in the opinion of the Commission, at this time just and reasonable. We have no power to compel the company to accept less, except as implied in the power to prevent unlawful discrimination. . . . All special rates, whether in the form of contracts or definite periods, or informal, in excess of these prescribed rates, are illegal."

Of the several claims pressed in the argument, we need notice only two: That the obligation of the contract of July 18, 1912, was impaired, and that the plaintiff in error was deprived of its property without due process of law, by the decision of the supreme court of Georgia, holding that the rates prescribed by the Railroad Commission were valid and superseded those of the contract between the parties.

Long prior to the contract of 1912 the Railroad Commission was given jurisdiction over, and power to regulate, the rates of electric light and power companies, by statutes in form not greatly different from those of many other states, and since no reason is assigned for assailing their validity, other than the result in this case, they must be accepted as valid laws.

As we have seen, the rates pre-

scribed by the Commission were declared by it to be reasonable and the service company was given authority to charge them. The plaintiff in error did not assert in its pleadings, or offer evidence tending to prove, that these Commission rates were unreasonable, but complained only that they were higher than the contract rates, and for this reason, it argued, that to give effect to the order, as the state supreme court did, violated the provisions of the Constitution referred to.

The presumption of law is in favor of the validity of the order, and the plaintiff in error did not deny, as it could not successfully, that capital invested in an electric light and power plant to supply electricity to the inhabitants of a city is devoted to a use in which the public has an interest which justifies rate regulation by a state in the exercise of its police power. *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 407, 58 L. ed. 1011, 1020, L.R.A.1915C, 1189, 34 Sup. Ct. Rep. 612.

Thus it will be seen that the case of the plaintiff in error is narrowed to the claim that reasonable rates, fixed by a state in an appropriate exercise of its police power, are invalid for the reason that, if given effect, they will supersede the rates designated in the private contract between the parties to the suit, entered into prior to the making of the order by the Railroad Commission.

Except for the seriousness with which this claim has been asserted and is now pursued into this court, the law with respect to it would be regarded as so settled as not to merit further discussion.

That private contract rights must yield to the public welfare, where the latter is appropriately declared and defined and the two conflict, has been often decided by this court. Thus, in *Manigault v. Springs*, 199 U. S. 473, 480, 50 L. ed. 274, 278, 26

Sup. Ct. Rep. 127, it was declared that:

"It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from [properly] exercising such powers . . . for the general good of the public, though contracts previously entered into between individuals may thereby be affected."

This on authority of many cases which are cited.

In *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 357, 52 L. ed. 828, 832, 28 Sup. Ct. Rep. 529, 14 Ann. Cas. 560, it is said that:

"One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them. The contract will carry with it the infirmity of the subject-matter."

In *Louisville & N. R. Co. v. Mottley*, 219 U. S. 467, 482, 55 L. ed. 297, 303, 34 L.R.A. (N.S.) 671, 31 Sup. Ct. Rep. 265, this is quoted with approval from *Legal Tender Cases*, 12 Wall. 457, 550, 551, 20 L. ed. 287, 311, 312, viz.:

"Contracts must be understood as made in reference to the possible exercise of the rightful authority of the government, and no obligation of a contract can extend to the defeat of legitimate government authority."

In *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 567, 55 L. ed. 338, 31 Sup. Ct. Rep. 259, it is said:

"There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community."

In *Atlantic Coast Line R. Co. v. Goldsboro*, 232 U. S. 548, 558, 58 L. ed. 721, 726, 34 Sup. Ct. Rep. 364, the court said:

Constitutional
law—police
power—contract
rights.

the latter is appropriately declared and defined and the two conflict, has

"It is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the

—due process of law—impairing contract obligations—rate regulations.

health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise."

And in *Rail & River Coal Co. v. Ohio Industrial Commission*, 236 U. S. 338, 349, 59 L. ed. 607, 615, 35 Sup. Ct. Rep. 359, the state of the

law upon the subject is thus aptly described:

"This court has so often affirmed the right of the state in the exercise of its police power to place reasonable restraints, like that here involved, upon the freedom of contract, that we need only refer to some of the cases in passing."

These decisions, a few from many to like effect, should suffice to satisfy the most skeptical or belated investigator that the right of private contract must yield to the exigencies of the public welfare when determined in an appropriate manner by the authority of the state, and the judgment of the Supreme Court of Georgia must be affirmed.

ANNOTATION.

Power of state to change private contract rates for public utilities.

- I. Scope and introduction, 1423.
- II. Statements and grounds of rule:
 - a. In general, 1424.
 - b. Police power, 1427.
- III. Illustrations:
 - a. General statement, 1430.

I. Scope and introduction.

The question herein considered is, as indicated by the above title, the right to "change" private contract rates. Assuming the validity of such contracts in their inception, the question arises whether the state may constitutionally change the rate. And this question is, of course, quite distinct from the question of the original validity of the contract.

The question of the power of public service commissions to increase franchise rates is treated in annotations to *Salt Lake City v. Utah Light & Traction Co.* 3 A.L.R. 730, and *Virginia-Western Power Co. v. Com.* ante, 1148. The question treated in the present annotation is somewhat analogous to that considered in those annotations, except that in this note cases of private contracts only are included. Contracts between public utilities and municipalities are generally excluded. As shown by the an-

III.—continued.

- b. Gas and electric contracts, 1430.
- c. Railroad contracts, 1432
- d. Street railroad contracts, 1435.
- e. Telephone contracts, 1435.
- f. Water rate contracts, 1436.
- g. Miscellaneous, 1437.

notations referred to, it is generally held, with a few exceptions, that municipalities have not been delegated authority to make contracts with public utilities beyond the power of public service commissions to increase without the municipality's consent. And in some of the cases within the scope of the present annotation it has been suggested that the same rule should be applied, as to the power of the state to change the contract rate where the contract is with a private corporation or individual, as where it is with a municipality.

Thus, in *Kansas City Bolt & Nut Co. v. Kansas City Light & P. Co.* (1918) 275 Mo. 529, 204 S. W. 1074, the court, in holding that a contract subsequently entered into between an electric utility and a private corporation, for the furnishing of electricity at specified rates, was superseded by a higher rate schedule fixed by the Public Service Commission, cited cases in that

state holding that rates in contracts between public utilities and municipalities were subject to revision by the state, and said that "no valid reason can be stated why a rate contract entered into between a private manufacturing corporation and a public service corporation . . . would not (if permitted to stand) be just as much an abridgment of the rate-making power of the state as would a rate contract between a municipality and such public service corporation."

And in considering the question whether the constitutional provision against impairment of contracts prevented interference by a Public Service Commission with existing rate contracts with public utilities, the court in *Ohio & C. Smelting & Ref. Co. v. Public Utilities Commission* (1920) — Colo. —, P.U.R.1920D, 197, 187 Pac. 1082, said: "We have heretofore decided this question as to contracts entered into by municipalities in relation to rates to be charged by public utilities, as affected by the after-asserted power of the state. *Denver & S. P. R. Co. v. Englewood* (1916) 62 Colo. 229, 4 A.L.R. 956, P.U.R.1916E, 134, 161 Pac. 151. But a careful review of the authorities leads us to the conclusion that this rule as to the after-asserted exercise of the police power applies equally in the case of contracts relating to a public service as between persons and corporations."

There is no difference in principle, the court said in *Leiper v. Baltimore & P. R. Co.* (1918) 262 Pa. 328, P.U.R. 1919C, 397, 105 Atl. 551, in referring to the state's power to modify contract rates with public utilities, between a contract with a borough, with a corporation, or with an individual.

In the annotations above referred to on the question of the power of public service commissions to increase franchise rates, it is said that the decisions do not, in general, necessarily determine whether the state may confer on municipalities power to contract with utilities for rates which cannot, during the period of the contract, be increased by the state without the municipality's consent. And it should be observed that the cases in the present

annotation do not generally support the proposition that a legislature may not expressly authorize private rate contracts with public utilities for a limited period, which it may not abrogate during that period. Thus, in *Raymond Lumber Co. v. Raymond Light & Water Co.* (1916) 92 Wash. 330, L.R.A.1917C, 574, P.U.R.1916F, 437, 159 Pac. 133, the court, in holding that a private contract for water rates was subject to change by the Public Service Commission, although the contract was valid when made, and was in existence when the Public Service Commission Law was enacted, stated that had the legislature expressly authorized the contract for rates which were reasonable and for a limited time, and the contract had been made in pursuance of such authorization, a different question would be presented, on which no opinion was then expressed.

So, the court in *Limoneira Co. v. Railroad Commission* (1917) 174 Cal. 232, P.U.R.1917D, 183, 162 Pac. 1033, in holding that a discriminatory water contract might be annulled by the state Railroad Commission, stated that the uniform course of the decisions of the United States Supreme Court, on questions similar in principle, precluded any claim that the exercise by the state of the power thus to affect existing contract rates impaired the obligation of contracts within the meaning of the Federal Constitution, but limited its statement with the observation that it was speaking, of course, of a situation such as that presented, where the state could not be held, as matter of fact, to have surrendered to the utility, by something tantamount to a contract, any portion of this regulatory power.

II. Statements and grounds of rule.

a. In general.

It is quite generally held that rate regulations do not unconstitutionally impair existing contracts between public service corporations and consumers. As before stated, this does not mean, necessarily, that the state may not authorize the making of a contract with a public utility for a limited period, with which it could not inter-

fere without unconstitutional impairment of contracts, but it does mean that such authorization has not been generally given, and that private contracts with such utilities are regarded as entered into subject to reserved authority in the state, under the police power or express statute or constitutional provision, to modify the contract rate in the interest of the public welfare. Modification of the rates is, of course, generally made through the delegation of power to the various state public service commissions. The following cases support the doctrine, above indicated, that the state may change private contract rates with public utilities, without, unconstitutional impairment of contracts:

United States.—**UNION DRY GOODS Co. v. GEORGIA PUBLIC SERVICE CORP.** (reported herewith) ante, 1420; **Knoxville Water Co. v. Knoxville** (1903) 189 U. S. 434, 47 L. ed. 887, 23 Sup. Ct. Rep. 531; **Portland R. Light & P. Co. v. Railroad Commission** (1913) 229 U. S. 397, 57 L. ed. 1248, 33 Sup. Ct. Rep. 820, affirming (1910) 56 Or. 468, 105 Pac. 709, 109 Pac. 273; **Producers' Transp. Co. v. Railroad Commission** (1920) 251 U. S. 228, P.U.R.1920C, 574, 64 L. ed. —, 40 Sup. Ct. Rep. 181; **Lanning v. Osborne** (1896) 76 Fed. 819; **Portland R. Light & P. Co. v. Portland** (1912) 200 Fed. 890. See also **St. Joseph Gas Co. v. Barker** (1916) 243 Fed. 206.

California.—**Pinney & B. Co. v. Los Angeles Gas & E. Corp.** (1914) 168 Cal. 12, L.R.A.1915C, 282, 141 Pac. 620, Ann. Cas. 1915D, 471; **Southern P. Co. v. Spring Valley Water Co.** (1916) 173 Cal. 291, L.R.A.1917E, 680, 159 Pac. 865 (rule recognized); **Limoneira Co. v. Railroad Commission** (1917) 174 Cal. 232, P.U.R.1917D, 183, 162 Pac. 1033. See also **Henrici v. South Feather Land & Water Co.** (1917) 177 Cal. 442, 170 Pac. 1135 (rule implied); and **Allen v. Railroad Commission** (1918) 179 Cal. 68, 8 A.L.R. 249, P.U.R.1919A, 398, 175 Pac. 466, petition for writ of certiorari denied in (1919) 249 U. S. 601, 63 L. ed. 797, 39 Sup. Ct. Rep. 259.

Colorado.—**Ohio & C. Smelting & Ref. Co. v. Public Utilities Commission** 9 A.L.R.—90.

(1920) — Colo. —, P.U.R.1920D, 197, 187 Pac. 1082.

Georgia.—**Union Dry Goods Co. v. Georgia Pub. Service Corp.** (1914) 142 Ga. 841, L.R.A.1916E, 358, 83 S. E. 946, later appeal in (1916) 145 Ga. 658, 89 S. E. 779, which is affirmed, ante, 1420.

Maryland. — **Yeatman v. Towers** (1915) 126 Md. 513, P.U.R.1915E, 811, 95 Atl. 158.

Michigan.—**Grand Rapids & I. R. Co. v. Cobbs & Mitchell** (1918) 203 Mich. 133, 168 N. W. 961.

Minnesota.—**Seaman v. Minneapolis & R. River R. Co.** (1914) 127 Minn. 180, 149 N. W. 184.

Missouri.—**Fulton v. Public Service Commission** (1918) 275 Mo. 67, 204 S. W. 386; **Kansas City Bolt & Nut Co. v. Kansas City Light & P. Co.** (1918) 275 Mo. 529, 204 S. W. 1074. See also **Oak Grove Home Teleph. Co. v. Round Prairie Teleph. Co.** (1919) — Mo. App. —, 209 S. W. 552.

Nebraska.—**McCook Irrig. & Water Power Co. v. Burtless** (1915) 98 Neb. 141, L.R.A.1915D, 1205, P.U.R.1915C, 587, 152 N. W. 334. See also **Fitzgerald v. Fitzgerald & M. Constr. Co.** (1894) 41 Neb. 374, 59 N. W. 838.

New Jersey.—**Edison Storage Battery Co. v. Public Utility Comrs.** (1919) 93 N. J. L. 301, P.U.R.1920B, 234, 108 Atl. 247.

New York.—**Buffalo East Side R. Co. v. Buffalo Street R. Co.** (1888) 111 N. Y. 132, 2 L.R.A. 384, 19 N. E. 68; **Onondaga Golf & Country Club v. Syracuse & Suburban R. Co.** (1916) 96 Misc. 213, P.U.R.1916F, 540, 160 N. Y. Supp. 693.

Ohio.—**Chillicothe v. Logan Natural Gas & Fuel Co.** (1900) 8 Ohio N. P. 88, 11 Ohio S. & C. P. Dec. 24.

Oklahoma.—See **Durant v. Consumers' Light & P. Co.** (1918) — Okla. —, P.U.R.1919C, 46, 177 Pac. 361 (contract to furnish electricity at specified rate by purchaser of municipal lighting plant).

Oregon.—**Portland R. Light & P. Co. v. Railroad Commission** (1909) 56 Or. 468, 105 Pac. 709, 109 Pac. 273, affirmed in (1918) 229 U. S. 397, 57 L. ed. 1248, 33 Sup. Ct. Rep. 820.

Pennsylvania.—**Leiper v. Baltimore & P. R. Co.** (1918) 262 Pa. 328, P.U.R.

1919C, 397, 105 Atl. 551; *Schaper v. Cleveland & E. R. Co.* (1919) 265 Pa. 109, P.U.R.1920B, 406, 108 Atl. 407.

Texas.—*Southwestern Tele. & Teleph. Co. v. Dallas* (1910) — Tex. Civ. App. —, 131 S. W. 80, reversed on other grounds in (1911) 104 Tex. 114, 134 S. W. 321.

Vermont.—See *Fitzgerald v. Grand Trunk R. Co.* (1891) 63 Vt. 169, 13 L.R.A. 70, 3 Inters. Com. Rep. 633, 22 Atl. 76.

Washington.—*Raymond Lumber Co. v. Raymond Light & Water Co.* (1916) 92 Wash. 330, L.R.A.1917C, 574, P.U.R. 1916F, 437, 159 Pac. 133.

West Virginia.—*United Fuel Gas Co. v. Public Service Commission* (1914) 73 W. Va. 571, 80 S. E. 931; *Mill Creek Coal & Coke Co. v. Public Service Commission* (1919) — W. Va. —, 7 A.L.R. 1081, P.U.R.1920A, 704, 100 S. E. 557.

Wisconsin.—*Minneapolis, St. P. & S. Ste. M. R. Co. v. Menasha Wooden Ware Co.* (1914) 159 Wis. 130, L.R.A. 1915F, 732, 150 N. W. 411.

Generally, the authorities expressly base their decisions on the police power. See II. b, *infra*. Further explanations or statements of grounds of the decisions which do not expressly mention this power are here indicated.

In holding that private contract rates for water for irrigation purposes must yield to state regulation of such rates, the court, in *Lanning v. Osborne* (1896) 76 Fed. 319, said: "As the water in question, from the moment the appropriation became effective, became charged with a public use, it was not in the power of either the corporation making the appropriation, or of the consumers, to make any contract or representation that would at all take away or abridge the power of the state to fix and regulate the rates. All persons are presumed to know the law, and those who bought lands from the complainant corporation upon its representations that water for irrigation would be furnished at the annual rate of \$3.50 an acre, or otherwise acted or contracted with reference to such rates, must be held to have known that the Constitution conferred upon the legislature the power, and made it its duty, to pre-

scribe the manner in which such rates should be established."

If, as in the case last cited, there is in existence, at the time the contract is made, an express statute or constitutional provision authorizing regulation of rates by a utility commission, or otherwise, the contract is regarded as entered into in view of this express provision of law. This has doubtless been the case in a number of the decisions not expressly referring to such provisions. As referring to such express provisions, see the following cases under III. *infra*: *Armour Packing Co. v. United States* (1908) 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428; *Limoneira Co. v. Railroad Commission* (1917) 174 Cal. 232, P.U.R.1917D, 183, 162 Pac. 1033; *Leavitt v. Lassen Irrig. Co.* (1909) 157 Cal. 82, 29 L.R.A. (N.S.) 213, 106 Pac. 404; *Kansas City Bolt & Nut Co. v. Kansas City Light & P. Co.* (1918) 275 Mo. 529, 204 S. W. 1074; *Durant v. Consumers' Light & P. Co.* (1918) — Okla. —, P.U.R.1919C, 46, 177 Pac. 361.

The basis of the rule is thus stated in *Mill Creek Coal & Coke Co. v. Public Service Commission* (1919) — W. Va. —, 7 A.L.R. 1081, P.U.R.1920A, 704, 100 S. E. 557: "Surely it is in the interest of public convenience and of the general welfare that rates of public utilities be subject to regulation, both as a protection against extortionate charges, and at the same time for the purpose of safeguarding to a utility so restricted a reasonable return upon its investment. It must, of course, be recognized that a peculiar sanctity inheres in contracts entered into between parties competent to contract, and that the obligations thereby imposed will not lightly be disturbed. But the same policy that forbids to a utility total freedom of action likewise limits the extent to which contracts with a utility will be recognized, when the public need necessitates a partial or total annulment. The duty of the utility to subordinate its right of control over rates in the interest of the public welfare is balanced by a corresponding duty on the part of individuals contracting with such utility, to subordinate their rights

of contract to the same public welfare."

"The overwhelming weight of judicial opinion in this country," it was said in *Ohio & C. Smelting & Ref. Co. v. Public Utilities Commission* (1920) — Colo. —, P.U.R.1920D, 197, 187 Pac. 1082, is that "the constitutional interdiction of statutes impairing the obligations of contracts does not prevent the state from properly exercising such powers as are vested in it for the promotion of the common weal, or as are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected."

And in denying the contention that a municipal ordinance reducing water rates impaired the obligation of existing contracts between the water company and its consumers, the court in *Knoxville Water Co. v. Knoxville* (1908) 189 U. S. 484, 47 L. ed. 887, 23 Sup. Ct. Rep. 531, said: "But such contracts, of course, were made by it subject to whatever power the city possessed to modify rates. The company could not take away that power by making such contracts,"—citing *New Orleans v. New Orleans Waterworks Co.* (1891) 142 U. S. 79, 91, 92, 35 L. ed. 943, 947, 948, 12 Sup. Ct. Rep. 142, and *Browne v. Turner* (1900) 176 Mass. 15, 56 N. E. 969.

It was said also, in *Minneapolis, St. P. & S. Ste. M. R. Co. v. Menasha Wooden Ware Co.* (1914) 159 Wis. 130, L.R.A.1915F, 732, 150 N. W. 411, that the power to regulate rates of common carriers is a sovereign power of the state; that every contract made as to such rates with a corporation authorized to contract with reference thereto is made with the knowledge of, and subject to, the right of the state at any time to resume the exercise of such sovereign power; and that the legislative right to supersede it is as clear as though it were written into the contract itself, for the law implies it.

In *St. Joseph Gas Co. v. Barker* (1917) 243 Fed. 206, the rule was regarded as indisputable that, notwithstanding contracts between parties engaged in producing, furnishing, or

transporting public utilities, reasonable charges only will be allowed as against the public. The rule was invoked by a public service commission in fixing rates charged consumers for gas by a distributing company which had a contract with a producing company for gas at a certain rate.

Contracts concerning interstate transportation must be regarded as made upon the basis and with the understanding that changes in the law applicable to them may be made by Congress, and there is no vested right in the law as it exists at the time they are made. *Fitzgerald v. Grand Trunk R. Co.* (1890) 63 Vt. 169, 13 L.R.A. 70, 3 Inters. Com. Rep. 633, 22 Atl. 76.

The reported case (*UNION DRY GOODS Co. v. GEORGIA PUB. SERVICE CORP.* ante, 1420) is cited with approval in *Producers Transp. Co. v. Railroad Commission* (1920) 251 U. S. 229, 64 L. ed. —, P.U.R.1920C, 574, 40 Sup. Ct. Rep. 181, where the court laid down the rule that "a common carrier cannot, by making contracts for future transportation, or by mortgaging its property or pledging its income, prevent or postpone the exertion by the state of the power to regulate the carrier's rates and practices. Nor does the contract clause of the Constitution interpose any obstacle to the exertion of that power."

b. Police power.

See *UNION DRY GOODS Co. v. GEORGIA PUB. SERVICE CORP.* (reported herewith) ante, 1420.

The police power, as before stated, is generally regarded as the basis of the decisions holding that the state may modify private rate contracts with public utilities. And the clause in the Federal Constitution, forbidding the passage of laws impairing the obligation of contracts, it has been said, is not applicable to legislation within the scope of the police power. *Raymond Lumber Co. v. Raymond Light & Water Co.* (1916) 92 Wash. 330, L.R.A.1917C, 574, P.U.R.1916F, 437, 159 Pac. 183.

Contracts upon subjects which are within the police power, even though valid when made, must be taken to have been entered into in view of the continuing power of the state to con-

trol the rates to be charged by public service corporations. *Ibid.*

The police power of the state is impartial between a public utility and those contracting with it, requiring both to surrender rights for the general weal. *Mill Creek Coal & Coke Co. v. Public Service Commission* (1919) — W. Va. —, 7 A.L.R. 1081, P.U.R. 1920A, 704, 100 S. E. 557.

In holding that railroad rate contracts were subject to change by the subsequently created Railroad Commission, the court, in *Portland R. Light & P. Co. v. Railroad Commission* (1910) 56 Or. 468, 105 Pac. 709, 109 Pac. 273, affirmed in (1918) 229 U. S. 397, 57 L. ed. 1248, 33 Sup. Ct. Rep. 820, said that a grant by the legislature to a corporation of authority to employ the right of eminent domain necessarily implies a reservation of the police power to regulate the measure of compensation which is reasonable; and that if a carrier could, by a contract stipulating for the continuance of a specified rate, prevent any interference with such agreements, by invoking the law against impairment of contract obligations, it would thereby become superior to the legislature, which doctrine would never be acknowledged by the courts.

And in holding that a rate higher than that fixed by contract with a public utility could not be enjoined, where the higher rate had been authorized by the Public Service Commission, and that it was immaterial whether the contract was for an indeterminate or a determinate period, the court in *Leiper v. Baltimore & P. R. Co.* (1918) 262 Pa. 328, P.U.R. 1919C, 397, 105 Atl. 551, said: "Where the rights of individuals under a contract which would otherwise be perfectly valid are in conflict with the 'general well-being of the state,' the rights of the individuals must give way to the general welfare. It therefore follows that when, as in this case, the parties enter into a contract with a public service corporation relating to rates, they are presumed to have done so with the knowledge that the right of the state to exercise this police power in the future is expressly reserved, and that,

where the common weal and the interests of the public demand that the provisions of the contract thus entered into shall be modified, it can be done without any violation of the provision of the Constitution of the United States, with reference to the impairment of the obligation of contracts. A public service company is granted its franchise by the state, so that it may properly and efficiently serve its people. This grant is made subject to the reserved power of the commonwealth to supervise and regulate the exercise of the franchise, and, in the case of rates, to increase or decrease them as the public interest, as distinguished from mere private interest, may demand."

The reported case (*UNION DRY GOODS Co. v. GEORGIA PUB. SERVICE CORP.* ante, 1420) is cited and followed in *Mill Creek Coal & Coke Co. v. Public Service Commission* (1919) — W. Va. —, 7 A.L.R. 1081, P.U.R. 1920A, 704, 100 S. E. 557, where the rule is laid down that private contract rates must yield to the public welfare, when the latter is appropriately declared and defined, and the two conflict. This case goes farther than the *UNION DRY GOODS Co. CASE*, however, in that the contracts in question were entered into before the Public Service Commission Act was enacted, and it was contended that therefore the contract rates stood on a higher plane than those of subsequent date, and that the Public Service Commission could not interfere with such rates without unconstitutional impairment of contract obligations. In reply to this contention, the court said: "To adopt such a holding would be to permit private contracts to dispossess the state of a portion of its police power, where the statute enacted pursuant to that power was subsequent to such contracts. That would result in discrimination of the worst type, when the service rendered by a utility is required by law to be without discrimination. The Commission might authorize a rate which, according to its estimate, would yield a reasonable return, but those who were so fortunate as to possess contracts with the utility would be

entirely without the scope of such order, and would pay for the service at a rate lower than is paid by those subject to the Commission's order. The resulting difference between the estimated and actual yield would necessarily be made up by a still higher rate, to be paid by those not holding such contracts. In other words, the effect would be to recognize the contract action of individuals as of superior dignity to the police power of the state, a result tantamount to a denial of sovereignty in the state in the exercise of one of its most sacred and sovereign powers."

See also the following cases under III. *infra*, in which the court expressly refers to the police power as a ground of the decision: *Hite v. Cincinnati, I. & W. R. Co.* (1918) 284 Ill. 297, 119 N. E. 904; *Grand Rapids & I. R. Co. v. Cobbs & Mitchell* (1918) 203 Mich. 133, 168 N. W. 961; *McCook Irrig. & Water Power Co. v. Burtless* (1915) 98 Neb. 141, L.R.A.1915D, 1206, P.U.R.1915C, 587, 152 N. W. 334; *Buffalo East Side R. Co. v. Buffalo Street R. Co.* (1888) 111 N. Y. 132, 2 L.R.A. 384, 19 N. E. 63; *Onondaga Golf & Country Club v. Syracuse & Suburban R. Co.* (1916) 96 Misc. 213, P.U.R. 1916F, 540, 160 N. Y. Supp. 693; *United Fuel Gas Co. v. Public Service Commission* (1914) 73 W. Va. 571, 80 S. E. 931.

On facts not within the scope of the note, the rule is laid down in *Erie R. Co. v. Public Utility Comrs.* (1916) 89 N. J. L. 57, 98 Atl. 13, affirmed in (1917) 90 N. J. L. 673, 103 Atl. 1052, that "any contract that a railroad corporation is empowered by the state to enter into is made subject to the future exercise by the state of its police power, and hence the obligations of such contracts are not, in a constitutional sense, impaired by such future legislation."

And although involving contracts between municipalities and water companies, attention is called to the statements in *Re Guilford Water Co.'s Service Rates* (1919) — Me. —, P.U.R. 1920C, 363, 108 Atl. 446, and *Re Searsport Water Co.* (1919) — Me. —, P.U.R. 1920C, 347, 108 Atl. 452, which are

broad enough to include contracts made by such utilities with private individuals or corporations. In the latter case, it was said that all contracts relating to the public service are entered into in contemplation of the exercise of the state's regulatory powers whenever the public interests may require, and that no vested rights can be gained by contract, or otherwise, as against the proper exercise of the police powers of the state. And in the former case, the court laid down the rule that contract rights which affect the public safety and welfare must yield to that which is essential to the general good; and that the legislature, in the exercise of the police power, is unrestricted by the provisions of contracts between individuals or corporations, or between individuals and municipal corporations.

So, in *Fulton v. Public Service Commission* (1918) 275 Mo. 67, 204 S. W. 386, a case involving the question of the validity of an order of a Public Service Commission increasing franchise telephone rates, the court, in reply to the contention that the rights of individual subscribers were involved, stated that this suggestion was answered by the rule that individuals cannot abridge the police power by contracts made under an ordinance subject to revision under that power; that all such contracts necessarily are made in contemplation of the state's power to fix rates.

A case frequently cited in the authorities on the present question, although not, on its facts, within the scope of the note, is *Manigault v. Springs* (1905) 199 U. S. 473, 50 L. ed. 274, 26 Sup. Ct. Rep. 127, in which the court said: "It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which, in its various ramifications, is known as the police power, is an exercise of the sov-

foreign right of the government to protect the lives, health, morals, comfort, and general welfare of the people, and is paramount to any rights under contracts between individuals."

III. Illustrations.

a. General statement.

The following cases show the application of the rules above stated, under various circumstances. But no attempt is made to repeat every case applying the rules, unless a more detailed statement appears to be of value.

b. Gas and electric contracts.

Reasonable rates for electric light and power, prescribed by a state in the exercise of its police power, through the instrumentality of a Railroad Commission, are not repugnant to the contract or due process of law clauses of the Federal Constitution, merely because, if given effect, they will supersede the rates designated in a private contract between the electric light company and a customer, entered into prior to the making of the order by the Commission. *UNION DRY GOODS CO. v. GEORGIA PUB. SERVICE CORP.* (reported herewith) ante, 1420.

Rate contracts with a public utility, such as a contract with a natural gas company for exclusive service for a term of years, in consideration of reduced rates, are subject to the superior authority of the state, through its legislature, in the exercise of its police power, and are presumed to have been entered into with knowledge of this superior authority of the state; and whatever effect lawful legislation may have upon such contracts, they are not within the protection of the Federal Constitution, or thereby unlawfully impaired. *United Fuel Gas Co. v. Public Service Commission* (1914) 73 W. Va. 571, 80 S. E. 931.

And the above rule applies as well to contracts entered into by way of compromise of pending suits, as to any other class of contracts affected. *Ibid.*

In *St. Joseph Gas Co. v. Barker* (1916) 243 Fed. 206, a case involving a contract between producing and distributing gas companies for the furnishing of gas at a certain rate, the

rule invoked by the Missouri Public Service Commission, and regarded by the court as indisputable, was that, notwithstanding contracts between parties engaged in producing, furnishing, or transporting public utilities, reasonable charges only will be allowed as against the public.

An ordinance raising the rates to be charged by an electric utility above those at which it had contracted to render service to a consumer was held in *Pinney & B. Co. v. Los Angeles Gas & E. Corp.* (1914) 168 Cal. 12, L.R.A. 1915C, 282, 141 Pac. 620, Ann. Cas. 1915D, 471, not to impair the obligation of the contract, since it would be presumed that the contract was made in contemplation of the power of the public to fix the rates.

And in *Portland R. Light & P. Co. v. Portland* (1912) 200 Fed. 890, it was held that a city ordinance fixing gas and electric rates did not unconstitutionally impair the obligation of unexpired contracts with consumers, since such contracts were necessarily made subject to the power of the city to modify or change the rates.

Although the Public Utility Statute was not in effect at the time the contract was entered into and improvements contemplated therein were made, it was held, in *Ohio & C. Smelting & Ref. Co. v. Public Utilities Commission* (1920) — Colo. —, P.U.R.1920D, 197, 187 Pac. 1062, that rates fixed in the contract for the furnishing by an electric utility to a smelting company of electric power were subject to the jurisdiction of the Commission, which might increase the rates without unconstitutional impairment of the obligation of contracts.

Under the provision of the Missouri Constitution that "the exercise of the police power of the state shall never be abridged, or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals, or the general well-being of the state," it was held, in *Kansas City Bolt & Nut Co. v. Kansas City Light & P. Co.* (1918) 275 Mo. 529, 204 S. W. 1074, that a contract subsequently entered into between an electric utility and a private

corporation, for the furnishing of electricity at specified rates, was superseded by a higher-rate schedule fixed by the Public Service Commission.

And a contract for the sale of a municipal lighting plant, by which the purchaser agreed to furnish electricity at specified rates, was held, in *Durant v. Consumers' Light & P. Co.* (1918) — Okla. —, P.U.R.1919C, 46, 177 Pac. 361, to be subject to change, so as to permit an increase in the rates by the corporation commission, under a statute in force at the time the contract was made, giving the commission general supervision over public utilities, with power to establish rates.

A gas company, it was held in *Chillicothe v. Logan Natural Gas & Fuel Co.* (1900) 8 Ohio N. P. 88, 11 Ohio S. & C. P. Dec. 24, was obliged to furnish gas to consumers at the rate fixed by municipal ordinance, notwithstanding the fact that it had previously entered into contracts with consumers to furnish gas for a specified period at higher rates. Recognizing the right of the company to fix gas rates in the absence of an ordinance doing so, the court said that such right was subject to that of the city council to exercise its authority to make regulations at any time, and the company could not, by anticipating such action of the council, make contracts which would defeat the end to be attained by such legislation.

An order of the Public Utility Commission, granting to an electric utility the right to increase its rates above those fixed in contracts with consumers, was held in *Edison Storage Battery Co. v. Public Utility Comrs.* (1919) 93 N. J. L. 301, P.U.R.1920B, 234, 108 Atl. 247, not unconstitutionally to impair contract rights. The court, in the syllabus, laid down the rule that "private contracts as to rates to be charged for furnishing electric power must yield to the public welfare, and the state may fix a just and reasonable rate without regard to that reserved in the contract." The decision cites and follows that of the United States Supreme Court in the reported case (*UNION DRY GOODS CO.*

v. GEORGIA PUB. SERVICE CORP. ante, 1420).

If a patron of a public service corporation furnishing electric power and light contracts therefor for a definite period, where no rates have been prescribed by the Railroad Commission, he does so subject to subsequent schedules of rates lawfully prescribed by the Commission; and constitutional restraints upon the impairment of the obligation of contracts do not prevent the state from exercising such powers as are necessary in the exercise of its sovereign right to protect the lives, health, morals, comfort, and general welfare of the public, although contracts previously entered into between individuals may thereby be affected. *Union Dry Goods Co. v. Georgia Pub Service Corp.* (1914) 142 Ga. 841, L.R.A.1916E, 358, 83 S. E. 946. A later appeal in this case is reported in (1916) 145 Ga. 658, 89 S. E. 779, which is affirmed ante, 1420.

But an electric utility, it was held in *Long Beach v. Long Beach Power Co.* (1918) 104 Misc. 337, P.U.R. 1919A, 367, 171 N. Y. Supp. 824, while claiming the benefits, could not repudiate the obligations, of private rate contracts made in consideration of the grant to it of certain easements in platted land, subject to which lots were sold and its franchise granted, although higher rates were approved by a Public Service Commission. The court, in holding that a preliminary injunction should be continued, restraining the utility from charging a higher rate than that fixed by the contract, stated that as a general rule contracts which violate the fixed public policy of the state will not be enforced, but that in this case, where there was a grant of an exclusive right or franchise connected with private rights of property, the agreement having been entered into for the benefit of all persons who should purchase land subject to the easement mentioned, the defendant could not be heard to repudiate the contract so entered into as to the rate at which it would supply electric light to consumers, and at the same time be permitted to retain the benefits, property

rights, easements, and franchise conferred upon it by the contract; and that the fact that the defendant had filed a new schedule of rates to be charged by it to private consumers, or even that the Public Service Commission had approved of the increase in the rate, did not justify the defendant's actions.

Where there was an implied contract between a gas company and consumers that gas would be paid for at the rate established by a city ordinance which permitted a discount of 10 per cent on gas bills paid before the 10th of the month, it was held that any law which would retroact so as to change the substantial rights under the contract, as to transactions which had already occurred, would be to that extent unconstitutional; and that an amendatory ordinance fixing the same base rate, but omitting the discount feature and providing for a surcharge of 10 per cent on bills not paid within ten days after they were rendered, made a substantial change in the rights of consumers, and could not be applied to gas consumed between the meter reading of the previous month and the date that the ordinance took effect, which was on the 18th day of the month, the bill for which was rendered the 1st of the month following. *Amarillo Gas Co. v. Amarillo* (1919) — Tex. Civ. App. —, 208 S. W. 239.

It was held also in *Amarillo Gas Co. v. Amarillo* (Tex.) *supra*, that a minimum charge on meters, which was a new feature of the amendatory ordinance, could not be applied for the month when the ordinance became effective, without violation of contractual obligations.

c. Railroad contracts.

A contract by which a railway company, as part of the purchase price of a private logging railway owned by a lumber company, agreed to transport the railway company's logs at a specified rate, was held in *Seaman v. Minneapolis & R. River R. Co.* (1914) 127 Minn. 180, 149 N. W. 134, to be rendered inoperative by subsequent rate regulations, establishing a tariff higher than the contract rate.

And in *Minneapolis, St. P. & S. Ste. M. R. Co. v. Menasha Wooden Ware Co.* (1914) 159 Wis. 130, L.R.A.1915F, 732, 150 N. W. 411, it was held that there was no unconstitutional impairment of contract obligations by the application of a statute fixing uniform railroad rates for similar service, to a prior contract by which a shipper constructed a mill at a certain point on the railway lines, in consideration of specified rates for transportation for materials.

So, it was held in *Onondaga Golf & Country Club v. Syracuse & Suburban R. Co.* (1916) 96 Misc. 213, P.U.R. 1916F, 540, 160 N. Y. Supp. 693, that a railroad contract for a lower round trip fare to club members to a clubhouse than is given the public, although valid when made, is unenforceable in equity after the enactment of the Public Service Commission Law requiring the same charge to all for like service, where the carrier continues the old rate to the public. The court said that the legislature might control and regulate the fare to be charged by railroads under the police power, and that its power to do so could not be limited by a contract between a railroad company and one of its patrons.

In the absence of charter provision against future legislative interference, it was held in *Chicago, B. & Q. R. Co. v. Iowa* (Chicago, B. & Q. R. Co. v. Cutts) (1877) 94 U. S. 155, 24 L. ed. 94, that the power of a state legislature to provide maximum rates for a railroad company was not affected by the fact that before the exercise the company had pledged its income as security for the payment of debts incurred, and had leased its road to a tenant which relied on the earnings of the company for the means of paying the agreed rent. The court said that the company could not grant or pledge more than it had to give, and that after the pledge and lease the property remained within the jurisdiction of the state, continuing subject to the same governmental powers previously existing.

Prior contracts by railroad companies with shippers for special rates in interstate commerce have been held

unenforceable after the enactment of the Interstate Commerce Act, without unconstitutional impairment of contractual obligations. *Southern Wire Co. v. St. Louis Bridge & Tunnel R. Co.* (1889) 38 Mo. App. 191; *Bullard v. Northern P. R. Co.* (1890) 10 Mont. 168, 11 L.R.A. 246, 3 Inters. Com. Rep. 586, 25 Pac. 120; *Fitzgerald v. Fitzgerald & M. Constr. Co.* (1894) 41 Neb. 374, 59 N. W. 838; *Fitzgerald v. Grand Trunk R. Co.* (1890) 63 Vt. 169, 13 L.R.A. 70, 3 Inters. Com. Rep. 633, 22 Atl. 76.

In *Wight v. Pelham & H. R. Co.* (1916) 18 Ga. App. 195, 89 S. E. 176, in which only the syllabus by the court is reported, it is held that shippers and common carriers cannot, by contract between themselves, fix the rates to be charged on shipments of freight; that the power of regulating such rates is, by the state Constitution, conferred on the general assembly, and by it vested on the Railroad Commission, which has exclusive power to make rates and to determine what are just and reasonable rates.

A statute requiring railroad companies to file rate schedules, and prohibiting the charging of any other rate, pursuant to which a railroad company filed its demurrage charges, was held in *Grand Rapids & I. R. Co. v. Cobbs & Mitchell* (1918) 203 Mich. 133, 168 N. W. 961, not to violate the contract clause of the Federal Constitution, when construed as prohibiting performance of a prior contract between the railroad company and a lumber company, by which the former agreed to furnish cars rent free, without limitation as to time. The court said that when the parties entered into the contract they did so with the knowledge that the state, in the exercise of its police power, could pass laws regulating common carriers within its borders; and the doctrine was quoted that if the legislature had no power to alter its police laws when contracts would be affected, the most important and valuable reforms might be precluded by the simple device of entering into such contracts.

A right of way agreement by which a railway company bound itself, in

consideration for the grant, to furnish round-trip tickets and books at specified rates, although valid when made, was held in *Schaper v. Cleveland & E. R. Co.* (1919) 265 Pa. 109, P.U.R. 1920B, 406, 108 Atl. 407, to be subject to the power of the state to change the rates in the future, in the exercise of its governmental authority.

But in *Taylor v. Niles* (1913) 35 Ohio C. C. 445, it was held that a right of way agreement, valid when made, by which an interurban railroad company stipulated for a 5-cent fare from the owner's property to a near-by city, was not abrogated by the subsequent passage of the Railroad Commission Act and the adoption and publication by the railway company of a schedule of rates, which was approved by the Commission, ignoring the agreement and fixing a 10-cent rate between the points in question. And it was held that the court would decree specific performance of the contract and enjoin the charging of a higher rate than that fixed therein, where the agreed statement of facts on which the case was submitted did not show that the rate specified in the contract was unfair or unjust either to the company or to the public.

That a shipper who has made a contract with a railroad company for transportation, in accordance with its legal, published, and filed rate, may, if the contract rate is continued after the company has duly established a higher rate, be guilty of a penal offense under the Elkins Act of Congress of 1903, which forbids the giving or receiving of transportation for less than the published rates, since the statute, being then in force, is read into and becomes a part of the contract, see *Armour Packing Co. v. United States* (1908) 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428. The court, by Mr. Justice Day, said: "If the shipper sees fit to make a contract covering a definite period, for a rate in force at the time, he must be taken to have done so subject to the possible change of the published rate in the manner fixed by statute, to which he must conform, or suffer the penalty fixed by law."

As analogous to the cases cited in the note, attention is called to several cases involving the question whether statutes prohibiting free transportation of passengers or discrimination in passenger rates violate the contract clause of the Federal Constitution as applied to prior contracts of carriers for passes. The United States Supreme Court in *Louisville & N. R. Co. v. Mottley* (1911) 219 U. S. 467, 55 L. ed. 297, 34 L.R.A. (N.S.) 671, 31 Sup. Ct. Rep. 265, reversing (1909) 133 Ky. 682, 118 S. W. 982, held that Congress, in the exercise of its power over commerce, could enact the Commerce Act of June, 1906, which rendered unenforceable a prior contract, valid when made, by which an interstate carrier agreed to issue annual passes for life in consideration of a release of a claim for damages; and that the constitutional liberty of citizens to make contracts was not infringed by the enactment of this statute. The court cited various authorities as supporting the view that, as the contract in question would have been illegal if made after the passage of the Commerce Act, it would not be enforced against the railroad company, even though valid when made; and stated that if that principle were not sound, the result would be that individuals and corporations could, by contracts between themselves, in anticipation of legislation, render of no avail the exercise by Congress, to the full extent authorized by the Constitution, of its power of regulation. Among other cases to a similar effect, involving the question of impairment of contracts for passes, see *New York C. & H. R. Co. v. Gray* (1916) 239 U. S. 583, 60 L. ed. 451, 36 Sup. Ct. Rep. 176; *Louisville & N. R. Co. v. Crowe* (1913) 156 Ky. 27, 49 L.R.A. (N.S.) 848, 160 S. W. 759; *State v. Martyn* (1908) 82 Neb. 225, 23 L.R.A. (N.S.) 217, 117 N. W. 719, 17 Ann. Cas. 659; *Gill v. Erie R. Co.* (1912) 161 App. Div. 131, 135 N. Y. Supp. 355; *Cowley v. Northern P. R. Co.* (1912) 68 Wash. 558, 41 L.R.A. (N.S.) 559, 123 Pac. 998; *Shrader v. Steubenville, E. L. & B. V. Traction Co.* (1919) — W. Va. —, P.U.R.1919D, 895, 99 S. E. 207. In

Kentucky Traction & Terminal Co. v. Murray (1917) 176 Ky. 593, 195 S. W. 1119, a case involving alleged impairment of a contract for a pass, the court said: "The contention of appellee that the contract was valid when made and that its performance is enforceable, notwithstanding the subsequent enactment of the Anti-pass Law, therefore disregards the fundamental rule of the interpretation of contracts referred to, viz.: That all laws in existence when the contract is made or thereafter enacted in pursuance of the police power of the state, necessarily enter into and form a part of it as fully as if they were expressly incorporated into its terms. This principle is supported by a long line of authorities."

And in *Hite v. Cincinnati, I. & W. R. Co.* (1918) 284 Ill. 297, 119 N. E. 904, the court held that a provision of the Public Utilities Act which prevented performance of a prior contract granting a right of way for a railroad, in consideration of free transportation of the grantors, was not invalid on the ground that, as applied to this contract, it violated the contract provision of the Federal Constitution. It was said that "all contracts, whether made by the state itself, by municipal corporations, or by individuals, are subject to be interfered with or otherwise affected by subsequent statutes enacted in the bona fide exercise of the police power, and do not, by reason of the contracts clause of the Federal Constitution, enjoy any immunity from such legislation. . . . The condition contained in this deed was therefore subject to such regulation as might thereafter be made by the state in the exercise of its police power. Appellant dealt with the railroad company knowing that it was a public utility and that any contract made with it relating to its service was subject to alteration or abrogation by the state, in its exercise of that police power."

As representing a class of cases not within the scope of the note, but involving principles profitable for consideration in this connection, attention is called to *Atlanta & W. P. R. Co. v. Camp* (1908) 130 Ga. 1,

15 L.R.A.(N.S.) 594, 124 Am. St. Rep. 151, 60 S. E. 177, 14 Ann. Cas. 439, where the court held that a contract by a railroad company to locate a station at a given point was not per se void; that such a contract was enforceable against the company so long as it was possible for it to discharge the duties owed by it to the public, and, at the same time, discharge the duties incumbent upon it by the contract; but that whenever a time arrived when the company was hampered in the discharge of its duty to the public by its undertaking under the contract to establish the station, the same might be abandoned, notwithstanding the contract, as it was to be presumed that the parties there-to entered into it with full knowledge of the duty of the railroad company to subordinate private interests under contracts, to the public rights, whenever there was a conflict between the same.

See also *Seattle v. Hurst* (1908) 50 Wash. 424, 18 L.R.A.(N.S.) 169, 97 Pac. 454, holding that a municipal ordinance forbidding the solicitation of business from passengers entering or leaving a railroad station, being a valid exercise of the police power, does not unconstitutionally impair an existing contract between the railroad company and a transfer company, giving it the right to solicit such business within the depot grounds.

d. Street railroad contracts.

A statute making it unlawful for street railway companies in a certain city to charge the rates of fare then received was held in *Buffalo East Side R. Co. v. Buffalo Street R. Co.* (1888) 111 N. Y. 132, 2 L.R.A. 384, 19 N. E. 63, not to impair the obligation of a contract between two of the companies operating street railroads in that city, by which each had agreed not to change the rate without the consent of the other. It was conceded that the authority of the legislature in the exercise of its police power could not be limited or restricted by the provisions of contracts between individuals or corporations; and this proposition, the court said, was abundantly established by authority.

e. Telephone contracts.

The contention that an ordinance reducing telephone rates violated existing contracts between the telephone company and its patrons, and was therefore void, was overruled in *Southwestern Tele. & Teleph. Co. v. Dallas* (1910) — Tex. Civ. App. —, 131 S. W. 80, reversed on other grounds in (1911) 104 Tex. 114, 134 S. W. 321, it being said that this contention was incorrect, for the reason, first of all, that a public service corporation cannot disable itself by private contracts from performing the duties imposed by law upon it.

In holding that a telephone company could recover from another telephone company for services rendered for it in accordance with schedule rates allowed and filed with the Public Service Commission which were higher than the contract rate between the companies, the court in *Oak Grove Home Teleph. Co. v. Round Prairie Teleph. Co.* (1919) — Mo. App. —, 209 S. W. 552, said that, in view of the admitted fact that the charges for which plaintiff sought to recover were based on the schedule of rates in force at the time and duly filed with the Commission as provided by statute, the court under the law in that state could not do otherwise than to render judgment for the plaintiff, for it had been several times decided by the supreme court of the state that service rates fixed by contract between parties will be superseded by rates prescribed by the Commission.

Although not, on its facts, within the scope of the note, attention is called to *Northern Indiana & S. M. Teleph. & Tele. & Cable Co. v. People's Mut. Teleph. Co.* (1918) 187 Ind. 486, P.U.R.1918D, 548, 119 N. E. 212, a case involving the power of a Public Service Commission to order physical connection of telephone companies, as affected by the fact that the order would interfere with a third company's contract right regarding transmission of long-distance messages. The court stated that such a contract, if valid, does not prevent the state from exercising its power to provide for the welfare of the people, even though

such provision renders the contract partially or wholly ineffective.

f. Water rate contracts.

See *Lanning v. Osborne* (Fed.) under II. a, *supra*.

It is held in *Limoneira Co. v. Railroad Commission* (1917) 174 Cal. 232, P.U.R.1917D, 183, 162 Pac. 1033, that a discriminatory water contract, entered into since the adoption of the California Constitution of 1879, declaring the use of all water appropriated for sale, rental, or distribution to be a public use, subject to regulation, may be annulled by the state Railroad Commission.

See also *Leavitt v. Lassen Irrig. Co.* (1909) 157 Cal. 82, 29 L.R.A.(N.S.) 213, 106 Pac. 404, where the court laid down the rule that a public service water company which is appropriating water under the Constitution of 1879, for purposes of rental, distribution, and sale, cannot confer upon a consumer any preferential right to the use of any part of its water.

Under the Washington Commission Act prohibiting discrimination between patrons of water companies, but providing that nothing therein shall be construed to prevent any company from continuing to furnish its products under any existing contract, though giving the Commission power, in its discretion, to direct the termination of such contracts, it was held in *State ex rel. Raymond Light & Water Co. v. Public Service Commission* (1915) 83 Wash. 130, 145 Pac. 215, that contracts between a water company and a mill company, purporting to provide for the furnishing of water free to the latter, were not rendered void or voidable by the act, and that the Commission, in its discretion, might set aside an order which it had rendered without notice to or appearance by the mill company, directing termination of the contracts, where it appeared that the water plant formerly belonged to the mill company, and the contracts carried out a reservation of water made in connection with the transfer, although the deed contained no express reservation of water rights. This case was explained and distinguished in *Raymond Lumber Co.*

v. Raymond Light & Water Co. (1916) 92 Wash. 330, L.R.A.1917C, 574, P.U.R. 1916F, 437, 159 Pac. 133, where the court overruled any expressions in the opinion in the former case not in harmony with its decision in the latter, that private contract rates for public utilities are made subject to the police power, under which the state may modify the contracts; and explained its former decision on the ground that in that case the consumer had previously owned the water and conveyed it with a reservation,—in other words, did not convey the entire title; and that the contract was not subject to termination under the Public Service Commission Law without compensation, because the title of the consumer which had been reserved was not subject to be divested except by proper legal proceedings.

It was held in *Raymond Lumber Co. v. Raymond Light & Water Co.* (Wash.) *supra*, that the Public Service Commission Law, creating a Public Service Commission and empowering it to regulate rates of public service corporations, might be made to abrogate, so far as it was discriminatory, an existing contract by water supply companies to furnish water at certain rates to a manufacturing company, entered into for the purpose of securing its location in the municipality.

It was held in *McCook Irrig. & Water Power Co. v. Burtless* (1915) 98 Neb. 141, L.R.A.1915D, 1205, P.U.R. 1915C, 587, 152 N. W. 334, that contracts between an irrigation company and water users under its ditch were entered into with the law as to the right of the state to regulate rates forming a part of the contract, and that the rates might be increased by the State Railway Commission without unconstitutional impairment of contract rights. The court said: "We believe the larger and broader view, that most consistent with the spirit in which the law of irrigation should be administered, and that to which courts are more and more tending, is that any contracts entered into between the irrigation company and consumers under the ditch, with reference to the

annual rates which should be charged for the use of water, were entered into with the law forming a part of the contract, and were subject to legislative control. . . . Holding the view that the contracts were entered into subject to the right of the state, in the exercise of its police power, to regulate and fix reasonable rates to be charged for the use of the water, the order of the Railway Commission does not take property without due process of law, and is not in violation of the Constitution of the United States, the 14th Amendment, or the Constitution of the state of Nebraska."

The power of the state to change private contract rates for public utilities seems implied in the rule laid down in such cases as *Henrici v. South Feather Land & Water Co.* (1917) 177 Cal. 442, 170 Pac. 1135, where it was said that the obligation to furnish water at the agreed rates was unlimited in time, and continued until the rate was superseded by order of a public body vested with the power of regulating the service.

The obligation of contracts between a water company and private consumers, by which the latter were to pay for the water in accordance with the rates "now or hereafter in force," is not impaired by a municipal ordinance reducing such rates, enacted in the exercise of the power of the municipality to regulate water rates. *Knoxville Water Co. v. Knoxville* (1903) 189 U. S. 434, 47 L. ed. 887, 23 Sup. Ct. Rep. 531.

And it was held in *South Boulder & R. C. Ditch Co. v. Marfell* (1890) 15 Colo. 302, 25 Pac. 504, that an agreement by which a ditch company undertook to furnish a consumer with a cer-

tain amount of water year after year during the irrigation season, so long as he paid the annual rental therefor, was not a contract the obligations of which would be violated by the action of county commissioners, under the statute and at the consumer's request, in fixing a less rate as the reasonable maximum rate which the company could charge such consumer for his water supply, but was a mere option that might be terminated by the consumer at the end of any year, and which he terminated by causing the rate to be fixed under the statute, and declining to pay more.

It was said in *Southern P. Co. v. Spring Valley Water Co.* (1916) 173 Cal. 291, L.R.A.1917E, 680, 159 Pac. 865, that the power to revise contracts of public service water companies in the interests of the public applies as well to a contract creating, or attempting to create, an easement in the water held for public use, as to any other disposition thereof.

g. Miscellaneous.

Where the whole amount of the rentals for the use of, and tolls for persons passing through, a tunnel which a statute required a municipal transit commission to construct, was pledged, as required by the statute, to meet the principal and interest of the bonds issued to pay for its construction, this pledge expressly appearing on the face of the bonds, it was held that a contract was created with the bondholders which the legislature could not constitutionally impair by a subsequent statute abolishing or reducing the tolls. *Opinion of Justices* (1906) 190 Mass. 606, 77 N. E. 1038.

R. E. H.

J. W. BEACH, Appt.,

v.

E. P. WILLIAMSON.

Florida Supreme Court — December 17, 1919.

(— Fla. —, 83 So. 860.)

Corporation — insolvent — directors as trustees for creditors.

1. The directors of an insolvent corporation occupy toward the creditors of the corporation a fiduciary relation, in that the properties of the corporation constitute a fund for the payment of the corporation's debts, which fund the directors are charged with managing to the best interest of the creditors.

[See note on this question beginning on page 1447.]

— obtaining corporate property — suppressing information.

2. The directors of an insolvent corporation, who obtain a conveyance to themselves of all the properties of the corporation upon a promise to pay the debts of the corporation, by secreting information concerning their opinion as to the value of the properties, that they may gain profit for themselves, and, in pursuance of this design, urge upon the other stockholders and creditors their agreement to the transfer of the properties, will be deemed to have committed a fraud upon the creditors of the corporation, entitling them to a cancelation of the deeds conveying the properties, and to the declaration of a lien thereon for the payment of their debts.

Rescission — failure to pay consideration.

3. Failure to pay the agreed price for

a tract of land, or to redeem a promise which constitutes the consideration for the conveyance, furnishes no ground for its cancelation.

[See 4 R. C. L. 500.]

Corporation — duty of director.

4. When one accepts the position of director of a corporation, he contracts to give diligent attention to its concerns, and to be faithful and honest in the discharge of the duties which the position imposes.

[See 7 R. C. L. 457.]

— assets as trust fund.

5. The properties of a corporation are to be deemed a trust fund for the payment of debts of the corporation, so that the creditors have a lien upon it or right of priority out of it in preference to any shareholder of the corporation.

[See 7 R. C. L. 198, 750.]

Headnotes 1 and 2 by ELLIS, J.

APPEAL by defendant from an order of the Circuit Court for Lake County (Bullock, J.) appointing a receiver in a suit to cancel deeds conveying corporate property, and to declare a lien upon lands of the corporation for the payment of its debts. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Blount & Blount & Carter, for appellant:

Failure to pay the purchase money or to perform a promise constituting the consideration for a sale of real estate furnishes no ground to cancel the conveyance.

Harkness v. Fraser, 12 Fla. 336; Harrington v. Rutherford, 38 Fla. 321, 21 So. 283; Godwin v. Phifer, 51 Fla. 441, 41 So. 597; Hargadine McKittrick Dry Goods Co. v. Goodman, 55 Fla. 361, 45 So. 995.

Plaintiff having consented to and participated in the execution of the transfers, and received the benefit of Bressler's assumption of his debt, he cannot be heard to invoke the application of the trust-fund doctrine.

Bank of Ft. Madison v. Alden, 129 U. S. 372, 379, 380, 32 L. ed. 725, 727, 728, 9 Sup. Ct. Rep. 332.

Even if the sale was fraudulent, plaintiff participated in it and is bound by it.

Wheeler v. Matthews, 70 Fla. 317, 70

So. 416; *Simon v. Levy*, 36 Fla. 438, 18 So. 777; *Whitehouse v. Nelson*, 43 Wash. 174, 86 Pac. 174; 20 Cyc. 434; 14 Am. & Eng. Enc. Law, 2d ed. 281.

There must be waste or mismanagement, or some lack of power in the probate courts to administer the relief necessary to complete justice, in order to enable an equity court to assume administration of an estate.

Deans v. Wilcoxon, 25 Fla. 1025, 7 So. 163; *Ritch v. Bellamy*, 14 Fla. 537; *Opitz v. Morgan*, 68 Fla. 469, 67 So. 67.

Even if there was equity in the bill, there is no ground for the appointment of a receiver.

Hall v. Nieuirk, 118 Am. St. Rep. 206, note; *Fricker v. Peters & C. Co.* 21 Fla. 254; *Lehman v. Trust Co. of America*, 57 Fla. 473, 49 So. 502; *State v. Jacksonville, P. & M. R. Co.* 15 Fla. 286; 34 Cyc. 25, 51.

H. C. Duncan, whom the court appointed receiver, was not a proper party to receive the appointment.

Lehman v. Trust Co. of America, 57 Fla. 473, 49 So. 502; *High, Receivers*, 4th ed. § 68; 34 Cyc. 143.

Messrs. Hocker & Martin and E. P. Williamson, for appellee:

In view of the acts on the part of Beach, and the secret retention of an interest in the subject-matter with which he was called upon to deal as a director, no further circumstance need be shown to establish the fraudulent character of the transaction, and any stockholder can repudiate the entire matter, at his option.

Thomp. Corp. § 6527; *Buck v. Ross*, 57 Am. St. Rep. 63, note; *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. ed. 329, 3 Mor. Min. Rep. 688; *Richardson v. Green* (*Washburn v. Green*) 133 U. S. 80, 33 L. ed. 516, 10 Sup. Ct. Rep. 280; *Jacksonville Cigar Co. v. Dozier*, 53 Fla. 1059, 43 So. 523; *Harkness v. Fraser*, 12 Fla. 336; *Thomas v. Brownville, Ft. K. & P. R. Co.* 109 U. S. 522, 27 L. ed. 1018, 3 Sup. Ct. Rep. 315; *McGourkey v. Toledo & O. C. R. Co.* 146 U. S. 536, 36 L. ed. 1079, 13 Sup. Ct. Rep. 170.

Ellis, J., delivered the opinion of the court:

In November, 1917, E. P. Williamson exhibited his bill in the circuit court for Lake county against Groveland Realty Company, the Florida Development Corporation, both Florida corporations, Henry L.

Bressler, as administrator of the estate of George N. Bressler, deceased, M. A. Bressler, A. M. Bressler, Neva Mae O'Neill and her husband, M. C. O'Neill, H. L. Bressler, J. W. Beach, George T. Cann, as trustee for creditors of F. D. Tinsley and D. B. Hull.

The allegations of the bill, in substance, were that in 1913 the complainant and George N. Bressler and J. W. Beach and others were stockholders of the Florida Development Corporation, which was organized for the purpose of dealing in lands, and which held a large acreage of lands in Lake county; that the corporation was without funds to pay the proper demands upon it or to properly conduct its business, and owed large sums of money, about \$38,256, which, according to Exhibit E, attached to the bill, it owed to about forty persons, the complainant holding \$24,667.47 of the debt; that the stockholders unanimously agreed that the Florida Development Corporation should convey all its property, real and personal, to George N. Bressler, who agreed to assume and pay all of the debts and obligations of the corporation; that, pursuant to that agreement, a written contract was entered into between the corporation and George N. Bressler on the 1st day of May, 1913, whereby the corporation agreed to convey to George N. Bressler all its property, real and personal, and Bressler agreed to release all his claims and obligations against the corporation and to assume and pay all the liabilities outstanding against it. A clause in the agreement provided that it was mutually understood and agreed between the parties that the consideration for the conveyance to Bressler of all the corporation's property was the payment to Bressler of \$1, the release of his claims against the corporation, and that he would assume and pay all its liabilities, and that he would carry out and fulfil all the "selling contracts" made by it. Bressler's claim amounted to \$5,575; Williamson's claim amounted to \$24,000 and \$667.47.

The bill alleges that, pursuant to the agreement, a list of the liabilities and contracts of the corporation was delivered to Bressler; deeds were executed and delivered to him, conveying all the property of the corporation. Copies of these deeds were attached to the bill and made parts of it as Exhibits B, C, and D; that complainant was the president of the corporation at that time, but that he did not reside in Florida; that Bressler and J. W. Beach were directors of the corporation and the active men in charge of its business.

It is alleged that complainant is not informed whether Bressler had paid any of the other debts of the corporation, and that the bill was filed in behalf of complainant and all other creditors whose claims Bressler had assumed and agreed to pay.

It is alleged that this arrangement above recited was urged upon the complainant and the other stockholders by Bressler and Beach, who represented that it was for the best interests of all parties, and upon such representations complainant assented to the agreement. It is alleged that, prior to the consummation of this arrangement, Bressler and Beach privately entered into a contract dated the same day, May 1, 1913, of which, however, the complainant was ignorant, in which it was recited that Bressler had acquired certain lands in Lake county from Tinsley and Hull, H. S. Budd and R. F. E. Cooke, E. E. Edge and T. E. O'Keefe, and all the lands of the Florida Development Corporation, and all its assets, negotiable instruments, and personal property, and by which it was agreed that Bressler should receive "net to him in cash, less all expenses, commissions, office force, and necessary incidental expenses pertaining to the sale of said land contracts, real and personal property acquired, same not to include the liability of the Florida Development Corporation assumed by George N. Bressler, in the sum of thirty-three thousand two hundred seven and 81/100 (\$33,207.81) from the date of this agreement the sum of one hundred

thousand dollars (\$100,000) from the sale of the lands held by him, by contracts, deed or otherwise, "acquired from the Florida Development Corporation, Tinsley & Hull, Budd & Cooke and E. E. Edge as aforesaid, he will pay unto the said party of the second part [Beach] 25 per cent of the gross receipts received thereafter as aforesaid from the sale of said land at retail, less all expenses, commissions, office force and necessary incidental expenses pertaining to the sale of said land, same not to include the liability of the Florida Development Corporation assumed by George N. Bressler, in the sum of thirty-three thousand two hundred seven and 81/100 (\$33,207.81) dollars."

Another clause of this agreement provides that Bressler was in no event to be liable to Beach for any part of the "25 per cent hereinbefore referred to until" Bressler had first received his \$100,000 "as aforesaid from the sale of said lands." After which Beach "shall be entitled to 25 per cent of all property, both personal and real, acquired as herein set forth after reasonable time expires from date." It was also agreed that if Tinsley & Hull, Budd & Cooke, or T. E. O'Keefe should foreclose any of their mortgages on any of the lands, and such lands should be lost to the parties on account of such foreclosure, then Bressler's \$100,000, to be received by him before Beach should come into his interest, should be reduced by \$5 per acre for all lands so lost to the parties by foreclosure. Provision was also made in the contract for any loss that Bressler might sustain on account of the contracts made by the Florida Development Corporation which he had assumed, affecting lands conveyed by the corporation, the title to which might fail. It was provided that if Bressler should sell his interests in the property before he received the \$100,000, he should pay to Beach the sum of \$3,000 as full payment for all his interest or claim under the contract. Beach agreed to use his influence and good will in the sale

and colonization of the lands, and was to receive a commission on all sales effected by him. The bill alleges that at the time this contract was made Beach was the manager and secretary of the Florida Development Corporation; that Beach, at the time of filing the bill, was suing for large amounts under the contract made with Bressler, involving the property conveyed by the corporation to the latter, and such claims were adverse to the interests of the corporation's creditors mentioned in the list which was delivered to Bressler. It is asserted: That under these circumstances Beach's claims are subordinate to those of the complainant and other creditors of the corporation, because he had full knowledge and information of all the circumstances under which the corporation's properties were conveyed to Bressler, and himself urged the arrangement upon them. That after May 1, 1913, the corporation ceased to transact any business, and Bressler took charge of all the "assets, lands and property formerly belonging to it, and got all the benefit contemplated or agreed to under said arrangement." That he has never paid the consideration for which the deeds were executed. That the corporation has practically gone out of business, having divested itself by said arrangement of all its assets, and that what is left of its property in the hands of Bressler, or held by his estate or heirs, he having died intestate, constitutes a trust fund for the payment of the corporation's creditors. That M. A. Bressler, H. L. Bressler, A. M. Bressler, and Neva Mae Bressler are his heirs at law. Henry L. Bressler is administrator of George N. Bressler's estate. That the Groveland Realty Company is a Florida corporation organized by the heirs at law of George N. Bressler for the purpose of taking over his estate, including the property obtained from the Florida Development Corporation, and that all the above-mentioned parties had full knowledge of all the matters and cir-

cumstances alleged in the bill. That when Bressler acquired the property of the Florida Development Corporation he executed and delivered to the complainant four promissory notes, aggregating \$24,000, which notes are wholly unpaid except the amount indorsed thereon, which amount is about \$1,354. These notes were all due at the time the bill was filed, and had been presented to the administrator of Bressler's estate for payment, but had not been paid, and the administrator had filed a suggestion of insolvency. That Geo. T. Cann, as trustee for the creditors of F. D. Tinsley and D. B. Hull, claims to have some interest in the property described in the conveyance to Bressler from the Florida Development Corporation, but it is asserted that his claim is subordinate to that of the corporation's creditors.

The relief prayed for is in the alternative. An accounting is asked for against the representatives of Bressler's estate of the amount due by him to the creditors of the Florida Development Corporation whose debts he assumed and agreed to pay; that such representatives be required to pay the amount found to be due, and that all the property conveyed to Bressler by the corporation be deemed and held to be a trust fund for the payment of the debts of the corporation; or that the complainant and those who are mentioned in the list of the corporation's creditors which was delivered to Bressler be decreed to have a lien upon the property conveyed by the corporation to Bressler as aforesaid; or that the deeds executed by the corporation to Bressler be set aside and canceled for failure of consideration, and that such of the property therein described as may remain unadministered, or that was not sold by Bressler, shall be declared to revert to the Florida Development Corporation, and be held and administered by the court, and the proceeds thereof applied to the payment of the debts of the Florida Development Corporation, and what may remain be turned over to the

proper officers of the corporation; that a receiver be appointed to take charge of all the property described in the deeds from the Florida Development Corporation which has not been disposed of; and that he be authorized to sell any part of such property. There was also a prayer for general relief.

Upon application by complainant the court, on January 15, 1918, appointed a receiver, H. C. Duncan, to take charge of the assets as prayed for in the bill. A bond was given by him in the sum required by the order, and was duly approved by the clerk. It appears that H. C. Duncan was the attorney for all the defendants who bear the name of Bressler, and for the Groveland Realty Company and the defendant McNeill, on the 28th day of November, 1917.

From the order appointing the receiver, the defendant J. W. Beach appealed on February 15, 1918. The errors assigned are: First, entering the order and decree dated January 15, 1918; second, appointing H. C. Duncan receiver, and authorizing him to take charge of the assets, as prayed for in the bill.

It is argued by appellant that the relief asked in the third alternative should not be granted because failure to pay the agreed price for a

**Rescission—
failure to pay
consideration.**

tract of land, or failure to redeem a promise which constituted the consideration for a conveyance, furnishes no ground for the cancellation of the conveyance. This doctrine, thus generally stated, we think, is sound, and this court has in other cases, as cited by counsel for appellant, approved it.

In the case of *Harrington v. Rutherford*, 38 Fla. 321, 21 So. 283, this court, speaking through Mr. Chief Justice Mabry, said: "The authorities establish the rule that ordinarily a promise to do something in the future, though made by one party as a representation to induce another to enter into a contract, will not amount to a fraud in a legal sense, though the promise

subsequently and without excuse be broken and unfulfilled."

See also *Godwin v. Phifer*, 51 Fla. 441, 41 So. 597.

In the transaction disclosed by the bill, however, there was something more than a bare promise to pay a debt,—the relations of the parties were a little closer than strangers trading at arm's length; the relation of the parties Bressler and Beach to the property of the corporation was a fiduciary one, considered from the standpoint of the creditors of the corporation. As officers of the corporation it was their duty to manage the property to the best interests of the creditors of the corporation, to the end that their just claims and demands be paid in full.

Bressler and Beach were not only stockholders, but were officers of the corporation in management of its business in the direction of its affairs; they knew presumably its obligations, the value of its assets, and the condition of its properties.

The complainant was both officer and creditor to the corporation. He was by far the largest creditor of them all. He lived out of the state, leaving the management of the corporation's affairs to Bressler and Beach; trusted to their judgment, believed in their representations, knew little of the true conditions, and was guided by their statements to the agreement by which they acquired all the properties of the corporation, to be divided between them according to the terms of an agreement which they had privately made between themselves, but did not reveal to their associates or to the creditors of the corporation, in whose interest they pretended to act, and in whose interests they were in law required to act, to the end that their just debts and demands be paid and satisfied. Bressler and Beach, as directors of the corporation, bore somewhat the relation to it of trustees; and, while occupying such

fiduciary relation, they were precluded from receiving any personal advantage without the fullest disclosure to and assent of all concerned. See 7 R. C. L. 458; Bosworth v. Allen, 168 N. Y. 157, 55 L.R.A. 751, 85 Am. St. Rep. 667, 61 N. E. 163.

When one accepts the position of director of a corporation he contracts to give diligent attention to its concerns, and to be faithful and honest in the discharge of the duties which the position imposes. He is not supposed to be infallible, and does not stipulate against error, but he will not be permitted to speculate with corporate funds or property to his personal gain, nor, by suppressing information concerning the value of corporate properties, be permitted to acquire them as purchaser at a small price, to the consequent injury of the corporation or its creditors. See note in 55 L.R.A. 751.

A very general doctrine of the American courts is: That the properties of a corporation are to be deemed a trust fund for the payment of the debts of the corporation, so that the creditors

have a lien upon it or right of priority out of it in preference to any shareholder of the corporation. See 10 Cyc. 653; Crandall v. Lincoln, 52 Conn. 73, 52 Am. Rep. 560; Beck v. Henderson, 76 Ga. 360; Union Mut. L. Ins. Co. v. Frear Stone Mfg. Co. 97 Ill. 537, 37 Am. Rep. 129; Spear v. Grant, 16 Mass. 9; National Trust Co. v. Miller, 33 N. J. Eq. 155; Tinkham v. Borst, 31 Barb. 407; Marshall Foundry Co. v. Killian, 99 N. C. 501, 6 Am. St. Rep. 539, 6 S. E. 680; Morgan County v. Allen, 103 U. S. 498, 26 L. ed. 498; Sawyer v. Hoag, 17 Wall. 610, 21 L. ed. 731.

While the statement that the directors of a corporation are trustees for its creditors may be technically inexact, it is at least correct in the sense that they are bound to exercise diligence and good faith in dealing with the properties of the

corporation, to the end that the creditors' interests may be protected. Especially is this true in the case of an insolvent corporation. See 4 Fletcher, Cyc. Corp. §§ 2261-2271; Wheeler v. Matthews, 70 Fla. 317, 70 So. 416.

In the case of Sanger v. Upton, 91 U. S. 56, text, 60, 23 L. ed. 220, 222, the Supreme Court of the United States, through Mr. Justice Swayne, said: "The capital stock of an incorporated company is a fund set apart for the payment of its debts. . . . When debts are incurred a contract arises with the creditors that it shall not be withdrawn or applied, otherwise than upon their demands, until such demands are satisfied. The creditors have a lien upon it in equity. If diverted, they may follow it as far as it can be traced, and subject it to the payment of their claims, except as against holders who have taken it bona fide for a valuable consideration and without notice. It is publicly pledged to those who deal with the corporation, for their security."

As regards creditors, there is no distinction between money due for shares of stock in a corporation and any other assets which may form a part of the property and effects of the corporation.

No argument is necessary to apply these principles to the case at bar. Bressler and Beach, as directors of the corporation, represented to the president and other stockholders that the corporation had no funds with which to conduct its business or to pay its obligations; that it was to all intents and purposes insolvent; and induced the president and stockholders to agree to the proposition, which meant the sacrifice of the corporation's assets, that the creditors might be paid. This was the one and only purpose of the transaction, which purpose was perfectly consistent with the interests of creditors, and met the requirements of law and equity; but Bressler and Beach sought profit out of the transaction. Their knowledge of the value of the prop-

erties seemed to promise large returns. The information as to the value of the properties they kept to themselves, when conscience required them to disclose it, not only to the remaining stockholders, but to the creditors in whose interests they pretended to act. The contract shows that each placed a higher value upon the properties than the amount of the corporation's debts. The suppression of this information as to the value of the properties, and the purpose entertained by them to speculate upon it to their own advantage, was, in our judgment, a breach of good faith which, in their fiduciary capacities, they owed to the stockholders and creditors of the corporation. But they not only withheld the truth,—it seems that they purposely misrepresented the facts, and deceived by such misrepresentations those in whose interests they were required by equity and good con-

—obtaining
corporate
property—
suppressing
information.

science to act. This fraud constitutes the basis of equity jurisdiction in this case. It is difficult

to perceive how equity can be expected to permit these men to pocket great profits upon the property so acquired at the expense of the creditors whose fund it is, and at the expense of their own obligations of honor to deal fairly and justly by the creditors of the corporation which they represented in a fiduciary capacity.

The complainant was entitled to the relief prayed for to cancel the deeds and declare a lien upon the corporation's lands for the payment of its debts.

The appointment of the receiver we think was within the discretion of the court under the case made. The selection of Mr. H. C. Duncan, who was attorney of record for the Bresslers, was not in accordance with the rule announced in the case of *Lehman v. Trust Co. of America*, 57 Fla. 473, 49 So. 502, in that Mr. Duncan's relations to the Bresslers as their attorney left him not alto-

gether a disinterested party. However, we are informed that Mr. Duncan has resigned, and another has been appointed by the court in his place. It would be useless, therefore, to direct the chancellor to amend his order by the substitution of some other person for the one first appointed as receiver.

The order or decree is affirmed.

Browne, Ch. J., and Taylor, Whitfield, and West, JJ., concur.

A petition for rehearing having been filed, the following *Per Curiam* response was handed down January 26, 1920:

In the petition for rehearing it is asserted by counsel that the court in its opinion made a statement of fact that is not sustained by the allegations of the bill. This rather stringent review is not supported by the record.

In the first place, the record shows that the bill had been on file for more than three and a half months before the order appointing a receiver was made; that a notice was given by complainant's counsel to the parties defendant or their counsel by letter posted on November 28, 1917, two months after the bill was filed, of the intention to apply to the chancellor for the appointment of a receiver.

So far as the record discloses, there was no demurrer to the bill, no answer interposed, nor is there evidence in the record that a pro confesso order was taken against the defendants, but the court appointed a receiver.

In making this order the court below considered that the bill contained equity. Now the petitioner, through his counsel, appealed from the order appointing a receiver, and avers in his petition for rehearing that there is no allegation in the bill which warrants this court in finding from this record the existence of the facts which this court in its opinions holds constitute the basis of equity jurisdiction.

We announced in the opinion a proposition with which counsel

seems to have no quarrel. It is one which appears to us to be perfectly consonant with the principles of right dealing between man and man, and that is: "Where one accepts the position of director of a corporation, he contracts to give diligent attention to its concerns, and to be faithful and honest in the discharge of the duties which the position imposes."

Now what does the record disclose? Williamson, the complainant, although president of the Florida Development Company, did not reside in Florida, but Bressler and Beach "were directors and the active men in charge of the business and operations" of the corporation.

The chancellor was also mindful of the allegation that Williamson was not as well posted about the affairs (business and operation) of the corporation as Bressler and Beach, the active men in charge. The bill definitely alleges that Bressler and Beach urged the complainant to enter into the agreement with Bressler, and that they "represented to your orator and the other stockholders of said corporation" that it was for "the best interests of all parties concerned," and that Williamson was "moved and induced by the representations." It is definitely alleged that at this very time the "corporation was then without sufficient funds with which to pay the proper demands made upon it, and without necessary funds to properly conduct its business, and owed large sums of money." The chancellor assumed, and we think correctly, that Bressler and Beach knew that, because their diligence as directors would require them to know it, and that in this matter they were better posted than Williamson. Now if Bressler and Beach, having superior information, more accurate knowledge of the corporation's affairs, urged upon Williamson and the other stockholders that it was for the best interests of all parties concerned to transfer all the assets to Bressler upon his promise to pay the debts, as the contract which was

attached to the bill and made a part of it definitely provides he would do, good faith and honesty required them to withhold no information concerning the value of the corporation's assets, and entertain no secret purpose to speculate with those assets for their personal advantage. They owed the utmost of good faith to the stockholders and creditors of the corporation, which required them to disclose every detail of any enterprise which they contemplated entering upon, involving the corporation's assets conveyed to Bressler upon the representation by him that the purpose was to obtain the payment of the corporation's debts. If counsel differ from us upon this proposition, we regret the fact.

Now what does the record disclose as to the conduct of Bressler and Beach in this connection? They had entered into an agreement as referred to in the bill, which agreement had for its object the exploitation of the corporation's assets, and other properties which were added to them, for the personal profit and advantage of the two directors of the corporation, which agreement, so the bill alleges, the complainant had no knowledge of, and did not learn of its existence until long subsequent thereto. In the petition for rehearing counsel state: "It is, of course, probable that both Beach and Bressler thought that they could work out a profit from the lands by selling it by way of colonization, as mentioned in the contract."

As directors of the corporation, why was it not their duty to try and work out a profit to the corporation, instead of to themselves personally, by selling the lands in large or small tracts by colonization or any other means, especially as the corporation, so the bill alleges, was attempting to sell the lands "in large or small tracts"? If, as directors, they conceived a plan for making a profit from the lands, why should this plan be withheld by them from the stockholders and creditors in

whose interest they, by reason of their positions, were bound to act, instead of openly submitting it to them for indorsement or rejection? These directors of the corporation, Beach and Bressler, did not, according to the record, live up to this standard of good faith and fidelity to the interests of those whom the law required them to serve with diligence and utmost good faith.

A mere casual reading of the contract shows, we think, that Bressler and Beach contemplated making a large profit from the sale of the lands. The only difference between this court and counsel upon this point seems to be in the use of the adjective. We did not overlook the fact that the "contract between Beach and Bressler embraced lands in addition to those which Bressler derived from the Florida Development Corporation." The opinion specifically refers to the fact and mentions the names of the persons from whom Bressler acquired such lands. But we did not mention how many acres were so acquired, nor what was paid for them; indeed, neither the bill nor the contract gives that information; the contract merely recites that the lands so acquired lay in certain sections, and no mention is made of their cost. There are, as we read the record, ample grounds for the conclusion reached by the chancellor that Bressler and Beach had in mind the making of profit to themselves, in the transaction, upon the corporation's assets. Among other matters, it is alleged that "Beach is now suing for large amounts under the contract made between him and Bressler with respect to the property formerly belonging to the said" corporation. Yet, under the terms of the contract,

Beach was to receive only 25 per cent of the property, and then only after Bressler had received in cash "net to him" a sum of money almost three times larger than the debts of the corporation. It would seem from this that Beach, one of the directors and coworkers of Bressler, was asserting in the courts that his part of the profits was a large amount. The chancellor concluded, therefore, in the absence of any denial on the part of the defendants, that the profits contemplated and actually made were quite large, with respect to the property formerly belonging to the corporation. To hold that Bressler should be protected in the possession of these profits, or that Beach should appropriate the corporation's assets to the liquidation of his own claims against his fellow director over the persons whom it was their legal, equitable, and moral duty to protect first, is to give judicial sanction to a breach of faith; to protect a fraud upon the sophistical assertion that they had a right to buy the assets of the corporation. Officers of an insolvent corporation may have the right to buy the assets and properties of the corporation, but only after they have made a clean statement, to those most concerned, as to their beliefs concerning the value of the properties and possibilities for liquidation, to the end that the transaction may be kept free from the possibilities of double dealing. Notwithstanding the views of the able counsel for appellant, we have, after reading the bill and exhibits again, as requested, been confirmed in the opinion as rendered heretofore, so the petition is denied.

All concur.

ANNOTATION.

Right of creditors as against directors or officers to whom property of a corporation has been transferred for a consideration other than payment of debts due them.

The general question as to the right to prefer the stockholders or officers has not been considered herein, this discussion being confined in general to conveyances upon a consideration other than the discharge of debts due the purchasers.

Judicial sales have been excluded.

It is a general theory that the creditor of a corporation may attack a conveyance of corporate property to an officer or director; and, unless the conveyance was made in good faith and for an adequate consideration, may have the same set aside. *Pender v. Speight* (1912) 159 N. C. 612, 75 S. E. 851. A conveyance to stockholders which is not supported by an adequate consideration is invalid as against existing creditors of the corporation. *Ft. Worth v. National Park Bank* (1919) 261 Fed. 817. A transfer which seems to have been treated as not bona fide, and in which the consideration was paid by the president of the corporation, to whom the transfer was made, to the stockholders, and not to the corporation, was held null and void against a creditor, in *Mundy v. Jacques* (1911) 116 Md. 11, 81 Atl. 289.

See the reported case (*BEACH v. WILLIAMSON*, ante, 1438).

The converse of this proposition is true; and if the sale was made for an adequate consideration and in good faith, it will not be set aside at the instance of a creditor. *Crymble v. Mulvaney* (1895) 21 Colo. 203, 40 Pac. 499; *Barr v. Bartram & F. Mfg. Co.* (1874) 41 Conn. 506; *Swentzel v. Franklin Invest. Co.* (1902) 168 Mo. 272, 67 S. W. 596. In *Barr v. Bartram & S. Mfg. Co.* (1874) 41 Conn. 506, which was a bill in equity for an injunction to set aside a conveyance of real and personal property to a director and officer of the corporation, the court states that "a court of equity will not, upon the petition of a general creditor, restrain a corporation from con-

verting its assets into money by a sale thereof to a stockholder, when such sale is not in fact in fraud of the stockholders or of the creditors, nor in prejudice of the right of either; when no stockholder objects, and when the sale is made for an adequate price, with the intent to apply the proceeds thereof to the payment of the full amount of the debts of the company, or an equal proportion of every debt."

At least, a creditor cannot, by attachment, attack a conveyance of corporate property to a director or officer of the corporation. *Webb v. Rockefeller* (1903) 66 Kan. 160, 71 Pac. 283. In that case a creditor had attached the property conveyed as the property of the corporation. The director to whom the property had been conveyed was present and acted as chairman of the directors' meeting at which the resolution was passed, directing the transfer, but did not vote upon the adoption of the above resolution. After noticing these facts the court states that "it is not contended but that this sum [the purchase price] was the fair value of the property. No actual fraud in the transaction is asserted. Fraud in law alone is claimed. This proceeding is by attachment. The attack made upon the conveyance is purely collateral. That plaintiff may prevail, it must be held that the conveyance attacked is not voidable alone, but absolutely null and void. It will thus be seen that we are not here considering or concerned with the principles of equity which would control our actions in a direct proceeding by the shareholders, the beneficiaries of the corporate property, or others entitled to maintain such proceeding, brought to avoid the conveyance, for in such action all the equities of the parties would be investigated and decreed. But such is not this case. Here we are urged in a collateral action at law in attachment under the statute to declare this conveyance ab-

solutely null and void. This cannot be done."

The officer or director to whom the property has been transferred cannot be held liable for corporate debts. *Nedry v. Vaile* (1913) 109 Ark. 584, 160 S. W. 880.

Even if the officer or director participated on behalf of the corporation in making the sale to himself, general creditors cannot have the sale set aside on the single ground of a sale to an officer or director. In *Buell v. Buckingham* (1864) 16 Iowa, 284, 85 Am. Dec. 516, *Dillon, J.*, after referring to the general rules applicable to the purchase of trust property by the trustee, said: "As the principal or parties interested may confirm the sale, a mere stranger cannot make the objection that the trustee was the purchaser, or that the sale was irregular. The remedy belongs only 'to persons who had an interest in the property before the sale, and no other person can apply to set aside the sale;'" and concluded that "adopting this as the true view, it follows that Buell's participation in the sale and purchase of the property did not make the same void. The utmost effect it could have would be to make the sale voidable at the instance of any person having an interest in the property sold. But the defendants, being, at that time, general creditors, and having no interest in or lien upon the property, and there being no actual fraud, are not entitled to avoid the sale, simply on the ground that Buell was one of the three directors necessary to constitute a quorum. This, in my judgment, is the correct view to be taken of the case. But adjudged cases go farther (and it is possible some of them go too far) and sustain the purchase of Buell on broader grounds." The court then referred to cases in which the validity of a contract between the directors or officers of the corporation and one of their own number is sustained, and concludes: "Without dwelling further upon these authorities (which are the principal ones on both sides that I have met with directly bearing on the subject) I conclude that, as all the stockholders were in the case at bar

represented at the sale, and were satisfied with it, as it is not fraudulent in fact, and as the defendants were not interested in and had no lien on the property, the purchase thereof by Buell was binding upon the corporation, and is valid as to the defendants."

It has been held that the corporate creditor may subject to the payment of his claim corporate assets which had been conveyed to a stockholder in consideration of the stockholder's corporate stock, on the theory that the corporation cannot thus retire its stock to the prejudice of creditors. *Peterson v. Illinois Land & Loan Co.* (1880) 6 Ill. App. 257.

The fact that the officer to whom the conveyance was made upon a present consideration was surety on a debt of the corporation is not sufficient to make the transfer of assets of the corporation to him fraudulent. *Nedry v. Vaile* (1913) 109 Ark. 584, 160 S. W. 880.

Constructive fraud, resulting from the mere fact that the sale was to a director or officer, cannot be urged by a creditor; there must be actual fraud to afford a basis for relief to the creditor. *Crymble v. Mulvaney* (1895) 21 Colo. 203, 40 Pac. 499.

The transfer of corporate property attacked by a corporate creditor in *O'Connor Min. & Mfg. Co. v. Coosa Furnace Co.* (1891) 95 Ala. 614, 36 Am. St. Rep. 251, 10 So. 290, was made in discharge of a debt, and was to another corporation; the case, therefore, on its facts, is not within the scope of the present note. The rule, however, as to the rights of creditors of a corporation, to disaffirm a transfer of the property of the corporation, is stated very clearly as follows: "The directors of a corporation, in the transaction of its business and the disposition of its property, do not stand in any such relation to the general creditors of the corporation as they occupy to the corporation itself and to its stockholders. They are not the agents of such creditors, nor can they usually be regarded as trustees acting in their behalf. The creditors are not entitled to disaffirm a transfer of the property of the corporation made by its directors or other agents.

merely because the corporation itself or its stockholders could have done so. When a disposition of the property of a corporation is assailed by its creditors, they are not clothed with the right of the corporation or of its stockholders to set aside the transaction regardless of its fairness or unfairness, on the ground that it was entered into by representatives of the corporation who had put themselves in a relation antagonistic to the interests of their principal. The right of the creditor to impeach the transaction depends upon its fraudulent character. The question in such case is, Was the transaction which is complained of entered into with the intent to hinder, delay, or defraud creditors? Was the property fraudulently transferred or conveyed? The mere fact that the corporation, in disposing of its property, dealt with persons who, at the same time, were charged with the duty of representing its interests, does not, by itself, render the transaction fraudulent. . . . Where the property of a corporation is transferred to another corporation represented by the same directors, the fact of such relationship is a circumstance well calculated to arouse suspicion and calls for a rigid and severe scrutiny in the examination of such transaction when it is assailed by a creditor. When such a relationship is shown to exist between the contracting parties, clearer and fuller proof must be given of a valuable and adequate consideration and of the good faith of the parties than would be required if the transferee or grantee had been a stranger. When, however, such examination is made and such proof is forthcoming, and the result is that no fraud or unfair dealing is shown, and

it appears that the transaction was not vitiated by any infirmity of which a creditor has the right to complain, then the transaction must stand; and it is as valid as against the creditor as if the corporation had dealt with a stranger who was not involved in any way with the corporate representatives."

A lease of the corporate property (a stone quarry) to the president and general manager, who was taking out stone in fulfilment of an individual contract, was held to be voidable at the suit of creditors of the corporation, unless the contract was made in good faith and was fair to the corporation. *Ward v. McPherson* (1908) 87 Ark. 521, 113 S. W. 42.

A transfer of corporate property to two directors upon their agreement to pay certain creditors, in contemplation of the company suspending its business by reason of its insolvent condition, was held void under a statute in *Mills v. Hendershot* (1905) 70 N. J. Eq. 258, 62 Atl. 542, and a receiver for creditors was held entitled to recover from each transferee the value of the property respectively assigned to him.

A deed of corporate land to two of the directors of a corporation through a third person was held void as against creditors in *Cleveland v. La Crosse & M. R. Co.* (1859) Fed. Cas. No. 2,887, without regard to the adequacy of the consideration. This case is decided upon the theory that the directors of an incorporated company are trustees of the corporators, and have possession of the corporate property for the corporators and the creditors of the company; and this being so, they cannot purchase the corporate property. W. A. E.

THE SAMUEL STORES, Appt.,

v.

AARON H. ABRAMS.

Connecticut Supreme Court of Errors — December 22, 1919.

(— Conn. —, 108 Atl. 541.)

Contract — when contract enforced.

1. To enforce a stipulation in a contract between employer and employee that the latter will not re-engage in the same line of business, the court must see that the restriction is reasonably necessary for the fair protection of the employer's business or rights, and not unreasonably restrictive upon the rights of the employee, due regard being had to the interests of the public and the circumstances and conditions under which the contract is to be performed.

[See note on this question beginning on page 1456.]

— not to engage in business — validity
— public policy.

2. Whether the public interest requires that a stipulation not to engage in business shall be deemed void as against public policy varies with the changing conditions of life.

[See 6 R. C. L. 789.]

— stipulations between employer and employee.

3. Stipulations restrictive of the right to re-engage in business in agreements between employer and em-

ployee are not viewed with the same indulgence as between a vendor and vendee of a business and its good will.

[See 6 R. C. L. 806.]

— reasonableness of contract by manager of clothing store.

4. A contract by one employed as manager of a clothing store not to engage in similar business for a period of five years after leaving his employment in any city where the employer conducts a store is unreasonable and void.

[See 6 R. C. L. 806, 807.]

APPEAL by plaintiff from a judgment of the Court of Common Pleas for Fairfield County (Walsh, J.) sustaining a demurrer to the complaint in an action brought to enjoin defendant from conducting a clothing business in competition with plaintiff in alleged violation of his contract. *Affirmed.*

Statement by Curtis, J.:

Action for an injunction to restrain the defendant from conducting a clothing business in Bridgeport and from soliciting former and present customers of the plaintiff to trade with him, in alleged violation of a contract, brought to the court of common pleas for Fairfield county upon a complaint containing the following allegations:

"(1) The plaintiff is a corporation engaged in the sale of clothing for men, women, and children, and conducts a store for said purpose in said city of Bridgeport.

"(2) On June 4, 1918, the plaintiff and the defendant entered into a written contract, a copy of which is hereunto attached as exhibit A,

by which contract the plaintiff engaged the services of the defendant as manager for one of its branch stores for a period of one year from September 5, 1918, for the compensation stated in said agreement, which contract is still in force.

"(3) By the provisions of said contract the said defendant agreed that he would not engage in any business that would compete with the business of the party of the first part for five years after the date of the termination of his connection with the plaintiff, and that in the event of his so doing, the plaintiff would be entitled to an injunction, restraining him from continuing such business.

"(4) The said defendant, under

and in pursuance of said contract, entered into the service of the said plaintiff, and continued in such service until November, 1918, when the defendant left the employ of the said plaintiff.

"(5) The defendant, in the course of his said employment, acquired information and knowledge of confidential matters relating to the conduct of said business, including a list of the customers of such business.

"(6) The defendant, in violation of his said agreement, on December 9, 1918, opened a store in said Bridgeport, and engaged in the business of selling clothing for men, women, and children, and engaged in the same line of business conducted by the plaintiff in said Bridgeport, and engaged in business in competition with the plaintiff, in violation of the said agreement, and has advertised himself as formerly with the 'People's Store,' the same being the trade-name under which the plaintiff has been conducting business in said Bridgeport, and has been and is soliciting the customers of the plaintiff to trade with him, the defendant.

"(7) The plaintiff has fully performed all the provisions of said agreement on his part to be performed.

"(8) The plaintiff will be irreparably damaged by the continuation of said competitive business by the defendant, and has no adequate remedy at law.

"The plaintiff claims:

"(1) That the defendant be enjoined from further conducting and continuing such business, and from soliciting the former and present customers of the plaintiff to trade with him.

"(2) Such other and further relief as to the court may seem proper."

Exhibit A recites that the defendant is engaged as manager for one year in one of its branch stores. Such other parts of exhibit A as

are essential are found in the opinion.

To this complaint the defendant filed a demurrer, pleading, among other grounds of demurrer, the following: "An injunction against the defendant as prayed for would be mischievous and against public policy."

This demurrer the court of common pleas sustained; the plaintiff appealed.

Messrs. Keogh & Candee and John T. Dwyer, for appellant:

Employees who have knowledge of customer lists which they attempt to use in violation of their agreements may be enjoined from making such a use.

Carter v. Alling, 43 Fed. 208; Rousillon v. Rousillon, L. R. 14 Ch. Div. 351, 49 L. J. Ch. N. S. 338, 42 L. T. N. S. 679, 28 Week. Rep. 623, 44 J. P. 663; Knapp v. S. Jarvis Adams Co. 70 C. C. A. 536, 185 Fed. 1008; People's Coat, Apron & Towel Supply Co. v. Light, 171 App. Div. 671, 157 N. Y. Supp. 15; Mutual Milk & Cream Co. v. Heldt, 120 App. Div. 795, 105 N. Y. Supp. 661; Diamond Match Co. v. Roeber, 106 N. Y. 473, 60 Am. Rep. 464, 13 N. E. 419; Stevens & Co. v. Stiles, 29 R. I. 399, 20 L.R.A.(N.S.) 933, 71 Atl. 802, 17 Ann. Cas. 140; Empire Steam Laundry Co. v. Lozier, 165 Cal. 95, 44 L.R.A.(N.S.) 1159, 130 Pac. 1180, Ann. Cas. 1914C, 628; Witkop & H. Co. v. Boyce, 61 Misc. 126, 112 N. Y. Supp. 874.

The contract is not contrary to public policy or mischievous.

Cook v. Johnson, 47 Conn. 176, 36 Am. Rep. 64; Styles v. Lyon, 87 Conn. 23, 86 Atl. 564; Schoolnick v. Gold, 89 Conn. 110, 93 Atl. 124; Oregon Steam Nav. Co. v. Winsor, 20 Wall. 66, 22 L. ed. 318; Gibbs v. Consolidated Gas Co. 180 U. S. 396, 32 L. ed. 979, 9 Sup. Ct. Rep. 553; Fowle v. Park, 131 U. S. 88, 33 L. ed. 67, 9 Sup. Ct. Rep. 658; Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co. 175 U. S. 106, 44 L. ed. 91, 20 Sup. Ct. Rep. 33; Herreshoff v. Boutineau, 17 R. I. 3, 8 L.R.A. 469, 33 Am. St. Rep. 850, 19 Atl. 712.

The restriction is not unreasonable as to the time of its duration.

Cook v. Johnson, 47 Conn. 176, 36 Am. Rep. 64; Styles v. Lyon, 87 Conn. 23, 86 Atl. 564; Haynes v. Doman [1899] 2 Ch. 13, 68 L. J. Ch. N. S. 419, 80 L. T. N. S. 569, 15 Times L. R. 354;

Hitchcock v. Coker, 6 Ad. & El. 438, 1 Nev. & P. 796, 2 Harr. & W. 464, 6 L. J. Exch. N. S. 266; *Rousillon v. Rousillon*, L. R. 14 Ch. Div. 351, 49 L. J. Ch. N. S. 338, 42 L. T. N. S. 679, 28 Week. Rep. 623, 44 J. P. 663; *Anchor Electric Co. v. Hawkes*, 171 Mass. 101, 41 L.R.A. 189, 68 Am. St. Rep. 403, 50 N. E. 509; *Magnolia Metal Co. v. Price*, 65 App. Div. 276, 72 N. Y. Supp. 792; *Schoolnick v. Gold*, 89 Conn. 110, 93 Atl. 124.

The restriction is not unreasonable as to the area of its operation.

Carter v. Alling, 43 Fed. 208; *Mason v. Provident Clothing & Supply Co.* [1913] A. C. 724, 82 L. J. K. B. N. S. 1153, 109 L. T. N. S. 449, 29 Times L. R. 727, 57 Sol. Jo. 739, Ann. Cas. 1914A, 491.

It was error to refuse to enjoin the defendant from using the customer list.

Stevens & Co. v. Stiles, 29 R. I. 399, 20 L.R.A. (N.S.) 933, 71 Atl. 802, 17 Ann. Cas. 140; *Knapp v. S. Jarvis Adams Co.* 70 C. C. A. 536, 135 Fed. 1008; *Witkop & H. Co. v. Boyce*, 61 Misc. 126, 112 N. Y. Supp. 874; 2 Story, Eq. ¶ 952; *Empire Steam Laundry Co. v. Lozier*, 165 Cal. 95, 44 L.R.A. (N.S.) 1159, 130 Pac. 1180, Ann. Cas. 1914C, 628; *New Method Laundry Co. v. McCann*, 174 Cal. 26, 161 Pac. 990, Ann. Cas. 1918C, 1022; *Magnolia Metal Co. v. Price*, 65 App. Div. 276, 72 N. Y. Supp. 792.

The contract is reasonable and enforceable in equity.

Fleckenstein Bros. Co. v. Fleckenstein, 24 L.R.A. (N.S.) 926, note; *Styles v. Lyon*, 87 Conn. 23, 86 Atl. 564; *Cook v. Johnson*, 47 Conn. 176, 36 Am. Rep. 64; *United States v. Addyston Pipe & Steel Co.* 46 L.R.A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271; *O. & W. Thum Co. v. Tloczynski*, 114 Mich. 149, 38 L.R.A. 200, 68 Am. St. Rep. 469, 72 N. W. 140; *E. I. Dupont de Nemours Powder Co. v. Masland*, 244 U. S. 101, 61 L. ed. 1018, 37 Sup. Ct. Rep. 575; *Artistic Porcelain Co. v. Boch*, 76 N. J. Eq. 538, 74 Atl. 680; *Underwood & Sons v. Barker* [1899] 1 Ch. 300, 68 L. J. Ch. N. S. 201, 47 Week. Rep. 347, 80 L. T. N. S. 306, 15 Times L. R. 177; *Haynes v. Doman* [1899] 2 Ch. 13, 68 L. J. Ch. N. S. 419, 80 L. T. N. S. 569, 15 Times L. R. 354; *Harrison v. Glucose Sugar Ref. Co.* 58 L.R.A. 915, 53 C. C. A. 484, 116 Fed. 304; *Philadelphia Ball Club v. Lajoie*, 202 Pa. 210, 58 L.R.A. 227, 90 Am. St. Rep. 627, 51 Atl. 973; *Columbia College v. Tunberg*, 64 Wash. 19, 116 Pac. 280; *Hackett v. A. L. & J.*

J. Reynolds Co. 30 Misc. 733, 62 N. Y. Supp. 1076; *Witkop & H. Co. v. Boyce*, 61 Misc. 126, 112 N. Y. Supp. 874; *McCall Co. v. Wright*, 198 N. Y. 143, 81 L.R.A. (N.S.) 249, 91 N. E. 516; *Carter v. Alling*, 43 Fed. 208; *Stevens & Co. v. Stiles*, 29 R. I. 399, 20 L.R.A. (N.S.) 933, 71 Atl. 802, 17 Ann. Cas. 140.

Mr. Alexander L. De Laney, for appellee:

The injunction was properly denied, as the contract set up is not a contract for the employment of services involving special skill and training, nor for services involving the exercise of high powers of mind peculiar to the defendant.

Wm. Rogers Mfg. Co. v. Rogers, 58 Conn. 363, 7 L.R.A. 779, 18 Am. St. Rep. 278, 20 Atl. 467; *Peabody v. Norfolk*, 98 Mass. 452, 96 Am. Dec. 664; *High, Inj. § 1120*; *Beach, Inj. § 443*; *Pom. Eq. Jur. § 1443*; *Bank of California v. Fresno Canal & Irrig. Co.* 53 Cal. 201; *Singer Sewing Mach. Co. v. Union Buttonhole & Embroidery Co.* Holmes, 253, Fed. Cas. No. 12,904; 22 Cyc. 857; *Sternberg v. O'Brien*, 48 N. J. Eq. 370, 22 Atl. 348; *Dills v. Doebler*, 62 Conn. 363, 20 L.R.A. 432, 36 Am. St. Rep. 345, 26 Atl. 398; *Levin v. Dietz*, 194 N. Y. 381, 20 L.R.A. (N.S.) 251, 87 N. E. 454; *Wadick v. Mace*, 191 N. Y. 4, 83 N. E. 571; *Welty v. Jacobs*, 171 Ill. 624, 40 L.R.A. 98, 49 N. E. 723; *Palmer v. Gould*, 144 N. Y. 671, 39 N. E. 378; *Stokes v. Stokes*, 143 N. Y. 708, 43 N. E. 211; *Giles v. Dunbar*, 181 Mass. 22, 62 N. E. 985; *E. Jaccard Jewelry Co. v. O'Brien*, 70 Mo. App. 432; *Burney v. Ryle*, 91 Ga. 703, 17 S. E. 986; *Geo. A. Kessler & Co. v. Chappelle*, 73 App. Div. 447, 77 N. Y. Supp. 285; *W. J. Johnston Co. v. Hunt*, 66 Hun, 504, 21 N. Y. Supp. 314; *Carter v. Ferguson*, 58 Hun, 569, 12 N. Y. Supp. 580; *Oppenheimer v. Hirsch*, 5 App. Div. 232, 38 N. Y. Supp. 311; *Simms v. Burnette*, 55 Fla. 702, 16 L.R.A. (N.S.) 389, 127 Am. St. Rep. 201, 46 So. 90, 15 Ann. Cas. 690; *Keeler v. Taylor*, 53 Pa. 467, 91 Am. Dec. 221; *Carroll v. Giles*, 30 S. C. 412, 4 L.R.A. 154, 9 S. E. 422.

Curtis, J., delivered the opinion of the court:

By the complaint and the contract, exhibit A, attached thereto, the following facts are disclosed:

The plaintiff is a corporation of the state of New York engaged in conducting branch clothing stores in various cities.

It employed the defendant as manager of one of its branch stores for the period of one year from September 5, 1918, under the written contract attached to the complaint.

The contract contains the following stipulation on the part of the defendant: "And, whereas, in the course of such employment, Aaron H. Abrams may be assigned to duties that may give him knowledge and information of confidential matters relating to the conduct and details of the business of the Samuel Stores, Incorporated, as to result in the opinion of the Samuel Stores, Incorporated, irremediable injury to it, for which no money damages could adequately compensate, if the said party of the second part should enter the employment of rival concern while this contract was still in effect, the said Aaron H. Abrams agrees not to engage in any other occupation during the life of this contract, and further agrees not to either directly or indirectly connect himself with any firm engaged in business similar to that of the party of the first part, which would compete with the business of the party of the first part, nor will he himself engage in any business that will compete with the business of the party of the first part, for five years after the date of his connection with the party of the first part being severed. The said Aaron H. Abrams agrees to use his best endeavors and his entire time to promote the business and business interests of the Samuel Stores, Incorporated."

The defendant in November, 1918, left the employ of the plaintiff, and on December 9, 1918, opened a store in Bridgeport, and engaged in the business of selling clothing for men, women, and children, and engaged in the same line of business conducted by the plaintiff in Bridgeport, and has advertised himself as formerly with the People's Store, the same being the tradename under which the plaintiff has been conducting business in

Bridgeport and the defendant has been and is soliciting the customers of the plaintiff to trade with him.

This case presents the question whether or not the restrictive stipulation in the contract between the parties is void as against public policy.

The public policy to be applied is the public policy of the present time. The changing conditions of life modify from time to time the reasons for determining whether the public interest requires that a restrictive stipulation shall be deemed void as against public policy. The following statement of the law found in the leading case of *Maxim v. Nordenfeldt* (1895) 11 Reports, 27, is generally recognized as fundamental: "The true view at the present time, I think, is this: The public have an interest in every person's carrying on his trade freely; so has the individual. All interference with individual liberty of action in trading and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. But there are exceptions; restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and, indeed, it is the only justification if the restriction is reasonable,—reasonable, that is, in reference to the interests of the parties concerned, and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favor it is imposed, while at the same time it is in no way injurious to the public."

~~Contract not to engage in business—validity—public policy.~~

Under this principle, that the reasonableness of a restriction in view of all the circumstances and the interests of the public and the parties is the test of its validity, certain basic considerations have developed as guides to covenantors and the courts. Some of these we will now consider.

The cases in relation to restraints of trade soon disclosed two leading classes of contracts, contracts between the vendor and vendee of a business and its good will, and, on the other hand, contracts between an employer and an employee.

Under the law, restrictive stipulations in agreements between employer and employee are not viewed with the same indulgence as such stipulations between a vendor and vendee of a business and its good will.

—stipulations
between
employer and
employee.

In the latter case, the restrictions add to the value of what the vendor wishes to sell, and also add to the value of what the vendee purchases. In such cases also the parties are presumably more nearly on a parity in ability to negotiate than is the case in the negotiation of agreement between employer and employee.

In a restrictive covenant between a vendor of a business and the vendee, "a large scope for freedom of contract and a correspondingly large restraint of trade" are allowable. In a restrictive covenant between employer and employee on the other hand, there is "small scope for the restraint of the right to labor and trade and a correspondingly small freedom of contract."

In dealing with a restrictive stipulation between an employer and an employee, as in this case, in order that the court may uphold and enforce the restriction, if it is not otherwise contrary to public policy, the court must find that the facts alleged disclose a restriction on the employee "reasonably necessary for

—when contract
enforced.

the fair protection of the employer's business or rights, and not unreasonably restricting the rights of the employee, due regard being had to the interests of the public and the circumstances and conditions under which the contract is to be performed." *Wm. Rogers Mfg. Co. v. Rogers*, 58 Conn. 356, 7 L.R.A. 779, 18 Am. St. Rep. 278, 20 Atl. 467; *Eureka Laundry*

Co. v. Long, 35 L.R.A. (N.S.) 119, note; *Simms v. Burnette*, 16 L.R.A. (N.S.) 389, note; *Herbert Morris v. Saxelby* [1916] 1 A. C. 688, 85 L. J. Ch. N. S. 210, 114 L. T. N. S. 618, 32 Times L. R. 297, 60 Sol. Jo. 305; *Mason v. Provident Clothing & Supply Co.* [1913] A. C. 724, 82 L. J. K. B. N. S. 1153, 109 L. T. N. S. 449, 29 Times L. R. 727, 57 Sol. Jo. 739, Ann. Cas. 1914A, 491; *Nordenfelt v. Maxim Nordenfelt Guns & A. Co.* [1894] A. C. 565, 63 L. J. Ch. N. S. 908, 11 Reports, 1, 71 L. T. N. S. 489, 6 Eng. Rul. Cas. 413, id. 11 Reports, 27; *Konski v. Peet* [1915] 1 Ch. 530 [1915] W. N. 98, 84 L. J. Ch. N. S. 513, 112 L. T. N. S. 1107, 59 Sol. Jo. 383; *Herreshoff v. Boutineau*, 17 R. I. 3, 8 L.R.A. 469, 33 Am. St. Rep. 850, 19 Atl. 712.

We are then to determine whether the facts set up in this complaint make it reasonably necessary for the fair protection of the plaintiff's business to hold that the restrictive stipulation in the contract should be enforced.

This stipulation provides, in effect, that the defendant, for five years after he leaves the employ of the plaintiff, shall not either directly or indirectly connect himself with any firm engaged in business similar to that of the plaintiff, which would compete with the business of the plaintiff in any city where the plaintiff conducts one of its branch stores.

It appears from the complaint that the services of the defendant contracted for by the plaintiff are not peculiar or individual in their character, nor purely intellectual, nor are they special or extraordinary services or acts.

The defendant's services and the plaintiff's business are not of a character to involve the acquisition of special business secrets of the plaintiff by the defendant. The agreement relates merely to services in a local retail business, and primarily aims to restrict competition.

The plaintiff conducts a local re-

tail clothing business in which the defendant was employed as manager. The situation of manager could have been filled by any person of sufficient business capacity.

The clothing business may be entered upon by anyone who desires to enter it, and whether the defendant opened a competitive store or another did so was immaterial to the plaintiff, except that the defendant, having acquaintance and knowledge of the plaintiff's customers, might solicit their trade.

The restriction in question provides, in substance, that in any city where the plaintiff carries on its business the defendant shall not directly or indirectly connect himself with any firm engaged in business similar to that of the plaintiff, which would compete with the business of the plaintiff, for five years after his employment with the plaintiff ceases.

This restriction, binding for that period and relating to every city in which the plaintiff has established a branch store, is not reasonably necessary for the fair protection of the plaintiff's business. It covers a number of cities in which the defendant, from his employment in one city, could have had no acquaintance with the local customers.

A restrictive agreement, providing that the defendant, while connected with a competing business, should not solicit trade from persons who were customers of the plaintiff at the branch store where the defendant was employed during his employment, might reasonably be claimed to be such a restriction as is reasonably necessary for the fair protection of the plaintiff's business. *Konski v. Peet* [1915] 1 Ch. 530 [1915] W. N. 98, 84 L. J. Ch. N. S. 513, 112 L. T. N. S. 1107, 59 Sol. Jo. 383.

Such a restriction obviously would not unduly restrict the rights of the defendant, since it would not otherwise restrict the field of his employment than by prohibiting the solicitation of the clothing trade of a limited number of people in one city.

By the sweeping terms of the restrictive stipulation in question, it is true that the solicitation of such customers of the plaintiff is indirectly prevented. But at what cost to the defendant? He is prohibited from entering or being employed in the clothing business in various cities, the number of which may be large, and the area in which he may exercise such experience in and aptitude for that business as he may possess is greatly limited.

The reasonable and fair protection of the plaintiff's business does not require such an extended restriction of the defendant's field of employment.

Public policy requires that the defendant's liberty of action in trading or employment shall not be unduly restricted. To enforce the sweeping terms of this restriction would be a useless, unnecessary, and undue curtailment of the defendant's liberty of trading and employment, and an unjustified restraint on competition.

The case at bar illustrates the following comment found in *Herreshoff v. Boutineau*, 17 R. I. 7, 8 L.R.A. 469, 33 Am. St. Rep. 850, 19 Atl. 713: "Covenantees [in contracts in restraint of trade between employer and employee] desiring the maximum of protection have, no doubt, a difficult task. When they fail, it is commonly because, like the dog in the fable, they grasp at too much, and so lose all."

There is no error.

The other Judges concur.

—reasonableness
of contract by
manager of
clothing store.

not require such an
extended restriction
of the defendant's
field of employment.

Validity and enforceability of restrictive covenants in contracts of employment.

I. Validity and enforceability of covenant:

- a. In general, 1456.
- b. Distinction between a covenant ancillary to the sale of a business and to a contract of employment, 1457.
- c. Distinction between covenants applicable during term of employment and subsequently thereto, 1460.

II. Covenant not to accept service for anyone except employer during term of contract:

- a. In general, 1463.
- b. As affected by the character of the service to be performed, 1463.

III. Covenant not to engage in similar or competing business after the termination of the contract:

- a. In general, 1467.

III.—continued.

b. Reasonable restrictions; illustrative cases:

- 1. Contracts for employment in mercantile or manufacturing business, 1468.
- 2. Contracts for employment in professional capacity, 1472.

c. Unreasonable restrictions as to period of restraint; illustrative cases, 1473.

d. Unreasonable restrictions as to territory, 1473.

IV. Effect of want of equity in contract:

- a. In general, 1478.
- b. Sufficiency of consideration, 1479.
- c. Lack of mutuality of obligation, 1480.

V. Effect of provision for liquidated damages or penalty, 1481.

VI. Injunctive relief as affected by comparison of injury to the parties, 1482.

VII. Effect of infancy of employee, 1483.

I. Validity and enforceability of covenant.

a. In general.

Restrictive covenants in contracts of employment, affecting the right of the employee to accept employment with others or engage in business for himself, are of two kinds: One not to accept employment with others during the term of the contract, and the other not to accept employment with others or engage in a similar business for himself for a definite period of time after the termination of the contract. Both of these classes of covenants are regarded as in some degree in restraint of trade. When they were first presented to the courts they were regarded as contrary to public policy, and hence invalid, but the importance of requiring one who had assumed by the solemnity of contract certain engagements, to observe them, as well as the necessity of furnishing a reasonable protection to the business of the employer, soon led the courts to view these covenants with a greater degree of toleration. Hence, the later decisions, in a measure at least, sustain

the validity of contracts containing covenants of this character. As to the first class of contracts or agreements, i. e., not to accept employment with others during the term of the contract, the courts, of course, have never undertaken to require the specific performance of the contract by requiring the employee to continue in his employment; they have, however, in proper cases, restrained the breach of such a covenant. Of course, in any case involving contracts of this character it may be safely assumed that the contract is valid, as the courts now view them, and that an action at law will lie for damage for the breach of the covenant. For various reasons, however, this remedy is of but little value to the employer, since the real purpose of a negative covenant of this character is to secure the specific performance of the contract, and to secure such enforcement it is necessary to invoke equitable aid to enjoin the breach of the negative covenant. To secure such aid frequently presents a serious difficulty to the employer, for it is not in every case that equity will assume jurisdiction. In order to in-

voke the aid of equity it must appear that the loss to the employer is irreparable and that his remedy at law is inadequate. From this premise it follows that, where equitable aid is sought, for the employer merely to establish the validity of the contract is not sufficient, and hence the fact that equity refuses relief in a given case is no indication that the court regards the contract as invalid.

The validity of such contracts, however, is more directly presented in the second class of cases, i. e., covenant by the employee not to engage for himself or for others in a competing business for a definite period of time, and generally within certain prescribed boundaries. The denial of relief for the breach of such covenants is generally based upon the ground, either that the contract is violative of public policy and hence invalid, that there is an adequate remedy at law, or that the contract is oppressive and imposes undue hardship upon the employee. While the same general principles of law apply to covenants of the latter class that apply to similar covenants ancillary to the sale of a business, nevertheless covenants of this kind by employees are more carefully scrutinized by the courts, and relief more readily denied, since the courts, generally, realize that a too ready enforcement of them may result in depriving the covenantor of the means of livelihood, and perchance cause him to become a charge upon the public.

h. Distinction between a covenant ancillary to the sale of a business and to a contract of employment.

It has been reasoned that, upon principle, agreements imposing restraints upon the right of an employee to engage in a competing business are to be determined by the same test as that applicable to agreements ancillary to the sale of a business. Upon this point, in *Eureka Laundry Co. v. Long* (1911) 146 Wis. 205, 35 L.R.A. (N.S.) 119, 131 N. W. 412, the court said: "The question arises, Does it make any substantial difference whether the thing of value bargained for is contained in a contract of sale, or in a

contract of hiring? If it is lawful and proper to protect a business just about to be acquired from certain acts by the seller, who is familiar with such business, why is it not equally lawful and proper to protect an established business from such acts by one who has become familiar therewith? We perceive no difference in principle. The purchaser says to the seller: 'You are familiar with this business. You know your customers; your personal acquaintance with them is such that you could divert their trade from me if you saw fit. Now, I will purchase your business upon the express condition that you will agree for a limited length of time not to engage in a like business in this locality; at the expiration of that time I shall know my business and my customers well enough to be able to protect myself.' So the owner of an established business says to a prospective employee: 'In the employment, you will become familiar with the customers of my business in a way that I cannot; you will meet them frequently, while I see them rarely, if ever. Now, I will hire you upon the express condition that you will agree for a limited length of time not to solicit trade from such of my customers as you may have supplied while in my employ, and will not engage in my business within a limited time, in the territory you have occupied; at the end of that time my new employees will be sufficiently well acquainted with my customers, to protect my business.' Why is not one contract as valid as the other? Both are based upon valuable considerations. If it be said that the latter contract tends unreasonably to hamper employees in their quest for employment, the answer is: Whatever is reasonably necessary for the protection of a legitimate business promotes the best interests of the employees of that business. No doubt experience has shown that owners of a business like that of plaintiff need such protection in a large city, where the customers, as a rule, come in contact only with the employee, and that his personality and acquaintance with them have much to do with the retention of their patron-

age. Freedom to contract must not be unreasonably abridged. Neither must the right to protect, by reasonable restrictions, that which a man by industry, skill, and good judgment has built up, be denied. If the restrictions are not otherwise contrary to public policy, they must be held to be valid when they appear to be reasonably necessary for the fair protection of the employer's business or rights, and do not unreasonably restrict the rights of the employee, due regard being had to the subject-matter of the contract, and the circumstances and conditions under which it is to be performed."

In *McCall Co. v. Wright* (1910) 198 N. Y. 143, 31 L.R.A. (N.S.) 249, 91 N. E. 516, *infra*, III. b, 1, the court said that "security from and limitation of competition in a given business is a valuable right in connection with said business, and that there are some contracts which, although they curtail competition to a limited extent, are valid and may be enforced. This question, perhaps, has most frequently come up in connection with the sale of a business under an agreement not to start a competing one. . . . It would seem that there is no fundamental principle in favor of the validity and enforceability of such an agreement in the case of the sale of a business, which would not sustain a contract, on a good consideration, prohibiting, for a limited period, an employee who has entered the employment and learned the business of one employer, from carrying the benefit of the information and trade secrets thus acquired into the employment and maintenance of a competing business."

But upon this point in *Styles v. Lyon* (1913) 87 Conn. 23, 86 Atl. 564, *infra*, III. b, 2, the court said that a contract restricting one from entering a similar business in a limited area might not injuriously affect the public, where a contract restricting the exercise by one of an ordinary vocation might. In determining whether the public interest is involved in contracts restricting employment, the court said that there must be kept before it the necessity of preserving inviolable

the agreements of men, so far as they are reasonable, and in maintaining freedom of individuals to pursue an ordinary vocation. While similar covenants ancillary to contracts of employment may invoke a somewhat broader application of the public-policy rule, in the construction of each class of contracts, and in the application of the test of reasonableness, there is no substantial difference, and authorities upon restrictive covenants in partial restraint of trade are applicable alike to contracts of sale and of employment.

In *Sternberg v. O'Brien* (1891) 48 N. J. Eq. 370, 22 Atl. 348, the court said that to many persons the right to labor is the most important and valuable right they possess. "It is their fortune, constituting the only means they have to obtain food, raiment, and shelter, and to acquire property. To such persons, a deprivation of this right is ruin, and to abridge it is to do them an injury which will very likely result in their ruin. When, therefore, a court is asked either to deprive a person of this right or to abridge it, it is its duty, before it acts, to consider with the utmost care whether, if it does what it is asked to do, it will not, on a careful comparison of consequences, do more injustice than justice. The defendant, it is true, has broken his contract, but that fact, standing alone, presents no ground whatever for the interference of this court,—indeed, scarcely more than would be presented by a case where the ground of action was a breach of warranty made on the sale of a horse."

In *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.* [1894] A. C. 535, 6 Eng. Rul. Cas. 413, while not in point as to facts, the court said that the general policy of the law is opposed to all restraints upon liberty of individual action which are injurious to the interests of the state or community. Nor is it doubtful that the courts will rightly refuse to enforce any compact by which an individual binds himself not to use his time and talents in prosecuting a particular profession or trade, when its enforcement would obviously or probably be

attended with these injurious consequences. But it must not be forgotten that the community has a material interest in maintaining the rules of fair dealing between man and man. It suffers far greater injury from the infraction of these rules than from contracts in restraint of trade."

This distinction is also pointed out in *Mason v. Provident Clothing & Supply Co.* [1913] A. C. (Eng.) 724, Ann. Cas. 1914A, 491. On this point the court said that "the diversities may be wide and the view of the law may be different as to the upholding or the scope of a covenant in restraint of personal or industrial freedom. If the contract, for instance, be for the sale of a business to another for full consideration or price, there may be elements going in the strongest degree to show that such a contract—in so far as it restrains the vendor from becoming the rival of a business whose good will he has sold, and which he has bargained he shall not oppose—there may be elements showing that such a contract is enforceable, and, indeed, that a declinature by the law to enforce it would amount to a denial of justice. It may clearly appear that the express view of the bargain may have been the elimination from the sphere of competition of the powerful personality of a possible rival, who by the very terms of the contract had been paid for disappearing into retirement, carrying his sheaves with him. In such cases a restraint is enforced by the law. But to use Lord Macnaghten's language in the *Nordenfelt Case* [1894] A. C. 565, 6 Eng. Rul. Cas. 413, 'there is obviously more freedom of contract between buyer and seller than between master and servant, or between an employer and a person seeking employment.' And in my opinion there is much greater room for allowing, as between buyer and seller, a larger scope for freedom of contract and a correspondingly large restraint in freedom of trade, than there is for allowing a restraint of the opportunity for labor in a contract between master and servant, or an employer and an applicant for work. . . . In both cases which have been

cited there are appeals to public interest. Yet the public interest in the one case may be on the side of freedom of contract, while on the other it is on the side of freedom of trade. The right to dispose for adequate consideration of a business which a person has built up, and which has become solid, attractive, and valuable by the exercise of his energy or ability, might become worthless unless accompanied by a substantial restraint of opposition on the part of the seller; and for the law to decline to support the restraint would be to impose a great obstacle to employment of the fruits of labor, and to destroy an incentive to industrial or commercial energy. The public interest might thus be grievously injured by such a restraint on freedom of contract. But, upon the other side, the public interest may strongly coincide with freedom of trade. That might be gravely endangered or contravened by a restriction or impairment of the liberty of the subject to enter the ranks of business or of labor, and work for and earn his living. . . . The law can achieve a reconciliation and adjustment of these two elementary liberties—the right to bargain and the right to work. And it has in fact achieved this in such a manner that the public interest has been in both cases conserved. . . . The public interest reconciles these two and removes all antagonism by the establishment of a principle and a limit of general application. It may be that bargains have been entered into with the eyes open, which restrict the field of liberty and of labor, and the law answers the public interest by refusing to enforce such bargains in every case where the right to contract has been used so as to afford more than a reasonable protection to the covenantee. In every case in which it exceeds that protection, the public interest, which is always upon the side of liberty, including the liberty to exercise one's powers or to earn a livelihood, stands invaded, and can accordingly be invoked to justify the nonenforcement of the restraint."

In *Hepworth Mfg. Co. v. Ryott* (Eng.) post, 1484, the court quotes

with approval from *Mason v. Provident Clothing & Supply Co.* as to the distinction between contracts entered into upon the sale of the good will of a business, and contracts entered into between an employer and an employee. Attention is particularly called to this case as a very valuable addition to the law of restraint of trade, as applied to contracts of employment. The doctrine is here clearly asserted that it is not sufficient justification for restraint of trade that the servant might help his new employer to compete with the old employer.

So in *Allen Mfg. Co. v. Murphy* (1911) 23 Ont. L. Rep. 467, the doctrine is stated that a restraint which may fairly be regarded as entirely reasonable when imposed in connection with the sale of a business with the good will, or with the transfer of patent rights or trade secrets, or with the dissolution of a partnership, should not be accepted in all cases as necessary or even approximately applicable to restraints imposed upon employees to whom the only consideration for their covenant is employment and the receipt of wages, or a yearly remuneration for a more or less certain number of months or years. Such persons are ordinarily not on the same plane as one who disposes of a business which, by its very nature, embraces extensive interests and connections, and involves dealings and transactions in most of the nations of the globe, and who has therefore received compensation by way of purchase money.

It has been held, where the question is raised by a motion for an injunction *pendente lite* to restrain the breach of a covenant of this character, that this remedy is harsh and may be an oppressive exercise of the power of the court, operating to deprive the defendant of the means of gaining a subsistence and of ability to support his family while the litigation is going on, which may continue many months, and hence it should be denied unless the case is clear. *Fredericks v. Mayer* (1857) 1 Bosw. (N. Y.) 227. Upon this point the court said: "The frequency of applications for injunctions

pendente lite, and, I may add, the facility with which they are obtained, may properly induce us to recur to some familiar rules which ought to govern the court in the exercise of its summary and, in a degree, arbitrary power; it should be guarded by a most cautious discretion, forbidding its exercise when it will operate oppressively or work immediate injury, or where the right of the plaintiff is doubtful, or the facts are not clearly ascertained. It has been well said that 'there is no power the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or is more dangerous in a doubtful case, than the issuing of an injunction. It is the strong arm of equity, which ought never to be extended unless to cases of great injury, where courts of law cannot afford an adequate or commensurate remedy in damages. The right must be clear. . . . and it will not be awarded in doubtful cases, nor in new ones not coming within well-established principles.' . . . These views should govern the court on a final hearing, and with all the proofs necessary to a final decree before them. Much more should they control us on an application for an injunction *pendente lite*, while the grounds of the application are controverted and the facts involved in serious doubt."

c. Distinction between covenants applicable during term of employment and subsequently thereto.

As heretofore suggested, covenants in restraint of the right to accept employment with others than the covenantor are of two kinds: Those applicable during the term of employment, and those applicable subsequently thereto. In the enforcement of these covenants different considerations are presented. Although in each case the right to relief depends upon a showing of irreparable injury by the breach of the covenant, and the inadequacy of any remedy at law, nevertheless the facts essential to secure relief differ widely in the two classes of covenants. As to the first class,—covenants not to engage with another during the term of employment,—the right to

equitable relief, so far, at least, as the actual decisions go, depends upon the showing by the employer that the services of the employee are of an extraordinary, peculiar, or unique character, to perform which a substitute cannot easily be secured. As to the other class of covenants—for some definite period of time subsequently to the termination of the contract, not to engage in a competing business, either for himself or for others,—the character of the service as unique or extraordinary, or the contrary, is not usually involved, but the right to relief depends upon a showing by the employer that, by reason of the character of the employment or the services rendered by the employee, he has been able to come into such close and intimate relations with the employer's patrons, customers, or clients, or to obtain such knowledge of the employer's business, that if he were to use the acquaintanceship or knowledge thus obtained in a competing business, in breach of his agreement, the result would be irreparable injury to the employer for which there is no adequate remedy at law. The distinction as to the showing necessary in order to secure equitable relief to restrain a breach of the two classes of covenants is clearly made in *Eureka Laundry Co. v. Long* (1911) 146 Wis. 205, 35 L.R.A. (N.S.) 119, 131 N. W. 412. Upon this point, and in answering the argument that relief should be denied an employer when he sought to restrain an employee who had solicited business for him, from breach of his covenant not to solicit for others over the same route for a certain period of time following the termination of his contract, on the ground that no showing had been made that the solicitor's services were extraordinary or peculiar, and in referring to the cases cited to prove that such a showing was necessary, the court said: "In all the cases above referred to the plaintiffs alleged damages to their businesses by reason of the fact that the defendants left their employ. We have no such case here. In this case it is not claimed that the plaintiff has in any way been damaged or injured by reason of the fact that

defendant has left its employ, and no damages are sought on that account, nor is it sought, either directly or indirectly, to retain the defendant in the employ of the plaintiff, as in many of the cases cited by respondent. On the contrary, the defendant is sought to be restrained from committing certain acts, after he has left the employment of the plaintiff, which will directly injure plaintiff's business, and which, in his contract of employment, he specifically agreed that he would not do. So it is apparent that the cases cited by the respondent have no application to the case at bar. The trial court properly found that the services of the defendant in this case were ordinary services, such as could be performed by anyone. But this case presents no question as to the character or kind of service to be rendered. It does not lie in the mouth of the defendant to say that anyone, whether skilled or unskilled, could cause similar damage to plaintiff's business after leaving his employ. He agreed not to cause such damage. The agreement was a reasonable and valid one, and a court of equity will enforce it."

In some cases, however, it is apparent that the breach of a covenant not to engage in a competing business, either for oneself or others, for a designated time following the termination of the contract of employment, has been denied upon the ground that no showing has been made that the services the employee rendered were unique, peculiar, or extraordinary. These holdings apparently recognize that in this class of covenants the right to relief may be based on the ground, either of irreparable damage to the employer's business by the act of the employee in engaging in a competing business or soliciting from the employer's customers, or the peculiar, unique, or extraordinary character of the services rendered so that a substitute could not easily be secured. As a matter of fact, however, this latter ground has never been invoked successfully in cases where the covenant was not to engage in a competing business for a designated period of time following the termination of the con-

tract, and the application of the rule of unique or extraordinary character of service to this class of covenants is by no means obvious, since in any event, the term of employment having ended, the employer is no longer entitled to the employee's services.

Thus, in *Osius v. Hinchman* (1907) 150 Mich. 603, 16 L.R.A. (N.S.) 393, 114 N. W. 402, the court refused to restrain a dentist from engaging in a competing business, in violation of a covenant with his former employer not to do so, it not appearing that the employer would suffer irreparable loss on account of the breach, or that his remedy at law was inadequate, there being no showing that the employer's damages would not be easily ascertainable, or that the employee's place could not be readily filled.

The point is also made in *Magid v. Tannenbaum* (1914) 164 App. Div. 142, 149 N. Y. Supp. 445, wherein the court refused to enjoin a traveling salesman for a business known as "tailors to the trade," from breaching a covenant not to enter the employ of anyone else in a similar business for a year following the termination of his employment. It is pointed out that it did not appear that the employee had obtained any of the employer's secrets, and the services were not unique or extraordinary.

In *Wm. Rogers Mfg. Co. v. Rogers* (1890) 58 Conn. 356, 7 L.R.A. 779, 18 Am. St. Rep. 278, 20 Atl. 467, the court refused to restrain an employee of a silver plating company from engaging in a competing business in violation of his covenant. It is pointed out that the employer had not shown any facts which would bring the case within the rule that would require an employee to be enjoined from disclosing business secrets.

And see *Keeler v. Tayler* (1866) 53 Pa. 467, 91 Am. Dec. 221, wherein the court refused to enforce an agreement by an employee of a manufacturing company to pay the manufacturer a certain sum of money for each and every article which he should thereafter manufacture for any other person than his employer. In *Simms v. Burnette* (1908) 55 Fla. 702, 16 L.R.A. (N.S.) 889, 127 Am. St. Rep. 201, 46

So. 90, 15 Ann. Cas. 690, one employed as secretary for a wholesale liquor house, covenanted not to engage in a competing business after the termination of his employment. In violation of this covenant, he engaged in the liquor business. A bill of complaint to enjoin the violation of the covenant was held on demurrer insufficient to entitle the employer to an injunction. The court said that the mere knowledge acquired by the employee as to the employer's business, the persons to whom he sold, etc., was not sufficient ground for the issuance of an injunction, even though it was also alleged that the employee had copied the names of the dealers and the prices, and names of the customers of the employer from the latter's books.

It is to be noted that in the cases involving covenants not to accept similar employment with others during the term of the contract the employment has generally been of a distinctive character, requiring the personal services of the employee, as, for example, contracts by actors, singers, or other public performers. On the other hand, cases involving covenants not to engage in a competing business after the termination of the contract have generally related to employments in some business. In general, the purpose of covenants of the first kind is to secure the personal services of the employee, while, as to the second kind, the purpose is to protect the business of the employer. Apparently due to this difference in the obvious purpose of the contract or covenants, the rule has been very generally established that, to secure relief by enjoining a breach of the first class of covenants, it must appear that the services of the employee were of special, unique, or extraordinary character, while to enjoin the breach of a covenant of the second kind, it must appear that the service of the employee has been of a character giving him an opportunity to obtain acquaintance with his employer's customers, or knowledge of his employer's business, which, if he were to make use of them in a competing business, would result in irreparable injury to the employer. Although

there seems to be no direct authority to that effect, it would seem that if it appeared that a covenant not to engage in a similar business during the life of the contract was entered into in a contract of employment, where the service was such as to enable the employee to make improper use of knowledge he had gained of his employer's business or customers, to the irreparable damage of the employer, the breach of the covenant might be enjoined on this ground, although the services were not special, unique, or extraordinary. There seems to be an implication to this effect in *Chain Belt Co. v. Von Spreckelsen* (1903) 117 Wis. 106, 94 N. W. 78, *infra*, II. b.

II. Covenant not to accept service for anyone except employer during term of contract.

a. In general.

As a rule covenants not to accept employment with anyone but the employer during the term of the contract are not opposed to public policy, and are generally held to be valid. The validity of such covenants finds support in the holdings of the cases referred to under *infra*, b.

For example, in *Robinson & Co. v. Heuer* [1898] 2 Ch. (Eng.) 455, 67 L. J. Ch. N. S. 644, 79 L. T. N. S. 281, 47 Week. Rep. 34, it is held that a covenant by an employee not to engage in any other business or accept employment with any other person during the contract of employment is not unreasonable. And in *Knapp v. S. Jarvis Adams Co.* (1905) 70 C. C. A. 536, 135 Fed. 1008, an agreement by an employee of a manufacturing company, knowing or being in a position to know certain trade secrets, to the effect that if he should leave his employment before the expiration of the term of his contract, for the purpose of entering a competing business, the amount of the wages should be less than they would otherwise be, is held to be valid. To the same effect is *Bossert v. S. Jarvis Adams Co.* (1905) 70 C. C. A. 23, 135 Fed. 1015.

The enforcement of such contracts, however, presents a more serious question. It is clear that courts will

not undertake to specifically enforce a contract to render personal service. (But see obiter statement to the contrary in *De Rivaflinoli v. Corsetti* (1833) 4 Paige (N. Y.) 264, 25 Am. Dec. 532.) Where, however, the contract contains a negative covenant not to render service for anyone else but the employer, the court, under proper circumstances which will be hereinafter more specifically pointed out, will grant relief to the employer,—to the extent, at least, of restraining the breach of the covenant,—by enjoining the employee from rendering service elsewhere. These general rules are well settled; the serious question, as already suggested, is presented when it comes to the question of the enforcement of the covenant.

b. As affected by the character of the service to be performed.

As heretofore indicated, covenants by an employee not to accept employment for others during the term of the contract of employment are generally regarded as valid; since, however, something more than the mere breach of such a covenant is essential in order to entitle the employer to invoke injunctive relief—at least, according to the decisions,—it being necessary in this regard to show irreparable damage to the employer and an inadequate remedy at law, the employer must produce evidence affirmatively showing that the services of the employee are of such a peculiar, unique, or extraordinary character that a substitute cannot be secured. Where this showing is made, equity will grant injunctive relief and restrain the breach of the negative covenant not to work for another. Such relief was granted upon this ground in the following cases:

United States. — *Keith v. Kellermann* (1909) 169 Fed. 196 (an actress or performer); *Comstock v. Lopokowa* (1911) 190 Fed. 599 (actress, temporary injunction issued).

New Jersey.—*Tribune Asso. v. Simmonds* (1918) — N. J. Eq. —, 104 Atl. 386 (newspaper writer and war reporter).

New York.—*S. C. Posner Co. v. Jackson* (1918) 223 N. Y. 325, 119 N.

E. 573 (rule stated; designer of gowns and ladies' garments); *Pratt v. Montegriffo* (1890) 57 Hun, 587, 25 Abb. N. C. 334, 10 N. Y. Supp. 903 (singer); *Canary v. Russell* (1894) 9 Misc. 558, 30 N. Y. Supp. 122 (theatrical star); *Daly v. Smith* (1874) 6 Jones & S. 158, 49 How. Pr. 150 (actress); *Hayes v. Willio* (1871) 11 Abb. Pr. N. S. 167 (actress).

Pennsylvania.—*Philadelphia Ball Club v. Lajoie* (1902) 202 Pa. 210, 58 L.R.A. 227, 90 Am. St. Rep. 627, 51 Atl. 973 (baseball player).

England.—*Lumley v. Wagner* (1852) 1 De G. M. & G. 604, 42 Eng. Reprint, 687, 21 L. J. Ch. N. S. 898, 16 Jur. 871, 6 Eng. Rul. Cas. 652 (actress); *Lanner v. Palace Theatre* (1893) 9 Times L. R. 162 (ballet dancer); *Morris v. Colman* (1812) 18 Ves. Jr. 437, 34 Eng. Reprint, 382, 11 Revised Rep. 230 (agreement not to write dramatic parts for any other theater).

In *McCaull v. Braham* (1883) 21 Blatchf. 278, 16 Fed. 37, it is said that contracts for the personal services of actors or actresses, or authors, etc., are of special merit, and hence are personal and peculiar, and when they contain negative covenants, which are essential parts of the agreement, that the employee will not perform elsewhere, and the damages in case of violation are incapable of definite measurement, they are such as ought to be observed in good faith, and specific enforcement in equity will be given.

In *Tribune Asso. v. Simonds* (N. J.) supra, after pointing out that the employee occupied a unique position among war observers, and was one of the foremost and interesting writers upon that subject, the court said: "His great capacity lies in his simplicity of description. He paints his word pictures so plainly that the ordinary reader may visualize the movements of the armies and the entire local situation, and his broad and intimate knowledge of the subject insures confidence. In these respects his position among writers is unique. It seems to me it cannot be denied that by the loss of his talents, which were developed by the Tribune, and by the loss to it of his reputation, which that

paper advanced at great outlay of money, serious damage has resulted. The Tribune has retained another famous war observer of international reputation, a Mr. Beloc, to fill the position Mr. Simonds occupied, but this is no answer to the charge that it has suffered irreparable injury by the loss of Mr. Simonds's services. Nor is a demonstration that the Tribune's circulation did not decrease, nor the Herald's circulation increase, after he changed his operations from the one to the other, proof that the complainant has not suffered loss. That is not at all a fair test. The test is: How much greater would the Tribune's income have been if Mr. Simonds had remained with it? Upon the conclusion that I have reached that Mr. Simonds breached his covenant, the complainant could undoubtedly recover a judgment at law for a money damage, but what would that money damage be? How could it be established? How could it be ascertained with any fair degree of certainty? For such an injury the legal machinery furnishes no adequate means of measuring the damage, and in such an event equity steps in to prevent the damage from becoming irreparable. This case presents a situation entirely different from the ordinary breach of a contract, where the injured party may go into the open market and supply his wants, and where the difference in cost measures the damage. Here the services engaged were of a peculiar character, and for the loss of which the damages are unmeasurable at law, and hence the preventive remedy."

In *Pilkington v. Scott* (1846) 15 L. J. Exch. N. S. 329, 15 Mees. & W. 657, 153 Eng. Reprint, 1014, there was involved a contract to serve for a period of seven years as a glass maker. The employee covenanted that during the term of the contract he would not work for any other person at any other glass house, or place of business, without the consent of his employer. There were also provisions reserving the right to cease paying the employee, which affected the mutuality of the obligation of the contract. Upon the holding, however, that the contract

was supported by a sufficient consideration the court sustained the right of the employer to recover in a case action against a third person, damages for wrongfully harboring the employee.

But in *Cort v. Lassard* (1889) 18 Or. 221, 6 L.R.A. 653, 17 Am. St. Rep. 726, 22 Pac. 1054, the court refused to enjoin the defendant, an ordinary acrobat, from breaching his agreement not to enter the employment of others during the term of his contract, upon the ground that the employer could readily secure another acrobat to perform the services theretofore performed by the defendant.

To the same effect, as to a contract by an actor, is *Hamblin v. Dinneford* (1835) 2 Edw. Ch. (N. Y.) 529; and also *Sanquirico v. Benedetti* (1847) 1 Barb. (N. Y.) 315 (contract by person to sing at a certain theater).

In *W. J. Johnston Co. v. Hunt* (1892) 66 Hun, 504, 21 N. Y. Supp. 314, affirmed in (1894) 142 N. Y. 621, 37 N. E. 564, it appeared that a person, in accepting employment as an advertising solicitor or agent for a publishing company, covenanted not to devote any of his time or attention during business hours, or otherwise, in the interest or to the advantage of any other corporation, company, person, or firm, electrical or otherwise, without the written consent of the employer. In refusing to enjoin the breach of this covenant, the court pointed out that "by the evidence in this case it was shown that plaintiff, immediately after the defendant had broken his contract, substituted in his place another; and, while there is some slight evidence to show that the effect of the withdrawal of the defendant Hunt and the substitution of another resulted, for the time being, in some loss of advertising to the plaintiff's paper, yet it failed to establish what is required in cases of this kind, viz., that the injury was irreparable, not capable of being ascertained and redressed by a suitable action at law, and that Hunt possessed 'special, unique, or extraordinary qualifications' as an advertising agent or solicitor. There can be no doubt that his services were

valuable, because this is evidenced by the character of the agreements, the efforts put forth by plaintiff to retain his services, and the consideration provided in the agreement for his compensation. Regarding, however, the character of the work which he was to perform, and the other considerations adverted to, we do not think that there is presented a case which should demand the equitable interposition of the court."

So, in *Hammerstein v. Mann* (1910) 137 App. Div. 580, 122 N. Y. Supp. 276, it was held that the breach of a negative provision in a contract for the employment of an actor, not to perform for anyone other than the employer, should not be restrained, since it did not appear that the services were unique or extraordinary, although the contract contained a stipulation acknowledging that the vocal and dramatic ability of the employee was unique, and there was also a stipulation giving to the employer the right to obtain an injunction in case the employee attempted to breach the contract.

In *Kemble v. Kean* (1829) 6 Sim. 333, 58 Eng. Reprint, 619, the court refused to restrain the violation of a stipulation not to act in any other theater than that of the employer during the life of the contract. This was one of the early cases, having been decided in 1829, and the ground of the decision was that since the court could not enforce the positive part of the contract, it would not restrain by injunction the breach of the negative part. The court said that where the agreement is mainly and substantially of an active nature, and is so undetermined that it is impossible to have performance of it in this court, and it is only guarded by a negative provision, this court will leave the parties altogether to a court of law, and will not give partial relief by enforcing only a negative stipulation. In *Lumley v. Wagner* (1852) 1 De G. M. & G. 604, 42 Eng. Reprint, 687, 16 Jur. 871, 21 L. J. Ch. N. S. 902, 6 Eng. Rul. Cas. 652, Lord Chancellor Lord St. Leonards expressed the opinion that *Kemble v. Kean* was wrongly decided, and

could not be maintained. In its broad scope, at least, it has not been followed by the later cases.

In *Chain Belt Co. v. Von Spreckelsen* (1903) 117 Wis. 106, 94 N. W. 78, the court refused to enjoin a breach of a covenant to work for the plaintiff for a specific number of years, where the answer of the defendant denied the possession of any of the plaintiff's trade secrets, or his intention to make use of any knowledge gained in a confidential way while in the employ of the plaintiff, although he admitted that he was seeking employment with a competing concern.

So, in *Geo. A. Kessler & Co. v. Chapelle* (1902) 73 App. Div. 447, 77 N. Y. Supp. 285, the court refused to enjoin an employee, an ordinary champagne salesman, from breaking his agreement and engaging as a salesman with a competing firm. The decision was based on the ground that the defendant's services were not of such a special, unique, or extraordinary character that an injunction would issue. It did not appear that any other question was considered.

In *Burney v. Ryle* (1893) 91 Ga. 701, 17 S. E. 986, the court refused to enjoin an employee from working for others in violation of his contract of employment, it being apparent that the employer sought the remedy in order to secure the benefits of an affirmative covenant to serve him exclusively for a specified time, and it not appearing that the services performed were peculiar or extraordinary.

In *Rosenstein v. Zentz* (1912) 118 Md. 564, 44 L.R.A.(N.S.) 63, 85 Atl. 675, the court refused to restrain the breach of a negative covenant by a piano salesman, by which he agreed that he would not, during the term of the contract, enter into any contract or employment, or be in any way interested or connected, with anyone other than the employer, in a certain territory. The denial of injunctive relief is based upon the fact that the services of the employee did not appear to have been unique or extraordinary. It is pointed out that there is nothing in the bill showing that the duties to be performed by the employee under

the contract of employment were unique and extraordinary, requiring peculiar and marked ability to prosecute them successfully. The court said that the duties that the employee was to perform were those of a salesman, collector, and general utility man in a business conducted for the sale of pianos and other musical instruments. Nowhere in the bill is it alleged that the duties that he was to perform were of the class mentioned. The only other allegation characterizing his duties, or disclosing the character of the position to be filled by him under the contract, was that he had the particular run of a class of trade in the employ of such firm. "We cannot gather from this allegation that the services to be performed by him were either intellectual, or peculiar and individual in their character, or in any sense unique or extraordinary. They were but the duties of an ordinary piano and musical instrument salesman, whose services could be readily acquired, and where the damages, if any, suffered by plaintiffs, would not be irreparable, but could be readily ascertained and recovered by a suit at law. The mere fact that the defendant should thereafter profit by the experience and knowledge gathered from his service with the old firm could in no sense be regarded as a legal wrong committed by him. The experience and information which he possessed were in no sense acquired under the contract which he is alleged to have broken."

In *Columbia College v. Tunberg* (1911) 64 Wash. 19, 116 Pac. 280, it is conceded that the employee could not be enjoined from giving piano lessons in violation of a negative covenant with an institution for instruction in music, since the services were not of a special, unique, or extraordinary character, or such that they could not be supplied by a substitute. It was nevertheless held that, since the employee had agreed to give his best services to the promotion of the interests of the employer, he might be enjoined from soliciting the patrons of the employer, and from charging the employer with being guilty of dishonorable and disreputable methods.

In *Strobridge Lithographing Co. v. Crane* (1890) 58 Hun, 611, 85 N. Y. S. R. 478, 12 N. Y. Supp. 898, it is held that where the work of a photographer was in large part purely mechanical, and there was nothing extraordinary in his qualifications, injunction would not issue to restrain the violation of his contract not to work for another.

In *E. Jaccard Jewelry Co. v. O'Brien* (1897) 70 Ma. App. 432, the court refused to enjoin a traveling salesman from breaching his contract not to serve anyone else in the same business during the life of the contract, where the ground asserted for equitable relief was that the services of the employee were unique and extraordinary. The court found as a fact against this allegation, and the question of the protection of the good will of the employer was not presented.

III. Covenant not to engage in similar or competing business after the termination of the contract.

a. In general.

The validity of covenants by employees not to engage in a similar or competing business for a definite period of time, following the termination of the contract of employment in which the covenant is incorporated, may be sustained, although the contract is recognized to be in restraint of trade. The test generally applied in determining the validity of such a covenant is whether or not the restraint is necessary for the protection of the business or good will of the employer, and, if so, whether it imposes on the employee any greater restraint than is reasonably necessary to secure to the business of the employer, or the good will thereof, such protection, regard being had to the injury which may result to the public, by restraining the breach of the covenant, in the loss of the service and skill of the employee, and the danger of his becoming a charge upon the public.

It has been said that the restriction upon an employee may be so manifestly opposed to public policy as to outweigh any advantage the public has in the freedom of trade and commerce. *Knapp v. S. Jarvis Adams Co.* (1905)

70 C. C. A. 536, 185 Fed. 1008. And that the reasonableness of such contract as between the parties is the test only, in those cases where the public interest also is not involved. Even though a contract is fair and reasonable between the parties, yet if it is so injurious to the public interest that public policy requires that it should not be enforced, it will be held void. *Tarr v. Stearman* (1914) 264 Ill. 110, 105 N. E. 957.

The test to determine the validity of covenants of this character, entered into in contracts of employment, is thus stated in *Herbert Morris v. Saxelby* [1916] A. C. (Eng.) 688, Ann. Cas. 1916D, 537: "If the restraint affords to the person in whose favor it is imposed nothing more than reasonable protection against something which he is entitled to be protected against, then, as between the parties concerned, the restraint is to be held to be reasonable in reference to their respective interests; but, notwithstanding this, the restraint may still be held to be injurious to the public, and therefore void; the onus of establishing to the satisfaction of the judge who tries the case, facts and circumstances which show that the restraint is of the reasonable character above mentioned, resting upon the person alleging that it is of that character, and the onus of showing that, notwithstanding that it is of that character, it is nevertheless injurious to the public, and therefore void, resting in like manner on the party alleging the latter."

As between the parties, the question as to the reasonableness of such contracts depends on all the circumstances of the case; if the restraint is greater than can possibly be required for the protection of the employer, the covenant is unreasonable and void. *Badische Anilin Und Soda Fabrik v. Schott* [1892] 3 Ch. (Eng.) 447, 61 L. J. Ch. N. S. 698, 67 L. T. N. S. 281. Unless there are circumstances showing some reasonable ground for imposing the restriction on the employee, thereby restricting his liberty to do what he can for his own support, the restriction will not be binding upon him.

Sir W. C. Leng & Co. v. Andrews [1909] 1 Ch. (Eng.) 763, 78 L. J. Ch. N. S. 80, 100 L. T. N. S. 7, 25 Times L. R. 93. To determine the validity of a contract it must be considered with reference to the business of the employer, which it was the object of the negative provisions to protect. If the restriction imposed is not wider than is reasonably required for the protection of the employer, regard being had to his business, it will be sustained. Dubowski v. Goldstein [1896] 1 Q. B. (Eng.) 478, 65 L. J. Q. B. N. S. 397, 74 L. T. N. S. 180, 44 Week. Rep. 436. The general rule has been asserted that the employer has a right to bind an employee not to go into the employ of a competitor for a reasonable time after the employment terminates, within the territory where the employer keeps his market. Whether a covenant to this effect is reasonable and binding is a judicial question, which must be determined by the particular facts and circumstances. Carter v. Alling (1890) 43 Fed. 208.

But in Moorman v. Parkerson (1911) 127 La. 835, 54 So. 47, although the doctrine was not applied, it was asserted that the law will not permit a man to bind himself by contract not to pursue, at any time or at any place, a calling whereby he earns his livelihood, because, being so bound, he might become a charge upon the community.

Since contracts in restraint of trade are prima facie invalid, the employer who asserts the validity of such a covenant must assume the burden of showing that under the circumstances the restraint is reasonable in character, and only such as is actually necessary for the protection of his business, with regard to which the employee's services were enlisted. Herbert Morris v. Saxelby [1916] A. C. (Eng.) 688, 85 L. J. Ch. N. S. 210, 114 L. T. N. S. 618, 32 Times L. R. 297, 60 Sol. Jo. 305, Ann. Cas. 1916D, 537; Mason v. Provident Clothing & Supply Co. [1913] A. C. (Eng.) 724, 82 L. J. K. B. N. S. 1153, 109 L. T. N. S. 449, 29 Times L. R. 727, 57 Sol. Jo. 739, Ann. Cas. 1914A, 491; Hepworth Mfg. Co. v. Ryott (Eng.) post, 1484. If the em-

ployee asserts that, notwithstanding the fact that the restraint is no greater than the protection of the employer's business demands, it is nevertheless invalid because injurious to the public, the burden rests upon him to establish his claim in this regard. Herbert Morris v. Saxelby (Eng.) supra.

But in Knapp v. S. Jarvis Adams Co. (1905) 70 C. C. A. 536, 135 Fed. 1008, it is said that all such covenants do in some degree restrain trade. Whether the restraint is permissible by law depends upon the facts. The party who alleges that the restraint is such as to be in law obnoxious is bound to prove the facts which make it so. There can be no presumption, merely from the fact of restraint, that it is an unlawful one. In Grand Union Tea Co. v. Lewitsky (1908) 153 Mich. 244, 116 N. W. 1090, it is said that where a soliciting salesman violates his contract not to engage in a competing business after the termination of his employment, there is no adequate remedy at law. Injunctive relief, however, is denied the employer on the ground that negative provisions of this character are declared invalid by statute.

b. Reasonable restrictions; illustrative cases.

1. Contracts for employment in mercantile or manufacturing business.

It is clear that if the nature of the employment is such as will bring the employee in personal contact with the patrons or customers of the employer, or enable him to acquire valuable information as to the nature and character of the business and the names and requirements of the patrons or customers, enabling him, by engaging in a competing business in his own behalf, or for another, to take advantage of such knowledge or of acquaintance with the patrons or customers of his former employer, and thereby gain an unfair advantage, equity will interfere in behalf of the employer and restrain the breach of a negative covenant not to engage in such competing business, either for himself or for another, providing the covenant does not offend against the

rule that as to the time during which the restraint is imposed, or as to the territory it embraces, it shall be no greater than is reasonably necessary to secure the protection of the business or good will of the employer.

United States.—*Carter v. Alling* (1890) 43 Fed. 208 (agreement by traveling salesman not to enter employ of any competitor for three years after termination of his contract); *Harrison v. Glucose Sugar Ref. Co.* (1902) 58 L.R.A. 915, 52 C. C. A. 484, 116 Fed. 304 (agreement by traveling salesman not to enter employ of competitor for three years after termination of the contract, within a radius of 1,500 miles from the city of Chicago).

Illinois.—*Cahill v. Madison* (1901) 94 Ill. App. 216 (agreement by salesman and collector, for one year after the termination of the employment by discharge or otherwise, not to solicit orders from, or make deliveries of the kind of goods dealt in by the employer to, any of the latter's customers with whom the employee may have been brought in contact during the term of his employment); *Hoops Tea Co. v. Dorsey* (1901) 99 Ill. App. 181 (agreement by solicitor for tea company, for two years following termination of contract, not in any way to compete with the business, customers, or trade of the employer; contract also contained provision that employee should be liable to employer for damages caused by breach, upon bond required or in any other legal proceeding).

New Jersey.—*American Ice Co. v. Lynch* (1908) 74 N. J. Eq. 298, 70 Atl. 138 (agreement by driver of ice wagon not to engage in the ice business within the territory covered by his route, or within five squares therefrom, for one year after his employment should cease; also agreement as to liquidated damage for breach); *Owl Laundry Co. v. Banks* (1914) 83 N. J. Eq. 230, 89 Atl. 1055 (agreement by driver of laundry wagon not, for two years after termination of employment, to engage in wet wash business in a certain county).

New York.—*Davies v. Racer* (1893) 72 Hun, 43, 25 N. Y. Supp. 293 (agreement by clerk to receive, influence, and

procure goods from shippers in a certain city and elsewhere that for twelve months after termination of employment he would not engage in that city, or within 50 miles thereof, in a similar business); *A. L. & J. J. Reynolds Co. v. Dreyer* (1895) 12 Misc. 868, 33 N. Y. Supp. 649 (agreement by soliciting agent driving over established route supplying goods to grocers, not, within six months after the termination of his employment, directly or indirectly to engage in business in the city of New York, or within a radius of 10 miles from said city, in competition with his employer); *Hackett v. A. L. & J. J. Reynolds Co.* (1900) 30 Misc. 733, 62 N. Y. Supp. 1076 (agreement by salesman over a certain route not, within five months after termination of his employment, to engage in a similar business within 10 miles of such route); *Magnolia Metal Co. v. Price* (1901) 65 App. Div. 276, 72 N. Y. Supp. 792 (agreement by traveling salesman not, for himself or others, to engage in a competing business for a period of five years after the termination of his contract); *Mutual Milk & Cream Co. v. Heldt* (1907) 120 App. Div. 795, 105 N. Y. Supp. 661 (driver of milk wagon; agreement not, for thirty-six months from the date of leaving employer's employment, to solicit orders for, or serve milk or cream to, any of the employer's customers); *Witkop & H. Co. v. Boyce* (1908) 61 Misc. 126, 112 N. Y. Supp. 874, order affirmed in (1909) 131 App. Div. 922, 115 N. Y. Supp. 1150 (agreement by a solicitor or agent that after termination of employment he would not engage in a similar business, or furnish to others a list of his employer's customers, or information concerning his business); *Eastern New York Wet Wash Laundry Co. v. Abrahams* (1916) 173 App. Div. 788, 160 N. Y. Supp. 69 (covenant not directly or indirectly, as employee or otherwise, to engage in similar business within certain boroughs for a period of eighteen months following the termination of the contract of employment); *Clark Paper & Mfg. Co. v. Stenacker* (1917) 100 Misc. 173, 165 N. Y. Supp. 367 (covenant not to enter

of the customers of the employer, modified as to costs (1918) 183 App. Div. 923, 170 N. Y. Supp. 1073).

Ohio.—Smith v. Kernan (1880) 8 Ohio Dec. Reprint, 32 (traveling salesman).

Pennsylvania.—Erie County Milk Asso. v. Ripley (1901) 18 Pa. Super. Ct. 28 (covenant not, for one year after termination of contract, to engage in similar business in the city or in that vicinity); Philadelphia Towel Supply & Laundry Co. v. Weinstein (1914) 57 Pa. Super. Ct. 290.

Wisconsin.—Eureka Laundry Co. v. Long (1911) 146 Wis. 205, 35 L.R.A. (N.S.) 119, 131 N. W. 412 (covenant by driver of laundry wagon not, for two years following the termination of his contract, to solicit laundry from his employer's customers); Jewel Tea Co. v. Novak (1911) 146 Wis. 224, 131 N. W. 415 (covenant not, for twelve months after termination of contract, for himself or others, to solicit or take orders for, or deliver orders to, any of the customers of the employer).

England.—Underwood & Sons v. Barker [1899] 1 Ch. 300, 68 L. J. Ch. N. S. 201, 47 Week. Rep. 347, 15 Times L. R. 177, 80 L. T. N. S. 306 (agreement by clerk and foreman of wholesale concern selling goods in the United Kingdom and several foreign countries not, for twelve months following the termination of his employment, to engage in a competing business in the United Kingdom and such foreign countries); White v. Wilson (1907) 23 Times L. R. 469 (covenant by employee of brewing company not to engage in similar business or enter employment of person engaged in similar business for five years after termination of contract); Howard v. Danner (1901) 17 Times L. R. 548 (agreement by waiter in restaurant not, for a month after a near-by restaurant was opened, to enter into employ thereof); Mumford v. Gething (1859) 7 C. B. N. S. 305, 141 Eng. Reprint, 834, 29 L. J. C. P. N. S. 105, 1 L. T. N. S. 64, 8 Week. Rep. 187, 6 Jur. N. S. 428 (covenant to pay employer a penal amount if the employee, a traveling

employer); Rogers v. Macdonald (1853) 3 Ch. 346, 62 L. J. Ch. N. S. 100, 18 Week. Rep. 53, 67 L. T. N. S. 100 (agreement by traveling salesman not to engage in similar business for five years after termination of contract, in selling malted liquor, within 100 miles of the location of the employer); Parsons v. Cottrell (1856) 56 L. T. N. S. 839, 51 J. P. 100 (agreement not to engage in similar business within 50 miles of the place where employer was engaged); Rousillon (1880) L. R. 14 Q. B. 49, 49 L. J. Ch. N. S. 338, 42 Week. Rep. 679, 28 Week. Rep. 623, 4 L. T. N. S. 363 (agreement by traveling salesman to represent a similar business, not to establish himself or associate with any other person or firm in the same trade for ten years after termination of contract); Lammie v. Tube Co. v. Phillips (1880) L. T. N. S. 363 (agreement by employee of manufacturing company not to engage for himself or other person in business anywhere in the world for five years after termination of contract); Tallentire (1853) 1 El. & Bl. 391, 18 Week. Rep. 482, 22 L. J. Q. B. 114, 17 Jur. 114 (agreement by canvasser of books not to carry on a competing business in London, Manchester, or Liverpool); Cornwall v. Hawkins (1857) L. J. Ch. N. S. 435, 26 L. T. N. S. 20, 20 Week. Rep. 653 (employee of a company); Dubowski v. [1896] 1 Q. B. 478, 65 L. J. Q. B. 397, 74 L. T. N. S. 180, 44 Week. Rep. 436 (agreement by milkman not to directly or indirectly, in any way interfere with the business of the employer, following termination of the contract); Inns (1857) 24 Beav. 307, 26 L. J. Ch. N. S. 376, 26 L. J. Ch. N. S. 376 (agreement by person employed to deliver milk and take orders not to engage in similar business within 3 miles of place of employment); Haynes v. Doman [1899] 1 L. J. Ch. N. S. 419, 80 L. T. N. S. 15, 15 Times L. R. 354 (agreement

ployee of manufacturer not to accept employment from any other person in the same kind of business within 25 miles of the works of the employer); *Hood & Moore's Stores v. Jones* (1899) 81 L. T. N. S. 169 (agreement by employee of dealer in grain not to enter into similar business for himself or others within a radius of 2 miles from employer's place of business); *Lyddon v. Thomas* (1901) 17 Times L. R. 450 (agreement by employee of stock brokers not, for twenty months after termination of his contract, to carry on a similar business within 50 miles of place of employment); *Moenich v. Fenestre* (1892) 61 L. J. Ch. N. S. 737, 2 Reports, 102, 67 L. T. N. S. 602 (agreement by clerk for commission merchant not, for five years after termination of employment, to engage for himself or others in the sale of goods of the same kind as those sold by the employer); *National Provincial Bank v. Marshall* (1888) L. R. 40 Ch. Div. 112, 58 L. J. Ch. N. S. 229, 60 L. T. N. S. 341, 37 Week. Rep. 183, 53 J. P. 356 (covenant by bank clerk not, for two years after termination of his employment, to engage in same business within 2 miles of employer's place of business).

In *Knapp v. S. Jarvis Adams Co.* (1905) 70 C. C. A. 586, 185 Fed. 1008, the court said that, with respect to the territory to which the restriction should apply, the rule has always been that it might extend to the limits wherein the plaintiff's trade would be likely to go. The changes which have marked the course of judicial decision in modern times seem to consist in conforming the application of the rule to the constant development of the facilities of commerce and in the enlargement of the avenues of trade.

In *Lamson Pneumatic Tube Co. v. Phillips* (Eng.) supra, the court enjoined the breach of a covenant by the manager of a business not, for five years following the termination of his contract, to engage in a similar business in the United Kingdom or eastern hemisphere, although it appeared that as a matter of fact the employer's business was a comparatively small one, and did not extend over the

territory included in the covenant. It is pointed out by Vaughan Williams, L. J., however, that when the parties entered into the contract it was contemplated to establish a business extending throughout the eastern hemisphere.

In *Hood & Moore's Stores v. Jones* (Eng.) supra, the court enjoined a breach of a covenant by a salesman and manager not to engage in the same business within 2 miles of the place of business of his employer, although no limitation was imposed as to the period of the restraint. The court said that the absence of a limitation as to time would not render the covenant void if it was otherwise reasonable,—citing *Moenich v. Fenestre* (Eng.) supra.

In *Chesman v. Nainby* (1726) 2 Strange, 739, 93 Eng. Reprint, 819, it is held that an agreement, as a condition to being taught a trade, not to carry on the same business within $\frac{1}{2}$ mile of the instructor's residence or within $\frac{1}{2}$ miles of anywhere she or her executors or administrators might remove to, is divisible and may be enforced as to the first restriction.

Although there was no territorial limitation upon the restraint imposed in the covenant presented in *White v. Wilson* (1907) 23 Times L. R. (Eng.) 469, the validity of the covenant was sustained, it being by the manager of a brewing company not, for five years following the termination of his employment, to engage in a competing business. The court apparently regarded the term "competing business" as a territorial limitation.

In *McCall Co. v. Wright* (1910) 198 N. Y. 143, 31 L.R.A. (N.S.) 249, 91 N. E. 516, an injunction was issued to restrain the violation of a covenant not to engage in a similar business, entered into by an employee who occupied a superior and managerial position, in which he became possessed of the employer's trade secrets.

In *Sutherland v. Connecticut Mut. L. Ins. Co.* (1914) 87 Misc. 383, 149 N. Y. Supp. 1008, the court upholds the validity of an agreement in an insurance agency contract that after the termination of the contract the agent

will not engage in a similar business for another, and that if he does he will lose all right to renewal commissions secured him by the agency contract.

2. Contracts for employment in professional capacity.

Covenants not to engage in a competing business, ancillary to a contract for the employment of one in his profession to aid or assist the employer in the practice of that profession, are not invalid as being in restraint of trade, if the restraint imposed is only such as is reasonably necessary for the protection of the practice of the employer; and a breach of the covenant will be enjoined.

Connecticut.—*Styles v. Lyon* (1913) 87 Conn. 28, 86 Atl. 564 (agreement by physician not to practise his profession in a distant city where he was employed as assistant).

Colorado.—*Freudenthal v. Espey* (1909) 45 Colo. 488, 26 L.R.A.(N.S.) 961, 102 Pac. 280 (agreement by physician not to practise his profession in the county where he was employed for five years after the termination of his employment).

Rhode Island.—*Tillinghast v. Boothby* (1897) 20 R. I. 59, 37 Atl. 344 (agreement by a dentist not to engage in the practice of that profession in the county where he was employed).

Tennessee.—*Turner v. Abbott* (1906) 116 Tenn. 718, 6 L.R.A.(N.S.) 892, 94 S. W. 64, 8 Ann. Cas. 150 (agreement by dentist not to engage in that occupation in the town where he was employed).

Texas.—*Patterson v. Crabb* (1899) — Tex. Civ. App. —, 51 S. W. 870 (agreement by teacher in a private school not to engage in competing business in the city where the school was located, after the termination of his employment).

England.—*Howard v. Woodward* (1864) 10 Jur. N. S. 1123, 5 New Reports, 8, 34 L. J. Ch. N. S. 47, 11 L. T. N. S. 414, 13 Week. Rep. 132 (agreement by clerk of solicitor not to practise profession within 50 miles from place of employment); *Mallan v. May* (1843) 11 Mees. & W. 663, 152 Eng. Reprint, 971, 12 L. J. Exch. N. S. 376,

1521, 600, 6 Eng. Rep. 633 (agreement by dentist not to carry on the same business in London or any place in England or Scotland; action to recover on bond); *Fox v. Scard* (1863) 33 Beav. 327, 55 Eng. Reprint, 394 (agreement by surgeon's assistant not to practise profession during the employer's life, or within ten years after his death, at or within 12 miles of the town of employment); *Sainter v. Ferguson* (1849) 1 Macn. & G. 286, 41 Eng. Reprint, 1275, 1 Hall & Tw. 383, 19 L. J. Ch. N. S. 170, 14 Jur. 255 (agreement by surgeon and apothecary employed as assistant, not to engage in a competing business within a designated territory, under penalty of £500); *Davis v. Mason* (1793) 5 T. R. 118, 101 Eng. Reprint, 69, 2 Revised Rep. 562 (agreement by surgeon's assistant not to practise his profession within 10 miles of the town where employed, for ten years after the termination of employment; action for damages for breach of contract); *Smith v. Hawthorn* (1897) 76 L. T. N. S. 717 (agreement by person employed as assistant master of schools not to carry on school within a radius of 9 miles from location of school, for the period of twelve years following termination of employment); *Edmundson v. Render* (1904) 90 L. T. N. S. 814 (agreement by solicitor's clerk not to practise his profession within 15 miles of town where employed; action for damages for breach of covenant); *Everton v. Longmore* (1899) 15 Times L. R. 356 (agreement by physician not to practise profession at place of employment or within 5 miles thereof); *Hastings v. Whitley* (1848) 2 Exch. 611, 154 Eng. Reprint, 635 (agreement by surgeon not to practise profession at or within 10 miles of such town; action for penalty of bond); *Dendy v. Henderson* (1855) 11 Exch. 194, 156 Eng. Reprint, 800, 24 L. J. Exch. N. S. 324 (agreement by physician's clerk not to practise his profession for twenty-one months at or within 21 miles of the town where employed); *May v. O'Neill* (1875) 44 L. J. Ch. N. S. 660 (agreement by solicitor's clerk not to practise profession within city of London or counties of Middlesex

or Edgerton); *Palmer v. Mallet* (1887) L. R. 36 Ch. Div. 411, 57 L. J. Ch. N. S. 226, 58 L. T. N. S. 64, 36 Week. Rep. 460 (agreement by surgeon not to set up or carry on the business of surgeon at place of employment, or within 10 miles thereof); *Giles v. Hart* (1859) 5 Jur. N. S. 1381, 1 L. T. N. S. 154, 8 Week. Rep. 74 (agreement by surgeon's assistant not to practise within town or within radius of 5 miles thereof); *Gravelly v. Barnard* (1874) L. R. 18 Eq. 518, 43 L. J. Ch. N. S. 659, 30 L. T. N. S. 863 (agreement not to practise profession of surgeon, apothecary, or midwife in place of employment, or within 10 miles thereof).

In *Ballachulish Slate Quarries Co. v. Grant* (1904) 5 F. (Scot. Ct. Sess.) 1105, 3 *Butterworths' Dig.* (1898-1907) Col. 836, an agreement by a physician, employed by the owners of a quarry professionally to attend their employees, that upon the termination of his employment he would not practise in that district, was held reasonable and valid.

In *Lewis v. Durnford* (1907) 24 *Times L. R. (Eng.)* 64, the court enjoined the breach by a clerk to a solicitor, of his covenant not to act for any person who had, within the previous five years, been a client of such solicitor.

c. Unreasonable restrictions as to period of restraint; illustrative cases.

It has been held that a contract restraining an employee from exercising his skill and knowledge along certain lines of invention and manufacture, without any limitations, is repugnant to public policy and void. *Albright v. Teas* (1883) 37 N. J. Eq. 171.

Upon this point the case of *Konski v. Peet* [1915] 1 Ch. (Eng.) 530, [1915] W. N. 98, 84 L. J. Ch. N. S. 513, 112 L. T. N. S. 1107, 59 Sol. Jo. 383, is of interest. Here the employee of a retail establishment covenanted not to solicit customers of the latter after the termination of the contract of employment. This covenant was held to be invalid, since it was construed to include all customers of the covenantee whether at the time the agreement was entered into, during

the term of the employment, or subsequently thereto.

d. Unreasonable restrictions as to territory.

As heretofore stated, contracts by which an employee agrees not to engage in a competing business after the termination of the contract of employment are in restraint of trade and invalid, unless the restraint is so limited as to be no greater than actually necessary for the protection of the business of the employer, or if the restraint imposed is unreasonable, in view of the interest of the public in securing the benefit of the employee's labor, skill, knowledge, etc. And even though the covenant does not offend in these regards, the courts may refuse to restrain its breach, if under the circumstances it is harsh and oppressive upon the employee, and there is no corresponding or counterbalancing advantage accruing to the employer by restraining the breach.

In the following cases this doctrine was applied to the extent, at least, of refusing to enjoin a breach by an employee of a negative covenant not to engage, for himself or another, in a similar business, after termination of the contract of employment, the refusal being based either on the ground that the contract was harsh and oppressive under the circumstances, or that the restraint was more extensive than the protection of the business of the employer required. And see *supra*, III. c, and III. d.

Alabama.—*Iron Age Pub. Co. v. Western U. Teleg. Co.* (1887) 83 Ala. 498, 3 Am. St. Rep. 758, 3 So. 449.

Connecticut.—*Wm. Rogers Mfg. Co. v. Rogers* (1890) 58 Conn. 356, 7 L.R.A. 779, 18 Am. St. Rep. 278, 20 Atl. 467.

Florida.—*Simms v. Burnette* (1908) 55 Fla. 702, 16 L.R.A. (N.S.) 389, 127 Am. St. Rep. 201, 46 So. 90, 15 Ann. Cas. 690.

Georgia.—*Hammond v. Georgian Co.* (1909) 133 Ga. 1, 65 S. E. 124.

Illinois.—*Midland Press v. F. E. Compton & Co.* (1917) 204 Ill. App. 216.

Michigan.—*Osius v. Hinchman* (1908) 150 Mich. 603, 16 L.R.A. (N.S.) 393, 114 N. W. 402.

Missouri.—*Mallinckrodt Chemical Works v. Nemnich* (1902) 169 Mo. 389, 69 S. W. 355; *E. Jaccard Jewelry Co. v. O'Brien* (1897) 70 Mo. App. 432.

New Jersey.—*Mandeville v. Harman* (1886) 42 N. J. Eq. 185, 7 Atl. 37; *Steinmeyer v. Phenix Cheese Co.* (1917) 91 N. J. L. 351, 102 Atl. 150.

New York.—*Oppenheimer v. Hirsch* (1896) 5 App. Div. 232, 38 N. Y. Supp. 311; *Tolman v. Mulcahy* (1907) 119 App. Div. 42, 103 N. Y. Supp. 936; *Hammerstein v. Mann* (1910) 137 App. Div. 580, 122 N. Y. Supp. 276; *Magid v. Tannenbaum* (1914) 164 App. Div. 142, 149 N. Y. Supp. 445; *Strobridge Lithographic Co. v. Crane* (1890) 58 Hun, 611, 35 N. Y. S. R. 473, 12 N. Y. Supp. 898; *Gilbert v. Wilmer* (1918) 102 Misc. 388, 168 N. Y. Supp. 1043; *De Pol v. Sohlike* (1867) 7 Robt. 280; *Bingham v. Maigne* (1885) 20 Jones & S. 90.

Pennsylvania.—*Keeler v. Taylor* (1866) 53 Pa. 467, 91 Am. Dec. 221; *Iron City Laundry Co. v. Leyton* (1913) 55 Pa. Super. Ct. 93; *Seward v. Shields* (1900) 9 Pa. Dist. R. 583.

Rhode Island.—*Herreshoff v. Boutineau* (1890) 17 R. I. 3, 8 L.R.A. 469, 33 Am. St. Rep. 850, 19 Atl. 712.

South Carolina.—*Carroll v. Giles* (1889) 30 S. C. 412, 4 L.R.A. 154, 9 S. E. 422.

Wisconsin.—*Chain Belt Co. v. Von Spreckelsen* (1903) 117 Wis. 106, 94 N. W. 78.

England.—*Horner v. Graves* (1831) 7 Bing. 735, 131 Eng. Reprint, 284, 5 Moore & P. 768, 9 L. J. C. P. 192; *Allsopp v. Wheatcroft* (1872) L. R. 15 Eq. 59, 42 L. J. Ch. N. S. 12, 27 L. T. N. S. 372, 21 Week. Rep. 162; *Ward v. Byrne* (1839) 5 Mees. & W. 548, 151 Eng. Reprint, 232, 9 L. J. Exch. N. S. 14, 3 Jur. 1175; *Henry Leetham & Sons v. White* (1907) 23 Times L. R. 254, [1907] 1 Ch. 322, 76 L. J. Ch. N. S. 304, 96 L. T. N. S. 348; *Ehrmann v. Bartholomew* [1898] 1 Ch. 671, 78 L. T. N. S. 646, 67 L. J. Ch. N. S. 319, 14 Times L. R. 364, 46 Week. Rep. 509; *Beetham v. Fraser* (1905) 21 Times L. R. 8; *Saintier v. Ferguson* (1849) 1 Hall. & Tw. 383, 47 Eng. Reprint, 1460, 1 Macn. & G. 286, 41 Eng. Reprint, 1275, 19 L. J. Ch. N. S. 170, 14

Jur. 255; *Capes v. Hutton* (1826) 2 Russ. Ch. 357, 38 Eng. Reprint, 370, 26 Revised Rep. 102; *Perls v. Saalfeld* [1892] 2 Ch. 149, 61 L. J. Ch. N. S. 409, 66 L. T. N. S. 666, 40 Week. Rep. 548.

Where the obvious purpose of the covenant is to make it penal rather than protective, with the object thereby to paralyze the earning capabilities of the employee if and when he leaves the covenantee's services, and not to provide a reasonable protection to the latter's business, the contract is invalid. *Hepworth Mfg. Co. v. Ryott* (Eng.) post, 1484.

Where the territory comprised within the scope of a negative stipulation is unnecessarily extensive, the agreement is void. For example, an agreement by a traveling salesman not, directly or indirectly, to sell or be concerned in a sale, either on his own account or for others, in a certain line of goods, being unlimited as to time or territory, is unreasonable. *Allsopp v. Wheatcroft* (1872) L. R. 15 Eq. (Eng.) 59, 42 L. J. Ch. N. S. 12, 27 L. T. N. S. 372, 21 Week. Rep. 162.

In *Herreshoff v. Boutineau* (1890) 17 R. I. 3, 8 L.R.A. 469, 33 Am. St. Rep. 850, 19 Atl. 712, the general rule was recognized that contracts of this character, although in restraint of trade, will be enforced if the restraint is reasonable in view of the business it is sought to protect. It is, however, held in this case that where the restraint upon the employee not to exercise his trade or profession within a state was greater than the business of the employer required, the employer being a school or college, and the employee a teacher, the covenant was invalid and its breach would not be restrained. In considering the validity of such agreements, the court said: "In the days of the early English cases, one who could not work at his trade could hardly work at all. The avenues to occupation were not as open nor as numerous as now, and one rarely got out of the path he started in. Contracting not to follow one's trade was about the same as contracting to be idle, or to go abroad for employment. But this is not so now. It

is an everyday occurrence to see men busy and prosperous in other pursuits than those to which they were trained and used, as well as to see them change places and occupations without depriving themselves of the means of livelihood, or the state of the benefit of their industry. It will, therefore, be absurd, in the light of this common experience, now to say that a man shuts himself up to idleness or to expatriation, and thus injures the public, when he agrees for a sufficient consideration not to follow some one calling within the limits of a particular state. There is no expatriation in moving from one state to another; and from such removals a state will be likely to gain as many as it would lose. We do not think public policy demands an agreement of the kind in question to be declared void, and we do not think such a rule is established upon authority. . . . Courts should be slow to set aside as unreasonable a restriction which has formed a part of the consideration of a contract, yet when it is a restriction upon individual and common rights, which only oppresses one party without benefiting the other, all courts agree that it should not be enforced. In determining the reasonableness of a contract, regard must be had to the nature and circumstances of the transaction. . . . In the present case, we think the restriction is unreasonable. Not, as a rule of law, because it extends throughout the state, but because it extends beyond any apparently necessary protection which the complainant might reasonably require, and thus, without benefiting him, it oppresses the respondent, and deprives people in other places of the chance which might be offered them, to learn the French and German languages of the respondent."

In *Mandeville v. Harman* (1886) 42 N. J. Eq. 185, 7 Atl. 37, it is held that a covenant by a physician ancillary to a contract for his employment in his profession, not to engage in a competing practice in the city where employed, being a city of some size, is unreasonable and void. The court said that a contract which precluded

a person from the right to employ his talent, industry, and capital in any useful undertaking is void, without reference to the character of the restraint, whether general or special. The presumption is that contracts of this character are void, and it is only by showing the reasonableness of the contract that the presumption is overcome. The rule is not that a limited restraint is good, but that it may be good. It is valid when the restraint is reasonable, and a restraint is reasonable when it imposes no shackles upon one party which are not beneficial to the other.

In *Steinmeyer v. Phenix Cheese Co.* (1917) 91 N. J. L. 351, 102 Atl. 150, it is held that a contract by a traveling salesman for a cheese company that, after the termination of his employment, he would not engage in the same business as servant or employee for others, is so broad as to violate public policy, and hence is invalid. So, in *Midland Press v. F. E. Compton & Co.* (1917) 204 Ill. App. 216, it is held that a restrictive covenant in a contract for personal services, which was without limitation as to territory, is void as against public policy. And in *Kinney v. Scarbrough Co.* (1912) 138 Ga. 77, 40 L.R.A.(N.S.) 473, 74 S. E. 772, an agreement by a salesman and local manager of a foreign corporation, in effect, not directly or indirectly, in any capacity, whether upon his own account or for others, to engage in any business of a character similar to that conducted by his employer, was held invalid because contrary to public policy, since it was without territorial limitation.

In *Mallinckrodt Chemical Works v. Nemnich* (1902) 169 Mo. 389, 69 S. W. 355, a petition for an injunction to restrain the violation of a covenant by an employee not, for six years, to engage in a competing business in the United States, was demurred to, and the court held that the demurrer was well taken, on the ground that the allegations of the pleader were conclusions rather than statements of fact. It was, however, said that this covenant was not such a one as a court of equity will specifically enforce by

injunctive process restraining the employee from violating its terms and provisions. The court refers to the opinion of Bland, P. J., in the court of appeals, with approval, upon this point. See (1899) 83 Mo. App. 6.

In *Tarr v. Stearman* (1914) 264 Ill. 110, 105 N. E. 957, the contract, while purporting to be for the employment of a person to operate a dental office, also provided for the sale to him of a dental outfit used in the business, the property to be transferred when the profits of the business turned over to the employer had reached, at least, a certain sum within a designated time. There was also a provision for the forfeiture of the contract by the employee, and a provision, in effect, that upon the termination of the contract he would not practise dentistry in the city where the office was located, or within 25 miles thereof. After pointing out that the employer was not a licensed dentist and could not himself practise that profession in that state, it is held that according to the literal terms of the contract, even though the employer performed the agreement according to its terms, and the business was transferred to the employee, he could not continue the practice of his profession in that state, and hence the contract was unreasonable and void.

In *Oppenheimer v. Hirsch* (1896) 5 App. Div. 232, 38 N. Y. Supp. 311, the court refused to enjoin the breach by a traveling salesman engaged in one state, of a covenant not, for three years after the termination of his contract, to engage in the selling of similar goods in sixteen different states and territories, and the Dominion of Canada. By the terms of the contract the employer reserved the right to discharge the employee within a week after he entered his services. Under the circumstances the covenant was held unreasonable, and hence unenforceable in equity.

In *Bingham v. Maigne* (1885) 20 Jones & S. (N. Y.) 90, it was held that an agreement by an employee of a printing company not to engage in a similar business within 25 miles of the city of New York was unreasonable and void.

In *Allen Mfg. Co. v. Murphy* (1911) 23 Ont. L. Rep. 467, it is held that if in scope the restriction has the effect of compelling the employee either to quit the only occupation to which he is at all adapted, or leave the Dominion of Canada, it is invalid in toto, because not reasonably necessary for the protection of his employer's business. In this case the employer was a manufacturer and dealer in apparel and pressed goods of all kinds, and machinery, raw materials, etc., necessary to such manufacture and to carry on a general laundry business. Such business, however, did not extend to all parts of the Dominion of Canada.

In *Ehrmann v. Bartholomew* [1898] 1 Ch. (Eng.) 671, 78 L. T. N. S. 646, 67 L. J. Ch. N. S. 319, 14 Times L. R. 364, 46 Week. Rep. 509, stipulations were held to be unreasonable and void, where they required the employee to refrain from directly or indirectly engaging or employing himself in any business, or conducting any business with any other person or persons than his employer, for the period of ten years following the termination of his employment.

In *Ward v. Byrne* (1839) 5 Mees. & W. 548, 151 Eng. Reprint, 232, 9 L. J. Exch. N. S. 14, 3 Jur. 1175, it is held that an agreement is invalid where made by an employee of a coal dealer, by the terms of which he agreed not to engage in the same business for nine months after the termination of his employment, it being unlimited as to territory.

In *Beetham v. Fraser* (1905) 21 Times L. R. (Eng.) 8, the court refused to restrain the violation of a negative covenant by an employee, not to engage in a competing business in Wurbidge or the city of London, on the ground that it was unreasonably restrictive, and was not severable.

In *Dowden & Pook v. Pook* [1904] 1 K. B. (Eng.) 45, 73 L. J. K. B. N. S. 38, 89 L. T. N. S. 688, 20 Times L. R. 39, 52 Week. Rep. 97, an agreement by a department manager of a manufacturing concern, in effect, not, for five years after the termination of his employment, in any capacity, directly or indirectly, to carry on or be engaged

in a similar business, or permit or suffer his name to be used in connection with such a business, is held to be unreasonable and void, since in scope it embraces more territory than reasonably necessary for the protection of the employer.

In *Pearks v. Cullen* (1912) 28 Times L. R. (Eng.) 371, the court refused to restrain the breach of a covenant by a shop assistant not, for two years after termination of his contract of employment, to engage in a similar business within 2 miles of the place of employment, or to solicit from any of the customers of his employer. This covenant was held not reasonably necessary for the protection of the employer's business, it appearing that clauses of this character were unusual, and not necessary for protection against shop assistants.

In *Ehrman v. Bartholomew* [1898] 1 Ch. (Eng.) 671, 78 L. T. N. S. 646, 67 L. J. Ch. N. S. 319, 14 Times L. R. 364, 46 Week. Rep. 509, it is held that a covenant by a traveling salesman to devote the whole of his attention and time to the business of the employer, and not, directly or indirectly, to engage or employ himself in any other business, or transact any business with any other person or persons than the employer, for a term of ten years, was unreasonable and not enforceable.

So, in *Clarke, S. & Co. v. Solomon* (1920) 26 Times L. R. (Eng.) 759, a covenant was held unreasonable and hence unenforceable by injunctive process, where by its terms a commercial traveler covenanted not to carry on a similar business, either in his own behalf or for others, within 5 miles from any point where the covenantee traded, it appearing that the restriction included territory with which the covenantor had no connection during the life of the contract.

In *Ward v. Byrne* (1839) 5 Mees. & W. 548, 151 Eng. Reprint, 232, 9 L. J. Exch. N. S. 14, 3 Jur. 1175, it is held that an agreement not to serve in a competing business in any capacity for a period of nine months, being without limit territorially, is unreasonably restrictive and void.

In *Morris v. Ryle* (1910) 103 L. T. N. S. (Eng.) 545, 26 Times L. R. 678, 54 Sol. Jo. 748, the court refused to restrain a breach of a covenant by a traveling salesman for the sale of hops not, for five years following the termination of the contract, to solicit from the customers he called upon during his employment, for the sale of any other goods or commodity whatever. This agreement was held unreasonable and void, and not enforceable as against the employee, who was soliciting for goods other than hops.

In *Henry Leetham & Sons v. White* (1907) 23 Times L. R. (Eng.) 254, [1907] 1 Ch. 322, 76 L. J. Ch. N. S. 304, 96 L. T. N. S. 348, an agreement by a traveling salesman for a flour mills company not to enter into the employment of any other flour mill, or directly engage in the selling or dealing in flour or other goods dealt in or manufactured by his employer and subsidiary companies, for the period of five years following the termination of his employment, was held to be unreasonable and void.

In *Herbert Morris v. Saxelby* [1916] 1 A. C. (Eng.) 688, 85 L. J. Ch. N. S. 210, 114 L. T. N. S. 618, 32 Times L. R. 297, 60 Sol. Jo. 305, Ann. Cas. 1916D, 537, it is held that a covenant by a person employed as a draftsman and engineer for a company engaged in the manufacture of certain kinds of machinery that for seven years following the termination of his contract he would not engage, either for himself or for others, in a similar business in the United Kingdom or Ireland, is unreasonable and void.

In *Perls v. Saalfeld* [1892] 2 Ch. (Eng.) 149, 61 L. J. Ch. N. S. 409, 66 L. T. N. S. 666, 40 Week. Rep. 548, the court refused to enjoin the breach of an agreement by an employee not, for three years after the termination of his employment, to accept another situation or go into business for himself within 15 miles of the city where he was employed, without the consent of the employer, who agreed to consent thereto if the business in which the employee engaged as employee or in his own behalf was not with reference to the same class of goods as those

sold by the employer. The agreement was held broader than necessary for the protection of the business of the employer, and hence invalid.

In *Sir W. C. Leng & Co. v. Andrews* [1909] 1 Ch. (Eng.) 763, 78 L. J. Ch. N. S. 80, 100 L. T. N. S. 7, 25 Times L. R. 93, the court refused to restrain a breach of a covenant by the reporter of a newspaper that, after the termination of his employment, he would not engage with any other paper within a radius of 20 miles from the place of publication. This decision was based on the ground that such a covenant was not necessary for the protection of the employer's business, it appearing that such covenants were not necessary or even usual in such employment.

IV. Effect of want of equity in contract.

a. In general.

It has been held that, in order to be entitled to invoke equitable aid to enjoin the breach of a negative covenant by an employee not to engage in a competing business, it must be alleged and proved that the employer has performed the contract on his part, and is ready and able to continue to perform. It is fatal to injunctive relief if it appears that the ability of the employer to continue performance is destroyed by his insolvency, bankruptcy, etc. *Measures Bros. v. Measures* [1910] 2 Ch. (Eng.) 248, 102 L. T. N. S. 794, 26 Times L. R. 488, 54 Sol. Jo. 521. Likewise, the rescission of a contract of employment by an employer relieves the employee of the obligation to refrain from breaching a negative covenant not to engage in a competing business, since this latter covenant is dependent upon the continued existence of the contract as a whole. *General Bill-Posting Co. v. Atkinson* [1909] A. C. (Eng.) 118, 1 B. R. C. 497, 78 L. J. Ch. N. S. 77, 99 L. T. N. S. 943, 25 Times L. R. 178. In *Lawrence & G. Dental Co. v. Gilroy* (1893) 50 Ill. App. 310, it was held that an injunction would not issue to restrain the breach of a covenant not to engage in a competing business, made ancillary to a contract of employment, where the employee termi-

nated the contract of employment on account of the failure of the employer to pay him his salary when due. And in *Rice v. D'Arville* (1895) 162 Mass. 559, 39 N. E. 180, it is held that the employer of an opera singer is not entitled to enjoin the breach by her of a covenant not to render services except at places under his management, where he has failed to pay her for services rendered under prior engagements.

But in *Magnolia Metal Co. v. Price* (1901) 65 App. Div. 276, 72 N. Y. Supp. 792, in restraining the breach by a traveling salesman of a covenant not, within five years after his employment terminated, to engage for himself or others in a similar business, the court said: "The position that the defendant held under the contract was a confidential one, and it was proved that he received from his employer business information which was of great value to the plaintiff in carrying on its business; that he received from the plaintiff a complete knowledge of all its customers, and analyses of the various metals that were used in the composition of the metal manufactured by the plaintiff, copies of contracts with large customers of the plaintiff, and a list of those in the trade who used what was known as 'Babbitt metal,' which metal was used for the same purpose as that manufactured by the plaintiff; and he was made acquainted with the business methods of the plaintiff. When a person occupied such a position, which enabled him to obtain such information of the plaintiff's business, it was quite essential for the plaintiff's protection that when such an employee left the plaintiff's employ he should not accept a position in which he could use the information thus obtained to injure the plaintiff's business. . . . The object of this covenant was to prevent the defendant, after he retired from the plaintiff's employ, from using the knowledge which he had acquired while in such employ, in any business that was competing with it; and whether the defendant's relation with the plaintiff terminated by the expiration of the time fixed in the contract

by reason of a breach thereof by the defendant, under the provisions of the contract authorizing, under certain conditions, the termination of the defendant's employment by the company, or by mutual consent of the parties, the covenant relating to the conduct of the defendant, after his employment by the plaintiff had ceased, continued binding upon him."

In *Stiff v. Cassell* (1856) 2 Jur. N. S. (Eng.) 348, it is held that an employer of an author to write exclusively for a magazine for a year is not debarred from securing an injunction restraining the author from writing for others in violation of this stipulation, by the mere fact that the employer, upon the abandonment of the contract by the author, procured the services of another writer to write up the work properly.

b. Sufficiency of consideration.

Where the consideration for an agreement not to practise as dentist within a distance of 200 miles from a certain place is merely the covenantor's employment as assistant for a term of years, the contract to be terminable on three months' notice by the employer, the covenant is unreasonable and in restraint of trade, being broader than necessary for the employer's protection, and the consideration inadequate. *Horner v. Graves* (1831) 7 Bing. 735, 131 Eng. Reprint, 284, 5 Moore & P. 768, 9 L. J. C. P. 192.

In *Cahill v. Madison* (1901) 94 Ill. App. 216, in enjoining the breach of a covenant by an employee not, within one year after the termination of his employment, to solicit orders or make deliveries of teas, coffees, or other goods, wares, or merchandise carried by his employer, either for himself or for any other person or corporation, the court said: "Taking all the provisions, terms, and conditions of the contract into consideration, and the nature of appellee's employment, the time that he actually worked for appellant, and our common experience with reference to compensation paid to salesmen in ordinary commercial business, we think it cannot be said that the contract is in any way unfair, unreasonable, or oppressive to

appellee; nor does it give to appellant any undue or unconscionable advantage over appellee. The employment is in its nature fiduciary and confidential, and it would seem to us a gross breach of confidence and fair dealing, even without any agreement, for appellee, after more than two years of service for appellant, receiving from him his regular wages, and having acquired an intimate knowledge of the nature and character of appellant's business, to have quit appellant's employ and made a deliberate attempt to deprive appellant of the trade of the very customers to get whom he had been paid for his services by appellant. To prevent any such result, appellant, as a part of the consideration of employment of appellee, might very properly and reasonably have required the very undertaking of appellee contained in this contract. . . . This is not a question of enforcing a restrictive covenant relating to personal services of appellee, but of his betraying a trust and confidence reposed in him by his employer, by attempting to take away, for his own benefit and in direct violation of his express contract, his employer's customers, knowledge of whom he had acquired in the course of the performance of his duty as an employee."

In *Seward v. Shields* (1900) 9 Pa. Dist. R. 583, an agreement by the driver of a laundry wagon that, after leaving his employer, he would not serve any customer whom he served while in such employment, was held not to be supported by a sufficient consideration to entitle it to be enforced in equity by restraining the breach thereof.

In *Carroll v. Giles* (1889) 30 S. C. 412, 4 L.R.A. 154, 9 S. E. 422, the court refused to enjoin the breach of an agreement not to engage in a competing barber business in a small place, on the ground that the agreement was not based upon an adequate consideration, the only consideration being a partnership arrangement between two persons engaged in the barber business in a certain place before an indefinite period of time. The doctrine is here asserted that in order to en-

title the covenantee to enjoin the breach of a covenant of this character, the consideration for the covenant must be sufficiently adequate to call for the exercise of equitable jurisdiction to restrain its breach.

In *Tolman v. Mulcahy* (1907) 119 App. Div. 42, 103 N. Y. Supp. 936, it appeared that the employee had agreed not to accept similar employment elsewhere, and that he would not disclose any secret of the employer's business which he learned during his employment. In the application by the employer for an injunction to restrain a breach of the covenant, the defense was that the employee had to terminate the contract of employment, and take employment with a rival concern, because the employer did not and would not pay him sufficient wages, so that he could live upon the same. Under these circumstances a temporary injunction was granted, enjoining the employee from disclosing the trade secrets of the employer, but the court refused to enjoin the employee from taking service with a rival concern.

c. Lack of mutuality of obligation.

It has been held that an injunction will not issue to restrain the breach of a negative provision not to engage in a competing business, where the covenant is ancillary to a contract of employment which is for an indefinite period of time, although the employee's services involved the exercise of special skill, judgment, and discretion, since the contract is lacking in mutuality. *Iron Age Pub. Co. v. Western U. Teleg. Co.* (1887) 83 Ala. 498, 3 Am. St. Rep. 758, 3 So. 449. So, where a contract for the services of an actress required the employer to pay a certain amount during the regular theatrical season for her services, but did not require the employer to employ the actress for any specific period during the summer season, equity would not enjoin the breach of the covenant not to perform elsewhere during the summer season, since in this regard the contract is open to the objection that it is lacking in mutuality to such an extent that its breach will not be enjoined by a court of

equity. *Keith v. Kellermann* (1909) 169 Fed. 196.

In *Kimberley v. Jennings* (1836) 6 Sim. 340, 58 Eng. Reprint, 621, 5 L. J. Ch. N. S. 115, it is held that where the employers reserved the right to discharge the employee or discontinue the payment of his salary, if the latter, from illness or any other cause over which he could have no control, should become incapable of serving the employer, the clause rendered unreasonable a covenant by the employee that he would not, for the remainder of the term of employment, the whole being six years, render service to any other individual in any capacity, or in any other trade, business, profession, or employment whatsoever, without the consent of the employer, or the survivor of them.

In *Dockstader v. Reed* (1907) 121 App. Div. 846, 106 N. Y. Supp. 795, a contract for the employment of a singer in a minstrel troupe contained a stipulation that the services of the employee were special, unique, and extraordinary, and that he could not be replaced; it was also agreed that if he breached the contract by performing for anyone else an injunction might issue against him; this agreement was the only evidence offered to support the application for an injunction to restrain the breach of the agreement. Under these circumstances it was held that the employer was not entitled to an injunction. The contract also gave the employer the right to discharge the employee without recourse if his services were unsatisfactory, and also absolute right of discharge without cause, upon two weeks' notice. The court said that while equity will often restrain an actor under a contract to perform for one and not to perform for another, from performing for another during the period of the contract, an application for equitable relief is addressed to the sound discretion of the court, and will not be granted where the party seeking relief is not specifically bound by the contract, so that the obligations are reciprocal and enforceable. Whether equity will intervene to restrain by injunction the violation

of a restrictive covenant in relation to personal services depends in large measure upon whether a substitute for the employee can readily be obtained, and whether such substitute will substantially answer the purpose of the contract.

In *Gilbert v. Wilmer* (1918) 102 Misc. 388, 168 N. Y. Supp. 1043, injunction was denied to restrain the breach of a covenant of this character, on the ground that the provisions were too inequitable to justify a court of equity in enforcing it, the agreement in effect binding the employee to work as a window cleaner for the plaintiff at such places and in such manner as he was directed, his employment to continue as long as he gave satisfaction, the employer being the sole judge of the character of the work. The court pointed out that the plaintiff could have discharged the defendant after one hour's service, and according to the plaintiff's construction of the contract, the defendant would have been prevented from working at his business as window cleaner in that city for the period of one year.

In *Oppenheimer v. Hirsch* (1896) 5 App. Div. 232, 38 N. Y. Supp. 311, supra, where the restriction covered several states and territories and the Dominion of Canada, for the period of three years after the termination of the contract of employment, a further reservation by the employer of the right to discharge the employee practically at any time was held to render the contract unreasonable and unenforceable.

So, in *Iron City Laundry Co. v. Leyton* (1913) 55 Pa. Super. Ct. 93, the court refused to enjoin the breach of an agreement by an employee not to engage in a similar business for ninety days after the termination of his employment, on the ground that the covenant was unreasonable and inequitable, in view of the reservation by the employer of the power to terminate the contract at any time.

But in *Daly v. Smith* (1874) 6 Jones & S. (N. Y.) 158, it is held that a covenant by an actress not to appear in any other theater from the date of

the contract is not rendered unreasonable by the fact that the term of her employment did not commence until a subsequent date, it appearing that the actress had considerable experience in business, as well as business capacity. In *De Rivafinoli v. Corsetti* (1833) 4 Paige (N. Y.) 264, 25 Am. Dec. 532, the employer of an artist to sing applied for a writ of ne exeat against the employee, on the ground that the latter was going to leave the country and violate his agreement not to act at any other theater or public hall than those to which the complainant consented. This agreement and the contract of employment were to take effect at a certain time in the future. Upon this latter ground, the court held that the action was premature, and dismissed the writ.

V. Effect of provision for liquidated damages or penalty.

It has been held that the fact that the contract for employment provides for a bond to secure the employer against the breach by the employee of a covenant not to engage in a competing business at the termination of his term of employment does not entitle the employee, upon paying the amount of the bond, to engage in a competing business, and hence it is no defense to an application for an injunction to restrain the breach that such payment has been made. *American Ice Co. v. Lynch* (1908) 74 N. J. Eq. 298, 70 Atl. 138.

So, the fact that the performance of a covenant was secured by a bond to pay a certain sum of money in event of the breach, and that the employee offered to pay such sum of money, has been held not to preclude the employer of the right to equitable relief by restraining the breach of the covenant by the employee. *National Provincial Bank v. Marshall* (1888) L. R. 40 Ch. Div. (Eng.) 112, 58 L. J. Ch. N. S. 229, 60 L. T. N. S. 341, 37 Week. Rep. 183, 53 J. P. 356.

In *Sainter v. Ferguson* (1849) 1 Hall & Tw. 383, 47 Eng. Reprint, 1460, 1 Macn. & G. 286, 41 Eng. Reprint, 1275, 19 L. J. Ch. N. S. 170, 14 Jur. 255, an employee of an apothecary

covenanted not to practise as an apothecary in the vicinity of his employer under the penalty of £500. A motion by his employer for an injunction to restrain the breach of this covenant was held up by the court, and the employer was given an opportunity to sue the employee upon the bond. Subsequently, when judgment was recovered for the penalty of the bond, the injunction was denied on the ground that the employer was not entitled to equitable relief based upon the contract, after he had recovered the penalty of the bond.

In *Howard v. Woodward* (1864) 10 Jur. N. S. (Eng.) 1123, 5 New Reports, 8, 34 L. J. Ch. N. S. 47, 11 L. T. N. S. 414, 13 Week. Rep. 132, a bond not to practise within 50 miles of the place of employment, with a proviso that if the employee did he would pay to the employer a fixed sum, was held not an agreement to pay a stipulated sum in event of the breach, in the sense that the agreement precluded the employer from securing an injunction to restrain the breach. But it has been held that where the employer claimed the damages stipulated in the contract of employment to be paid for its breach by engaging in a competing business, he is not entitled to have the breach of the covenant enjoined. *Sainter v. Ferguson* (Eng.) *supra*.

In *Mapleson v. Del Puente* (1883) 13 Abb. N. C. (N. Y.) 144, the court refused to continue an interlocutory injunction restraining a singer from violating a contract not to sing in public or private concerts during his engagement without the consent of the employer, where he further agreed that in case of the failure to fulfil his contract, he would pay his employer for damages and expenses a fixed penalty, and it further appeared that upon his breaching the contract a substitute had been secured, and the employee had tendered the amount of the penalty in open court.

In *Hahn v. Concordia Soc.* (1875) 42 Md. 460, the court intimates that the breach of a covenant not to perform for any other person than the employer should be restrained where the services are of a unique character,

but relief was denied in the instant case on the ground that the contract contained a provision for the payment of a definite sum of money as damages in case of the breach thereof. The court said that "having thus by their own contract, made presumably with full knowledge of the means and ability of the defendant, and having fixed by their own estimate the extent of injury they would suffer from a non-observance of this condition, and having indicated as clearly as if so stated in terms that the only form in which they could seek redress and recover the stipulated penalty or forfeiture was a court of law, the complainants are precluded from now resorting to a court of equity for relief by way of injunction, on the ground that a violation of this part of the contract would result in irreparable damage and injury to them."

VI. Injunctive relief as affected by comparison of injury to the parties.

The strict enforcement of a contract of this character will not be granted where such enforcement would impose a great hardship upon the employee, with little or no corresponding benefit to the employer. *Tolman v. Mulcahy* (1907) 119 App. Div. 42, 103 N. Y. Supp. 936. So, where the object of the restraining clause is to prevent an employee from performing for others, without any substantial benefit to arise therefrom to the employer, an injunction will not issue. *De Pol v. Sohlke* (1867) 7 Robt. (N. Y.) 280, holding that an injunction would not issue to restrain the violation of a negative covenant not to render her personal service as a danseuse to persons other than the plaintiff, where there is no showing that the breach would produce an irreparable damage to the plaintiff.

In *Sternberg v. O'Brien* (1891) 48 N. J. Eq. 370, 22 Atl. 348, the court refused to restrain the breach of an agreement by a soliciting agent not to be engaged in or concerned or interested in a business similar to that of his employer within a certain designated territory. The court said that the case was within the rule that an injunction should never be granted

when it will operate oppressively or contrary to the real justice of the case, or where it is not the fit and appropriate method of redress under all the circumstances of the case, or when the benefit it will do the complainant is slight in comparison with the injury it will do the defendant.

In *Herreshoff v. Boutineau* (1890) 17 R. I. 3, 8 L.R.A. 469, 33 Am. St. Rep. 850, 19 Atl. 712, it is held that an agreement by a person employed to teach that, for a year after the termination of his employment, he will not engage in a similar vocation, is unreasonable and void, since it imposes restrictions upon the individual rights which only cause loss without benefit to the employer.

VII. Effect of infancy of employee.

In *Cain v. Garner* (1916) 169 Ky. 633, L.R.A.1916E, 682, 185 S. W. 122, Ann. Cas. 1918B, 824, there was involved a negative covenant by an infant not to leave the services of his employers during the term of the contract (three years). Upon the assumption that the services were sufficiently unique and extraordinary to entitle the employer to relief, had the employee been an adult, it was held that the contract was not binding upon the infant, and hence was not enforceable. To the same effect, as to an infant actress, is *Aborn v. Janis* (1909) 62 Misc. 95, 113 N. Y. Supp. 309.

In *Capes v. Hutton* (1826) 2 Russ. Ch. 357, 38 Eng. Reprint, 370, 26 Revised Rep. 102, the court refused to enjoin the breach of a covenant by a person employed as clerk for a clerk to an attorney, not to practise that profession within a certain district, it appearing that the clerk entered into the covenant while an infant. The court held that the covenant was not enforceable when he reached his majority.

But in *Evans v. Ware* [1892] 3 Ch. (Eng.) 502, 62 L. J. Ch. N. S. 256, 3 Reports, 32, 67 L. T. N. S. 285, an infant covenantor was restrained from breaching his covenant not to engage in competing business where the covenant was ancillary to a contract of employment for a milk company.

And in *Mutual Milk & Cream Co. v. Prigge* (1906) 112 App. Div. 652, 98 N. Y. Supp. 458, an agreement by the driver of a milk wagon not to solicit from the employer's customers for three years following the termination of the contract was held to be valid, and the breacher thereof was enjoined. The court said that the employee received the benefit of his employment, and for aught that appeared might have continued indefinitely in plaintiff's employ thereunder. On the question of the effect of his infancy upon the validity of the covenant, the court said: "It does not appear that any undue advantage was taken of him. Although he had not arrived at the age at which all contracts with him would be binding, he was of sufficient age to appreciate the nature of his contract, and to know whether or not it was for his benefit. The terms imposed were not unusual or unreasonable. It was a perfectly proper condition for the plaintiff to insist upon as a condition precedent to the employment, or as a condition of the continuance thereof, that its employee should not, after becoming acquainted with his customers, leave its employ and solicit business for another in competition with it. This is not a question of the liability of an infant for damages for a breach of contract. The question presented is whether an infant shall be permitted to repudiate his contract without restoring what he has received thereunder, and, if restoration cannot be made, without being enjoined for making use of the knowledge he gained, to the disadvantage and damage of his employer."

In *Bromley v. Smith* [1909] 2 K. B. (Eng.) 235, in enjoining the breach by an infant of a negative covenant not to engage in a similar business, the court said that there was abundant authority that contracts for services may be binding on infants, although they contain restrictive terms. A contract which contains the only terms on which an infant can reasonably expect to get employment, the court said, must be for his benefit. "The defendant could not get employment in the plaintiff's or any other similar busi-

ness on any better terms than those I have suggested, and I think it was for his benefit to get employment on those terms; by entering into the plaintiff's service on those terms he was only giving up the chance of setting up in business in a place where

he was not known, and it is quite right that when leaving that service he should forego the right of soliciting customers whom he would never have known but for that service. Common honesty demands that forbearance." A. G. S.

HEPWORTH MANUFACTURING COMPANY, Limited, Appts.,

v.

WERNHAM RYOTT, Respt.

English Court of Appeal — October 14-16, 1919.

([1920] 1 Ch. 1.)

Contract — restraint of trade — pseudonym of moving picture actor.

A contract between a moving picture actor and a producer that the former shall act for the latter under a pseudonym under which the producer will advertise him, and that he will not use the pseudonym for any other purpose whatever, is void as in restraint of trade and against public policy, and will, therefore, not prevent his acting under that pseudonym for other producers.

[See note on this question beginning on page 1500.]

APPEAL by plaintiffs from an order of the Chancery Division (Astbury, J.) dismissing an action brought to restrain defendant from using a certain stage name for any purpose whatever and from acting or otherwise appearing thereunder. *Affirmed.*

The facts are stated in the opinions of the court.

Hon. Frank Russell, K.C., and Dighton Pollock, for appellants:

Defendant is bound by his contract not to use the pseudonym Stewart Rome.

Vernon v. Hallam, L. R. 34 Ch. Div. 751, 56 L. J. Ch. N. S. 115, 55 L. T. N. S. 676, 35 Week. Rep. 156; Lotinga v. People (1913) Times, Nov. 13, p. 3d.

Patrick Hastings, K.C., and H. E. Wright, for respondent:

The contract in question is clearly unenforceable.

Mason v. Provident Clothing & Supply Co. [1913] A. C. 724, 82 L. J. K. B. N. S. 1153, 109 L. T. N. S. 449, 29 Times L. R. 727, 57 Sol. Jo. 739, Ann. Cas. 1914A, 491; Morris v. Saxelby [1916] 1 A. C. 700, 85 L. J. Ch. N. S. 210, 114 L. T. N. S. 618, 32 Times L. R. 297, 60 Sol. Jo. 305, Ann. Cas. 1916D, 537; Horwood v. Millar's Timber & Trading Co. [1917] 1 K. B. 305, 86 L. J. K. B. N. S. 190, 115 L. T. N. S. 805, 33 Times L. R. 86, 61 Sol. Jo. 114; Denny

v. Denny [1919] 1 K. B. 588, 88 L. J. K. B. N. S. 679, 120 L. T. N. S. 608, 35 Times L. R. 238, [1918-19] H. B. R. 139.

Warrington, L. J.:

This is an appeal from an order of Astbury, J., dismissing the plaintiffs' action. The plaintiffs are a company whose business it is to produce kinema films. The defendant is a kinema actor. The object of the action is to enforce an agreement by the actor by which he is subject to certain restraints—which I will refer to more particularly when I come to read the covenant—upon the use by him, and the advertisement to the public, of a pseudonym or acting name under which he has passed in his profession as a kinema actor.

The real defense to the action, which has been adopted by Astbury,

J., is that the contract in question comes within the principle under which contracts in restraint of trade are held to be prima facie void as being contrary to public policy; and is not within the well-known exception from the generality of that rule in regard to contracts which contain provisions reasonably necessary for the protection of the person with whom they are entered into. The question is whether Astbury, J., was right in the view he thus took in supporting the defense which I have stated.

The facts of the case are really not in dispute. The plaintiffs, as I have already mentioned, are a company whose business it is to produce kinema films. Having produced a film, they then proceed to sell that film to middlemen, who are called renters, and those renters then proceed to deal with the film and the right of producing it by conferring such rights upon the proprietors of kinema theaters. That, speaking generally, is the course of the business in this particular trade.

For the purpose of producing these films it is the practice of the film-producing firm—there are only nine or ten in this country—to have what is called a stock company, and apparently, judging from the agreement which we have before us, and also from what was stated in evidence, they, as far as possible, impose upon the actors forming part of that stock company a pseudonym for the purpose of advertisement, and they advertise, no doubt, in the trade papers, their films which they have produced and which they have for disposal, with the names of the actors; and where, as is in some instances the case, the actors are performing under a pseudonym, they, of course, advertise that pseudonym.

The defendant was an actor by profession. He started that profession in the year 1905, and from that time until the year 1913, with some interruption which it is immaterial to mention, he acted here and in Australia in his own name.

In 1913 he entered in to a contract with the plaintiffs to act as a kinema actor as part of their stock company. We have not before us the agreement which he made in 1913, but, so far as I know, it was substantially the same, except that the salary was much smaller, as that which he entered into in 1915, and which is the contract sued upon.

He and the company adopted as his pseudonym—I am using as far as possible a neutral term—the name of “Stewart Rome.” He proved a very skilful kinema actor; he had natural capabilities and qualifications which fitted him for that profession, and, under the name of “Stewart Rome,” he proved a very successful actor, and films which represented him in a leading part in the picture plays represented became extremely popular with the renters, with the kinema theater proprietors, and with the public; so that the name of “Stewart Rome” added largely to the value of the films which were produced, and, of course, become also a very important item in the equipment of Mr. Ryott, the defendant, himself, and an element in enabling him to earn a salary in the profession which he had adopted.

Under those circumstances the agreement in question was made on the 29th October, 1915, at a time when Mr. Ryott was still in the employment of the plaintiff company under his previous contract. That contract was made between the plaintiff company of the one part and Mr. Ryott of the other part. It provides, first: “The company engages the artiste to dance, act, and perform for the purpose of being photographed, to the best of his or her ability, as required such parts as the company or its representative may allot for this purpose, and to perform such parts wherever and whenever required by the company for a period of twelve months at a salary of £7 per week, this engagement to commence on the 1st June, 1915,”—that is, four months before the date of the contract,—“and to

terminate on the 31st May, 1916, unless determined by the company as hereinafter provided and subject to the terms and conditions hereinafter set forth."

Pausing there for one moment, it is an absolute contract on the part of the defendant to act for the company for a whole year ending the 31st May, 1916, though the company, under the provisions of the agreement, could determine it in certain events.

Then the second clause provides—I need not read it in full—that he shall not act for any other employer during that time. The third clause is important. It provides as follows: "If the company advertise the artiste"—it is to be observed that there is the condition that it is only "if they advertise the artiste"—"they will do so under the name of 'Stewart Rome,' and the right to use such pseudonym or any other pseudonym hereinafter agreed upon in connection with photoplays or otherwise shall be the sole property of the company."

Pausing for one moment upon that, I fail to see how the name under which the defendant acts can possibly be the subject of property in the company. One understands property in a trademark. One understands property in copyright, some literary or artistic production. But how there can possibly be property in the use by an actor of a *nom de théâtre* passes my comprehension. It only means—that is the outside of what it can mean, I think—that Mr. Ryott, the artiste, shall not as between himself and the company have the right to use the name of "Stewart Rome" without their consent. If it means that, then for the purposes of this agreement it really means nothing, because the same provision, as will be seen, is contained in another clause of the agreement.

The clause in the agreement that is sued upon is the fourth: "Upon the determination of this agreement, it is hereby declared and agreed as to any such pseudonym as

follows: The artiste shall not use such pseudonym for any purpose whatever, and shall not dance, act perform, or otherwise pose for the purpose of being photographed by any person, firm, or corporation, or agree so to do, unless and until the said person, firm, or corporation have agreed in writing with him or her not to expose or advertise photographs of him or her under such pseudonym; and, further, shall not dance, act, perform, or otherwise appear in any theatrical, dramatic, or spectacular entertainment under such pseudonym; and shall not agree with any person, firm, or corporation to dance, act, perform, or otherwise appear in any such theatrical, dramatic, or spectacular entertainment unless and until such person, firm, or corporation have agreed in writing with him or her not to announce or advertise his or her dance, act, performance, or other appearance under such pseudonym."

I shall have to come back presently to analyze that contract when I have stated the rest of the agreement. The subsequent clauses in the agreement are, most of them, not material. But there are two which are material. The first of those is the eighth: "If the company shall cease to make photoplays for more than six consecutive days, whether by reason of fire, epidemic, strikes, lockouts, or any other cause which the company in its absolute discretion may consider adequate, or if the company shall sell or otherwise dispose of its business and/or its studio, then the company may by notice in writing to the artiste forthwith determine this agreement." The point of that is, that power is given to the employer in certain events to terminate the agreement; no corresponding power is given to the employees.

Clause 14 provides that "it is agreed that the company shall have the option of re-engaging the artiste for a further period of one year at a salary of not more than \$8 per week or such smaller sum as

may be agreed upon, and in other respects on the same terms and conditions as herein contained, and that they may exercise this option at any time before the termination of the agreement."

Therefore, one day before the 31st May, 1916, they might exercise this option. I will assume that that option can only be exercised once, though it has been contended that it may be introduced into the new agreement constituted by its exercise, and be exercised from time to time over and over again. I will assume that it is not so oppressive as that. But for another year, at the very moment before the termination of the agreement, the company may impose upon the defendant the obligation of serving them for another year at an advance of no more than £1 on the salary which he had been earning at the time this agreement was made.

I have now mentioned all the material clauses in the agreement. And I propose to go through the fourth clause thereof and see exactly what it is that it purports to do, and the restrictions which it purports to impose upon the actor. First, he is not to use the pseudonym for any purpose whatever. That is to say, supposing he desires to revert to his practice of an ordinary stage actor, he would be prohibited by this agreement from acting under this name of "Stewart Rome." How that can possibly be required for the protection of these film producers seems to me to be quite unintelligible.

Then I come to the second branch of the clause.

I have divided it, as Mr. Russell did, into four subdivisions for convenience. "He shall not dance, act, perform, or otherwise pose for the purpose of being photographed by any person, firm, or corporation, or agree so to do, unless and until the said person, firm, or corporation have agreed in writing with him or her not to expose or advertise photographs of him or her under such pseudonym."

That is intended to prevent the exhibition outside the kinema theater, for the information of the public as to what is taking place inside, of a photograph of the defendant, either in character or in the ordinary dress of an English gentleman, under the name of "Stewart Rome."

The third subclause is: "And, further, shall not dance, act, perform, or otherwise appear in any theatrical, dramatic, or spectacular entertainment under such pseudonym." There, again, that subclause only contains as a particular provision that which would be covered by the more general provision to which I have already referred—namely, that he shall not use the pseudonym for any purpose whatever. But it is quite clear upon the words of it that it would prevent the defendant from performing on the stage, not for the kinema at all, but for performing on the stage under the name of "Stewart Rome."

The fourth subclause, which is the provision that it is mainly sought to enforce in this action, is that he "shall not agree with any person, firm or corporation to dance, act, perform, or otherwise appear in such theatrical, dramatic, or spectacular entertainment"—again not confined to kinema—"unless and until such person, firm, or corporation have agreed in writing with him" ("or her" is in the agreement, because it is a printed form, available for either a male or a female artiste) "not to announce or advertise his or her act, dance, or performance, or other appearance under such pseudonym." That is the agreement sued upon.

This agreement expired by the effluxion of time on the 31st May, 1917. It had been renewed for one year. But meanwhile—in January, 1917—the defendant had been called up for military service, and was engaged in military service until sometime towards, I think, the end of the year 1918. While he was still on military service, and after the period of the contract had,

expired, certain correspondence took place between him and a representative of the plaintiff company as to his re-entering their service at a salary of £10 per week. However, no agreement had actually been come to, and on the 25th January, he made a contract with another film-producing company to act for them at a salary of £20 per week, and did not require them to enter into an agreement not to announce or advertise his performance under the name of "Stewart Rome." That is to say, he unquestionably committed a breach of the fourth subclause of the fourth clause of his agreement with the company. I think that is all I need state of the facts.

The first question that arises is whether this provision is within the principle rendering void and unenforceable contracts which are in restraint of trade. The material fact with reference to that appears to me to be this: The defendant, while posing for the plaintiff company under the name of "Stewart Rome," acquired a particular item of equipment,—namely, the popularity which his name of "Stewart Rome," coupled with his skill in acting, had acquired for him. It is in evidence that the popularity of the films is which the name of "Stewart Rome" appeared as one of the principal characters was exceedingly high; in fact, it is stated in evidence that in a competition, held under circumstances which we do not know, but it does not very much matter, the famous name of "Charlie Chaplin" appeared at the head of the list, and that of "Stewart Rome" appeared second. I only mention that as showing that the name of "Stewart Rome" as that of a kinema actor had obtained a very high degree of popularity.

Of course, the result of that is that the film producer who is able to announce a film in which the name of "Stewart Rome" appears can obtain a higher price for that film than the film producer who cannot advertise the name of "Stewart

Rome." Not only that, but Mr. Ryott himself, owing to that fact, is enabled to command a higher price for the services he performs for that film producing company. Accordingly, the pseudonym of "Stewart Rome" and the right to use that pseudonym for the purposes of his profession have become—by nothing, as far as I can see, that the plaintiff company have really done—an important item in the defendant's professional equipment.

I say, "as far as I can see, nothing the plaintiff company have done." I am not forgetting that the plaintiff company, knowing that they have a valuable asset in Mr. Stewart Rome, have spent considerable sums in advertising the films in which he appears. They do that, however, for their own purposes, and in order to obtain that higher price which the fact I have referred to enables them to command. Incidentally, no doubt, it increases the value of Mr. Stewart Rome's qualifications to himself, but the real object of the advertisement is for the plaintiff company to obtain a price for their films.

That name of "Stewart Rome" is an important item in the professional equipment of the gentleman in question, and one which he has made of importance by his own skill, by his own personal qualifications, and no doubt by his attention to that which is necessary in order to make a good kinema actor. If this agreement were carried into effect, he would lose that item of equipment for the period, impossible, of course, of definition, during which, either by using his own name or by using another pseudonym, he would be acquiring over again that item of equipment as attached either to his own name or another pseudonym, as the case might be. He is therefore prevented from going into the market with the full equipment which he has acquired in the practice of his profession.

Is his being so prevented in effect in restraint of trade, to use the

technical expression applicable to such cases? It may be said that there is now no dispute about the law; but I propose to read one or two passages in which learned judges, all of them addressing the House of Lords, have expressed their views as to what is meant by a contract in restraint of trade. Lord Macnaghten, in *Nordenfelt v. Maxim-Nordenfelt Guns & Ammunition Co.* [1894] A. C. 535, in a passage quoted by Lord Haldane in *Mason v. Provident Clothing & Supply Co.* [1913] A. C. 724, at p. 733, Ann. Cas. 1914A, 491, said: "The true view at the present time I think is this: The public have an interest in every person's carrying on his trade freely; so has the individual. All interference with individual liberty of action in trading and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule."

The material expression for the present case is: "All interference with individual liberty of action in trading." Then Lord Macnaghten went on to say: "But there are exceptions. Restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and, indeed, it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned, and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favor it is imposed, while at the same time it is in no way injurious to the public."

It is also pointed out in the same case—that is to say, in *Mason's Case*, *ubi supra*, that there is a clear distinction between contracts entered into upon the sale of a good will, for example, and contracts entered into between an employer and an employee, and for the simple reason that contracts for the protection of good will are to protect an item

of property which is being sold by the covenantor for a consideration which he receives from the covenantee.

There is one other passage in *Mason's Case*, *ubi supra*, which I think I ought to refer to. It is a passage in the speech of Lord Shaw. He is dealing with the case of a servant seeking fresh employment, and using information which he had obtained in the course of his employment by his previous master, and he goes on to say this: "Upon this last point, my Lords, there was much argument at your Lordships' bar as to whether this case did not fall within the principle of *Haynes v. Doman*, 80 L. T. N. S. 569, [1899] 2 Ch. 13, 68 L. J. Ch. N. S. 419, 15 Times L. R. 354. But *Haynes v. Doman* was a case, and was expressly so treated, of the divulging of trade secrets, and of a servant entering into new employment carrying with him these trade secrets, with the constant risk of divulging them to rival manufacturers. Such cases, my Lords, are, in my opinion, widely distinguished from the other cases of an employee who, by faithful and industrious exercise of his powers, becomes mentally, or even manually, well equipped as a servant. The distinction between that case and the former is as wide as the psychological distinction between subjective and objective knowledge. But it is also as real. For, in the former case, equipment of the workman becomes part of himself, and its use for his own maintenance and advancement could not, except in rare and peculiar instances, be forbidden. But in the other case the knowledge of trade secrets may be as real and objective as the possession of material goods, and the law would much more readily support a restraint of liberty which would, or might, be likely to induce the transfer of this to others, with the danger of consequent loss. In all cases of restraint sought to be put upon an employee under a contract be-

tween master and servant this distinction should be borne in mind."

I refer to that passage because the learned Lord is there dealing with the case of an item of equipment which the servant has obtained by his own efforts while in the employment of his master, and saying that, as regards that item of equipment, he cannot properly be deprived of the advantage of it unless there are exceptional circumstances which would justify his being so deprived.

In this present case, as I have already said, the defendant is possessed of an item of equipment which it is undisputed is of value to him. This agreement, if carried into effect, would deprive him of that item of equipment, and would make it necessary for him to reac-

Contract—
restraint of
trade—
pseudonym of
moving picture
actor.

quire it in an un-
defined period of
time. For that
reason it seems to
me that this agree-

ment is within the principle which renders void contracts in restraint of trade. It is an interference with the right of the defendant to use those qualifications of which he is possessed to the best advantage for himself and for the public, and, as such, it is contrary to public policy.

It was said by Mr. Russell, and this was really the foundation of his argument, that there is nothing here to prevent him acting for whomsoever he pleases as a kinema actor after the termination of this agreement. In my opinion that is not enough. No doubt he can, without breaking this agreement, act as a kinema actor. But he would be so maimed and crippled by the loss of that which is at the present moment the source of his popularity, and the qualification which enables him to earn a high, remunerative salary. He would have to go back to the beginning and earn a reduced salary. I think it was stated in the evidence that probably his salary would not be more than £6 per week, whereas he is now able to obtain £20. In my judgment, therefore,

the agreement is in restraint of trade.

The only other question is, Does it come within the exception? Is there anything in this agreement which is necessary for the reasonable protection of the previous employer? As far as I can understand, it can hardly be suggested that there is anything to be protected. If there is anything to be protected, it is the thirty or thirty-one films produced by the previous employers, the plaintiffs, in which Mr. Ryott is represented. A suggestion was made that the value of those films might be destroyed or impaired if the defendant, under the name of "Stewart Rome," were to act for other employers in some objectionable or vulgar performance. It seems to me that is fantastic. But it does not end there. Really, on the evidence, considering that Mr. Ryott ceased, when he was called up in January, 1917, nearly three years ago, to act for the plaintiffs, every film in which he appears must be at least two years and three-quarters, old. And the evidence is that the life of a film is certainly not more than three years, except in very exceptional circumstances where they may be reissued.

It is hardly suggested that, if the contract is in restraint of trade, there was anything in this that is reasonably necessary for the protection of the employer.

I have only to say one word more. I think it is pretty obvious that the object of this agreement is not to protect any property of the employers which they may have in any films which they produce. The real object of this agreement is to bind the particular actor to those particular employers, if under the use of the selected pseudonym he has acquired a popularity so as to make it worth the while of the employers to retain him in their service. That I think, is obviously the true object of this agreement. And I am glad to think that by our decision that object will probably be defeated.

In my judgment the decision of

Astbury, J., was right, and this appeal ought to be dismissed with costs.

Atkin, L. J.:

The defense to the action brought in the present case is that the agreement sued upon is in restraint of trade. The argument that was addressed to us was almost entirely based upon the contention that this agreement was not in fact in restraint of trade as that doctrine has been authoritatively laid down by the courts. Quite shortly, I will state what has been decided in reference to the doctrine of restraint of trade.

The authoritative decisions that have been pronounced lately, I think, are contained in the speeches of Lord Parker in the House of Lords and in the Privy Council. I do not refer to his judgment in the Privy Council in the case of *Atty. Gen. v. Adelaide S. S. Co.* 109 L. T. N. S. 258, [1913] A. C. 781, 29 Times L. R. 743, Ann. Cas. 1914A, 417, in which Lord Parker, delivering the judgment of the Privy Council, stated in some detail the principles of this particular doctrine; but in the case of *Morris v. Saxelby* [1916] 1 A. C. 688, at p. 706, Ann. Cas. 1916D, 537, Lord Parker says this, affirming and adopting the decision of Lord Macnaghten in *Nordenfelt v. Maxim-Nordenfelt Arms & Ammunition Co.* [1894] A. C. 535, 63 L. J. Ch. N. S. 908, 11 Reports, 1, 71 L. T. N. S. 489, 6 Eng. Rul. Cas. 413: "As I read Lord Macnaghten's judgment, he was of opinion that all restraints on trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. It is not that such restraints must of themselves necessarily operate to the public injury, but that it is against the policy of the common law to enforce them except in cases where there are special circumstances to justify them. The onus of proving such special circumstances must, of course, rest on the party alleging them."

So far that lays down that a re-

straint of trade is, *prima facie*, contrary to public policy. It is a misapprehension to suggest, if it were suggested, that this doctrine is confined to merely restraint of trade in any ordinary meaning of the word "trade." It extends further than trade. It extends to the exercise, undoubtedly, of a man's profession or calling. And, if authority is needed for that, I think it would be found in the passage in *Farwell, L. J.'s* judgment in the case of *Sir W. C. Leng & Co. v. Andrews*, 100 L. T. N. S. 7, [1909] 1 Ch. 763, 78 L. J. Ch. N. S. 80, 25 Times L. R. 93, and which was also quoted with approval by Lord Shaw in *Mason v. Provident Clothing & Supply Co.* 109 L. T. N. S. 449, [1913] A. C. 724, Ann. Cas. 1914A, 491, Lord Atkinson in *Morris v. Saxelby*, *ubi supra*. There the passage which I refer to is this: *Farwell, L. J.*, said, referring to the passage cited by Lord Macnaghten: "That doctrine does not mean that an employer can prevent his employee from using the skill and knowledge in his trade or profession which he has learned in the course of his employment by means of directions or instructions from the employer. That information and that additional skill he is entitled to use for the benefit of himself and the benefit of the public, who gain the advantage of his having had such admirable instruction."

I think that makes it quite plain, if authority were needed, that the doctrine was not merely confined to restraining commercial transactions as such. What is meant by "restraint of trade." There are one or two passages that I should like to read with a view to indicating the broad way in which that question has been considered by the learned judges who have had to deal with the matter. I think that the first passage I should like to refer to is going back almost to the source of the doctrine—namely, *Mitchel v. Reynolds*, 1 P. Wms. 190, 24 Eng. Reprint, 350, 1 Smith, Lead. Cas. 11th ed. p. 413, where Lord Maccles-

field said: "The two reasons of the distinction upon which the judgments in these cases of voluntary restraints are founded are, first, the mischief which may arise from them, first, to the party by the loss of his livelihood and the subsistence of his family; secondly, to the public by depriving it of a useful member."

Following out the doctrine, and explaining the kind of restraint which is considered objectionable by the courts, there are one or two passages which I think help one to understand what is meant. Lord Shaw in *Mason's Case* said this: "My Lords, conflicting considerations are in such cases immediately presented to the mind. Here is a bargain, it is said, between two parties having full contracting power, and with their eyes open. It is not void or voidable under any of the familiar categories which justify rescission. Why then should the law decline to hold parties to it? On the other hand, it is said, here is a citizen who has come for a period of years under a restraint which is inconsistent with elementary freedom, namely, the freedom to earn his living as best he can. This is a freedom which it is not alone in his interest, but in the public interest, that the law should protect."

Lord Shaw also said: "In my opinion there is much greater room for allowing, as between buyer and seller a larger scope for freedom of contract and a correspondingly large restraint in freedom of trade, than there is for allowing a restraint of the opportunity for labor in a contract between master and servant or an employer and an applicant for work." Dealing with the contract in that case, which was a restriction upon an employee, he said: "No workman could have the freedom to dispose of his own labor, or risk a movement towards his own advancement, under what might turn out to be the cruel operation of such a clause."

Finally, and it is the only other passage that I wish to cite, there is

the passage which my Lord has read from the speech of Lord Shaw in *Morris's Case*. I should not wish to read it again, except that I think there is a passage at the end of it, which my Lord did not read, which I will call attention to. Lord Shaw said: "There is no public interest which compels the rendering of those things dormant or sterile or unavailing; on the contrary, the right to use and expand his powers is advantageous to every citizen, and may be highly so for the country at large." Lastly, in the case that I first cited,—perhaps I should have referred to it in that order,—in the *Mason Case*, Lord Moulton said this: "It is evident that those who drafted this covenant aimed at making it a penal rather than a protective covenant, and that they hoped by means of it to paralyze the earning capabilities of the man if and when he left their service, and were not thinking of what would be a reasonable protection to their business; and having so acted they must take the consequences."

I ask myself what is the effect of this contract in reference to the restraint which has been put upon the defendant's activities as judged by the passage that I have just read. It appears to me that it is quite plain that the result of this contract was to deprive the defendant of the reputation which he has earned under what was his professional name,—that is to say, the only name in which he was known as a film actor. It is quite impossible, it seems to me, to dispute, at any rate it is plainly proved by the evidence, that the effect of depriving the defendant of the right to use the professional name which he has used, and the only name which he has used in his profession for five years, is to diminish his earning capabilities to begin with.

It is obvious that that which is of value to him is the fact that he has achieved a certain reputation in his calling, and if those who employ him are not to be allowed to advertise the fact and make known to the

public that they have advantages of the services of a skilled artiste, that they will not pay him as much for his services as they would if they were free to make the full announcement to the public of the person whom they have secured for their service.

Here, on the evidence, it is evident that, if that is measured in money, it represents one half of the defendant's earning capabilities, certainly for some time, and for a substantial time. For how long it is not easy to know. Quite apart from gauging it in money, it appears to me that there are other considerations which are just as important,—specially important to an artiste in a profession such as this, who depends entirely, it appears to me, or very largely, for his success in life, upon his reputation with the public.

The defendant has built up a reputation, has acquired a public reputation. Ordinarily speaking, I suppose, it is one of the most legitimate, and certainly one of the strongest, incentives to good work in this world, that a man tries to improve his reputation; he honestly seeks to increase his reputation and tries to make his work worthy of his reputation, and to move on, so to speak, from height to height. In this particular case the effect of this contract is that, having worked for five arduous years in this particular calling, he certainly, like Sisyphus, rolled up his burden to a certain height, and falls back again, or is thrust back again and has to start again and win another reputation, not even under the same identity, but under a name which is unknown to the public.

It appears to me that that, in itself, is a deprivation of a man's liberty of action, and it has diminished his aptitude, apart from paralyzing his capacity. Perhaps in a slightly different application, it appears to me that Mr. Ryott might say that he "who steals my purse, steals trash; . . . but he that filches from me my good name, robs me of that which not enriches him,

and makes me poor indeed." I myself am satisfied that, at any rate, this contract is plainly in restraint of trade within the meaning of the doctrine.

The only other question that arises is whether or not the restraint of trade is justified by being a protection that is reasonably necessary, and no more than is reasonably necessary, for the protection of the employer's interests. What was the object of this clause, as stated in evidence by the employers who entered into it? I desire to read quite a short passage from the shorthand notes.

This is in the examination in chief:

Q. If the name were used by anyone else than your firm, how do you suggest it would injure you?

A. It would give a wrong impression, would not it?

Q. First of all you say it would give a wrong impression?

A. The name has been so long associated with our firm.

Q. You mean in connection with the Hepworth Picture Films?

A. Yes.

Q. What do you mean when you say it would give a wrong impression?

A. I think it would convey the impression that the picture which was being advertised had been made by us.

If that means anything at all, it is a suggestion of "passing off," and we have not heard a single suggestion of any sort or kind that that was the real reason. And it is quite plain there is nothing in it, because these films produced by the rival firm of producers are produced by that firm who advertise themselves as the producers, and there is no suggestion that they seek to pass them off as the films of the plaintiff company.

Then there is another suggestion, which I think rather emanates from counsel, because it is put in the form of a leading question: Assume that the name were used in

connection with plays of inferior standard to yours, would that prejudice you?

A. Yes, I think it would.

We have heard some sort of suggestion as to that, which to my mind is mere pretense and make-believe. There is no real foundation for it at all. I do not believe Mr. Hepworth ever thought of it for a single moment. Nor can I imagine how a clause such as this could be justified upon such a ground as that. It would apply to every case where a man was employed in his own name, for however short a time, if, in fact, the name of the servant was associated with the product or the output of the master. In every case the master might say: 'You must change your name, because your name, if employed afterwards in connection with other goods, may be used in connection with goods which are of inferior quality to ours.'

I do not think it necessary to say more on that suggestion.

Then the passage goes on thus:

And you have had up till now a monopoly in that name.

A. Yes.

Well, that is true. All that means is that a monopoly in a name is that the man who was called by that name had only acted for that particular company.

Q. How would it affect you if other plays were subsequently staged and filmed with Mr. Stewart Rome's name advertised with it?

A. It is very difficult to say, but I assume it would reduce the value.

Q. They would be competing films?

A. They would be competing films.

That, again, in itself is made quite plain, I think, by the authorities which have been referred to by my Lord, that it is not sufficient justification for a restraint of trade that the servant might help his new employer to compete with the old employer; that in itself is not sufficient.

Those are the only reasons that are put forward by him, so far as I have been able to go through the evidence of Mr. Hepworth, to justify this particular clause. They seem to me to be entirely insufficient. But he was cross-examined, and I think, in cross-examination, a further reason appeared which, I think, approaches very much more clearly to the real reason in this particular case.

Q. Do you really think it was for the reasonable requirements of your business that that should be done?

A. Yes.

Q. You concede, do you not, that supposing the name is of value to the artiste, about which we may have our own opinion, you have a tremendous hold over these people, if you can make them sign an agreement like that?

A. Yes, it gives some hold, certainly.

Q. Supposing it is right that an artiste has to begin life more or less over again, we will take only half of his marketable value, you can go on paying these people half their marketable value as long as they stay with you, because they dare not go anywhere else. That is right, is it not?

A. It seems a logical deduction from your premises.

Q. But do not you think it is a fair deduction from your agreement?

A. No, I do not think that.

It appears to me that that is the real essence of this agreement. To my mind it gave them a hold upon the artistes who signed these agreements, and etymologically and manifestly I can draw no distinction between a restraint upon the employee, and a hold upon the employee. I think it was intended to have a hold upon the employee, and to my mind it was entirely unreasonable and unfair. I consider this a most unconscionable clause, and I am very glad, therefore, to think that such an agreement as this has been brought before the court, and

that the court will refuse to enforce it. I cannot conceive anything more intolerable, as far as one can see, than that young people of either sex should enter into these agreements wholesale. There is a printed agreement with this clause prepared for all of them, and a pseudonym prepared for all of them, so that the employer should be able to filch the identity of an artiste who was of any value.

I am glad to think as a result of this decision that this clause will disappear.

If there were any other question there is the further question that would arise as to whether or not this is excessive, even if it were required for the protection of the employers at all. Upon that I entirely agree with what fell from my brother Eve during the argument, when he pointed out that this was a restraint that operated during the whole of the defendant's life, whereas the life of a film was only a life of, in substance, some six or nine months, with a possibility of its appearance for three years. I entirely agree with that view.

Upon all these grounds it seems to me that the decision of the learned judge in the court below was quite right, and that this appeal should be dismissed with costs.

Eve, J.:

The real and substantial question in this case is whether the contract in clause 4 of the agreement of the 29th October, 1915, on which the action is founded, is one which can properly be described as a "contract in restraint of trade." If that question is answered in the affirmative, the further one arises, whether its operation is more extensive than is necessary for the reasonable protection of the covenantees.

What is meant by the expression "contract in restraint of trade?" It means a contract whereby a restraint is imposed upon the liberty of an individual to earn his living or exercise his calling, or, in other words, a contract whereby the individual liberty of action in trading

is interfered with and controlled. What we have to consider is, first, whether the restrictions imposed upon the covenantor in clause 4 of this agreement have that operation.

In this connection it is very material to bear in mind that counsel for the appellant was constrained to admit that, if clause 3 of this agreement had been omitted, and if the defendant had acted and performed and been advertised in his own name, he would still, in order to make his argument logical, have been bound to contend that the contract was not one in restraint of trade. In construing clause 4, therefore, we are entitled to read it as though the reference to the pseudonym were omitted and as though it dealt only with the respondent's own name. Just see, by taking clauses 1 and 4, what the effect of the subparagraphs would be. The first one would be this: "The artiste shall not use his own name for any purpose whatever"—that is, after leaving the employment of the plaintiffs. Then he had to obtain from any persons into whose employment he was about to enter a written contract that they would not allow him to "dance, act, perform, or otherwise appear in such theatrical, dramatic, or spectacular entertainment, or announce or advertise his or her dance, act, or performance, or other appearance under his own name."

Can it be said that these are not stipulations designed and calculated to deter the covenantor from transferring his services and qualifications to a competitor in trade?

Mr. Russell took exception to one passage in the judgment in the court below, where the learned judge said: "By an ingenious device made use of by the company when it first engaged the defendant he was induced to agree to adopt the pseudonym of Stewart Rome, and during his service as a cinematograph actor in the plaintiff's employ in this name alone he acted, was advertised, and became known."

I do not think that there was evidence to show that there was any

inducement on the part of the plaintiff company which led the defendant to adopt the name. But I do say that, in my opinion, the insertion of the clause in this agreement requiring the *artistes* to adopt the pseudonym was a device—I am not using the word in any opprobrious sense—for controlling the *employees* after leaving the service of the employers by an attempt to create in the employers some proprietary right in the name by which the *employees* had been designated and become identified in his profession.

It is a device which, in my opinion, has failed—failed because when the argument is pressed to its logical conclusion it comes to this, that the appellants here are obliged to contend that, if the adoption of the pseudonym was dropped altogether, this contract would not be a contract in restraint of trade, although a man, by its very terms, agrees not to use his own name for any purposes whatever, and that he will not be advertised as an actor in this particular business or anything connected with it in his own name.

I think it is quite impossible, upon the true and fair construction of this agreement, to come to any other conclusion than that the contract is in fact a contract in restraint of trade, and, having arrived at that, there really is very little left in the case. The suggestion of there being any right or property of the employer which this contract was necessary to protect was shadowy in the extreme, and even had there existed such a right of property I am of opinion that it was of so transitory a nature, of so ephemeral a character, that the imposition upon the employee of a restraint extending during the whole of his life is altogether unreasonably wide, and far more than was necessary for the due protection of his right, if it existed.

For these reasons I agree in thinking that this appeal fails and must be dismissed.

Appeal dismissed.

Solicitor for the appellants: W. P. Guillet.

Solicitors for the respondent: Romer and Skan.

NOTE.

The annotation following *Samuel Stores v. Abrams*, ante, 1456, covers the general question as to the validity of contracts by employees in restraint of trade. The reported case (*HEPWORTH MFG. CO. v. RYOTT*, ante, 1484) represents one phase of this question. No other case has been found which passes upon the validity of a contract by which an employee covenants in substance not to use his pseudonym for any purpose whatsoever after termination of his contract of employment. The case contains a valuable discussion of the applicability to such a contract of the principles governing contracts in restraint of trade. As shown in the note referred to, contracts by employees in restraint of trade are valid if reasonable and necessary to the protection of the business or good will of the employer, but such contracts are invalid if oppressive or if not reasonably necessary for the protection of the employer's business or good will. In this connection the *RYOTT CASE* emphasizes an important matter to be considered as affecting the validity of these contracts, that is, that the employer is not entitled to contract with his employee against the use by the latter of the knowledge, reputation, skill, and ability which he has acquired by reason of his employment, as distinguished from knowledge of or acquaintance with the patrons, customers, or clients of the employer, or his trade secrets.

RE JOSEPH MITCHELL DONOVAN.

South Dakota Supreme Court — May 24, 1920.

(— S. D. —, 178 N. W. 143.)

Attorney and client — advertising divorce business — unprofessional conduct.

1. For an attorney to send news items to the public press concerning divorce cases in which he is mentioned as attorney in the case and referred to by name as an expert on marriage, and which are subsequently compiled in a booklet for distribution, is unprofessional and dishonorable conduct.

[See note on this question beginning on page 1500.]

— condemnation of practice.

2. The practice by an attorney of advertising or encouraging divorce litigation cannot be condemned in too strong language.

[See 2 R. C. L. 1098.]

— suspension from practice.

3. An attorney guilty of advertising for divorce business will be suspended from practice even though, because of his general character and the difficulty of taking up other business, disbarment would be inadvisable.

APPLICATION for disbarment of the defendant attorney. Defendant suspended.

The facts are stated in the opinion of the court.

Messrs. Byron S. Payne, Attorney General, and E. R. Winans, Assistant Attorney General, for the State:

The advertising indulged in by the accused justified his disbarment.

People ex rel. Maupin v. MacCabe, 18 Colo. 186, 19 L.R.A. 231, 36 Am. St. Rep. 270, 32 Pac. 280; Re Schnitzer, 33 Nev. 581, 33 L.R.A. (N.S.) 941, 112 Pac. 848; People ex rel. Deneen v. Smith, 200 Ill. 442, 93 Am. St. Rep. 206, 66 N. E. 27; State v. Giantvalley, 123 Minn. 227, 143 N. W. 780; People ex rel. Colorado Bar Asso. v. Taylor, 32 Colo. 250, 75 Pac. 914; Ingersoll v. Coal Creek Coal Co. 117 Tenn. 263, 9 L.R.A. (N.S.) 282, 119 Am. St. Rep. 1003, 98 S. W. 178, 10 Ann. Cas. 829; Re Neuman, 169 App. Div. 638, 155 N. Y. Supp. 428; 2 R. C. L. 1097.

Messrs. Aikens & Judge for defendant.

Polley, J., delivered the opinion of the court:

In March, 1918, an accusation was filed in this court accusing defendant of certain unprofessional conduct as a member of the bar of this state. This accusation was referred to the attorney general, with directions to investigate the matter set out in said accusation and to re-

port the result of his investigation to this court. The report filed by the attorney general was such that the court felt warranted in issuing an order directing that official to prepare and serve on defendant a formal complaint. The matter was delayed because of the ill health of the defendant, and the complaint was not served until the 6th day of September, 1918.

The complaint charges that at divers times, for several years previous to the filing of the complaint, the defendant had published and circulated a booklet entitled "The Law of Marriage, Annulment, Domicil, Divorce," purporting to contain a synopsis of the laws of the various states pertaining to marriage, annulment, domicil, and divorce; that said booklet contains many misleading statements relative to the divorce laws of this and other states; that said booklet also contains a number of purported newspaper articles accredited to such papers as the New York Journal, Atlanta Constitution, Minneapolis Journal, Philadelphia North American, St. Paul Dispatch, and Cincin-

nati Enquirer, which said purported newspaper articles make reference to defendant as a specialist and expert on the law of marriage and divorce, but alleges that said articles never were in fact published in the newspapers to which they were accredited.

It is the theory of the complainant that the said booklet referred to in the complaint was published, sold, and distributed by defendant for the purpose of advertising, first, the state of South Dakota as the place where divorces could be most easily obtained, as compared with other states; and, second, defendant as the man who was the best qualified of anyone in the state to procure such divorce.

That such was the purpose of said publication is too plain to leave any room for argument. Reference to a few of the matters contained in said booklet will suffice to support this conclusion. At pages 39 to 50, inclusive, thereof, are set out what purport to be the statutory causes that will authorize an "absolute divorce" in the various states. On page 47 the causes for divorce in South Dakota are stated as follows:

"(1) Consanguinity (nearer than second cousins); (2) fraudulent contract; (3) force in bringing about the marriage; (4) duress in compelling marriage; (5) unsound mind of either party; (6) another husband or wife living, undivorced; (7) nonage; (8) impotency; (9) adultery; (10) extreme cruelty, physical or mental; (11) wilful desertion for one year; (12) driving the other from home by cruelty, threats, stratagem, or fraud; (13) refusal of matrimonial intercourse for one year; (14) failure of the husband to support wife for one year; (15) habitual intemperance for one year; (16) conviction for felony."

Section 137, Code 1919, enumerates the only grounds—six in number—on which a divorce may be granted in this state; therefore defendant's statement that there are sixteen causes for divorce must

necessarily be incorrect and misleading. This is explained by defendant in this way: That the effect of the annulment of a marriage is the same as a divorce, and that he just grouped all the causes for both remedies together under the one head. Even then, there would be but twelve causes, while defendant has enumerated sixteen. But, if the causes for divorce and annulment in this state had been grouped together in good faith, why did he not follow the same plan in case of North Dakota? The causes for divorce and annulment of marriage are exactly the same in that state as in this. N. D. Comp. Laws 1913, §§ 4368 and 4380. On page 45 of the booklet defendant enumerates the six grounds for divorce found in § 4380, Comp. Laws of North Dakota 1913, and says nothing about the causes for annulment. Many other statements are equally misleading.

On page 69 of the booklet is a table purporting to give the length of time one must have resided in the various states before he can commence an action for divorce. The time necessary for acquiring a domicile in this state is fixed at seven months, and on page 82 is the following paragraph relative to domicile: "Action may be commenced after a domicile of the plaintiff within the state for six months. Cause may be tried before the court, on the equity side, thirty days after the service on defendant. Annulment suits are governed by the provisions respecting citizenship, which, like domicile, is acquired in six months. If the cause accrued while the plaintiff was domiciled without the state, one year's domicile is required."

No part of this statement of the law is positively false, though it is so badly garbled as to be misleading and deceiving. Sections 156 and 158 require a residence of one year, provided that, if the cause of action arises in this state, then a residence of six months is sufficient. A comparison of the table found in page 69

of the booklet, with the statutes of the various states, will show that, in nearly all the states except South Dakota, the length of residence is given at from two to ten months longer than that prescribed by the statutes. The effect of this is, of course, and it could have been intended to have no other effect than, to convince a nonresident that he could get a divorce quicker by coming to South Dakota than he could any place else.

The newspaper articles mentioned in the complaint consist of sixty-two separate articles, each of which purports to have been taken from a different newspaper. Each article gives an account of a more or less notorious divorce case, involving parties from many of the states of this country and some from foreign countries. These articles occupy a large percentage of the entire booklet, which contains only 112 small pages. Their origin is left wholly in doubt. Defendant's explanation is as follows: He does not pretend that he ever saw any of said articles in the papers to which they are accredited, with perhaps one or two exceptions, but claims that he was a subscriber to certain "clippings bureaus," and that these bureaus sent the clippings to him; that he believed they were genuine, and that they had in fact been published as matters of news in the said newspapers. This explanation is not very convincing. In the first place, these several divorce cases do not seem to us to have been of sufficient importance to have been published as matters of news in the metropolitan dailies of the eastern cities. In the second place, the outstanding feature of each and every one of these articles is the fact that defendant was the attorney for the successful party. Certainly, these papers could have no interest in advertising him and his divorce business in this manner. In one article, accredited to the "Mexico Daily Herald," defendant is referred to as "J. M. Donovan, the international expert on marriage

and divorce." In another article, accredited to the Montreal Star, defendant is referred to as "J. M. Donovan, the well-known United States expert on marriage." Many others are of similar import. This constitutes advertising as a divorce lawyer through the public press, and is generally held by the courts to be unprofessional and dishonorable conduct. 6 C. J. 599.

Attorney and client—advertising divorce business—unprofessional conduct.

This brings us to the more difficult question involved in the case, to wit: What should be the judgment of the court? The referee who tried the case recommends that defendant be censured by the court for his unprofessional and dishonorable conduct, and that he be ordered to refrain and desist from such conduct in the future. The attorney general excepts to the referee's recommendation, but does not recommend disbarment.

It appears from the evidence that defendant was admitted to the bar in 1889, and that he has been engaged in the practice of his profession constantly since that time; but, so far as the record shows, he has never given his attention to any other law business than that pertaining to divorce cases. This is his sole means of livelihood. He has a family. He has always been a good citizen and enjoyed the confidence and respect of people in his community. It is not claimed that he has ever overcharged, or in any way taken advantage of his clients, or that he has ever practised any fraud upon the courts of the state. On the other hand, his course of procedure has brought reproach upon the state abroad, and brought the bar and the courts of the state into disrepute at home. He appears to be without any sense of the proprieties or ethics of the profession.

"The ethics of the legal profession forbid that an attorney should advertise his talents or his skill as a shopkeeper advertises his wares. An attorney may properly accept a retainer for the prosecution or de-

fense of an action for divorce, when convinced that his client has a good cause. But for anyone to invite or encourage such litigation is most reprehensible." *People ex rel. Maupin v. MacCabe*, 18 Colo. 186, 19 L.R.A. 231, 36 Am. St. Rep. 270, 32 Pac. 280.

The practice of advertising or encouraging divorce litigations could hardly be condemned in stronger language, nor, in our opinion, could the condemnation be too strong. *Re Schnitzer*, 33 Nev. 581, 33 L.R.A. (N.S.) 941, 112 Pac. 848.

To disbar defendant would be to deprive him of his means of livelihood, after he has reached a time of

life when it would be difficult for him to take up any other business. It is not at all likely that, if defendant is permitted to continue to practise law, he will ever again be guilty of any of the offenses charged in the complaint. But, on the other hand, his offense against the ethics of the profession has been too flagrant to be dismissed with a mere reprimand. To do so would be to reduce the case to a mere farce.

The judgment of the court will be that defendant will stand suspended from the right to practise in any court of record in this state for a period of six months from the entry of judgment herein.

ANNOTATION.

Encouraging divorce litigation as ground for disbarment or suspension.

As to presumption of innocence in disbarment proceeding, see annotation following *Re Reilly*, 7 A.L.R. 89.

It is generally held that the encouragement by attorneys of divorce litigation, by means of advertisements or circulars so worded as to induce divorce proceedings, and the employment of themselves therein, constitutes ground for disbarment or suspension. *Re Biaggi* (1918) 36 Cal. App. 650, 172 Pac. 1130; *People ex rel. Maupin v. MacCabe* (1893) 18 Colo. 186, 19 L.R.A. 231, 36 Am. St. Rep. 270, 32 Pac. 280; *People ex rel. Colorado Bar Asso. v. Taylor* (1904) 32 Colo. 250, 75 Pac. 914; *People ex rel. Moses v. Goodrich* (1875) 79 Ill. 148; *People ex rel. Deenen v. Smith* (1902) 200 Ill. 442, 93 Am. St. Rep. 206, 66 N. E. 27; *Re Schnitzer* (1911) 33 Nev. 581, 33 L.R.A. (N.S.) 941, 112 Pac. 848; *Re Neuman* (1915) 169 App. Div. 638, 155 N. Y. Supp. 428.

In *People ex rel. Maupin v. MacCabe* (1893) 18 Colo. 186, 19 L.R.A. 231, 36 Am. St. Rep. 270, 32 Pac. 280, holding it a ground for disbarment of an attorney that he inserted an anonymous advertisement that divorces were legally obtained by him very quietly, and that they were good

everywhere, the court said: "In the present case we are not called upon to deal with a matter of ordinary advertising, but with a peculiar kind of advertising. Respondent did not advertise for business openly, giving his name and office address. His advertisement was anonymous, and well calculated to encourage people to make application for divorces who might otherwise have refrained from so doing. When a lawyer advertises that divorces can be legally obtained very quietly, and that such divorces will be good everywhere, such advertisement is a strong inducement,—a powerful temptation,—to many persons to apply for divorces, who would otherwise be deterred from taking such a step from a wholesome fear of public opinion. The advertisement published by respondent says, in effect: 'If you are dissatisfied with your partner in life,—if you desire a divorce,—communicate with me, and your desire shall be gratified. No one will know it. You see, I advertise anonymously. I do not even subject myself to criticism. Everything will be done very quietly, and you will be able to sever the disagreeable marriage tie without public scandal, and hence without re-

proach.' The fear of public opinion is not the highest motive, but it exercises a wholesome influence in many ways. It is undoubtedly potent in preventing many suits for divorce; and in most of such cases, not only the individuals directly concerned, but the circle of society in which they move, as well as society at large, are greatly benefited by the restraining influence of public opinion. The advertisement published by respondent to the effect that divorces could be legally obtained very quietly, which would be good everywhere, was the more mischievous because anonymous. Such an advertisement is against good morals, public and private. It is a false representation, and a libel upon the courts of justice. Divorces cannot be legally obtained very quietly which will be good anywhere. To say that divorces can be obtained very quietly is equivalent to saying that they can be obtained without publicity. Every lawyer knows that to obtain a legal divorce a public record must be made of the proceeding; the complaint must be filed; the summons must issue; process must be served upon the defendant, either personally or by publication in a public newspaper; proof must also be taken, and a decree must be publicly rendered by the court having jurisdiction of the proceeding. All these public proceedings the statute imperatively requires, and for a lawyer, by an advertisement, to indicate that such public proceedings can or will be dispensed with by the courts having jurisdiction of such cases, is a libel upon the integrity of the judiciary that cannot be overlooked when brought to our notice."

The decision in *People ex rel. Maupin v. MacCabe* (Colo.) supra, was followed in *People ex rel. Colorado Bar Asso. v. Taylor* (1904) 32 Colo. 250, 75 Pac. 914, where advertising through the public press, and otherwise, by an attorney as a divorce lawyer, was held sufficient ground for disbarment. The exact wording of the advertisement involved does not appear.

It will be observed that in the reported case (*RE DONOVAN*, ante, 1497) the publishing and circulating by an

attorney of a booklet purporting to give a synopsis of divorce laws, and containing many misleading statements and purported clippings from newspapers, making reference to the publisher as a specialist and expert on the law of marriage and divorce, was held unprofessional conduct and a ground for suspension.

And in *People ex rel. Moses v. Goodrich* (1875) 79 Ill. 158, anonymous advertising by an attorney, giving incompatibility as a ground for divorce, and stating that divorces were obtained by him without publicity or scandal, was held fraudulent and sufficient cause for disbarment.

And in *Re Schnitzer* (1911) 33 Nev. 581, 33 L.R.A. (N.S.) 941, 112 Pac. 848, it was held that publishing advertisements in the other states, and the sending of pamphlets there for the purpose of attracting people to the state to institute divorce proceedings in its courts, and procuring the employment of the one doing the advertising, was misconduct on the part of an attorney within the meaning of a statute governing disbarment or suspension.

And in *People ex rel. Deneen v. Smith* (1902) 200 Ill. 442, 98 Am. St. Rep. 206, 66 N. E. 27, an insertion by an attorney in a newspaper of an advertisement reading, "Loyal, wealthy atty. guarantees family freedom in month; no advance costs; witnesses quietly volunteered; K 333 Tribune office," was held a violation of *Hurd's Rev. Stat.* 1901, p. 681, entitled "An Act to Punish the Offense of Advertising for Divorces," and a ground for disbarment.

And in *Re Biaggi* (1918) 36 Cal. App. 650, 172 Pac. 1130, an advertisement in newspapers of general circulation by an attorney, giving his name, and reading, "Divorce, probate, and criminal law my specialties. Notary public. Consultation free. 426-27 Bank of San Jose Bldg.," was held a violation of the provisions of § 159a of the Penal Code, the provisions of which do not appear, and ground for suspension.

And in *Re Neuman* (1915) 169 App. Div. 638, 155 N. Y. Supp. 428, adver-

tisements by an attorney, giving his name and address, and stating that matrimonial actions were a specialty, and that all matters were confidential, were held a violation of § 120 of the Penal Law, providing that whoever causes to be printed or published advertisements offering to procure, or to aid in procuring, any divorce, or the severance, dissolution, or annulment of any marriage, should be guilty of a misdemeanor, but it was held that even if there was not a violation of the statute, the attorney was guilty of professional misconduct, and he was accordingly suspended from practice for one year.

And in *State v. Giantvalley* (1913) 123 Minn. 227, 143 N. W. 780, an attorney was held to have violated a statute making it a misdemeanor to cause to be published any advertisement offering to procure or assist in procuring any divorce, or offering to appear or act as attorney in any suit for divorce, where he caused an advertisement to be published in a paper reading, "Law specialties, divorce, and corporation matters; confidential advice; free booklet on organization and promotion of corporations; references. Address H. 722, Tribunal. J. T. W."

**STANDARD SCALE & SUPPLY COMPANY, Appt.,
v.
BALTIMORE ENAMEL & NOVELTY COMPANY:**

Maryland Court of Appeals — March 17, 1920.

(— Md. —, 110 Atl. 486.)

Contract — effect of interference by government embargo.

1. A government embargo on shipments does not relieve one who has contracted to sell for prompt delivery a finished product from the consequences of noncompliance with his contract.

[See note on this question beginning on page 1509.]

Trial — duty to instruct for defendant.

2. When the evidence is legally insufficient to fix a liability on defendant, it is the duty of the court, when applied to by an appropriate prayer, to instruct the jury to find a verdict for him.

[See 26 R. C. L. 1067.]

Sale — countermand of order — liability.

3. One ordering trucks for prompt delivery may countermand the order without liability if deliveries are not made for several months after the order was received.

— necessity of performance in time.

4. In mercantile contracts stipulations as to time are regarded as essential, and a material provision of the contract, upon the failure or nonperformance of which the purchaser is

not bound to accept and pay for the goods.

[See 23 R. C. L. 1373.]

Trial — question of law — time for filling contract.

5. Upon undisputed facts the question of what is a reasonable time for filling an order for goods is one of law for the court.

[See 23 R. C. L. 1369.]

Sale — duty to furnish cars for transportation.

6. One contracting to sell and deliver promptly certain manufactured articles cannot avoid the consequences of delay in delivery by claiming that the buyer should have furnished the cars for transportation if no provision to that effect appeared in the contract, and the seller furnished the cars for the first consignment, and never claimed that it was the buyer's duty to do so.

[See 23 R. C. L. 1480.]

Appeal — refusal of testimony — error.

7. It is not error, in an action for breach of contract, to refuse to permit a witness to state whether or not a paper in evidence was the full contract, since the question of construction of the contract is for the court.

Evidence — opinion — compliance with contract.

8. A witness cannot, in an action for breach of contract, give his opinion as to whether or not the contract was complied with.

[See 11 R. C. L. 594.]

APPEAL by plaintiff from a judgment of the Superior Court of Baltimore City (Stump, J.) in favor of defendant in a suit brought to recover the balance alleged to be due on a contract for the purchase of certain platform trucks. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. John L. G. Lee and Hiram J. Weiskopf, for appellant:

Plaintiff could show that the defendant agreed that the trucks should be made in Columbus, and that the defendant was to pay the freight from Columbus to Baltimore, although there was no writing to that effect.

6 R. C. L. p. 925; Brantly, Contr. 415; Ady v. Jenkins, 133 Md. 36, 104 Atl. 178; Greenl. Ev. 15th ed. art. 282; Warner v. Miltenberger, 21 Md. 273, 88 Am. Dec. 578; Warfield v. Booth, 33 Md. 68; Owings v. Baker, 54 Md. 85, 39 Am. Rep. 353; Farrell v. Baltimore, 75 Md. 493, 23 Atl. 1096; Burnett v. Bealmear, 79 Md. 36, 28 Atl. 898; McCann v. Preston, 79 Md. 223, 23 Atl. 1102.

The embargo on the shipment from Columbus, put on by the government, and in effect from January 1st to August 1st, 1918, excused plaintiff from making prompt delivery.

Hadley v. Clarke, 8 T. R. 259, 101 Eng. Reprint, 1377, 4 Revised Rep. 641; McBride v. Marine Ins. Co. 5 Johns. 308; Baylies v. Fettyplace, 7 Mass. 325; Beale v. Thompson, 4 East, 546, 102 Eng. Reprint, 940.

As the contract was f. o. b. Columbus, plaintiff's liability ceased when it made the trucks and had them ready to load on the cars at Columbus.

A. Collins Lumber Co. v. Kingsdale Lumber Co. 176 N. C. 500, 97 S. E. 483; Dwight v. Eckert, 117 Pa. 508, 12 Atl. 32; Bartels v. Redfield, 16 Fed. 336; Kunkle v. Mitchell, 56 Pa. 100; Evanson Elevator & Coal Co. v. Castner, 183 Fed. 409; Davis v. Alpha Portland Cement Co. 73 C. C. A. 388, 142 Fed. 74; Baltimore & L. R. Co. v. Steel Rail Supply Co. 59 C. C. A. 419, 123 Fed. 655; R. J. Menz Lumber Co. v. E. J. McNeeley & Co. 58 Wash. 223, 28 L.R.A. (N.S.) 1007, 108 Pac. 621; Hurst

v. Altamont Mfg. Co. 73 Kan. 422, 6 L.R.A. (N.S.) 923, 117 Am. St. Rep. 525, 85 Pac. 551, 9 Ann. Cas. 549; Gill v. Vogler, 52 Md. 666; Denmead v. Coburn, 15 Md. 29; Aspegren v. Wallerstein Produce Co. 111 Va. 570, 69 S. E. 957; Fairfax Forrest Min. & Mfg. Co. v. Chambers, 75 Md. 604, 23 Atl. 1024.

Messrs. Vernon Cook and S. Ralph Warnken, for appellee:

In mercantile contracts time is of the essence, and a material provision of the contract.

Williston, Sales, § 453, p. 779; Tiffany, Sales, p. 278; Norrington v. Wright, 115 U. S. 188, 29 L. ed. 366, 6 Sup. Ct. Rep. 12; Barker v. Borzone, 48 Md. 474.

When time of delivery, as fixed by contract and understood by plaintiff, is not complied with, the court can direct a verdict for defendant.

Soper v. Creighton, 93 Me. 564, 74 Am. St. Rep. 375, 45 Atl. 840; Tobias v. Lissberger, 105 N. Y. 404, 59 Am. Rep. 509, 12 N. E. 13; Elliott v. Lord, 48 L. T. N. S. 542, 52 L. J. P. C. N. S. 23, 5 Asp. Mar. L. Cas. 63; Wheeler v. Harrison, 94 Md. 147, 50 Atl. 523; Williston, Sales, p. 775, § 451; Coates v. Sangston, 5 Md. 121.

A railroad embargo cannot excuse a long delay in fulfilling a contract, and breach of a material provision thereof.

Tiffany, Sales, 2d ed. 308; Benson v. Atwood, 13 Md. 20, 71 Am. Dec. 611; Kribs v. Jones, 44 Md. 396; Pennsylvania R. Co. v. Reichert, 58 Md. 261; United States v. Gleason, 175 U. S. 588, 44 L. ed. 284, 20 Sup. Ct. Rep. 228; Jones v. United States, 96 U. S. 24, 24 L. ed. 644; Tiffany, Sales, 2d ed. pp. 308, 309; 35 Cyc. 245.

The duty to furnish cars for transportation rested on the seller.

Samuel M. Lauder & Sons Co. v.

Albert Mackie Grocery Co. 97 Md. 13, 62 L.R.A. 795, 54 Atl. 634; Williston, Sales, p. 409, note; Vogt v. Schienebeck, 122 Wis. 491, 67 L.R.A. 756, 106 Am. St. Rep. 989, 100 N. W. 820, 2 Ann. Cas. 814; Hurst v. Altamont Mfg. Co. 73 Kan. 422, 6 L.R.A. (N.S.) 928, 117 Am. St. Rep. 525, 85 Pac. 551, 9 Ann. Cas. 549.

Briscoe, J., delivered the opinion of the court:

This is a suit brought by the plaintiff against the defendant to recover an alleged balance due on a contract for the purchase of 100 wooden hand trucks by the defendant of the plaintiff, to be used in its business to carry material from one part of its building to another.

The plaintiff is a corporation, engaged in the business of manufacturing contractors' equipments and supplies and a general line of machinery. The main office is in the city of Pittsburgh, Pennsylvania, but it also has offices located in Baltimore and other large cities. It also acts as broker or sales agent for other factories making supplies and machinery that it does not manufacture itself.

The defendant is also a corporation, and is engaged in the general enameling business, and at the time of the contract entered into and sued on in this case had a factory at Woodhall street, Baltimore, and a new plant under construction at Mt. Winans, Baltimore county. The hand trucks were purchased for use at its new plant and factory, and were to be delivered at its Mt. Winans plant. The trucks were to be specially made, and to be used for a special purpose in moving material about the plant. They were designated as platform trucks, with end racks at each end and a platform about 9 feet long and 3 feet wide.

The contract sued on, and which was accepted and acted on by the parties, appears from the record to be as follows:

The Baltimore Enamel and Novelty Co.,

Baltimore, Md.

Enameled Iron Signs for Advertising Purposes.

Brewers' Trays, Railroad Signals in all Colors, and General Enamelers.

Die Work. Reflectors. Spinning Work.

Baltimore, August 9, 1917

Please fill the following prompt:

The Standard Scales & Supply Co., Pittsburgh, Pa.

100 trucks like sample, except with heavy casters.

Consigned to our siding—Mt. Winans, Md.

	\$26.00 per truck
for heavy casters	.90 price per truck
	<hr/>
	\$26.90 total per truck

Yours truly,

The Baltimore Enamel & Novelty Co.

Per APC—S

Order B—No. 4874.

Put order number on invoice.

(Fully equipped machine shop for doing all kinds of stamping, spinning, and die work.)

At the close of the testimony the court directed a verdict for the defendant by granting the defendant's two prayers, which instructed the jury, first, that there was no evidence in the case legally sufficient to entitle the plaintiff to recover; and, secondly, that the contract between the parties required the plaintiff to ship the trucks promptly, and as it appears from the uncontradicted evidence in the case that the plaintiff did not promptly ship them to the defendant, and the defendant, after waiting a reasonable time, rescinded or countermanded the order, their verdict should be for the defendant. The plaintiff excepted to the granting of these prayers, and the action of the court, in this ruling, is the basis of the third exception. The first and second exceptions relate to rulings on evidence. From a judgment in favor of the defendant for costs, the plaintiff has prosecuted this appeal.

It is the settled law that, when the evidence offered in the case is legal

ly insufficient to fix a liability upon the defendant, it is the duty of the court, when applied to by an appropriate prayer, to instruct the jury to find their verdict for the defendant.

The undisputed evidence in this case shows that the contract between the parties was entered into on the 9th of August, 1917, for 100 special trucks, at \$26.90 each, aggregating \$2,690, to be delivered at Mt. Winans, Maryland. The contract, which is in the form of a letter, addressed to the plaintiff by the defendant and accepted by it, uses the expression, "Please fill the following prompt," and it was understood between the parties at the time of the contract that the order would be filled within from four to six weeks.

On October 22, 1917, the defendant inquired of the plaintiff by letter, to know when they would make shipment, as they would soon be ready for them. The plaintiff replied to this letter, on October 23, 1917, in which it was stated that the factory promised shipment of the trucks on October 15th, but they had failed to receive shipping papers or anything indicating that shipment had gone forward. The letter further stated: "We are writing factory to-day, urging upon them the necessity of prompt shipment, if same has not already gone forward, and as soon as we are in receipt of information that shipment has gone forward, or advices as to when it will go forward, we will immediately communicate with you."

On January 7, 1918, the defendant was advised by the plaintiff that 50 trucks, one half of the order, had been shipped on the 2d of January, 1918, and that the balance of the order will go forward at a very early date. It was further stated in this letter: "We regret the delay in filling this order, but factory was unable to get sufficient lumber to make these trucks, and had considerable difficulty in obtaining same."

9 A.L.R.—95.

The first shipment, one half of the order, it will be thus seen, was not made until about five months after the date of the contract; but the defendant received the 50 trucks under this shipment, and paid one half of the contract price, to wit, the sum of \$1,345. The proof further shows that the defendant, on the 18th of May, 1918, not having received the balance of the order, by a letter of that date countermanded it "on account of the delay in shipping, as we cannot use the trucks at this late date, as they were ordered for a special purpose."

The plaintiff, however, notwithstanding "the countermand" of the order, shipped the second 50 trucks on August 2 and 5, 1918, 25 in each shipment; but the defendant declined to accept them, because it had countermanded the order, and the plaintiff had failed to comply with the terms of the contract with respect to "the prompt" delivery of the trucks. Upon these facts there was, in our opinion, no error committed by the granting of the defendant's two prayers.

The law is well settled, as a general rule, that in mercantile contracts stipulations as to time are regarded as essential, and a material provision of the contract, upon the failure or nonperformance of which the purchaser is not bound to accept and pay for the goods, unless they are delivered or tendered on the day specified in the contract, and may rescind and repudiate the contract. *Barker v. Borzone*, 48 Md. 474; *Ady v. Jenkins*, 183 Md. 38, 104 Atl. 178; *Jones v. United States*, 96 U. S. 24, 24 L. ed. 644; *Norrington v. Wright*, 115 U. S. 188, 29 L. ed. 366, 6 Sup. Ct. Rep. 12.

In this case, the second lot of 50 trucks was not shipped by the plaintiff until about three months after the defendant had countermanded the order, and until nearly one year after the contract was executed. The contract required that the or-

Sale—countermand of order—liability.

—necessity of performance in time.

der should be filed "promptly," and as the delivery of the trucks here sued for was not made until nearly one year after the contract, the court below was right in holding that the contract had not been complied with, and, as the defendant had countermanded the order on the 18th of May, 1918, in directing a verdict for the defendant.

The facts in this case as to the delay in filling the order under the contract being undisputed, the ques-

Trial—question of law—time for filing contract.

tion of what was a reasonable time was clearly one of law for the court, and not for a jury. *Wheeler v. Harrison*, 94 Md. 147, 50 Atl. 523; *United Fruit Co. v. New York & B. Transp. Co.* 104 Md. 576, 5 L.R.A. (N.S.) 240, 65 Atl. 415, 10 Ann. Cas. 437.

It is clear, we think, that the defense relied upon, that the performance of the contract as to the prompt delivery of the trucks in

Contract—effect of interference by government embargo.

question was rendered impossible by an embargo on shipment from Columbus, Ohio, going east, by the government, cannot be sustained, under the facts of this case. In 35 Cyc. 244, the general rule as to impossibility of performance of contracts, arising subsequently to the making of a contract, is thus stated as supported by authority: that a seller who promises unconditionally to deliver takes the risk of being unable to perform, although his inability is caused by inevitable accident, or circumstances beyond his control. It is further said, at page 245 of the same volume, that, in accordance with the general rule, it has usually been held that the seller is not excused from delivery by the obstruction of routes of transportation, whether due to the freezing of waterways, seizure of a railway by the government, freshets, or other causes, unless such contingencies are expressly provided for in the contract; and especially will the rule prevail where other routes of transportation were open to the seller; and that a failure to deliver under

the terms of the contract is not excused by the inability of the seller to procure cars or other means of transportation, unless there is a stipulation covering such contingency, and even in such case he must show that he made a reasonable effort to procure transportation.

The same principle and rule of law has been announced by this court and the Supreme Court of the United States in a long line of well-considered cases. *Benson v. Atwood*, 13 Md. 20, 71 Am. Dec. 611; *Kribs v. Jones*, 44 Md. 396; *Pennsylvania R. Co. v. Reichert*, 58 Md. 261. In *Southern Bldg. & L. Asso. v. Price*, 88 Md. 163, 42 L.R.A. 206, 41 Atl. 54, it is said it is familiar law that if, at the time of making the contract, the thing promised be possible in itself, it is no excuse for nonperformance that its performance became subsequently impossible from causes beyond the control of the promisor. *Jones v. United States*, 96 U. S. 24, 24 L. ed. 644; *United States v. Gleason*, 175 U. S. 588, 44 L. ed. 284, 20 Sup. Ct. Rep. 228.

Under the order, which is the contract in this case, the plaintiff promised unconditionally to manufacture and deliver to the defendant the trucks here in question. The contract was not made dependent upon embargoes or other contingencies which might have been provided for and guarded against by the terms of the contract, but, failing in this, the case must be governed by the general rules of law applicable to such contracts. *Tiffany, Sales*, 2d ed. 308; *Brantly, Contr.* 262-264.

We find nothing in the contract to show that the trucks were to be shipped f. o. b. Columbus, or to justify the argument, made by the plaintiff, that the duty or obligation rested upon the defendant to furnish the cars necessary for the transportation of the trucks. The only reference in the contract to the shipment of the trucks is that they were to be "consigned to our siding—Mt. Winans, Md." The course of dealing, however, between the par-

ties, amounted to a construction of the contract as imposing the duty upon the seller (plaintiff) here to furnish the cars. The plaintiff provided the cars for the first shipment, and at no time in its correspondence as to the delay did it assert or claim that it was the duty of the defendant to furnish the cars, or that the delay in the delivery was due to this cause or failure. Samuel M. Lauder & Sons Co. v. Albert Mackie Grocery Co. 97 Md. 18, 62 L.R.A. 795, 54 Atl. 634; Wiliston Sales, 409; Vogt v. Schienebeck, 122 Wis. 491, 67 L.R.A. 756, 106 Am. St. Rep. 989, 100 N. W. 820, 2 Ann. Cas. 814; Hurst v. Altamont Mfg. Co. 73 Kan. 422, 6 L.R.A. (N.S.) 928, 117 Am. St. Rep. 526, 85 Pac. 551, 9 Ann. Cas. 549.

Sale—duty to furnish cars for transportation.

There is no reversible error in the ruling of the court, upon exceptions to testimony, as set out in the record. The first exception was to the refusal of the court to allow the witness to answer the following question: "Is this paper which you produced in evidence, is this the full contract, or is it merely the acceptance of an offer on the part of the defendant?"

The construction of the contract was for the court, and not for the witness, and there was nothing in the circumstances surrounding the written contract that would bring it within any of the exceptions to the general rule that would permit the introduction of oral evidence to vary or contradict the terms of a written contract.

Appeal—refusal of testimony—error.

The second exception was to the refusal of the court to permit the following question to be asked the witness Little: "Whether or not the Standard Scale & Supply Company complied with the contract offered in evidence, and, if they have done, what they contracted to do under that contract."

The court properly sustained the defendant's objection to the question, because the question was one calling for the opinion of the witness, and whether the contract had been complied with by either of the parties was a question of law under the facts of the case, to be determined by the court.

Evidence—opinion—compliance with contract.

For the reasons we have stated, the judgment from which this appeal was taken will be affirmed.

Judgment affirmed with costs.

Burke, J., sat in this case, but did not participate in the decision.

NOTE

The question involved in the reported case, as to whether the buyer of goods to be delivered promptly may cancel the contract for failure to make delivery, where such failure is occasioned by an act of the government in the prosecution of the war, is covered in annotation appended to the case of BROOKE TOOL MFG. CO. v. HYDRAULIC GEARS Co. post, 1509, on "Rights of parties to contracts the performance of which is interfered with or prevented by war conditions or acts of government in prosecution of war."

BROOKE TOOL MANUFACTURING COMPANY, Limited,

v.

HYDRAULIC GEARS COMPANY, Limited.

English Court of King's Bench—October 29, 1919.

(89 L. J. K. B. N. S. 263.)

Sale — government interference — postponement of time of delivery.

Interference with the performance of a contract for delivery of goods by governmental orders for war purposes, with which the seller is bound

to comply, does not entitle him to make deliveries at a period later than that named in the contract, when the government requirements are provided for.

[See note on this question beginning on page 1509.]

APPEAL from the Judge of the Solihill County Court.

The action was brought by the plaintiffs to recover £75, 17s. 9d. for goods sold and delivered by them to the defendants. Both the plaintiff and defendant firms were "controlled establishments" within the Munitions of War Act 1915, which, under § 4, subsection 5, "shall comply with any regulations made applicable to that establishment by the Minister of Munitions with respect to the general ordering of the work in the establishment, with a view to attaining and maintaining a proper standard of efficiency," under a penalty.

A contract was made in July, 1917, for the delivery at the plaintiffs' works to the defendants of certain speed end mills within a period of from eight to twelve weeks, i. e., not later than October, 1917. The plaintiffs' firm was so wholly engaged in government work that no deliveries could be made until May, 1918. The defendants declined to accept them; whereupon the plaintiffs brought this action to recover their price. The county court judge gave judgment for the plaintiffs for the amount claimed.

The defendants appealed.

Disturnal, K. C. (Leslie Marks with him), for the appellants:

The onus was on the plaintiffs to explain their breach of the terms in the contract as to time of delivery. The county court judge put the onus on the defendants to justify their refusal to accept.

[He was stopped.]

Hurst, K. C. (Finnemore with him), for the respondents, the plaintiffs:

The plaintiffs were bound to comply with the government regulations under § 4, subsection 5, of the Act of 1915, and, in order to do so, were unable to carry out the term as to delivery. The defendants, as a controlled firm also, would be aware of this, and therefore a condition was implied in the contract that it was to

be carried out subject to any alteration occasioned by the necessity for the plaintiff's compliance with the government's requirements.

Lush, J.:

In this case the plaintiffs agreed to sell and the defendants agreed to buy certain goods on the terms that delivery should be completed within eight to twelve weeks of the date of the contract, July 18, 1917. The goods should therefore have been delivered by October 18, 1917. In fact, the plaintiffs never tendered them until May, 1918. Thereupon the defendants refused to accept them, and the plaintiffs brought this action for their price.

The question for our determination is whether the plaintiffs were entitled to compel the defendants to take delivery seven months after the time provided by the contract. Both firms were controlled establishments, and the plaintiffs were bound to obey the government's orders, and therefore it might be impossible for them to carry out their contract with the defendants to deliver the goods within the stated time. The county court judge gave judgment for the plaintiffs, and, in the course of his judgment, he says: "The question raised is whether, on the facts, the defendants had any justification for canceling the contract. In my opinion they had not. As a controlled firm the plaintiffs were compelled to give their whole time, when required, to government work. . . . The defendants, being also a controlled firm, must have been well aware of the orders and regulations which applied to such a firm."

In my opinion, the learned judge put the onus on the wrong party. It was not a question whether the defendants could establish justification for canceling the contract, but whether the plaintiffs could estab-

lish any reason for forcing the defendants to accept delivery after the delay. The county court judge has held that, because both the parties were controlled establishments, the contract must be altered, and a new term incorporated in it to the effect that, if the plaintiffs are prevented from delivering the goods at the date agreed upon, they can deliver later, and compel the defendants to accept and pay for them, provided that they can show that the delay is due to their having had to execute government orders. In my opinion that is an erroneous view.

We are not considering here the question whether the defendants could sue the plaintiffs for damages for delay in delivery, which would be an entirely different question; we are considering the exactly opposite question; namely, whether the plaintiffs can demand payment for the goods in spite of the fact that they were delivered long after the time for delivery specified in the contract. If the county court judge was right, very remarkable consequences would ensue. The plain-

tiffs might deliver more than a year after the time agreed upon, and when the goods might be entirely useless to the defendants; yet the latter would still be bound to accept delivery and pay for the goods. Such a result would, in my view, be entirely unreasonable. In my opinion, therefore, the county court judge was wrong, and there was no ground for reading this new term into the contract. The appeal must be allowed.

Sale—
government
interference—
postponement
of time of
delivery.

Sankey, J.:

I entirely agree, and merely wish to add that, in my opinion, the statute does not in any way alter the terms of a contract, but merely affords an excuse for nonperformance. It is a weapon of defense, and not of offense, and can be used as a shield, but not as a spear.

Appeal allowed.

Solicitors: Bartlett & Gluckstein for defendants.

Solicitors: Trinbrell & Deighton, agents for Tanfield & Company, Birmingham, for plaintiffs.

ANNOTATION.

Rights of parties to contracts the performance of which is interfered with or prevented by war conditions or acts of government in prosecution of war.

I. Introduction, 1059.

II. In general:

- a. Where subject-matter of contract or means of performance has been requisitioned, or put under governmental control, 1510.
- b. Effect of requisition of chartered vessel, 1510.
- c. Where performance involves doing of illegal act, 1513.
- d. Change in conditions, due to war, as destroying basis of contract, 1515.

I. Introduction.

The earlier cases discussing the rights of the parties to a contract the performance of which is interfered with or prevented by war conditions or the acts of the government in the pro-

II.—continued.

- e. Right to resume performance after cessation of governmental interference, 1521.

III. Effect of provision in contract suspending or excusing performance in certain contingencies:

- a. As excluding doctrine of commercial frustration, 1521.
- b. As covering situation occasioned by war:
 1. In charter parties or bills of lading, 1521.
 2. In contracts of sale, 1522.

secution of the war are collected in the annotation in 3 A.L.R. 21. The present note reviews the recent decisions on the subject. Its scope does not include the question of the effect of war on contracts of alien enemies, or the

effect of legislative enactments, such as moratory acts, designed to grant relief in the matter of the performance of contracts during the existence of war conditions.

The decision of the court of appeals in *Peter Dixon & Sons v. Henderson, C. & Co.*, referred to in the note in 3 A.L.R. on page 49 as reported in (1918) 87 L. J. K. B. N. S. (Eng.) 683, has since been also reported in [1919] 2 K. B. 778.

II. In general.

a. Where subject-matter of contract or means of performance has been requisitioned, or put under governmental control.

(Supplementing annotation in 3 A.L.R. p. 22.)

In *Crown Embroidery Works v. Gordon* (1920) 190 App. Div. 472, 180 N. Y. Supp. 158, it was held that a good defense to an action for damages for breach of a contract for the manufacture, sale, and delivery of a quantity of cloth was not stated by an answer alleging that, before the time for the defendant to complete performance had arrived, the action of the War Industries Board, in taking possession and control of all of the yarn mills in the United States and their products, and of all the woolen and worsted yarn in the United States, rendered it impossible for them to fulfil their contract, since such answer does not show that the action of the government was taken before the lapse of a reasonable time for the purchase of the necessary material after making the contract.

In *Ingram Day Lumber Co. v. Kola Lumber Co.* (1920) — Miss. —, 84 So. 693, it was held that performance of a contract to manufacture and deliver lumber of certain sizes and dimensions within a stipulated time was not excused by an order of the United States Shipping Board Emergency Fleet Corporation, requiring the manufacturer to place at its disposal all lumber and timber of certain dimensions, including a material portion of the sizes covered by the contract sued on, and to refrain from selling or disposing of such lumber without first obtaining authority from the said Emergency

Fleet Corporation, or the Priority Committee of the War Industries Board, where it did not appear that the capacity of the manufacturer's mill was engrossed by government orders, or that application for permission to comply with its contract had been made and refused.

In *Whitehall Court v. Ettlinger* (1919) 89 L. J. K. B. N. S. (Eng.) 126, it was held that a tenant continued liable for rent during the term of his lease notwithstanding the leased premises had been requisitioned by the government, it not appearing that such requisition was for a time indeterminate, or for the full period of the tenancy, there being in such case no eviction by title paramount.

The decision in *Moore & Tierney v. Roxford Knitting Co.* (1918) 250 Fed. 278, which is cited and set out at page 23 of the note in 3 A.L.R., has since been affirmed by the circuit court of appeals (1920) — A.L.R. —, — C. C. A. —, 265 Fed. 177, certiorari denied in (1920) 253 U. S. —, 64 L. ed. —, 40 Sup. Ct. Rep. 588. The majority of the latter court took the position that "when a manufacturer is given to understand that he is required to supply certain goods to the government of the United States, and is told that he has no option to decline to comply, we are satisfied that as to those goods an 'order' has been placed or received, within the spirit and intent and the letter of the statute, whether the authoritative direction is written or oral, and notwithstanding the fact that the parties actually come to an agreement in what has the form of a contract. Substance is not to be sacrificed in such cases to form."

b. Effect of requisition of chartered vessel.

(Supplementing annotation in 3 A.L.R. p. 24.)

As to the effect of an exception of "restraints of princes" to exonerate the owners from further performance of a charter party, see III. b, 1, post.

The question of the effect of the requisition of a chartered vessel was raised in *The Isle of Mull* (1919) 257 Fed. 798, wherein it appeared that the libellant chartered a steamship from

its owner, a British corporation, in January, 1914, for a five-year term. In July, 1915, in a Spanish port, on demand of those assuming to act for the British admiralty, the owner placed the ship at the service of the British government, which paid therefor to the owner a sum considerably in excess of the charter hire. The charterer sued in admiralty to recover its loss through the repudiation of the charter party, and the substantial defense of the owner was that the action of the admiralty extinguished the charter and all rights under it by virtue of the usual "restraint of princes" clause in the charter party. The court concluded, in a lengthy opinion, that while the freedom of the owner to leave the vessel in the charterer's service was in fact effectively restrained by the action of the British government, nevertheless, the owner was not entitled to retain the profit accruing to it from such action, and that the libellant was entitled to recover the equivalent of the sum by which the amount received by the owner exceeded the charter hire.

But in *The Frankmere* (1920) 262 Fed. 819, it was held that a time charter of a British vessel containing the usual "restraint of princes" clause was terminated by the requisition of the vessel by the British government, and that the charterer was therefore entitled neither to damages generally for breach of contract, or, specifically, for the excess paid by the British government to the owner over and above the charter rate. The court in this case refused to adopt the view advanced in *The Isle of Mull* (Fed.) supra, and adhered to that promulgated in *Earn Line S. S. Co. v. Sutherland S. S. Co.* (1918) 254 Fed. 126.

The case of *Earn S. S. Co. v. Sutherland S. S. Co.* (Fed.) supra, cited in the note in 3 A.L.R. on pages 25 and 43, has been affirmed by the circuit court of appeals in *The Claveresk* (1920) — C. C. A. —, 264 Fed. 276, the appellate court holding that no damages were recoverable against the owner of a vessel for nonperformance of a time charter party by reason of the vessel's having been requisitioned

by his government for an indefinite period which in fact outlasted the period covered by the charter, on the ground that the charter party was dissolved by the cessation of the state of things upon which it depended, the court saying: "The relief afforded by the restraint clause is also too slow; one party always demands, both parties ought to ask, and in the interest of the public the law insists on knowing: How does the contract stand eo instanti the ship is taken away? Is the private contract living or dead, and, if dead, what killed it? This question cannot be answered by reference to the restraint clause, or any other expressed term of the written contract; therefore another legal creation, and one underlying the words chosen by the parties, is appealed to, and we find that this charter party ended or died, and its obligations were forever dissolved, on February 10, 1917, because the commercial adventure was then frustrated. This phrase is said to have been born in the judgment in *Jackson v. Union Marine Ins. Co.* (1874) L. R. 10 C. P. (Eng.) 125, 44 L. J. C. P. N. S. 27, 31 L. T. N. S. 789, 23 Week. Rep. 169, 2 Asp. Mar. L. Cas. 435, 6 Eng. Rul. Cas. 650 (*Bank Line v. Capel* (1919) 1 A. C. (Eng.) 467, 88 L. J. K. B. N. S. 211, 120 L. T. N. S. 129, 35 Times L. R. 150, 63 Sol. Jo. 177, 14 Asp. Mar. L. Cas. 370), it has been the subject of recent exhaustive discussion in the House of Lords (*Horlock v. Beal* [1916] 1 A. C. (Eng.) 486, 85 L. J. K. B. N. S. 602, 114 L. T. N. S. 193, 32 Times L. R. 251, 60 Sol. Jo. 236, 21 Com. Cas. 201, Ann. Cas. 1916D, 670, and the *F. A. Tamplin S. S. Co. v. Anglo-American Petroleum Products Co.* [1916] 2 A. C. (Eng.) 397, 85 L. J. K. B. N. S. 1389, 115 L. T. N. S. 315, 32 Times L. R. 677, and *Bank Line Case* (Eng.) supra), and the doctrine was recently applied in *Allanwilde Transport Co. v. Vacuum Oil Co.* (1919) 248 U. S. 377, 63 L. ed. 312, 3 A.L.R. 15, 39 Sup. Ct. Rep. 147, and *Lewis v. Mowinckel* (1914) 132 C. C. A. 88, 215 Fed. 710. It is so authoritatively held in the cases cited, and those on which they rely, that the doctrine of frustration applies to a varie-

ty of maritime contracts, including time charters, that more than mention of the fact scarcely seems necessary. In our judgment the justification for the holdings is best expressed by Lord Sumner (*Bank Line Case*, at page 454) in saying: 'Rights ought not to be left in suspense or to hang on the chances of subsequent events. The contract binds or it does not bind, and the law ought to be that the parties can gather their fate then and there.' But since parties almost never agree about it, courts must ascertain fate for them by (says Lord Loreburn, in *F. A. Tamplin S. S. Co. Case* at page 404) inferring, 'from the nature of the contract and the surrounding circumstances, that a condition not expressed was a foundation on which the parties contracted.' It follows naturally that, when the foundation is removed, the superincumbent contract falls and dies; it is killed by that malignant disease—a change of circumstances. It may also be accepted on authority that frustration of adventure and termination of contract may be the instant result of an act which may be properly described as 'restraint of princes,' etc. *Bank Line Case*, at page 442. Applying these rules to the facts before us, it being true that government on February 10, 1917, made it impossible for either Sutherland, Earn Line, or any other private individual to use *The Claveresk*, and did this under circumstances clearly showing to any sensible man that such indefinite taking would almost certainly outlast the life of the charter, it further appearing that the boat was so retained far beyond the charter period, and indeed (by admission at bar) still is kept by government (cf. *Bank Line Case*, at page 454), it follows as a conclusion of law that the charter party was terminated by frustration on February 10, 1917. Although this result has been worked out in the highest British court with an enormous expenditure of writing, an examination of the case law relied on shows that the doctrine of frustration as applied to time charters is regarded as a logical outcome of the *Union Marine Ins. Co. Case* (Eng.) *supra*, and *Geipel v. Smith*

(1872) L. R. 7 Q. B. (Eng.) 404, 41 L. J. Q. B. N. S. 153, 26 L. T. N. S. 361, 20 Week. Rep. 332, 1 Asp. Mar. L. Cas. 268, which are likewise the precedents forming the foundations of *The Styria v. Morgan* (1902) 186 U. S. 1, 46 L. ed. 1027, 22 Sup. Ct. Rep. 731, and kindred decisions. Indeed, we cannot think the doctrine new except in phraseology and application; for it is elementary that among the ways in which any contract ends and is dissolved is the cessation of existence of some thing, condition, or state of things, upon the continued existence of which the contract was known to depend, provided such cessation of existence arises without fault in either contracting party. *Jenks*, Dig. English Civil Law, bk. 2, part 1, § 297, citing cases. In the present instance, what ceased to exist was Sutherland's control of the *Claveresk*; that swept away the foundation of contract, as thoroughly as might a fire or shipwreck." The circuit court of appeals, however, did not pass upon the question discussed in the court below, as to whether the charterer was entitled to the compensation paid by the government, upon the ground that the question was not before them on the pleading.

In *Texas Co. v. Hogarth Shipping Co.* (1919) 265 Fed. 375, the court, without deeming it necessary to determine whether or not there had been a "valid requisition" by the British government of a vessel declared and accepted under a charter party between the owner, a British corporation, and the charterer, an American corporation, held that the fact that the British government took and used the vessel during the time contemplated by the charter party established a case of "impossibility of performance," relieving the owner from liability for damages in failing to furnish the vessel. *Haugh*, C. J., observed that the phrase, "frustration of venture," had obtained much vogue of late, and that *Allanwilde Transp. Co. v. Vacuum Oil Co.* (1919) 248 U. S. 377, 63 L. ed. 312, 3 A.L.R. 15, 39 Sup. Ct. Rep. 147, will increase it, but that to him the phrases seemed only equivalent for, and no improvement on, "impossibility of perform-

ance," using "impossibility" in the practical sense so well illustrated by Maule, J., when he pointed out that a shilling might be retrieved from deep water, yet legally it was "impossible" to do it, because no sensible man would attempt the foolish job.

c. Where performance involves doing of illegal act.

(Supplementing annotation in 3 A.L.R. p. 26.)

In *E. Hulton & Co. v. Chadwick, T. & Co.* (1919) 122 L. T. N. S. (Eng.) 66, the House of Lords affirmed the decisions of the lower courts, which are fully set out in the original annotation at page 31, note 37.

As stated in the annotation in 3 A.L.R., at page 26, it is a well-recognized exception to the general rule that what a party undertakes to do he is bound to perform; that where the performance of a contract becomes impossible, by reason of an act or state rendering performance illegal, both parties to the contract are discharged.

Accordingly it has been held that performance of a contract is excused where it would have subjected the promisor to prosecution and fine and imprisonment, owing to lawful action by the Federal authorities, incident to the war, even though such action was not taken until the last day for performance, since the promisor was not bound to perform sooner. *Crown Embroidery works v. Gordon* (1920) 190 App. Div. 472, 180 N. Y. Supp. 158.

In *Wageck v. Travelers Ins. Co.* (1919) 108 Misc. 65, 177 N. Y. Supp. 327, it appeared that an insurance company, pursuant to an act of Congress, paid to the Alien Property Custodian the sum which it claimed to be due as the proceeds of a life insurance policy. It was held that the beneficiary of the policy had no right of action against the company as far as the sum so paid was concerned, the court saying: "The provisions of § 7 (c) of the 'Trading with the Enemy Act' seem to make a payment to the Alien Property Custodian, in pursuance of a demand under subsection (c), an absolute bar to an action against the person making such payment. The determination of the Alien Property Custodian that the property is the property of an alien enemy, even though erroneous, and even though made without the investigation required by subsection (c), is an absolute protection to the person making the payment or delivering or conveying the property demanded. The act itself contains provisions (§ 9) for the correction of any errors which may be made in the determination of the ownership of any property so taken, and the plaintiff, who is not claimed to be an alien enemy, may prosecute her claim by filing the notice required by that section, and thereafter applying to the President for the payment of the amount, or bringing an action in the United States district court."

The principle above stated was held not to apply in *Erdreich v. Zimmermann* (1920) 190 App. Div. 443, 179 N. Y. Supp. 829, in which it was held, reversing (1919) 107 Misc. 508, 176 N. Y. Supp. 762, that a contract, both parties to which were residents of the United States, for the purchase of bonds of the German government, to be delivered upon their arrival from Europe, did not become illegal and incapable of execution upon the declaration of war by the United States against Germany, but that performance thereof was merely suspended until peace should be declared. The court said: "Had the sale of these bonds, which was made on December 14, 1916, been at a date after our entry into the World War, notwithstanding the contract was not between an American citizen and a citizen of an enemy government, still, the result of the sale being to furnish money to the German government with which to prosecute the war, the transaction, manifestly, would be illegal. As to whether the present sale was in any way affected by our declaration of war is a matter of some doubt. If the moneys paid by the plaintiff for said bonds had, in fact, been forwarded to Germany prior to our entry into the war, then the mere consummation of the transaction by the delivery of the bonds themselves after we entered the war would be a matter of little importance; but, if the payment of plain-

tiff's moneys to Germany awaited the delivery of the bonds by that government, then, of course, the declaration of war should have at once halted the transaction. It seems to me that the appellate term was in error in holding that the obligation of the defendants to deliver the bonds purchased by the plaintiff ended with the outbreak of the war. At most, the delivery of said bonds was suspended during hostilities. Until the declaration of peace, delivery of the bonds would be impossible; but when peace shall come, as it eventually must, then the valid transaction as to the sale of the bonds, which has been suspended during hostilities, may be completed by the delivery of said bonds. In other words, our entry into the war did not cancel a valid contract between plaintiff and defendants, but merely suspended the same until peace shall be declared. The plaintiff, who purchased these bonds purely as a speculation, should not be permitted to rescind such purchase merely because succeeding events may have lessened the values of the securities which he purchased. The transaction was an entirely legal one at its inception. The plaintiff had an entire right, if he saw fit, to purchase the securities of the German government, with whom this country was not then at war. To whatever extent a state of war between this country and Germany may have forbidden the active continuance of such dealing, or the consummation of the contract so long as hostilities continued, when peace is once declared there certainly can be no public policy against the delivery to the plaintiff of the bonds which, prior to the war, he had purchased, and for which he had paid."

In *Federal Sign System v. Palmer* (1919) 176 N. Y. Supp. 565, it appeared that the parties entered into an agreement whereby the plaintiff was to install and maintain an electric sign and the defendant was to pay a weekly sum as rental. By the orders of the Federal Fuel Administrator the nights during which the sign was lighted were limited. In an action for the nonpayment of rent and to recover li-

quidated damages, it was held that the orders of the Fuel Administrator did not terminate the agreement, and the defendant was liable for the nonpayment of the rent.

In *The Isle of Mull* (1919) 257 Fed. 798, it was held that the American charterer of a British vessel had no right to ask that the ship be sent to Bremen, a German port, after war had been declared between England and Germany, and had no right to withhold payment of the charter hire because of the refusal of the owner to comply with such demand; but that a demand that the ship be sent to Rotterdam was reasonable, since Rotterdam was a neutral port and not unsafe, and therefore the charterer was entitled to an allowance on the charter hire for the time the ship was out of service because of the refusal of the owner to comply with the demand.

As stated in the original annotation, at page 28, where performance of a contract is prevented by an act of state, such as a prohibition of exportation, nonperformance during the period of inhibition is excused, but the contract itself is not dissolved unless, at the time it should have been performed, there is a reasonable probability that the inhibition will continue for such a length of time as to frustrate the object of the engagement from a business point of view.

In *Schmidt v. Wilson & Canham* (1920) 47 Ont. L. Rep. 194, it was held that a contract for the sale of a quantity of pelts, to be shipped from New Zealand and delivered in the United States, was not annulled, but merely suspended, by an embargo upon the shipments of pelts to the United States, imposed by the New Zealand government; and therefore that the seller was bound to wait a reasonable time to see whether it would be possible to fulfil the contract before repudiating it; and that the seller could not claim the right to repudiate after the embargo had been removed, even though he might legally have done so during its continuance.

Where, after the making of a c. i. f. contract for the sale of goods to a buyer in a foreign country, the govern-

ment prohibits their exportation except by special permission, it is the duty of the seller to use his best endeavors to obtain such permission. *Ibid.*

In *The Sebastian v. Altos Hornos de Vizcaya* (1919) 36 Times L. R. (Eng.) 177, it was held that the charterer of a vessel to carry a cargo of coal from the United States to Spain, who had used all due diligence to procure an export license, was not liable for demurrage or damages for detention for the period during which the vessel was detained in port after the loading of the cargo, awaiting the issuance of such license, where, at the time of loading the cargo, the possibility of delay was equally known to the owners.

d. Change in conditions, due to war, as destroying basis of contract.

(Supplementing annotation in 3 A.L.R. p. 32.)

Where performance¹ of a contract has been more than temporarily interrupted, or wholly prevented, by a change in the conditions, with reference to which the parties must be deemed to have contracted, it has been held that the obligation of the contract is dissolved, on the ground that it is subject to an implied term that the situation with reference to which it was made shall remain essentially unchanged. This is the doctrine, so called, of commercial frustration.

As stated in the earlier note, it is not enough to bring this doctrine into operation that performance has become more difficult or dangerous or unprofitable.

So, also, in *Pacific Phosphate Co. v. Empire Transport Co.* (1920) 36 Times L. R. (Eng.) 750, it is said that the doctrine of commercial frustration is not to be extended so as merely to let a party escape from a bad speculation; but that the change in circumstances must be so great that no reasonable man would have entered into the contract in the new circumstances.

But increase in cost, while not in itself a cause of frustration, may be looked at as an indication of a change of conditions generally. *Ibid.*

The question whether the doctrine

of frustration of adventure applies to any particular state of facts is one of law, to be decided by the court upon the facts. *Comptoir Commercial Anverso v. Power, Son & Co.* [1920] 1 K. B. (Eng.) 868, 36 Times L. R. 101.

The point stated in the earlier note (at page 33) that while the rights of the parties are to be determined not according to the event, but in view of the circumstances existing at the time the promisor refuses or becomes unable to proceed, the courts are entitled to take into account the real duration of the interruption as proved by the event, is also supported by *The Claveresk* (1920) 264 Fed. 276.

The doctrine of commercial frustration is not applicable to a contract of lease which vests in the lessee an estate during the term. *Whitehall Court v. Ettlinger* (1919) 89 L. J. K. B. N. S. (Eng.) 126.

In *Federal Steam Nav. Co. v. Sir Raylton Dixon & Co.* [1919] W. N. (Eng.) 277, 64 Sol. Jo. 67, it appeared that the defendants agreed to build for the plaintiff a steamer, to be delivered by a certain date, the contract providing that, in the event of any delay caused through strikes, fire, frost, floods, bad weather, war, or any cause whatsoever beyond the builders' control, which should interfere with the construction of the vessel, the builders should be allowed one working day's extension of time for each day of such delay; that shortly after the making of such contract the defendants' works were, in consequence of the war, declared to be a controlled establishment; that before defendants could proceed with the building of the steamer it was necessary for them to obtain from the board of trade a priority certificate to enable them to procure the necessary material, which the board declined to grant until the parties had agreed to an increase in the contract price; and that the Shipping Controller, in consequence of the initiation of the system of standard ships, instructed the defendants to proceed with the construction of the vessel as a standard ship, which was a ship of smaller dimensions than the contract ship, and of a different design. Under

these circumstances it was held that, owing to government interference, it had become impossible to carry out the contract as varied, and therefore that the defendants were no longer bound to perform.

In *Atlantic Steel Co. v. R. O. Campbell Coal Co.* (1919) 262 Fed. 555, it was held that the taking over and control of the output of a coal mine by the Federal fuel administration operated to exonerate one who had contracted to supply another with coal therefrom during a certain period, "shipments to be made at the rate of 1,000 tons per month, or one car per day," during the portion of such period while such control continued. This conclusion seems to have been reached without special reliance on a provision in the contract that "if the mines from which this coal is to be shipped are unable to operate by reason of mining troubles or on account of other causes beyond their immediate control, the first party is not to be liable for failure to make shipments during said period," although this provision is referred to by the court as justifying its conclusion as to the divisibility of the contract. The court said: "That the defendant in this case, when called upon to surrender the use and control of its property to the public need, should thereby become liable to damages for failure to perform a civil obligation, is unthinkable. That its performance should be only temporarily excused would be less harsh, and, if time were not of the essence of the contract, it might be thought that no hardship would result in a mere postponement. To apply the rule of postponement, however, to the many contracts that were indefinitely arrested by government action, both in coal mines and manufacturing establishments, during the war, would perhaps result in an accumulation of obligations to make deliveries or to receive and pay for goods that would be ruinous to the persons involved. It would seem to be a much more practical rule to establish that, when the performance became due, whether time was strictly of the essence or not, if performance could not be made, because

of government action then forbidding, the duration of which obstacle was indefinite and unascertainable, the obligation was thereby canceled and the contract discharged, and that the parties should each be at liberty and under the duty to save themselves as best they might by other contracts and arrangements. This, in principle, seems to be settled by the rulings as to embargoes on ships releasing their owners from their contracts to carry, in the cases of *Allanwilde Transport Corp. v. Vacuum Oil Co.* (1919) 248 U. S. 377, 63 L. ed. 312, 3 A.L.R. 15, 39 Sup. Ct. Rep. 147, and *Standard Varnish Works v. The Bris* (1919) 248 U. S. 392, 63 L. ed. 321, 39 Sup. Ct. Rep. 150. And see *Louisville & N. R. Co. v. Mottley* 1911) 219 U. S. 467, 55 L. ed. 297, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265."

The court in the foregoing case also held that the purchaser had no right to an accounting for profits actually made by the seller on account of deliveries to the government of the coal which, under the contract, should have been delivered to the purchaser, the court saying: "At first thought there seems to be, waiving any question of the appropriateness of joining such an action in the present suit, considerable justice in the idea; but it could not be practically applied and followed to its consequences. The plaintiff by this contract got title to no specific property, so as to own its proceeds. It got only an executory promise that so much coal should be produced and delivered to it, for which it gave only its executory promise to pay. Since the regulation of the production of the coal fell under the government agency, including the right to fix wages and hours of labor, the coal was produced under very different conditions from those that would have existed aside from government control, and it is not certain but that coal which might have been produced prior to such control at a profit at \$1.35 per ton may actually have been produced at no greater profit at \$3.10 per ton under such control. The effort to do justice by causing an accounting to be made of the actual profits received would

have to go deeper than the mere comparison of the contract price with the price paid by the government. Nor would it be good policy to hamper, during a time of war, response to the demands of the government on these mines with a liability over to others under pre-existent contracts. A similar scrutiny would have to be applied to the plaintiff, also, whose plant, the petition discloses, was a steel plant, which continued in operation during the war, doubtless under the same governmental control. Its products were sold, no doubt, at a price fixed by the government under the same law, based upon a profit with coal at \$3.10 per ton, which it alleges it had to purchase during this period. Having been allowed, in this way, an expense item of \$3.10 for coal, it ought not to be allowed to make an additional profit of the difference between that price and its old contract price. It will be readily seen that to follow an adjustment of the sort suggested in the amendment throughout the devious course that it might take in passing on a profit or loss under war conditions, to others affected by it, would be a wholly impractical job for the courts. The simplest and best rule, and the one most consonant with good policy, is that suggested first above, that the action of the government, in so far as it directly interfered with and prevented the fulfilment of contracts, should be considered as a final discharge from their obligation."

In *Comptoir Commercial Anversoï v. Power, Son & Co.* [1920] 1 K. B. (Eng.) 868, 36 Times L. R. 101, it was held that a contract for the sale of wheat for export at a price f.o.b. including freight and insurance not covering war risks, and providing that, in the event of war, should sellers not have received from buyers insurance covering war risk three days prior to shipment, they should have the right, if they should think fit and be able, to cover war risk for account and risk of the buyers, was not subject to an implied condition that, if the sellers should be unable to sell the exchange, the contract should be at an end, although it was found that it had long

been a recognized usage or custom of the trade for shippers of grain to sell the exchange, and that it would not be possible to carry on export business generally without doing so; and therefore that the seller was not released from the obligation of the contract by reason of the fact that the outbreak of war made it impossible to procure insurance against war risks and consequently to sell the exchange.

In *Ross Lumber Co. v. Hughes Lumber Co.* (1920) — C. C. A. —, 264 Fed. 757, it was held that the seller of lumber to be delivered from time to time at a price which was to vary to correspond with the changes made in a certain published report of the market price of such lumber, known as Shuster's concessions sheet, was not liable for nonperformance, where, during the currency of the contract, the government fixed a maximum price at which such lumber could be sold commercially. The court said: "There can be no question that the parties contracted with each other that the price should be fixed by the price list of September 10, 1912, and the semi-monthly concession sheets issued by Shuster, the prices to vary according to a calculation based upon these. The data upon which this calculation was to be made, without fault of either party, but owing to war conditions, became and were unattainable. In place of the Shuster semi-monthly concessions, which were based upon reports of actual sales, and which were recognized by all dealers in yellow pine lumber as fixing the market price of the product, there is substituted the maximum price fixed by the government. The criterion upon which [depended] the price of the commodity to be delivered by the defendant to the plaintiff, a necessary term of a binding contract, thus, without a fault of either of the parties, ceased to exist, and either party could refuse to be further bound by the terms. But, if that is not correct, and we say that the intention of the parties was that price to be paid by the plaintiff was the 'market price' existing at the times of the different deliveries, we are still left in the condition of having no cri-

terion by which such price can be fixed, unless we go further and say the maximum price fixed by the government was the 'market price.' This is, as we understand it, the contention of the plaintiff. It is uncontradicted that, although there were other publications carrying quotations of sales of lumber, they all varied from the prices fixed by Shuster's price list and semimonthly concessions. This is very persuasive that for that reason the parties contracted with reference alone to that method of fixing the price, but also shows the impossibility of arriving at a 'market price' by looking to these other publications. Could the act of the government, under the war conditions then existing, fixing an arbitrary maximum price, establish a market price? We think not, and this view seems to be supported by the supreme court of Michigan in *Lovejoy v. Michels* (1891) 88 Mich. 15, 13 L.R.A. 770, 49 N. W. 901. While this case involves a different consideration of facts than in the instant case, it, with the discussion contained in note on page 771 of 13 L.R.A., is enlightening on the question in this case. The idea of a market price is based upon the untrammelled dealing in a commodity, by sellers and buyers unhampered by price-fixing by governments or monopolies. There was no such market existing subsequent to June 10, 1918, when the government fixed the maximum price."

In *Moorhead v. Union Light, Heat, & P. Co.* (1918) 255 Fed. 920, it was held that a gas company which has accepted a franchise for a definite term, fixing a maximum price, is not entitled, on a bill in equity, to release from its contract and an injunction against the enforcement of the franchise ordinance merely because the existence of war has made the performance of the contract at the established rate unprofitable. See to the same effect, *Muscatine Lighting Co. v. Muscatine* (1919) 256 Fed. 929.

In like manner it was held in *Columbus R. Power, & Light Co. v. Columbus* (1919) 249 U. S. 399, 63 L. ed. 669, 6 A.L.R. 1648, P.U.R. 1919D, 239, 39 Sup. Ct. Rep. 349, that the enforce-

ment of a franchise ordinance fixing street railway fares would not be enjoined though operating expenses had increased as a result of war, and particularly by reason of a 50 per cent increase in wages, ordered by the National War Labor Board. The court said: "It is undoubtedly true that the breaking out of the World War was not contemplated, nor was the subsequent action of the War Labor Board within the purview of the parties when the contract was made. That there might be a rise in the cost of labor, and that the contract might at some part of the period covered become unprofitable by reason of strikes or the necessity for higher wages might reasonably have been within their contemplation when the contract was made, and provisions made accordingly. There is no showing in the bill that the war or the award of the War Labor Board necessarily prevented the performance of the contract. Indeed, as we have said, there is no showing, as in the nature of things there cannot be, that the performance of the contract, taking all the years of the term together, will prove unremunerative. We are unable to find here the intervention of that superior force which ends the obligation of a valid contract by preventing its performance. It may be, and, taking the allegations of the bill to be true, it undoubtedly is, a case of a hard bargain. But equity does not relieve from hard bargains simply because they are such. It may be that the efficiency of the service and fairness in dealing with the company which performs such important and necessary service ought to require an advance in rates; such was the strongly announced opinion of the War Labor Board. But these and kindred considerations address themselves to the duly constituted authorities having the control of the subject-matter."

In *Black v. New Orleans R. & Light Co.* (1919) 145 La. 179, 82 So. 81, the court sustained, against a taxpayer's suit, the action of a municipal council in granting to a street railway company a temporary increase of franchise rates because of the exigencies

of war, and at the suggestion of the national authorities, so as to avoid possible impairment of transportation facilities during the war.

In *North Hempstead v. Public Service Corp.* (1919) 107 Misc. 19, 176 N. Y. Supp. 621, affirmed upon opinion below in — App. Div. —, 182 N. Y. Supp. 954, the action was brought to recover damages for the nonperformance of a contract whereby the plaintiff town had granted to the defendant the right to operate gas mains along public highways and in public places in the town. The defendant pleaded impossibility of performance because, owing to the existence of a state of war with Germany, the United States had taken control of and supervision over the distribution of steel and pipe, and the defendant had been unable to procure pipe for laying in the town, as required by the contract. It was held that the defendant could not avail itself of this defense, saying: "It may be conceded that the rules and regulations of the War Industries Board greatly increased the difficulty, and probably the expense, of securing pipe, but the difficulty so created stands in no other or different category than if created by any other cause or unforeseen contingency, such as scarcity of labor, strikes, increased taxation, or demands in excess of the supply. The controlling consideration is that neither the acquisition nor the use of the pipe for the purpose of fulfilling the obligation assumed by the defendant was forbidden or rendered illegal by any act of 'the law.' Official action increased the difficulty of performance, but imposed thereon no taint of illegality, and I am of the opinion that none of the cases hold that performance is excused by such a situation as is disclosed in this case. On the contrary, it has been held that increased difficulty and expense of performance, occasioned by a law enacted after the execution of a contract, never excuses performance."

In *Norfolk & W. R. Co. v. Public Service Commission* (1918) 82 W. Va. 408, 8 A.L.R. 155, P.U.R. 1918E, 737, 96 S. E. 62, the court refused to suspend an order of the Public Service

Commission requiring a railroad company to furnish shipping facilities to a coal mining company on the ground that it was not shown that the exigencies of war disabled the railroad company from the performance of its duty in this respect. It was said: "The argument is further made by the railway company that at this time its energies are fully required to meet the extraordinary demands made upon it because of the present state of war; that all of its resources in the way of steel rails, ties, and switches are needed for this purpose, and that it should not be required to furnish facilities to any shipper other than those already having such facilities, for the reason that to do so might require of it additional equipment, or additional work for its trains or crews, without producing any additional freight. As before stated, the granting of the facilities asked for here does not make any requisition upon the material resources of the railway company. It does not require the expenditure of one cent by it, and it does not show how the granting of the facilities asked for this shipper would increase its work so as to embarrass it in complying with its public duty. In the absence of such a showing we would not be justified in saying that this shipper should not be granted the facilities enjoyed by other shippers of coal. If it should turn out, in the operation of this switch connection for the business of the Trace Company, that an undue burden is imposed upon the railway company, and that its operations are crippled, and it is hindered and delayed in performing its paramount duty to the government, upon representation of such condition to the Director General of Railroads, he has ample power to give the railway company relief, and we do not doubt that, upon a showing of that character being made, such relief will be promptly afforded."

In *Boret v. L. Vogelstein & Co.* (1919) 188 App. Div. 605, 177 N. Y. Supp. 402, it appeared that the parties entered into an agreement for the sale and purchase of copper, the purchase price to be arrived at by averag-

ing the quotations of prices as published in a trade journal. Subsequently the United States entered the European War, and the price of the material in question was fixed by the government. The parties submitted to the court on an agreed statement of facts the question whether the contract was rendered null and void by reason of the conditions created by the action of the United States government. Holding that the contract was valid and enforceable, the court said: "The contract did not fix a price. It clearly expressed the intention of the parties that the copper was to be paid for at the prevailing market price at the time of the various deliveries. The contract was entered into after all the great powers except the United States had become involved in the war with Germany. It was to extend eight years. The parties must have contemplated that unusual and abnormal market conditions would be occasioned by the war, and that there was a possibility of the United States becoming involved, and that the performance of the contract might have been rendered difficult or burdensome. Parties cannot be relieved from the performance of their contracts merely for those reasons, but only where, by acts of law, the performance thereof has become impossible or illegal."

In *Meyer v. Sullivan* (1919) — Cal. App. — 181 Pac. 847, it appeared that the defendants contracted to deliver a cargo of wheat to the plaintiffs "f. o. b. Kosmos steamer at Seattle." Subsequently, owing to the war conditions, the Kosmos line canceled their sailing schedule, and the defendants refused to deliver the wheat. on the ground that no Kosmos steamer was available at Seattle on which the wheat could be loaded, and therefore that the contracts were canceled. Affirming a judgment for the plaintiffs for breach of contract, the court said: "Defendants contend that both buyers and sellers were excused from performance of the contracts, by reason of the fact that war conditions rendered the contemplated means of performance unavailable; that is, because it was impossible to furnish a Kosmos steamer,

both parties were released from all liability in the matter. We cannot agree with such contention. It is admitted that the plaintiffs were at all times ready, willing, and able, and attempted, to perform their part of the contract. There is no showing but that defendants were fully able to deliver the wheat contracted for, and as directed by the plaintiffs, at the place designated."

In *Salembier, L. & Co. v. North Adams Mfg. Co.* (1919) 178 N. Y. Supp. 607, it appeared that the defendant contracted to sell and deliver to the plaintiff woolen goods, which it failed to do. It was alleged in an affidavit for an attachment, that after it became evident that the defendant was not going to perform its contract, the plaintiff attempted to obtain the material elsewhere, but found that practically the entire woolen goods supply of the United States had been preempted by the government, and it was impossible to obtain the material. The defendant claimed that this statement showed the impossibility of performance on its part. The court held that this was an unwarranted construction of the words used, since there was nothing in the statement to warrant the conclusion that the defendant could not have performed had it taken proper preparatory steps in season.

In *The Eros* (1916) 241 Fed. 186, affirmed in (1918) 163 C. C. A. 295, 251 Fed. 45, it appeared that the libellant, an American citizen, chartered a yacht of a citizen of France, and under the provisions of the agreement, the yacht proceeded to New York, where it was when the European War broke out. After extended and unsatisfactory negotiations between the libellant and the master of the yacht, the latter, acting on instructions from the owner, informed the libellant that "the whole thing is off," whereupon the libellant treated the contract as broken, and subsequently libeled the yacht for breach of the charter party. Rendering a decree for the libellant, the court said: "It is clear that Baron De Rothschild's attitude constituted a breach of the charter party by him, unless it was legally justified or ex-

cused under the circumstances. By its express terms the agreement was to be construed according to English law. Under that law, as under our own, the Baron De Rothschild's obligation to supply and maintain a crew, and to send the yacht wherever the charterer wished to go within the limits prescribed, was absolute. The outbreak of war between France and other powers in no way relieved him of that obligation. It did not justify his refusal to permit the yacht to go outside the territorial waters of the United States, although performance may have been rendered more hazardous."

In *Wolf v. Park & Tilford* (1919) 176 N. Y. Supp. 768, an action by the purchaser of goods for the failure of the seller to deliver the same, the seller was permitted to offer in evidence the various Federal orders concerning an embargo on domestic freight which prevented interstate shipments during the period covering the time of delivery. Although it did not expressly so appear, the embargo was presumably laid as the result of war conditions. The court held that the admission of the evidence was error, as the Federal embargo was no defense to the action.

c. Right to resume performance after cessation of governmental interference.

It will be noted that in the reported case (*BROOKE TOOL MFG. CO. v. HYDRAULIC GEARS CO.* ante, 1507) it is held that the seller of goods, who, by reason of governmental requirements, has been unable to make delivery within the time provided for by the contract, cannot compel the buyer to take delivery after the expiration of such period.

In *STANDARD SCALE & SUPPLY CO. v. BALTIMORE ENAMEL & NOVELTY CO.* (herewith reported) ante, 1502, it is held that a seller of goods was not relieved from the consequences of non-compliance with his contract to make prompt delivery by the fact that it was occasioned by an embargo on shipments imposed by the United States government, while in control of the railroads.

It has been held, however, that the buyer is under obligation to accept goods after the time fixed for their delivery where the order therefor was taken "subject to war hazards and to delays due to government action over which the seller has no control." *Barish v. Brander* (1920) 180 N. Y. Supp. 447.

III. Effect of provision in contract suspending or excusing performance in certain contingencies.

a. As excluding doctrine of commercial frustration.

(Supplementing annotation in 3 A.L.R. p. 41.)

In *Pacific Phosphate Co. v. Empire Transport Co.* (1920) 36 Times L. R. (Eng.) 750, it was held that a contract to provide tonnage for the carriage of phosphate between certain points during a stated period was dissolved by the change in circumstances occasioned by the war, although it provided that "in the event of a war in which Great Britain is engaged, and which is likely to affect the safety of the steamers or their cargoes, shipments may, at the option of either party, be suspended until the termination of the war, and the period of such suspension shall be added on to the end of the contract period," as the parties, in entering into their contract, never contemplated such a war as had actually happened, or its consequences.

b. As covering situation occasioned by war.

1. In charter parties or bills of lading.

(Supplementing annotation in 3 A.L.R. p. 43.)

In *The Claveresk* (1920) 264 Fed. 276, it is held that an order given by the British admiralty to the owner, requiring him on a day certain to place his vessel, then in foreign waters, at the service of admiralty agents, there to remain for an indefinite period, was a restraint of princes, within the exception clause of the charter party.

The owners of a British vessel are entitled to rely upon the "restraint of princes" clause in the charter, notwithstanding the commandeering of the vessel by the British government

took place while the vessel was in an Italian harbor, since, while technically the government might not have been able to enforce its decrees and orders as long as the ship remained in harbor, it might have been immediately seized and taken upon reaching the high seas. *The Frankmere* (1920) 262 Fed. 819.

In *Aktieselskabet Olivebank v. Dansk Svovlsyre Fabrik* [1919] 2 K. B. (Eng.) 162, 120 L. T. N. S. 629, 88 L. J. K. B. N. S. 745, 35 Times L. R. 373, 24 Com. Cas. 178, it appears that by the terms of a charter party the plaintiffs' vessel was to proceed with a cargo of nitrate to one of several ports in the United Kingdom for orders to discharge the cargo at a safe port in the United Kingdom or one of several named ports in Denmark. The vessel, on arriving at one of the ports in the United Kingdom, was ordered by the defendants to a Danish port, which had become an impossible port, owing to the fact, known to the defendants, that the further importation of nitrate into Denmark had been prohibited by the British government. The master thereupon discharged the cargo in the United Kingdom. In an action against the defendants for freight it is held that the defendants were not entitled to claim that the venture had failed under a "restraint of princes" clause in the charter party, but were liable for the freight under an implied term of the contract to the effect that the defendants should order the vessel to a possible port, and so give the plaintiffs an opportunity of earning freight.

In *South Atlantic S. S. Line v. London-Savannah Naval Stores Co.* (1918) 166 C. C. A. 476, 255 Fed. 306, it appeared that a steamship line, before the outbreak of war, agreed to furnish freight room for the carriage of naval stores from Florida to England. The contract contained a provision that it was subject to the conditions contained in the bill of lading, and the bill gave the carrier the liberty to call at any port or ports, in or out of the customary route. After the outbreak of war, the steamship company tendered a ship, reserving the right to forward the cargo by way of a con-

tinental port, under the provision in the bill of lading, but the shipper refused unless the trip was made direct to the British Isles, as the existing war conditions increased the risk of loss of the cargo in shipping by way of a continental port. The court held that the demand of the shipper that the carrier forego the right which the contract reserved to it, of going by way of a continental port, was unwarranted, and the shipper could not recover for the failure of the carrier to perform the contract.

2. In contracts of sale.

(Supplementing annotation in 3 A.L.R. p. 48.)

In *Atlantic Steel Co. v. R. O. Campbell Coal Co.* (1919) 262 Fed. 555, it was held that a provision in a contract for the sale of a quantity of coal, to be delivered from time to time during a stated period, at the rate of 1,000 tons per month, that "if the mines from which this coal is to be shipped are unable to operate by reason of mining troubles, or on account of other causes beyond their immediate control, the first party is not to be liable for failure to make shipments during said period," operated to exonerate the seller from liability to make shipments during the period while the output of the mine was under the control of the Federal Fuel Administration, the court saying: "While in a certain sense the mines did operate, they did not operate under the control of the defendant, nor was it able to avail itself of their operation in the discharge of its contracts. It may fairly be said that, within the meaning of these parties, on account of causes beyond defendant's control, it could not operate its mine for the purpose of meeting the shipments due during the period of Federal control, and that the stipulation that it should not be liable for the failure to make shipment is to be applied."

In *Roessler & H. Chemical Co. v. Standard Silk Dyeing Co.* (1918) 166 C. C. A. 223, 254 Fed. 777, the question at issue was the construction of a provision in a contract of sale, purporting to exonerate the seller from liability for damage or delay occasioned by

war, as affected by the circumstance that the contract was entered into after the outbreak of the war. It appeared that the parties entered into an agreement in January, 1915, by which the defendant was to deliver to the plaintiff a quantity of prussiate of soda in equal instalments during the year 1915. The contract contained the following provision: "Sellers not liable . . . for losses or damage or delays due to causes beyond their control, including . . . war or insurrection." The defendant delivered accruing instalments under the contract until March 30, 1915, when it had notice of an order in council, dated March 15th, of the British government, requiring its land and naval forces to prevent any goods whatever reaching Germany. This order was enforced against the protests of the government of the United States, with the result that there were no general importations of prussiate of soda after that date. The defendant failed to deliver any prussiate of soda to the plaintiff after May, 1915, and an action for breach of contract resulted. The district judge gave judgment for the plaintiff, holding that the proviso in the contract as to losses by war had no application. The circuit court of appeals reversed the judgment, saying: "The question involved is one of law, viz., whether the facts found by the district judge sustain his conclusion of law, which was that the exception of losses due to war does not apply at all. His view was that, as the war between Germany and England existed when the contract was made, the parties must have intended relief in some future war in which the United States should be involved. We cannot agree to this. The exception was not of war, but of losses or damage or delays due to war. Embargoes or restraints coming from the United States would be a defense, whether excepted or not. In our opinion the exception applied as much to the existing war between Germany and England as to any war which might subsequently arise and cause such damage, losses, or delays, whether the United States was a party to it or not. It was evidently more

important and appropriate to the existing war than to wars that might subsequently arise. This particular war had continued for over five months when the contract was made, and for all that time and for three months later the defendant had been importing enough prussiate of soda from Germany to satisfy its outstanding contracts as they accrued. Both parties, of course, must be held to have had notice of the possibility of embargoes and restraints, and the exception was intended to cover just such possibilities. No one could have anticipated that this British order in council would be proclaimed, and it was this change of condition that caused the loss."

A similar question was raised in *Arkell & Douglas v. N. H. Borenstein & Sons* (1919) 188 App. Div. 158, 176 N. Y. Supp. 581, an action to recover the purchase price of a quantity of straw hats sold to the defendant by the plaintiff, wherein the defendant counterclaimed for damages for the nondelivery of hats by the plaintiff under other contracts. The plaintiff, in its reply, alleged that the hats in question were manufactured in Italy, and that it was impossible to furnish the hats, owing to conditions which obtained in Italy at the time the deliveries were to be made, which conditions were the direct result of the war with Austria, in which Italy was then engaged. The contracts for the delivery of the hats each contained the following stipulation: "This contract is contingent upon strikes, floods, riots, war, rebellion, and all other contingencies unavoidable or beyond our control." The court held that since war between Italy and Austria was declared several months prior to the execution of the contracts, it was apparent that the mere fact that a state of war existed was no defense; that the burden clearly rested on the plaintiff to show that it was actually prevented from performing its contract by conditions over which it had no control, and which resulted from the causes set forth in the contracts; and that while there was some evidence

tending to show that the conditions obtaining in Italy at the time made the manufacture of the hats in question difficult, such evidence was not sufficient to sustain the burden cast on the plaintiff.

In *Comptoir Commercial Anverso* v. Power, Son & Co. [1920] 1 K. B. (Eng.) 868, 36 Times L. R. 101, a clause in a contract for the sale of wheat for export, that "in case of prohibition of export, force majeure, blockade, or hostilities preventing shipment, this contract or any unfulfilled part thereof shall be at an end," was held not to operate to exonerate the seller, who, owing to the outbreak of war, was unable to insure against war risks, and consequently to sell the exchange.

In *Davison Chemical Co. v. Baugh Chemical Co.* (1919) — Md. —, 106 Atl. 269, it was held that the fact that, because of the existence of war, a manufacturer may realize greatly advanced prices, is not within a clause of a contract to the effect that "war or other uncontrollable causes rendering buyers unable to receive or sellers to deliver" shall make the contract inoperative. Therefore, a manufacturer under contract to deliver a certain quantity, who subsequently makes war contracts in excess of his output, is not entitled to require the buyer under the original contract to receive in full performance a quantity ascertained by prorating, which is less than that called for by the contract.

E. C. B.

PEOPLE OF THE STATE OF ILLINOIS

v.

JAKE SANTOW et al., Plffs. in Err.

Illinois Supreme Court — June 16, 1920.

(293 Ill. 430, 127 N. E. 671.)

• False pretenses — liability for swindling — confidence game.

1. There may be swindling in a business transaction without the person who is responsible for the swindling being guilty of operating the confidence game.

[See note on this question beginning on page 1527.]

— what necessary to convict of confidence game.

2. To render one guilty of obtaining money by the confidence game he must be shown to have secured the confidence of the complaining witness, and thereby defrauded or attempted to defraud him of his money by false statements,

fraudulent misrepresentations, or pretenses.

[See 11 R. C. L. 839.]

— misrepresentations of identity.

3. Persons who sell a carload of mill refuse as scrap rags are not guilty of operating the confidence game if they merely misrepresented their identity and relationship.

ERROR to the Circuit Court for Stephenson County (Heard, J.) to review a judgment convicting defendants of attempting to obtain money by means of the confidence game. *Reversed.*

The facts are stated in the opinion of the court.

Mr. Douglas Pattison for plaintiffs in error.

Messrs. Edward J. Brundage, Attorney General, George C. Dixon, Assistant Attorney General, and Charles H. Green, for the People:

If A takes advantage of the confi-

dence reposed in him by B, and thereby defrauds B of his property by a swindling scheme, it is immaterial that the scheme took the form of a business transaction, or a written contract between the parties.

People v. Bertsche, 265 Ill. 272, 106

N. E. 823, Ann. Cas. 1916A, 729; People v. Poindexter, 243 Ill. 68, 90 N. E. 261; People v. Depew, 237 Ill. 574, 86 N. E. 1090; Chilson v. People, 224 Ill. 535, 79 N. E. 934; Hughes v. People, 223 Ill. 417, 79 N. E. 137.

While it is necessary, in a confidence-game prosecution, to prove the falsity of representations made to induce the victim to part with his money, in order to establish the corpus delicti of the crime, yet it is not necessary to prove such fact by direct evidence, and it is sufficient if the circumstances proved fully warrant the jury in believing such representations were false, and no attempt is made by the accused to explain them.

People v. Strosnider, 264 Ill. 434, 106 N. E. 229.

A check in the hands of the maker is not property.

People v. Warfield, 261 Ill. 293, 103 N. E. 979.

Carter, J., delivered the opinion of the court:

Plaintiffs in error, Jake Santow and M. Weinberg, were indicted, tried, and found guilty in the circuit court of Stephenson county of attempting to obtain money by means of the confidence game, and were sentenced to the penitentiary. This writ of error was then sued out.

Joe Warsawsky operated a junk business in Freeport, Illinois, under the name of Freeport Iron & Metal Company, not incorporated. October 4, 1918, plaintiffs in error came and loitered about the gate in front of his place of business, and after some preliminary conversation they announced to Warsawsky that they were market peddlers at Marengo, Illinois, and also, when that business was dull, peddled junk gathered in and about Marengo; that they had some rags, iron, and paper which they would like to sell to Warsawsky, stating that they had been "skinned" or treated badly a couple of times before by dealers in other cities, and had been advised by an acquaintance in Chicago that Warsawsky would give them a square deal. Warsawsky offered them \$4 a hundred for the rags they claimed they had at Marengo. They left for a brief time, and then came back

and said they would sell the rags for \$4.25 a hundred and the other junk (iron and paper) at the prices originally fixed by Warsawsky. They also said that, being poor men, they would like to arrange with the purchaser to receive three quarters of the amount in cash when the bill of lading was presented to Warsawsky for the rags. It was agreed that these rags were to be shipped as directed by Warsawsky, and thereafter one of the plaintiffs in error would bring him the bill of lading and receive three fourths of the agreed price in cash. The testimony shows that two or three days thereafter one of the plaintiffs in error telephoned to Warsawsky, asking where the rags were to be sent and was told to send them to a firm in Chicago, and Santow, who was doing the talking on the telephone, said he would be up on the next train with the bill of lading. In accordance with that statement he went to Freeport the same day, and left the bill of lading with Warsawsky. The bill of lading, instead of being for "mixed rags" as the testimony tends to show was the agreement, billed them as "scrap rags." Warsawsky figured up the amount due under the contract, and gave Santow a check for three fourths, or \$795.60, which Santow took to the Stephenson County Bank, upon which it was drawn, and indorsed it, and obtained in its place, a draft on the First National Bank of Chicago. Shortly after Santow left, Warsawsky, noticing that there was no stencil weight by the railroad company marked on the bill of lading, went to the railroad office to see if it had railroad scales, and then went to Marengo the following morning to see the car of rags. He found, according to his testimony, that the car contained "nothing but a lot of mill refuse, soaking wet." He testified that plaintiffs in error told him the rags were gathered in and around Marengo. An employee, Saunders, corroborated his testimony in regard to the conversation at the time the transaction

was had and the contract entered into for the purchase of the rags and junk. One Lane, who was with Saunders when the car was opened, testified for the state that they examined the contents of the car and found it was loaded 2 or 3 feet high on both sides with "wet, smoky, stringy mill refuse;" that the contents consisted of bales of what was called in the rag business "chop suey;" that "it looked like mill strings, partly rags and some kind of wood, pieces of paper; it was good and wet, . . . just as it came from the mill waste." Other witnesses testified to the same effect. The assistant agent of the Northwestern Railway in Chicago stated that after the car had been received in Chicago its contents were found to be "wet refuse, made up of a whole lot of material," and he was ordered by the railroad authorities to dump the car, as they could not get anything for its contents. Some of the witnesses for plaintiffs in error testified they saw the contents of this car; that the rags were mixed scrap rags, having a market value of about 3 cents a pound; that they were a little damp, and that some of the material was mill refuse, but not all; that some of it was what might be called "scrap rags." The evidence also tends to show that plaintiffs in error represented at the time these rags were sold that they were country mixed rags, and that country mixed rags are such as are collected by ragpickers going from house to house in the country districts, and included all kinds of rags that would be gathered under such conditions. The weight of the evidence shows that the contents of the car were not country mixed rags, but scrap rags, which would be practically worthless in the market.

The evidence shows that this identical car of rags was originally billed from Chicago by the Chicago Metal Refining Company to B. Goodman at Marengo, and was receipted for by Santow under the name of J. Steinberg; that he also paid the freight and demurrage on the car; that Santow was the son of

one of the owners interested in the original consignor company. A fictitious name was given by plaintiffs in error in receipting for the car, and the same fictitious name was given at the time the rags were sold to Warsawsky. The testimony shows that the plaintiff in error Weinberg at the time of the sale stated to Warsawsky that the other plaintiff in error was his son, and that the reason he was selling everything out was that his boy would soon be called to war,—expected to be called in two or three weeks,—and that he had to get rid of everything before the son went, and he gave his name to Warsawsky as M. Steinberg. The check made by Warsawsky at the time the bill of lading was presented was made to M. Steinberg, and likewise the draft that was given by the Stephenson County Bank, and the evidence shows without dispute that the plaintiffs in error gave these same names to other persons with whom they were communicating at or about the time of this transaction, while their names, as shown by the record, are M. Weinberg and Jake Santow, and there is nothing in the record to show that the two plaintiffs in error are in any way related.

Counsel argue that the evidence is entirely consistent with the theory that the transaction was a mere business one, in which both parties were dealing at arm's length on an equal footing; that at the most the only thing the evidence proves is that plaintiffs in error misrepresented their goods, and that the evidence fails utterly to show that Warsawsky reposed any confidence in plaintiffs in error, or that either party had any special confidence in the other. In order to find plaintiffs in error guilty of the confidence game as defined by the statute (Hurd's Rev. Stat. 1917, chap. 38, §§ 98, 99), proof must be shown that by the use of false statements, misrepresentations, or pretenses they secured the confidence of the com-

False pretenses—
what necessary
to convict of
confidence game.

plaining witness, and that, having so secured such confidence, they defrauded him or attempted to defraud him, of his money. There may be swindling in a business transaction without the person who is responsible for the swindling being guilty of operating the confidence game. A swindling operation does not constitute a confidence game unless the element of confidence becomes a part of such swindling. *People v. Gallowich*, 283 Ill. 360, 119 N. E. 283; *Juretic v. People*, 223 Ill. 484, 79 N. E. 181. In the case at bar there is little, if any, proof tending to show any misrepresentation made by the plaintiffs in error to the complaining witness except as to their names, and that one of them was the son of the other. The history of the entire transaction tends strongly to show that the plaintiffs in error and the complaining witness were dealing at arm's length and on equal footing. There is no evidence tending to show that because of false representations of any swindling operation the complaining witness had been induced to repose confidence in the plaintiffs in error. The statute

—liability for swindling—confidence game.

relating to the confidence game does not apply to business transactions between parties dealing with each other on equal footing. *People v. Turpin*, 283 Ill. 452, 17 L.R.A. (N.S.) 276, 84 N. E. 679. To justify a conviction on an indictment for the confidence game it is not sufficient to prove the defendant guilty of such acts and fraudulent practices only as would subject him to liability in a civil action. *Dorr v. People*, 223 Ill. 216, 81 N. E. 851. Under the proper construction of the confidence-game statute, as heretofore construed by this court, it cannot be held that the plaintiffs in error were guilty of the confidence game.

—misrepresentations of identity.

This conclusion makes it unnecessary to consider or decide certain other questions raised in the case. We deem it proper, however, to state that, under the reasoning of this court in *People v. Jordan*, 292 Ill. 514, 127 N. E. 117, the third instruction given on behalf of the people must be held erroneous.

The Circuit Court erred in not setting aside the verdict for want of sufficient evidence. The judgment of that court is therefore reversed.

ANNOTATION.

False representations in business transaction as within statute relating to "confidence game."

The holding of the reported case (*PEOPLE v. SANTOW*, ante, 1524), to the effect that the Illinois statute relating to the confidence game does not apply to business transactions between persons dealing with each other on equal footing, finds support in three earlier decisions in the same jurisdiction. Thus, in *People v. Turpin* (1908) 233 Ill. 452, 17 L.R.A. (N.S.) 276, 84 N. E. 679, it was held that the statute had no application to a transaction between persons technically called traders, who dealt with each other freely and apparently without regard to the value of the property involved, but with the manifest purpose of acquiring it with the view of trading it in

turn to someone else. The court, in this connection, said: "This statute was never designed to apply to a business transaction between parties dealing on an equal footing, even though one of them may believe he has parted with more than he received." So, in *People v. Conkrite* (1914) 266 Ill. 438, 107 N. E. 703, it was held that the fact that a partnership business did not prove as profitable as a person who purchased a share therein had been led to believe it would, did not constitute the sale of the share a "confidence game."

And in *Lory v. People* (1907) 229 Ill. 268, 82 N. E. 261, the fact that, contrary to the expectation of persons en-

gaged in developing a gold mine, the operation of the mine proved to be a failure, was held not to convert a sale of the mining stock into a confidence game, where all the representations of fact made at the time of the sale were true, although accompanied by the expression of a greatly exaggerated opinion as to the possibilities of the mine, there being nothing to show that the opinion was not honestly entertained, or that it was unreasonable.

However, in *People v. Keyes* (1915) 269 Ill. 173, 109 N. E. 684, wherein it appeared that the defendant had entered into contracts of partnership with different persons for the purpose of defrauding them of money, and

with no intention of performing the contracts, the court, in sustaining a conviction of obtaining money by means of the confidence game, said: "There is no basis for the contention that this is a mere breach of an ordinary business contract honestly entered into."

And where the evidence showed that the defendant took advantage of the confidence reposed in him by the complaining witness, and thereby defrauded him of his property by a swindling scheme, it was held to be immaterial that the scheme took the form of a business transaction. See *People v. Bertsche* (1914) 265 Ill. 272, 106 N. E. 823, Ann. Cas. 1916A, 729. W. F. F.

T. B. ROBERTS, Exr., etc., Plff. in Certiorari,
v.
A. B. VAUGHN, Next Friend of Robert Sayers.

Tennessee Supreme Court — March 18, 1920.

(— Tenn. —, 219 S. W. 1034.)

Infant — right to compensation for services.

1. The next friend of an infant may be compensated for personal services rendered in performing the duties which are necessary to the success of the infant in the suit in which he represents him.

[See note on this question beginning on page 1537.]

Judgment — agreed — what concludes.

2. An agreed judgment based upon a compromise agreement of the parties, one of whom is next friend of an infant, eliminates all questions as to the authority of the next friend to bind the infant by an agreement to compromise.

Attorney and client — source of fees.

3. Fees of counsel for an infant, which, by an agreed judgment, are to be paid out of the infant's share of the estate, must be paid out of the proceeds of real estate, where the personalty is consumed by other charges which become part of the agreed judgment.

Infant — right of next friend to expenses.

4. The next friend of an infant is entitled to be reimbursed expenses actually paid by him in the litigation.

— services as necessities.

5. The securing of a valuable estate for an infant is a necessary, for the

expenses of which the infant is liable.

[See 14 R. C. L. 259.]

— who may become next friend.

6. Anyone willing to be bound for costs can become next friend of an infant to procure any right in court which the infant has.

— power of next friend to employ counsel.

7. The next friend of an infant may appoint counsel for him, although the infant is incapable of employing one for himself.

[See 14 R. C. L. 290.]

— contract for counsel fees.

8. A next friend cannot bind the infant by a contract as to the amount of fees to be allowed counsel.

[See 14 R. C. L. 290; see note in 7 A.L.R. 108.]

Courts — jurisdiction to refer question of fees.

9. A court of general jurisdiction,

with power to try a will contest, may consent to a compromise of the contest, and refer to its clerk the question of the amount of fees to be allowed the next friend and counsel for an infant contestant, which are provided for in the compromise.

— power to allow lien for counsel fees.

10. A statutory lien for counsel fees may be allowed by a court of law as well as a court of equity.

[See 2 R. C. L. 1084, 1085.]

Infant — services of counsel as necessities.

11. Services rendered by counsel in

securing an estate for an infant are necessities.

[See 14 R. C. L. 259.]

Attorney and client — reasonableness of fee.

12. Eight thousand dollars is not excessive to allow attorneys consisting of three firms and two individuals, for securing an estate for an infant through a will contest which required three trials and two arguments on appeal, where the amount recovered for him was between \$17,000 and \$19,000, and their recovery depended upon the success of the litigation.

CERTIORARI to the Court of Civil Appeals to review a judgment affirming a judgment of the Circuit Court for Williamson County, entered upon a compromise of a will contest which allowed fees to counsel and next friend. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. M. H. Meeks and Frank P. Bond for plaintiff in certiorari.

Messrs. E. M. Hearn, McCorkle & White, W. C. Cherry, and McCarley & Stephenson for defendant in certiorari.

Lansden, Ch. J., delivered the opinion of the court:

This case originated in the circuit court of Williamson county, and was appealed to the court of civil appeals. A petition for certiorari has been filed to correct the judgment of the latter court, and while many questions are discussed in the case, we think only three need be presented in this opinion.

Joab Sayers died testate in Williamson county, and willed all of his property to his brothers and sisters. He was the father of one child, Robert Sayers, but had been divorced from his wife a few years before his death. He was the owner of a large estate, both real and personal, which amounted to over \$50,000. The next friend of the minor child, Robert Sayers, instituted a contest of the will. There were three trials in the circuit court of this case, and the trial resulted in a verdict by the juries against the will and in favor of the infant plaintiff, Robert Sayers. After the verdict in the last trial the circuit judge granted a peremptory instruction and dismissed the suit. An appeal was taken there-

from to the court of civil appeals, which court reversed and remanded the judgment of the circuit court, and directed that court to enter a judgment upon the last verdict of the jury. The case was then brought to this court upon petition for certiorari, and the judgment of the court of civil appeals was modified to the extent of remanding the case for another trial. Upon the remand a compromise was reached between the next friend and the executor, acting for the devisees, and this compromise was fully presented to the circuit judge and approved by him. There is no complaint now at the terms or the manner of the compromise.

A judgment of the court was rendered upon the compromise, and this judgment embraced all of its terms, so that the case, as it comes to us, is an agreed judgment based upon the compromise

Judgment—
agreed—what
concludes.

agreement of the parties. This eliminates all questions which could be made upon the authority of the next friend to bind the infant by an agreement to the compromise. The compromise provided that the next friend should be reimbursed his actual expenses paid out of pocket, and in addition it provided that he was to be paid for his personal serv-

ices. It also provided for paying counsel for the infant out of the infant's part of the estate. It is reasonably clear that counsel can be paid out of the proceeds of the real estate only, the personal estate being consumed in other charges, which were agreed to and made the judgment of the circuit court.

Attorney and
client—
source of fees.

The circuit court referred the case to the clerk of his court, to report, among other things, what would be a reasonable fee for the next friend and the counsel for the infant employed by the next friend.

The question, made by proper assignment of error, as to whether the next friend is entitled to compensation for his personal services, is remarkably free of previous adjudication. There seems to be no doubt in the authorities but what the

Infant—right
of next friend
to expenses.

next friend is entitled to be reimbursed expenses actually paid. 14 R. C. L. 288, 289.

The facts of this case show beyond doubt that the infant secured a valuable estate by the services of the next friend.

This was a necessity, and the infant is liable for all necessities. *McIsaac v. Adams*, 190 Mass. 117, 112 Am. St. Rep. 321, 76 N. E. 654, 5 Ann. Cas. 729; *Owens v. Gunther*, 75 Ark. 37, 86 S. W. 851, 5 Ann. Cas. 130; *Wheaton v. East*, 5 Yerg. 61, 26 Am. Dec. 251; *White v. Flora*, 2 Overt. 426, *Scott v. Buchanan*, 11 Humph. 471. But whether the next friend is entitled to compensation for personal services is not free from doubt. Anyone who is willing to be bound

—who may
become
next friend.

for costs can become next friend of an infant to procure any right in the court which the infant has. *Stephenson v. Stephenson*, 3 Hayw. (Tenn.) 123; *Miles v. Kaigler*, 10 Yerg. 10, 30 Am. Dec. 425; *Benton v. Pope*, 5 Humph. 393. This was provided by the Statute of Westminster that in certain

cases the infant might sue by next friend, but now by common practice any person may sue as next friend by giving bond for cost, although the court, in its discretion, may dismiss the suit, or appoint another next friend, if it deems the one suing to be an improper person. *Green v. Harrison*, 3 Sneed, 132. The next friend has full power to act for the purpose of securing the infant's rights, and may do all things that are necessary to this end. He may ap-

point counsel for the infant, although the infant is incapable of employ-

ing one for himself. *Ibid.* His power as next friend is strictly limited to the performance of the precise duty imposed upon him by law. He is expected to represent the infant, see that

the witnesses are present at the trial.

of the infant's case, and to do all other things which are necessary to the infant's success. In such cases we see no reason why he should not have compensation for personal services performed within the powers granted him by law. The court, however, should closely peruse the case, and especially the services claimed, and be convinced by clear and satisfactory proof that the services have been rendered for which compensation is asked, and that these services fall within the general powers granted by the law to a next friend. The next friend's account for personal services against the infant should be scrutinized closely. He is always under the control of the court, and can be removed from his office by the court whenever it is deemed to be to the interest of the infant that such be done. In this case, Mr. Vaughn rendered unexceptionable services to the infant, and prosecuted the suit to secure the infant's rights with great vigor and alertness. We think the amount allowed him is reasonable and well earned.

A question is made that a new trial should have been granted in

order to allow the next friend to more fully prove that he made a contract with one of the counsel for the amount of his services, and upon a contingent basis. The trial judge refused to grant a new trial

—contract for
counsel fees.

for this reason, and the court of civil appeals affirmed the

trial judge. We think there was no error in this action. The next friend cannot contract with counsel for the amount of his fees so as to bind the minor. *Cole v. Superior Ct.* 68 Cal. 86, 49 Am. Rep. 78. It is immaterial if the next friend did make a contract for the amount of counsel fees. Such fees must be allowed by the court after an investigation of their value. See the note of 97 Am. St. Rep. 1002. The attorney in such cases has been likened to an attorney appointed by the court to defend a criminal, and his rights are subject to the subsequent action of the court in fixing his compensation. *Cole v. Superior Ct.* supra; *Richardson v. Tyson*, 110 Wis. 572, 84 Am. St. Rep. 937, 86 N. W. 250.

It is said by appellant that the circuit court was without jurisdiction to refer the case to the clerk for the purpose of fixing the amount of counsel fees, among other things. The argument is, in substance, that the will contest in the circuit court presented the single question of will or no will, and the court could not refer the case to the clerk for the purpose of ascertaining the facts and adjudicating rights upon the matters of compromise, such as fees of counsel and allowance for services of the next friend, and the like. It is said that these are matters of administration which belong to the county court, and not to the circuit court, and no agreement of the parties could confer jurisdiction upon the court to determine these issues. It is a court of law without jurisdiction of such matters of administration, and its decree, based upon the agreement of the parties, is void. The court of civil appeals was of opinion that jurisdiction of these matters was conferred upon the cir-

cuit court by §§ 6063 and 6074 of Shannon's Annotated Code. Said sections being as follows:

"The circuit courts of this state are courts of general jurisdiction, and the judges thereof shall administer right and justice according to law, in all cases where the jurisdiction is not conferred upon another tribunal."

"Any suit of an equitable nature, brought in the circuit court, where objection has not been taken by demurrer to the jurisdiction, may be transferred to the chancery court of the county or district, or heard and determined by the circuit court upon the principles of a court of equity, with power to order and take all proper accounts, and otherwise to perform the functions of a chancery court."

The circuit court is a court of general jurisdiction, and, among other things, it has jurisdiction to try an issue of *devisavit vel non*. Such was the nature of this case, and the will was transmitted by the county court to the circuit court for the trial of this issue. After three trials, and an appeal to the court of civil appeals, and a petition for certiorari to this court, the case was remanded for another trial. The circuit court plainly had jurisdiction to do this. The parties effected a compromise of the issue, which provided, among other things, that a verdict should be entered, setting up the will, and also that a certain division of the estate should be made between the contestants and the contestees. Because the contestant was an infant, he could not bind himself by the compromise at all, unless it was to his advantage. Therefore, it was necessary to submit the compromise to the circuit judge, and have his approval on behalf of the infant. This was all done, and was clearly within the jurisdiction of the circuit court, because the jurisdiction to try the will contest is given by statute, and the jurisdiction to compromise it follows as of necessity. The items in contest here were provided for by the compromise, and it would have

been useless to divide the compromise into its component parts. We are of opinion, therefore, that the circuit court had jurisdiction to approve the compromise which the parties had made, and in doing so it had jurisdiction of the matters in controversy, because they are parts of the compromise. We think, it is plain that this is not a case of conferring jurisdiction by agreement. It is merely entering a final judgment in the contested will case.

The circuit court declared a lien upon the part of the estate which was secured to the infant to secure fees of counsel. This lien is clearly granted by §§ 3592a1 and 3592a2 of Shannon's Annotated Code. The

—power to allow
lien for
counsel fees. lien can be granted by a court of law, as well as a court of equity, because it is given by the statute. In addition, the services rendered by counsel for the infant

Infant—services
of counsel as
necessaries. were necessities. He is liable for their value in the same way that he is liable for necessities. Owens v. Gunther, 75 Ark. 37, 86 S. W. 851, 5 Ann. Cas. 130; McIsaac v. Adams, 190 Mass. 117, 112 Am. St. Rep. 321, 76 N. E. 654, 5 Ann. Cas. 729; Epperson v. Nugent, 57 Miss. 45, 34 Am. Rep. 434; Munson v. Washband, 31 Conn. 303, 83 Am. Dec. 151; Barker v. Hibbard, 54 N. H. 539, 20 Am. Rep. 160; Jones v. Yore, 142 Mo. 38, 49 S. W. 384. A distinction exists between the services of counsel, as in this case, and services rendered for the protection of the infant in the enjoyment of his general or civil rights, which we need not discuss here, because the distinction is clearly drawn in most of the cases above cited. The infant being liable as for necessities the counsel are entitled to a lien upon the estate secured for him, because the estate is in the hands of the court. It will not disburse the amounts secured to the infant by the services of his counsel without first paying their reasonable fees.

Upon the amount of the fees we make the following quotation from the opinion of the court of civil appeals, delivered by Judge Clark, which we think is a full, fair, and proper disposition of the case:

"Second. By the first and second assignments it is insisted that the trial judge erred in adjudging that the attorneys for the contestant were entitled to a fee of \$8,000 for the services rendered by them to the minor contestant, and it is insisted that said amount is excessive and is more than reasonable compensation for the services rendered.

"The issue above suggested constitutes the main controversy made on this appeal. To sustain his contention the appellant relies on the facts as disclosed by the record, showing the services rendered and the results obtained by the attorneys to whom the fee complained of was allowed, and also upon the testimony of certain witnesses, which testimony tends to show that the fee is excessive.

"On the other hand, as tending to establish the proposition that the fee allowed is not excessive, but is only reasonable, appellees rely on the facts disclosed by the record, and which show the services rendered and the results obtained, and on certain testimony taken on the order of reference, which testimony, it is insisted, not only shows that the fee allowed is reasonable, but also that a larger fee would not have been excessive. Appellees also rely on the alleged fact that the fees which they were to receive were contingent. Appellant, in part, denies the insistence of appellees as last stated, and insists that Attorneys Hearn and White and McCorkle were paid their respective fees in advance, that Mr. Harry Stokes contracted with the next friend, A. B. Vaughn, to represent the contestant for 20 per cent of the amount recovered, and that Attorneys McCarley and Stephenson and Judge Cherry took the place of Mr. Stokes in the case, and are bound by his alleged contract.

"As to Mr. Hearn and McCorkle

& White being paid in advance, this contention is not sustained by the record, and seems to be almost entirely without any foundation to rest upon. The facts with reference to this matter, briefly stated, are that, shortly after the death of the testator, after his will was probated and it was discovered that all of his property was willed to his brothers and sisters, and his only child disinherited, the mother of the contestant called on Mr. Hearn with a view to employing him to represent her child in a contest of her former husband's will, to the end that the property left by the deceased might be procured for said child. Mrs. Sayers is a poor woman, with little property. Mr. Hearn had a talk with Mr. McCorkle with reference to the matter, and it was agreed that if Mrs. Sayers would pay to Mr. Hearn \$50 and to the firm of McCorkle & White \$50, and give said parties each a note for \$50, they would institute the contest and would look to the recovery for the balance of the fee to be received by them. The \$100 was paid, and two notes for \$50 each executed by Mrs. Sayers, as agreed, and the contest was instituted. J. K. P. Ridley acted as next friend for the minor. He conferred with said attorneys, and brought to them the money, and paid one or both of said notes when they became due. At the time of the signing of the notes, Mrs. Sayers signed an agreement which appears in the record, and which shows that the employment of Mr. Hearn and McCorkle & White was upon the terms and conditions as above stated. It is insisted for the appellant that Mrs. Sayers did not know that she signed said agreement, and did not intentionally sign same. Attention is called to the fact that the agreement was written on the same sheet of paper that Mr. Hearn's note was written on, and was just below the note, and that Mrs. Sayers understood that she was signing the notes only. This insistence is not sustained by the record. In the first place, it is inconceivable that said attorneys would undertake for a fee

of \$100 each the prosecution of a will contest that apparently, and, as afterwards developed, in reality, was encumbered with many serious difficulties, involving an estate, at the time of the institution of the contest, supposed to be worth between \$30,000 and \$40,000, and which, as it afterwards developed, was worth over \$50,000, and all of which estate, if the contest was successful, would go to their client. In the next place, both Mr. McCorkle and Mr. Hearn testify that the contract of employment was as shown by said paper writing signed by Mrs. Sayers, and that they did not agree to represent the contestant for the fee which has been paid them. It is not insisted that Mrs. Sayers did not sign the agreement, and it could not be successfully so insisted, for it is apparent that the signature to the agreement is the same as the signature to the notes. Mrs. Sayers knew that she was to execute only two notes, and it is not reasonable that she would have signed three papers, or would have signed her name three times, without knowing the contents or inquiring with reference to the contents of the third paper signed.

"As to the contract with Mr. Harry Stokes being for 20 per cent of the amount of the recovery, there is evidence both for and against that proposition. It is admitted that Mr. Stokes entered into a written contract with the next friend, Mr. Vaughn. It is also admitted that the employment of Mr. Stokes was upon a contingent basis, the difference between the parties being that appellant insists that the fee of Mr. Stokes was to be 20 per cent of the amount recovered, while appellees insist that it was to be 50 per cent. The written contract was lost after the death of Mr. Stokes, and, notwithstanding diligent search was made for same, it could not be found. Mr. Vaughn, the next friend, and his son, testify that the contract provided for a fee of 20 per cent of the recovery, while Mr. Stephenson, who saw and read the contract, and Mrs. Davis, former

stenographer for Mr. Stokes, who wrote the contract, testify that it was for 50 per cent. There are circumstances in the record in addition to the testimony given supporting each of the theories, and the issue is a close one. However, we are unable to see how this issue becomes important in this controversy, as none of the appellees are undertaking to recover on the contract made with Mr. Stokes, and the fee, or the part of the fee, that his estate is to receive for the services rendered by him prior to his death, is embraced in the \$8,000 allowed as the fee to all of the attorneys representing the contestant.

"After the death of Mr. Stokes, which was after the second trial of the case, Messrs. McCarley & Stephenson and Judge Cherry came into the case. It is insisted for the appellant that they were to take the place of Mr. Stokes, and that the fee to be paid them for the services to be rendered was covered by the contract with Mr. Stokes. That these attorneys took the place of Mr. Stokes in the case is admitted, but that the fee to be paid them was covered by the contract with Mr. Stokes is denied, and in our judgment is not sustained by the record. Mr. Vaughn, the next friend, had a very high regard for Mr. Harry Stokes and his ability as a lawyer. He agreed to act as next friend on condition that he be permitted to employ additional counsel. He employed Mr. Harry Stokes as the additional counsel. When Mr. Stokes was killed, Mr. Vaughn was somewhat at sea as to what course he should pursue with reference to counsel to take his place. It is but reasonable to assume that, had he understood that McCarley & Stephenson, who were in the office with Mr. Stokes, were employed in the case under the contract with Mr. Stokes, he would have gone to them, and, at least, advised with them with reference to procuring counsel to take the place of Mr. Stokes. He did not do so. He called to see Mr. Walter Stokes, of the Nashville bar, and proposed to employ him in the

case to take the place of Mr. Harry Stokes. Mr. Walter Stokes told Mr. Vaughn that he was not situated so that he could accept the employment, and suggested to him that he get McCarley & Stephenson to look after the case. Thereupon Mr. Vaughn called on Mr. Stephenson, talked with him with reference to the case, and at that time did suggest that additional counsel be employed and suggested Mr. Eslick. Mr. Stephenson made no objection to Mr. Eslick, but stated that Judge Cherry was associated with them in a number of cases, that he was an excellent lawyer, and suggested that he be employed. The recollections of Mr. Stephenson and Mr. Vaughn do not harmonize altogether as to all that was said in this conversation. Mr. Vaughn insists that Mr. Stephenson said that he and Mr. McCarley were already in the case, and Mr. Stephenson denies this. However, it is not insisted that anything was said to Mr. Stephenson or Mr. McCarley or Judge Cherry, the latter of whom was afterward called into the conference and employed, with reference to the amount of their fees, or that they would be expected to take the place of Mr. Stokes in the case and upon the terms that he had been employed. We do not think that the will of Mr. Stokes has any bearing on this proposition. None of the three lawyers last named were partners with Mr. Stokes, and no reference is made in the will of Mr. Stokes to the case at bar, and the general provisions thereof do not cover this case in so far as providing for the payment of the fees of said lawyers out of the estate of Mr. Stokes is concerned.

"The proponents of the will were represented by able and diligent counsel. The case remained on the docket for about two years before it was tried the first time. There is proof in the record to the effect that the original next friend was not very conversant with matters pertaining to lawsuits, that it was difficult to procure him to take an interest in the case and to furnish his then counsel with the information neces-

sary for them to have in order to warrant them in proceeding; but when Mr. Ridley died, and Mr. Vaughn was made next friend, the battle became imminent, and soon began to be waged with great ability, energy, and effectiveness. As heretofore stated, the first trial resulted in a verdict for contestant. Upon motion for a new trial, this verdict was set aside and a new trial granted. Some time elapsed before the second trial. The principal asset of the deceased was a tract of land. This tract of land was increasing in value, and it seems that the legal battle was increasing in energy and earnestness. The second trial resulted in a verdict for the contestant. This verdict was set aside and a new trial granted. It was deemed advisable to preserve certain wayside bills of exception. This was done. Shortly after the second trial, the death of Mr. Harry Stokes occurred, and it was shortly after his death that Messrs. McCarley & Stephenson and Judge Cherry were employed. The third trial was had in July, 1916. The appellant undertakes to minimize, to some extent, the services rendered by the appellees in this trial, because a large portion of the testimony introduced was read from the transcript of the record made on the former trial. The record discloses that this course was deemed advisable by the attorneys representing the contestant for certain reasons suggested in the testimony, and the correctness of their judgment, or at least the fact that they made no mistake, is evidenced by the fact that the third trial also resulted in a verdict in favor of the contestant. However, it also appears that, under the agreement, either party had the right to introduce oral testimony, and this was probably done.

"The proponent made a motion for a new trial, the motion was granted, and the trial judge also sustained proponent's motion which he had previously made for a directed verdict, and judgment was entered accordingly. The case came

to this court, and went from this court to the supreme court, with the results heretofore stated. The case was argued before the supreme court while that court was in session at Jackson, and one or more of the attorneys for the contestant appeared before the supreme court and argued the case at that place.

"Is the amount of \$8,000 excessive compensation for the services rendered?

"In the first place, quite an array of counsel were employed to represent the contestant, three firms, McCorkle & White and McCarley & Stephenson, Cherry & Steger, and two individual lawyers, Mr. Hearn and Mr. Harry Stokes. It is true that only Mr. Hearn and McCorkle & White were in the case from its inception to the present time, but Mr. Stokes came into the case before the first trial, and the other attorneys were employed before the third trial in the lower court, and, with reference to the character of the services rendered, it is sufficient to say that the next friend, who, from the beginning of his connection with the case, has taken great interest therein, expresses himself as entirely satisfied with the results obtained; and, taking into consideration the actions of the trial judges, this court and the supreme court, it is reasonable to assume that the feeling of satisfaction indulged by the next friend is not without good foundation. It is not necessary for us to undertake to detail the work that was necessary to be done and which was done in prosecuting this suit to an end which, to a large degree, is successful,—at least, to an end that is accompanied with great benefits to the infant contestant. It appears that, after the decision in the supreme court, it appeared that lands in Williamson county and in the neighborhood of said county, where the land of the testator is, had very much increased in value, and, as the next friend and his attorneys thought, had reached the maximum value. Proponent was confronted with the fact that three juries had set aside the will. Contestant was

confronted with the fact that the trial judge had set aside the verdict of three juries. This court had held that the trial judge should have entered judgment on the verdict of the last jury. The supreme court had held that the proponent was entitled to a new trial. All parties interested were confronted by the fact that the litigation was very expensive, and that a very large bill of costs had already been incurred, and that it had become difficult to keep in touch with the witnesses for the respective parties and to procure their further attendance. These facts, among others, led to the agreement of settlement and compromise which had heretofore been set out, and which was clearly best for all parties interested.

"Mr. E. J. Smith and Mr. Hamilton Parks, of the Nashville bar, testify that, in their opinions, \$5,000 would be reasonable compensation to the attorneys for contestant; and Judge John T. Allen is of the opinion that one third of the amount actually recovered for the minor would be reasonable compensation to the attorneys for the contestant. These witnesses are good men and reputable lawyers, and their opinions are entitled to and have been given considerable weight by this court.

"On the other hand, Judge Higgins, Mr. E. J. Hamilton, Mr. W. E. Norvell, Mr. Lewis Leftwich, state as their opinion that appellees are entitled to 50 per cent of the amount recovered. Mr. E. T. Seay puts it at from 30 per cent to 50 per cent, but later in his deposition says that he does not think 50 per cent would be reasonable. Judge E. F. Langford, Messrs. F. A. Berry, Chester K. Hart, Harry A. Luck, John R. Aust, of the Nashville bar, and R. H. Crockett, of the Franklin bar, testify that, in their opinions, 50 per cent of the net amount recovered for the minor contestant would be

reasonable compensation to his attorneys.

"The gross estate of the deceased amounted to slightly more than \$50,000. While it is insisted by the guardian ad litem that it does not yet appear how much the contestant will receive under this compromise settlement and the decree of the court, still we think it appears reasonably certain that the contestant's share of the estate of his father, after the payment of debts, costs, and expenses to be paid out of the general fund, will be from \$17,000 to \$19,000.

"It seems that the court left the matter of how many attorneys should be employed to represent the contestant to the next friends. They saw proper to employ the number hereinbefore mentioned. With the exception of the small amounts paid to Mr. Hearn and to McCorkle & White, these attorneys knew that the compensation, if any, to be received by them for the services rendered, depended on their winning the case. It might happen, and, judging from the actions of the various courts, there was a strong probability, that they might receive no compensation for their services. This may have spurred them to greater efforts; but, however that may be, there is no complaint as to the efforts put forth. In view of all of these facts, we cannot say that the amount allowed by the trial judge is excessive.

We understand that the amount allowed covers the entire fee of all of the attorneys representing the contestant, and that they have agreed, or will agree, upon a division among themselves, and this includes the amount that the estate of Mr. Harry Stokes is to receive. The first and second assignments of error are therefore overruled."

The case is affirmed.

*Attorney and
client—reason-
ableness of fee.*

ANNOTATION.

Right of next friend to compensation for services rendered to infant in the litigation.

- I. Scope, 1537.
- II. Distinction between a next friend and guardian ad litem, 1537.
- III. Authority for awarding next friend compensation for services, 1538.
- IV. The basis in reason for awarding next friend compensation for services, 1543.
- V. Conclusion, 1543.

I. Scope.

This annotation is altogether restricted to cases concerned with the payment for services rendered in causes at law and in equity, and other legal proceedings, of persons who bring and carry on suits and actions and special proceedings as next friends of infants. It does not include cases relating to the compensation for services in such matters of persons specially appointed as guardians ad litem for infant parties.

II. Distinction between a next friend and guardian ad litem.

A next friend is very like a guardian ad litem, the chief difference being that he is the curator of an infant plaintiff, while the guardian ad litem represents an infant defendant. *Turner v. Partridge* (1831) 3 Penr. & W. (Pa.) 172; *O'Donnell v. Broad* (1892) 6 Kulp (Pa.) 435.

A next friend is distinguished from a guardian ad litem in that the former is admitted by the court to prosecute a suit in the name and behalf of an infant plaintiff, whereas the latter is appointed by the court to defend a suit against an infant defendant. *Tucker v. Dabbs* (1873) 12 Heisk. (Tenn.) 18.

A guardian ad litem is appointed by the court because courts are bound to guard the interests of infants, whether they are protected or unprotected by guardians. *Sheahan v. Wayne Circuit Judge* (1879) 42 Mich. 69, 3 N. W. 259.

An infant, not being capable of appointing an attorney, must sue by his
9 A.L.R.—97.

prochein ami or guardian. *Tidd*, Pr. 9th ed. 99.

If an infant claims a right or suffers a wrong on account of which it becomes necessary to seek a remedy in court, his nearest relative is supposed to be the person who will take him under his protection and institute a suit to establish his right or vindicate his wrong; and the person who institutes a suit in behalf of an infant is, therefore, termed his next friend (prochein ami). *Story*, Eq. Pl. § 57.

But a prochein ami is not required to be any particular relative who acts because he is nearest of kin. *Guild v. Cranston* (1851) 8 Cush. (Mass.) 506.

According to *Blackstone* (1 Com. 464), a prochein ami may be any person who will undertake the infant's cause.

Another distinction between a next friend and a guardian ad litem may be observed in the method by which, respectively, they come to represent the infant in the litigation in hand. A guardian ad litem invariably is an appointee of the court, while usually the next friend is a volunteer.

In theory of law, a prochein ami is appointed by the court; but in practice no formal appointment is made until and unless his authority to act is challenged. *Guild v. Cranston* (Mass.) *supra*.

A next friend, in contemplation of law, is an officer of court, appointed to guard and promote the interests of the person in whose behalf he acts,—although no actual order appointing him is made,—and he is subject to removal and replacement by the court. *Trahern v. Colburn* (1884) 63 Md. 99.

It formerly was held that a defendant sued by an infant by next friend was not obliged to answer until the plaintiff showed a rule of court admitting him to prosecute the suit; but the rule nowadays is that the next friend is admitted without other record than

a recital in court. *O'Donnell v. Broad* (1892) 6 Kulp (Pa.) 435.

The appointment of a next friend to prosecute an action of an infant, according to some, can be questioned only by special demurrer or specific denial in the nature of a plea in abatement. *Baxter v. St. Louis Transit Co.* (1906) 198 Mo. 1, 95 S. W. 856; *Dudley v. Wabash R. Co.* (1911) 238 Mo. 184, 142 S. W. 338.

A next friend is not a party to the suit he prosecutes, but is like unto an officer of court, specially designated to look after the infant's interests and to manage his cause. He differs from the attorney in that he controls the suit and is liable for costs; yet in many respects he is merely an attorney. *Sinclair v. Sinclair* (1845) 13 Mees. & W. 640, 153 Eng. Reprint, 268, 14 L. J. Exch. N. S. 109.

It is said to be a general rule that courts, to favor infants, permit any person to file a bill in behalf of one, but exercise, however, a very large discretion, on the one hand, to facilitate the proper exercise of such right to file a bill, and, on the other hand, to prevent any abuse of the right, or wanton expense, to the infant's prejudice. *Kingsbury v. Buckner* (1890) 134 U. S. 650, 33 L. ed. 1047, 10 Sup. Ct. Rep. 638.

III. Authority for awarding next friend compensation for services.

In awarding the next friend of an infant litigant compensation for personal services in the litigation, the reported case (*ROBERTS v. VAUGHN*, ante, 1528) is virtually an isolated case. In no other case that has been discovered after a painstaking search of domestic and foreign authorities has remuneration eo nomine been given to a next friend for his services as such.

In many jurisdictions there are statutes providing for appointments of guardians ad litem in suits and actions in which infants are parties, and authorizing courts to compensate such guardians; and in one state, at least, it has been declared by the courts that services of a guardian ad litem of an infant, rendered pursuant to an appointment by the court, are not gratuitous, and that courts have in-

herent power and authority to allow him compensation. *Jones v. Yore* (1897) 142 Mo. 38, 43 S. W. 384; *Walton v. Yore* (1894) 58 Mo. App. 562.

Because of the distinction between guardians ad litem and next friends, above stated, these cases hardly afford authority for the decision in *ROBERTS v. VAUGHN*, and the opinion they express on the point here considered is contrary to the judicial views elsewhere prevailing.

According to another authority of equal rank there is in force where the common law prevails a time-honored rule that a court may command the services of any member of its bar when in need of an instrument of the sort to stand for the helpless, and the service, apart from the capacity of the served to pay, must go unrequited except by the privilege enjoyed as a member of the profession, and the distinction of having done well a duty assumed cum onere. *McNaughton's Will* (1908) 138 Wis. 179, 118 N. W. 997, 120 N. W. 288.

In the same case, the court, speaking anent the compensation of a guardian ad litem of an infant party out of the corpus of an estate in litigation, said: It may safely be observed that, to the honor of the profession, the interests of judicial wards have been as faithfully conserved from time immemorial by the discharge of the duty to represent them in litigation, gratuitously in many cases, as probably it will be under a system securing for it a more certain money value; but it is recognized that the legislature may, if it sees fit, relieve the profession of the burden with its correlative honors. *Ibid.*

A court, said another authority, has a right to command the services of counsel for one unable to pay in civil as well as in criminal cases; the obligation of a lawyer to serve a penniless client when commanded by the court is an honorary one which burthens his license when he takes it, and as a sworn minister of justice, he cannot withhold his services when the court commands. *House v. Whitis* (1875) 5 Baxt. (Tenn.) 690.

The first Constitution of North Car-

olina declared: "It shall be a base and vile thing to plead for money or reward," and 'in substance provided that no one except a near kinsman not farther away than a cousin-german to the party concerned should be permitted to plead another man's cause, nor unless he first should make oath in each case that he had not received and would not receive, directly or indirectly, money or other reward for pleading the cause. Locke, Fundamental Constitutions, § 70; 2 N. C. Rev. Stat. 1837, p. 459.

A next friend of an infant is appointed or allowed to conduct the litigation for the advancement of justice, and not with a view of any rights or interests of his own. *Guild v. Cranston* (1851) 8 Cush. (Mass.) 506.

There are numerous cases in which the next friends of infants have been reimbursed for outlay and expenses, both ordinary and extraordinary, made and incurred in and about the suits and actions they have instituted and conducted. In some instances they have been repaid their proper disbursements despite defeat in the litigation, always provided they began the suit upon reasonable grounds and prosecuted it diligently and in good faith. But such cases do not help answer the question whether or not, besides his disbursements, a next friend is entitled to remuneration for his service.

In one American case—it arose in Georgia about half a century ago—the court thought a next friend not entitled to compensation. In that case, upon a demurrer for want of equity and because of an alleged adequate remedy at law, the court held good a bill in equity filed against infants and other defendants by a complainant to recover money expended for counsel fees and other expenses, \$570, and for the value (stated at \$1,000) of his services in prosecuting a successful suit as next friend of the infants. *Daniel v. Powell* (1860) 29 Ga. 730.

In the opinion of the court in that case it was said that the claim of the complainant against the infants was not a personal one, but was an equi-

table lien on the property gained; that the infants made no contract with the next friend to reimburse him for his expenditures in the litigation; that he acted for the benefit of their property under the direction of a court of chancery, and the court would see to it that he should receive a proper compensation out of the property itself, but would never go beyond the property benefited, because that might lead to a compensation beyond the service rendered; furthermore, that complainant ought to have had the original decree, which secured the infants the property, provide for his compensation as next friend, since that could have been done without additional costs; and because he failed to do this, he should pay the costs of having it done afterwards.

Had the court ended its opinion at this point, the case might have been authority for *ROBERTS v. VAUGHN*; but, instead of stopping here, the court proceeded to say: "Nor do we think he [the complainant] ought to be allowed any charges for personal services rendered by himself, for that would open a door for the office of a next friend to be turned into one of personal profit and speculation; but we do think that he ought to be allowed his charges on account of all proper expenditures of money made by him for the benefit of the property."

It is now a rule in Georgia that the law of reported cases in that state is contained in the headnotes; but whether or not that rule was in force sixty years ago, the writer of this annotation has been unable to ascertain. The headnote to the case reads as follows: A next friend, having obtained a decree in chancery securing a remainder interest to minors for whom he acts, has an equitable lien on the estate which he has benefited for all proper expenditures of money made by him, but not for his personal services.

The right of a next friend to reimbursement for necessary expenses out of the recovery in the suit he conducted is not denied, if he applies for repayment before the sum recovered has been paid over, and while it is yet con-

trolled by the court. *Leopold v. Meyer* (1860) 10 Abb. Pr. (N. Y.) 40.

If a *prochein ami* has acted in good faith and with reasonable prudence, and it appears that, in championing the cause of a person unable, by legal disability, to maintain and defend his rights in his own name, he was influenced solely by a desire to protect a defenseless one, it is not only manifest justice that he be reimbursed for his outlay from the estate of the incompetent whose interest he attempted, even unsuccessfully, to protect, but a rule of practice to that effect is absolutely essential to the safety and security of many persons entitled to legal protection, and, indeed, who are most in need of it, but incapable of knowing when they are wronged, or of seeking protection and redress. *Voorhees v. Polhemus* (1883) 36 N. J. Eq. 456.

All fair expenses beyond taxed costs are allowed to trustees, guardians, or next friends of infants, under the general head of just and proper allowances. *Yourie v. Nelson* (1874) 1 Tenn. Ch. 614.

Of the English cases, none refers by name to compensation of a next friend for his own services as such. If any awards him compensation for acting as next friend, the award is concealed under the term "costs" or "just allowance."

The definitions and dissertations on costs do not much enlighten the investigator in this country respecting the point.

Mr. Anderson, in his *Law Dictionary*, has defined costs as (1) the expenses of an action, recoverable from the losing party; (2) an allowance to a party for expenses incurred in conducting his suit; and (3) the sums prescribed by law as charges for services enumerated in the fee bill.

Mr. Black has it that the term "costs," besides being the allowance recoverable by a successful party from the defeated litigant, is in England also used to designate the charges an attorney or solicitor may make and recover of his client as remuneration for professional services, such as legal ad-

vice, attendances, drafting and copying documents, and conducting legal proceedings.

Mr. Beames, in what he modestly called a "Sketch on Costs," said there were two general principles on which courts of equity usually act in giving or withholding costs; namely, remuneration of the successful party and punishment of the unsuccessful one. In some instances, according to him, remuneration appears to be the sole, or, at least, the leading, principle; and, he added, when a court of equity awards costs to a trustee, his remuneration is the sole object, because the court can never be inferred to intend any punishment of the *cestui que trust* in making him, or the fund which belongs to him, pay those costs; on the contrary, it requires from such *cestui que trust* the discharge of a moral duty lest the gratuitous performance of a fiduciary obligation which can be attended with no benefit to the trustee be accompanied with a pecuniary loss to him. *Introduction, Summary of the Doctrine of Courts of Equity with Respect to Costs*, Lond. 1822.

In the United States, costs have been said to be an allowance to a party for expenses incurred in conducting his suit; and fees, the compensation to an officer for services rendered in the progress of the cause. *Musser v. Good* (1824) 11 Serg. & R. (Pa.) 248.

Costs have been defined also in the same jurisdiction as expenses incurred either in prosecuting or defending an action or any process at law or in equity, consisting of the fees of attorneys, solicitors, or other officers of court, and such disbursements as are allowed by law. *Janes's Appeal* (1878) 87 Pa. 431.

Mr. Bouvier, in his *Dictionary*, says: No costs were recoverable by either plaintiff or defendant at common law, and they were first given by the Statute of Gloucester (6 Edw. I. chap. 1), which, in substance, has been adopted in all the United States. And he adds: In no case can a party recover costs from his adversary unless he can show a statute giving him the right, and such statutes are strictly

construed, and not extended beyond their letter.

His latter statement has ample support in *Apperson v. Mutual Ben. L. Ins. Co.* (1876) 38 N. J. L. 388.

According to Judge Daniell, courts are extremely anxious to encourage those who stand forward as next friends of infants, and, whenever it can be done, allow them, out of the infants' estates, costs of any proceedings instituted in good faith for the infants' benefit. 1 Dan. Ch. Pr. 79.

Whoever will stand forward in the character of a next friend ought to be encouraged by the courts to every possible extent, it has been declared, while he can be supposed to intend the benefit of the infant; and so long as this is the case, no degree of mistake or misapprehension on his part should charge a *prochein ami* with costs as against an infant's estate. *Whittaker v. Marl* (1786) 1 Cox, Ch. Cas. 285, 29 Eng. Reprint, 1169.

In a later case it was put somewhat qualifiedly. It was therein said that the true principle which should govern in cases of suits by next friends of infants is that no discouragement ought to be resorted to to deter persons *bona fide* suing as next friends, but that no undue facility should be afforded to mere volunteers, who interfere for their own purposes rather than for the infant's advantage. While they seem to act in good faith, next friends will be protected, the presumptions will be in their favor, and the burden of proof will rest upon those who impeach their motives; but no strained presumptions will be indulged to save them, no forced constructions of their conduct will be made, and no bare possibilities will be conjured up in their behalf. *Nalder v. Hawkins* (1833) 2 Myl. & K. 243, 39 Eng. Reprint, 937, *Coop. t. Brougham*, 175, 47 Eng. Reprint, 62.

Recently it has been held that for the costs and damages recovered against a next friend of an infant in an unsuccessful action which he had brought upon the advice of counsel, in good faith, and had carried on with diligence and propriety, the infant was bound to indemnify him. *Steeden*

v. Walden [1910] 2 Ch. (Eng.) 393, 79 L. J. Ch. N. S. 613, 103 L. T. N. S. 135, 26 Times L. R. 590, 54 Sol. Jo. 681.

Long before that, Lord Eldon held a *prochein ami* not entitled to the costs of an unsuccessful suit out of the infant's estate if it appeared that, by reasonable diligence before suing, he could have ascertained that there was no real ground of action. *Pearce v. Pearce* (1804) 9 Ves. Jr. 548, 32 Eng. Reprint, 715.

The action of the English courts respecting claims of the next friends for costs against infants may be seen in the following citations of typical cases:

Sir William Grant, Master of the Rolls, on a bill filed by a legatee of a testator, who also was entitled to the residue of the estate in the right of his wife, in his own behalf, and as *prochein ami* of an infant, was applied to by counsel for the next friend for an allowance of costs beyond those taxed. There had been a decree with costs to be taxed, payable out of the estate, and these had been taxed, but the *prochein ami* asked for a further allowance. His counsel argued that if such an allowance could not be given, no one would file a bill in behalf of an infant except in the plainest of cases; but he admitted that his application was contrary to an adverse decision then recently made by the Master of the Rolls. In denying the application, Sir William remarked: "If the *prochein ami* is to a certainty to have all that exceeds the taxed costs, that leads him to be very careless. The inquiry could be only what was properly expended. This is a bill filed also by other parties as well as in behalf of the infant, and not purely for her right. I understand the lord chancellor has said he never will direct such a reference." Thereupon counsel *amici curiæ* cited cases in which Lords Eldon and Rosslyn, separately, had thus acted in special circumstances without sanctioning any general rule, but Sir William replied that that was often done in cases of charity, and adhered to his refusal so to order in the case at bar. *Osborne*

v. Denne (1802) 7 Ves. Jr. 424, 32 Eng. Reprint, 172.

About this time it was held that a trustee or next friend was, under the head of just allowances, entitled to fair expenses beyond taxed costs. *Fearn v. Young* (1804) 10 Ves. Jr. 184, 32 Eng. Reprint, 815.

In that case an application was made by motion for costs of trustees as between attorney and client, and, in passing upon it, Lord Chancellor Eldon said: Where the costs of the trustee are directed to be taxed, that means as between party and party, not in the larger way; but where a trustee, in the fair execution of his trust, has expended money by reasonably and properly taking opinions and procuring directions that are necessary for the due execution of his trust, he is entitled not only to his costs, but also to his charges and expenses under the head of just allowances. Some of the masters, I find, think that as these charges cannot come under the head of costs, they cannot be given under just allowances. With regard to an infant, this requires great consideration, for, as the infant himself cannot incur charges and expenses, if they cannot be claimed under just allowances, and the next friend is to be at the whole expense of the infant beyond his costs, persons will deliberate before they accept that office. *Ibid.*

In *Palmer v. Jones* (1874) 22 Week. Rep. (Eng.) 909, Sir George Jessel, Master of the Rolls, directed the costs of an infant's suit, conducted to a successful end by his next friend, to include "costs, charges, and expenses of the next friend, properly incurred before suit, with reference to its institution," after the regular costs had been taxed and ordered paid out of the fund recovered in the suit.

And in *Brown v. Weatherhead* (1844) 4 Hare, 122, 67 Eng. Reprint, 586, 9 Jur. 787, it was ruled that the costs of the next friend of an infant who, *pendente lite*, attained his majority, should, as between solicitor and client, be allowed up to the time the infant became of age, but not afterwards, even where further proceedings were had in consequence of those al-

ready taken, unless the infant had expressly authorized them after he became of age.

In Canada, an application was made to Mr. Justice Ferguson for an order authorizing infant's next friend to prosecute an appeal to the Supreme Court of the Dominion, and protecting him from the costs of the appeal out of funds of the infants, interned in court; where the court was divided in opinion in a decision adverse to the infants, and more than one counsel had advised an appeal. The learned judge, in granting the application, said: At first I did not clearly see my way to make the order, the next friend being a person who acted voluntarily and undertook the conduct of the suit, but, on reflection, I think that, under the circumstances, such an order should be made. It is a matter in which the infant's estate,—part of it,—according to the view of the next friend and counsel who advise him, is being taken away. The question really is, should, in this state of affairs, other estate of the infant's be applied, if necessary, to bear the expense of such an appeal, and the next friend be indemnified or recouped in case he should make advances for the purposes of the appeal? I think the order should be made. *Cottingham v. Cottingham* (1885) 11 Ont. Pr. 13.

From the foregoing review it is clear that for all the expenditures made in good faith by a next friend in beginning with probable cause and properly prosecuting with diligence a litigation in behalf of an infant, with or without success, he is entitled to repayment from the infant's property, whether his disbursements are or are not technically taxable as costs. And it is equally plain that attorneys, solicitors, and counsel regularly engaged in the bringing and carrying on of the infant's cause at the instance of the next friend, are entitled to be paid for their services a fair, just, and reasonable compensation. But it is not possible to rest upon any exact precedent the right of the next friend himself to compensation for his own services from the infant's estate.

IV. The basis in reason for awarding next friend compensation for services.

The court in the reported case (*ROBERTS v. VAUGHN*, ante, 1528), admitting that the question of the right of a next friend to compensation for his personal services "is remarkably free of previous adjudication," really rests the award upon the ground that, in the instant case, the services of the next friend were "necessary" to the infant, and asserts what, indeed, is not debatable, that an infant is liable for all necessities.

The court, unfortunately, was unable to cite a single authority for the assertion that the services of a next friend in securing a valuable estate for the infant were "a necessity."

The cases found do not strongly illuminate the question, which the court conceded to be not free from doubt, whether or not the next friend is entitled to compensation for personal services.

It has been said to be just, and within the principle making an infant liable for necessities, that reasonable fees should be paid out of his estate, won through litigation, to the lawyer who fought for his rights, to protect his interests, and to secure his property when he had no guardian. *Epperson v. Nugent* (1879) 57 Miss. 45, 34 Am. Rep. 434.

The property of infants, lunatics, and others who must appear in court proceedings by representatives, may be charged with the fees of an attorney employed by such representatives. *Westmoreland v. Martin* (1886) 24 S. C. 238.

The compensation for legal services to an infant concerning the administration, protection, and preservation of his property, depends on the same considerations, and is measured by the same rules, as those which apply in cases of like services to adults. *Bowling v. Scales* (1875) 1 Tenn. Ch. 618.

And the proper defense of a suit against an infant is declared a necessity, for the cost of which his estate may be liable. *Nagel v. Schilling* (1884) 14 Mo. App. 576.

Legal services which pertain to the defense of the liberty or the person of

an infant should be classed as necessities, for which he is liable to pay. The necessities of an infant concern his person, not his estate. The test of whether or not a thing is a necessity to an infant, for which he is bound to pay, is whether or not it relates to his person (whether or not it is a creature comfort, as it were). And legal services relating to an infant's property or estate should not be deemed "necessaries," and he is not liable for them, in the absence of a statute imposing liability. *Grissom v. Beidelman* (1912) 35 Okla. 343, 44 L.R.A.(N.S.) 411, 129 Pac. 853, Ann. Cas. 1914D, 599.

Legal services rendered an infant, and relating to his inheritance, do not fall in the category of necessities, for which he is liable; such necessities include only the things that are essential to his support, use, and comfort in his condition and circumstances of life. *Cobbey v. Buchanan* (1896) 48 Neb. 391, 67 N. W. 176.

Compensation for legal services respecting an infant's property cannot be recovered, irrespective of whether the infant has or has not a guardian. Such services are not necessities, whether or not they are beneficial. *Phelps v. Worcester* (1840) 11 N. H. 51.

The test of beneficiality does not determine whether or not services rendered an infant are to be accounted necessities, for the payment of which he shall be held liable. *Grissom v. Beidelman* (Okla.) supra.

In view of the protection afforded minors by provisions of law for the appointment of guardians, legal services rendered an infant in settling the estate of a decedent without a guardian's employment cannot be held necessities. *McIsaac v. Adams* (1906) 190 Mass. 117, 112 Am. St. Rep. 321, 76 N. E. 654, 5 Ann. Cas. 729.

V. Conclusion.

It would be both presumptuous and unjustifiable to pronounce the decision in the reported case (*ROBERTS v. VAUGHN*, ante, 1528) unsound in so far as it awards the next friend compensation out of the infant's estate for his personal services as such in a suc-

cessful litigation. The reason the court gave appears to afford insufficient support, and there is no precedent; but, on the other hand, appar-

ently no court has explicitly decided that a next friend in similar circumstances cannot be awarded compensation.
J. B. G.

HARRY B. ANDERSON, Respt.,

v.

FIDELITY & CASUALTY COMPANY OF NEW YORK, Appt.

New York Court of Appeals—April 20, 1920.

(228 N. Y. 475, 127 N. E. 584.)

Insurance — accident — public conveyance — taxicab.

An automobile operated as a public taxicab for fares controlled by taximeter is within the provision of an accident insurance policy for extra compensation for injuries while in or on a public conveyance provided by a common carrier for passenger service, although at the time of the accident the cab is engaged for the exclusive use of the person injured and his companion.

[See note on this question beginning on page 1555.]

APPEAL by defendant from a judgment and order of the Appellate Division of the Supreme Court, Third Department, modifying, by increasing the recovery, and affirming a judgment of a Trial Term for Albany County (Chester, J.) in favor of plaintiff in an action brought to recover the amount alleged to be due on an accident insurance policy. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. Charles B. Sullivan, with Messrs. Nadal, Jones, & Mowton, for appellant:

When appellant was injured and met with his accident, this taxicab was not a public conveyance, was not provided by a common carrier, was not then a public conveyance for passenger service, and the owner was not a common carrier.

Darnell v. Fidelity & C. Co. 46 Ins. L. J. 523; Dorr v. New Jersey Steam Nav. Co. 11 N. Y. 485, 62 Am. Dec. 125; Anderson v. Fidelity & C. Co. 100 Misc. 411, 166 N. Y. Supp. 640; Lough v. Outerbridge, 143 N. Y. 271, 25 L.R.A. 674, 42 Am. St. Rep. 712, 38 N. E. 292; New York C. & H. R. R. Co. v. Sheeley, 27 N. Y. Supp. 185; New York C. & H. R. R. Co. v. Flynn, 74 Hun, 124, 26 N. Y. Supp. 859; Brown v. New York C. & H. R. R. Co. 75 Hun, 358, 27 N. Y. Supp. 69; Public Service Commission v. Booth, 170 App. Div. 590, P.U.R. 1916A, 955, 156 N. Y. Supp. 140; Smith v. O'Brien, 46 Misc. 325, 94 N. Y. Supp. 673; Piedmont Mfg. Co. v. Columbia

& G. R. Co. 19 S. C. 353; Lake Shore & M. S. R. Co. v. Perkins, 25 Mich. 329, 12 Am. Rep. 275; McGregor v. Gill, 114 Tenn. 521, 108 Am. St. Rep. 919, 86 S. W. 318; Nashville & C. R. Co. v. Messino, 1 Sneed, 220; Atlantic City v. Dehn, 69 N. J. L. 233, 54 Atl. 220; Stanley v. Steele, 77 Conn. 688, 69 L.R.A. 561, 60 Atl. 640, 2 Ann. Cas. 342, 18 Am. Neg. Rep. 20; Trout v. Watkins Livery & Undertaking Co. 148 Mo. App. 621, 130 S. W. 136; 1 Moore, Carr. 1, 4, 21, 25; Babbitt, Motor Vehicles, 494; Oswego v. Collins, 38 Hun, 171; New York v. Hexamer, 59 App. Div. 4, 69 N. Y. Supp. 198; Oppenheimer v. Maryland Casualty Co. 70 Pa. Super. Ct. 382; Terminal Taxicab Co. v. Kutz, 241 U. S. 252, 60 L. ed. 984, P.U.R. 1916D, 972, 36 Sup. Ct. Rep. 583, Ann. Cas. 1916D, 765; Primrose v. Casualty Co. of America, 19 Pa. Dist. R. 471, affirmed in 232 Pa. 20, 37 L.R.A. (N.S.) 618, 81 Atl. 212; Conn v. Hunsberger, 224 Pa. 154, 25 L.R.A. (N.S.) 372, 132 Am. St. Rep. 770, 73 Atl. 324, 16 Ann. Cas. 504; Stanley v. Steele, 77 Conn. 688, 69 L.R.A.

561, 60 Atl. 640, 18 Am. Rep. 20, 2 Ann. Cas. 342; Copeland v. Draper, 157 Mass. 558, 19 L.R.A. 283, 34 Am. St. Rep. 314, 32 N. E. 944; Payne v. Halstead, 44 Ill. App. 97; Godbout v. St. Paul Union Depot Co. 79 Minn. 188, 47 L.R.A. 532, 81 N. W. 835; Siegrist v. Arnot, 10 Mo. App. 200, 86 Mo. 200, 56 Am. Rep. 425; Van Zile, Bailm. & Carr. 2d ed. chap. 11; Angell, Carr. § 89; Allen v. Sack-rider, 37 N. Y. 341; Fish v. Clark, 2 Lans. 176, 49 N. Y. 122; Hollister v. Nowlen, 19 Wend. 238, 32 Am. Dec. 455; Wells v. Steam Nav. Co. 2 N. Y. 204; Seaver v. Bradley, 179 Mass. 329, 88 Am. St. Rep. 384, 60 N. E. 795; Lake Shore & M. S. R. Co. v. Perkins, 25 Mich. 329, 12 Am. Rep. 275; Com. v. People's Exp. Co. 201 Mass. 564, 131 Am. St. Rep. 416, 88 N. E. 426; Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 393; Summer v. Caswell, 20 Fed. 249; Bigby v. United States, 103 Fed. 597, affirmed in 188 U. S. 400, 47 L. ed. 519, 23 Sup. Ct. Rep. 468; The Neaffie, 1 Abb. (U. S.) 467, Fed. Cas. No. 10,063; Nash-ville & C. R. Co. v. Messino, 1 Sneed, 224; Gillingham v. Ohio River R. Co. 35 W. Va. 588, 14 L.R.A. 798, 29 Am. St. Rep. 827, 14 S. E. 243; Re Ryder, P.U.R.1916B, 1067; Newcomb v. Yellow Cab Co. P.U.R.1916B, 983.

Messrs. Mills & Mills, for respondent:

The vehicle in question was a public conveyance.

Gassenheimer v. District of Columbia, 26 App. D. C. 557, 6 Ann. Cas. 920; Masterson v. Short, 33 How. Pr. 481; Primrose v. Casualty Co. of America, 19 Pa. Dist. R. 471, 232 Pa. 210, 81 Atl. 212, 37 L.R.A.(N.S.) 618, and note; Huddy, Automobiles, 4th ed. pp. 44, 418, 419, 476, 5th ed. pp. 45, 163, 164, 1049; 5 Am. & Eng. Enc. Law, 2d ed. 481; Fidelity & C. Co. v. Joiner, — Tex. Civ. App. —, 178 S. W. 806; 10 C. J. 607; Donnelly v. Philadelphia & R. R. Co. 53 Pa. Super. Ct. 28; Terminal Taxicab Co. v. Kutz, 241 U. S. 252, 60 L. ed. 984, P.U.R.1916D, 972, 36 Sup. Ct. Rep. 583, Ann. Cas. 1916D, 765; Van Zile, Bailm. & Carr. 2d ed. chap. 2, § 407; Dobie, Bailm. & Carr. 519; Mason-Seaman Transp. Co. v. Mitchell, 89 Misc. 230, 153 N. Y. Supp. 461; Fonsler v. Atlantic City, 70 N. J. L. 125, 56 Atl. 119.

Such vehicle was provided by a common carrier.

Burke v. State, 64 Misc. 558, 119 N. Y. Supp. 1089; O'Rourke v. Bates, 73 Misc. 414, 133 N. Y. Supp. 392; 5 Am. & Eng. Enc. Law, 2d ed. 481; Huddy,

Automobiles, 4th ed. 414, 420, 5th ed. 164; Dunn v. New Amsterdam Casualty Co. 141 App. Div. 478, 126 N. Y. Supp. 229; Primrose v. Casualty Co. of America, 19 Pa. Dist. R. 471, affirmed in 232 Pa. 210, 37 L.R.A.(N.S.) 618, 81 Atl. 212; Yellow Taxicab Co. v. Gaynor, 82 Misc. 97, 143 N. Y. Supp. 279; 1 Wyman, Pub. Serv. Corp. p. 407; 1 Moore, Carr. p. 60; Bonce v. Dubuque St. R. Co. 53 Iowa, 278, 36 Am. Rep. 221, 5 N. W. 177, 3 Am. Neg. Cas. 347; Van Hoeffen v. Columbia Taxicab Co. 179 Mo. App. 591, 162 S. W. 694; Lloyd v. Haugh & K. Storage & Transfer Co. 223 Pa. 148, 21 L.R.A.(N.S.) 188, 72 Atl. 516; Stiner v. Metropolitan Street R. Co. 84 N. Y. Supp. 285; Dwinelle v. New York C. & H. R. R. Co. 120 N. Y. 117, 8 L.R.A. 224, 17 Am. St. Rep. 611, 24 N. E. 319; Gillingham v. Ohio River R. Co. 35 W. Va. 588, 14 L.R.A. 798, 29 Am. St. Rep. 827, 14 S. E. 243; 9 Columbia L. Rev. 177; 10 Columbia L. Rev. 353; Carlton v. Boudar, 118 Va. 521, 4 A.L.R. 1480, 88 S. E. 174; Brown Shoe Co. v. Hardin, 77 W. Va. 611, L.R.A.1916D, 1199, 87 S. E. 1014; Lemon v. Chanslor, 68 Mo. 340, 30 Am. Rep. 799; Lewark v. Parkinson, 73 Kan. 553, 5 L.R.A.(N.S.) 1069, 85 Pac. 601, 20 Am. Neg. Rep. 81; Thomp. Carr. Pass. 26; Bench & Bar (Sept. 1917) p. 194; Waldum v. Lake Superior Terminal & Transfer R. Co. 169 Wis. 137, 170 N. W. 729; Kenna H. & S. E. R. Co. v. Calumet, 284 Ill. 301, 120 N. E. 259; Reaves v. Western U. Teleg. Co. 110 S. C. 233, 96 S. E. 295; Desser v. Wichita, 96 Kan. 820, L.R.A.1916D, 246, 153 Pac. 1194; Cushing v. White, 101 Wash. 172, L.R.A. 1918F, 463, 172 Pac. 229; Boland v. Gay, 201 Ill. App. 359; Fonsler v. Atlantic City, 70 N. J. L. 125, 56 Atl. 119; Allen v. Bellingham, 95 Wash. 12, 163 Pac. 18.

The vehicle was in no sense a private conveyance, nor was it provided by a private carrier.

Dwinelle v. New York C. & H. R. R. Co. 120 N. Y. 117, 8 L.R.A. 224, 17 Am. St. Rep. 611, 24 N. E. 319; 1 Moore, Carr. p. 4; Terminal Taxicab Co. v. Kutz, 241 U. S. 252, 60 L. ed. 984, P.U.R.1916D, 972, 36 Sup. Ct. Rep. 583, Ann. Cas. 1916D, 765; Yellow Taxicab Co. v. Gaynor, 82 Misc. 94, 143 N. Y. Supp. 279; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77.

It was provided for passenger service and plaintiff was a passenger therein.

Gassenheimer v. District of Columbia, 26 App. D. C. 557, 6 Ann. Cas. 920; Dunn v. New Amsterdam Casualty Co. 141 App. Div. 478, 126 N. Y. Supp. 229; Primrose v. Casualty Co. of America, 232 Pa. 210, 37 L.R.A.(N.S.) 618, 81 Atl. 212; Atlantic City v. Brown, 71 N. J. L. 81, 58 Atl. 110; Stiner v. Metropolitan Street R. Co. 84 N. Y. Supp. 285.

Elkus, J., delivered the opinion of the court:

This action is upon a policy of accident insurance issued by the defendant to the plaintiff. By article 7 of the policy it is provided that the amounts specified to be paid by other articles shall be doubled if the bodily injury is sustained by the assured "*while in or on a public conveyance (including the platform, steps, and running board thereof) provided by a common carrier for passenger service.*" The stipulated facts show: On October 8, 1915, the plaintiff was at the corner of State and Pearl streets in the city of Albany, in front of the office of the Yellow Taxi Service, Incorporated. A cab belonging to this company was standing at the curb, awaiting engagement. Plaintiff desired to go to the Elks Club on State street near Eagle street, and engaged this cab, which was operated by a chauffeur employed by the taxi company. The plaintiff entered the cab, accompanied by a friend, and gave the chauffeur the direction to take them to the Elks Club, arrived in front of the club, and, as the plaintiff attempted to alight, he stumbled and fell and sustained a fracture of the right patella or kneecap, and was seriously injured.

The question before this court is whether the taxicab in which the plaintiff received his injury is a public conveyance provided by a common carrier for passenger service, within the meaning of the policy sued upon.

The stipulated facts show that the Yellow Taxi Service, Incorporated, operate a number of Ford (automobile) cars, differing in no way from other Ford cars, except

that they are equipped with a taximeter, and that the bodies of the cars are painted yellow and bear a serial number. There was a space for additional passengers in the taxicab, but the plaintiff and his friend had the sole and exclusive occupation until his journey's end.

The Yellow Taxi Service, Incorporated, was organized under the Business Corporations Law (Consol. Laws, chap. 4), with the purpose, among others, "to conduct a general livery business by means of automobiles plying for hire in the streets of any city or village within the state or on the roads and highways of the state generally, or elsewhere, whether such vehicles are propelled by steam, gasoline, electricity or any other kind of motive power for the transportation of passengers or goods."

Pursuant to the authority granted by this charter, some taxicabs of the Yellow Taxi Service, Incorporated, were sent to stands at various places in Albany, awaiting applicants for their services, and to do a so-called "cruising" business, seeking and accepting "fares" who may signal to them when they are unengaged. Others awaited calls at the garage of the company. Apparently the chauffeur was the authorized agent of the company to accept a "fare," and was bound to accept every proper "fare" presented, under the provisions of chapter 14, §§ 5 and 14, of the General Ordinances of the City of Albany. This ordinance imposed a penalty of \$10 on the owner or driver of any conveyance used for the carrying and transportation of passengers for hire, other than street cars, who should refuse or neglect to convey any person to any place, within certain limits, around the city.

The term "common carrier" is not of statutory origin. Its meaning is to be found in the history of the law of the early days, when means of travel and communication were slow and uncertain, and innkeepers and carriers were re-

strained from the robbery, and oft-times murder, of those to whom they offered their hospitality or service, only by the imposition of heavy penalties and responsibility for the safe-keeping of their patrons' goods and persons. *Nugent v. Smith*, L. R. 1 C. P. Div. 19, 423, 45 L. J. C. P. N. S. 697, 34 L. T. N. S. 827, 24 Week. Rep. 237, 3 Asp. Mar. L. Cas. 198, 1 Eng. Rul. Cas. 216; *Coggs v. Bernard*, 2 Ld. Raym. 909, 92 Eng. Reprint, 107, 1 Smith, Lead. Cas. 199.

With the development in traveling facilities from the post horse to the chaise, the stagecoach, and to the modern railroad train or steamboat, the term "common carrier" has been applied to each new development catering to the public generally, and the strict rules of the old law have been relaxed but little, for with the development came new dangers of a mechanical sort, inherent to swiftly-moving machines. *Palmer v. Delaware & H. Canal Co.* 120 N. Y. 170, 17 Am. St. Rep. 629, 24 N. E. 302; *Ingalls v. Bills*, 9 Met. 1, 43 Am. Dec. 346, 9 Am. Neg. Cas. 426; *Hegeman v. Western R. Corp.* 13 N. Y. 9, 64 Am. Dec. 517. To-day, as is practically conceded by counsel for both parties in the instant case, the term "common carrier" should be applied to the "jitney bus," and tomorrow, in a proper case, it may well be that it may be applied to that most recent device for eliminating the fetters of distance, the aeroplane, presenting as it does new dangers unknown to the average man, which can only be decreased by a high degree of care upon the part of those in control of the mechanism which operates them.

Definitions are fundamental. Their application to any given state of facts, therefore, must be by analogy. *Moore, Carriers*, 2d ed. p. 19, defines a common carrier as "one who, by virtue of his business or calling, undertakes, for compensation, to transport personal property from one place to another, either by land or water, and deliver the same,

for all such as may choose to employ him; and everyone who undertakes to carry and deliver, for compensation, the goods of all persons indifferently, is, as to liability, to be deemed a common carrier."

A common carrier was defined, in *Gisbourn v. Hurst*, 1 Salk. 249, 91 Eng. Reprint, 220, to be "any man undertaking, for hire, to carry the goods of all persons indifferently," and in *Dwight v. Brewster*, 1 Pick. 50, 11 Am. Dec. 133, to be "one who undertakes, for hire, to transport the goods of such as choose to employ him, from place to place."

In *Bank of Orange v. Brown*, 3 Wend. 161, Chief Justice Savage said: "Every person who undertakes to carry, for a compensation, the goods of all persons indifferently, is, as to the liability imposed, to be considered a common carrier."

"The distinction between a common carrier and a private or special carrier is that the former holds himself out in common, that is, to all persons who choose to employ him, as ready to carry for hire; while the latter agrees in some special case, with some private individual, to carry for hire." *Story, Contracts*, § 752a.

The employment of a common carrier is a public one, and he assumes a public duty, and is bound to receive and carry the goods of any one.

"On the whole," says Professor Parsons, "it seems to be clear that no one can be considered as a common carrier, unless he has, in some way, held himself out to the public as a carrier, in such manner as to render him liable in an action if he should refuse to carry for anyone who wished to employ him." 2 Parsons, Contr. 5th ed. 166, note; *Allen v. Sackrider*, 37 N. Y. 341, 342.

In the early days there was no common carrier, except of goods. Common carriers of persons, as such, were unknown until recent times. Travel was unusual, and he who traveled did not travel in wagons or conveyances furnished by a

common carrier. Thereafter, the term "common carrier" acquired a broader meaning, and now applies to one who carries passengers as well as one who carries goods, either when he carries the passenger and his merchandise or baggage, or when he carries a traveler without his goods. *Bretherton v. Wood*, 3 Ball & B. 54, 6 J. B. Moore, 141, 9 Price, 408, 23 Revised Rep. 556; *Nolton v. Western R. Corp.* 15 N. Y. 444, 69 Am. Dec. 623.

The distinction as to liability of a carrier of goods and of passengers is illustrative. Chief Justice Mansfield said: "For the goods the carrier is answerable at all events; but he did not warrant the safety of the passengers. His undertaking as to them went no farther than this; that as far as human care and foresight could go, he will provide for their safe conveyance." *Christie v. Griggs*, 2 Campb. 79, 11 Revised Rep. 666; *Camden & A. R. & Transp. Co. v. Burke*, 13 Wend. 611, 616, 28 Am. Dec. 488; *Hollister v. Nowlen*, 19 Wend. 234, 236, 32 Am. Dec. 455.

This distinction in liability arises out of the difference in control exercisable over human beings and mere goods.

In *Jackson Architectural Iron Works v. Hurlbut*, 158 N. Y. 34, 38, 70 Am. St. Rep. 432, 52 N. E. 665, this court held that it was not error to refuse to instruct a jury that one whose business is that of a general truckman, whose particular specialty was moving heavy machinery, for which he kept and maintained a large number of trucks and horses and necessary help for the transaction of this business, was not a common carrier. Judge O'Brien, who wrote the opinion of this court, said: "A common carrier is one who, by virtue of his calling, undertakes, for compensation, to transport personal property from one place to another for all such as may choose to employ him; and everyone who undertakes to carry for compensation the goods of all persons indifferently, is, as to liability, to be deemed a common carrier."

Ibid.; *Bank of Orange v. Brown*, 3 Wend. 158; *Schouler, Bailm. & Carr.* 2d ed. 351; *Story, Bailm.* §§ 495, 496; 2 Kent, Com. 4th ed. pp. 598, 599; 2 Parsons, Contr. 165, 175; Angell, Carr. 870; *Allen v. Sackrider*, 37 N. Y. 341; *Lough v. Outerbridge*, 143 N. Y. 271, 25 L.R.A. 674, 42 Am. St. Rep. 712, 38 N. E. 292.

If we omit the words "the goods of," we find a perfect definition of a common carrier of persons, and, when the history of the change of common carriers from goods to persons is traced, we find that reason, custom, and common sense support this definition.

Does not the term "common carrier" have a different significance than the narrow definition given by Moore, to the layman who negotiates an insurance contract by which he is to be paid a specified sum, provided his injury takes place while traveling in a public conveyance provided by a common carrier? The insurance contract certainly meant something, and its meaning was not limited by the old definition of "common carrier." Its indemnity was for personal injuries. Did not "common carrier" include in the mind of the assured, and in the mind of the ordinary man, a street car, busses, jitneys, taxicabs, and all means of conveyance which are publicly offered to travelers, whether accompanied by their luggage or not, regardless of whether the offer is made by a carrier of goods and persons, or merely of persons?

The certificate of incorporation of the company owning the taxicab in question states that it is organized for the transportation of passengers or goods. Why, then, is it not a "common carrier," within the meaning of the insurance policy in the instant case? That the company itself was a common carrier within the meaning of the policy, there can be, I think, little doubt.

The tendency of the law is to eliminate distinctions which no longer continue in the mind of the ordinary man. The Supreme Court of the United States well says in *Little v.*

Hackett, 116 U. S. 366, 379, 29 L. ed. 652, 656, 6 Sup. Ct. Rep. 391, 397 (Field, J.): "There is no distinction in principle, whether the passengers be on a public conveyance like a railroad train or an omnibus, or be on a hack hired from a public stand in the street for a drive." And, in distinguishing the passenger in a public conveyance from the owner, said: "The owner of a public conveyance is a carrier, and the driver or the person managing it is his servant. Neither of them is the servant of the passenger, and his asserted identity with them is contradicted by the daily experience of the world." Field, J., 116 U. S. 366, 375.

The modern meaning of common carrier is well expressed in the California Code as follows: "Everyone who offers to the public to carry persons, property, or messages, excepting only telegraphic messages, is a common carrier of whatever he thus offers to carry." Cal. Civ. Code, § 2168.

The crux of the present case, therefore, narrows down to the point whether the taxicab furnished to the plaintiff, in which he was riding and from which he was alighting at the time of his injury, was a public conveyance. If this be so, and the company furnishing it being a common carrier, the conditions of the policy providing for double indemnity are fulfilled.

The stipulated facts show that the Yellow Taxi Service, Incorporated, sent its taxicabs, equipped with taximeters, on the streets of Albany, under the control of their chauffeurs, to wait at stands, or, when traveling upon the streets and unemployed, to transport any applicant for their service. The city ordinance clearly applies to them, and penalizes both the chauffeur and the owner for any refusal to accept any proper applicant. Certainly the owners and drivers of purely private conveyances cannot be subjected to this penalty.

In *Primrose v. Casualty Co. of America*, 232 Pa. 210, 214, 37 L.R.A.

(N.S.) 618, 81 Atl. 213, it was said: "The words 'public conveyance, provided for passenger service, and propelled by gasoline,' are to receive a reasonable meaning. All conveyances are either for public or private use. The automobile in the case at bar was not one for merely private use. It belonged to a company which, as already stated, was engaged in the business of hiring automobiles for general public use. The use of no one of its machines was limited to any particular person, but anyone able to pay the price for the privilege of riding in it, while it was under the control of and being operated by one of the company's employees, could do so. In some cases, a fare per head was charged for the use of the machine for a stipulated time or for a specified journey; in other instances, there was a charge for the use of the car of so much by the hour, and, under this arrangement, the deceased and his friends hired the car in which they were riding."

The facts in the *Primrose Case* were very similar to those in the case at bar, and while it may be that that decision was too broad, in that it applies to a rented automobile, under contract for a day or an hour or other specified time, it is clear that a taxicab equipped with a taximeter, "cruising" along the streets of a city, offering its services to the first comer, looking for "fares" to any place within the city limits, at a fixed price to be controlled by the distance and recorded by a taximeter, is a public conveyance within the usual concept of the term and also legal-

ly. Its character does not change by reason of some passer-by accepting the offer publicly made of its services. It was a public offer of conveyance which he accepted, and the instrument of conveyance must remain as to him a public conveyance to his journey's end or his dismissal of the cab.

There does not seem to be much reason in the argument that if all

Insurance—
accident—
public convey-
ance—taxicab.

the seats were occupied the conveyance was a public one; but that if only two or three of the four available seats were occupied, it was a private conveyance. The fact that, by custom, when engaged by a "fare," taxicabs proceed under the direction of that "fare" to the destination desired by him, and accept no other passengers, does not change the means or character of the conveyance. The custom is the result of business convenience, inherent in the successful conduct of the taxicab business. Those employing taxicabs desire greater speed and conveyance in transacting their business or journey than is furnished by the ordinary street car or jitney bus. This means of speed and convenience is offered by the taxicab, and that is what warrants its higher rate of charge. *Jackson Architectural Iron Works v. Hurlbut*, 158 N. Y. 34, 70 Am. St. Rep. 432, 52 N. E. 665.

The exclusive right to use does not alter the situation. In *Campbell v. Perkins*, 8 N. Y. 430, 435, in which the owners of a canal boat, carrying passengers and goods for hire, chartered a boat bearing their name to another company for a single trip, a passenger, apparently knowing nothing of the charter party, engaged passage on the boat, and during the trip from New York to Albany some of his luggage was lost, and he brought action against the owner. It was held "that the defendants, as owners of the boat, were liable to the plaintiff in their character as common carriers, notwithstanding there was no privity of contract between them and the plaintiff; that they had a duty to perform as common carriers, and were liable for their failure to perform such duty."

An express train which may not be filled to capacity, passes by ordinary stations, even cities, where passengers may be waiting, willing and anxious to board it, but its services belong to those few persons who entered it for specific destinations without intermediate stop. Passen-

gers often pay an extra fare to travel on these trains. Inns cannot be compelled to fill every room to capacity, nor Pullman companies to let unoccupied berths in sections already rented. These limitations do not alter their public character. *Jencks v. Coleman*, 2 Sumn. 221, Fed. Cas. No. 7,258.

This would make it appear that the test of the meaning of "public conveyance" is not whether all the seats are occupied, or whether a passenger takes one or more seats in a taxi, paying for those he himself does not occupy. The test is the public offer of conveyance at a fixed fare to all.

The judgment of the Appellate Division and order appealed from should be affirmed, with costs.

Hiscock, Ch. J., concurring:

While plaintiff was alighting from a taxicab in the city of Albany, he met with an accidental injury. At the time he held a policy issued by the defendant, insuring him against injury through accidental means, which provided that the amount to be paid in case of such an injury should be doubled if it was sustained by the assured "while in or on a public conveyance . . . provided by a common carrier for passenger service." By the judgment which has been recovered for double payment under this clause, the question has been presented whether the taxicab in which plaintiff was riding was a public conveyance provided by a common carrier for passenger service. The important facts by which this question is to be determined are as follows:

The Yellow Taxicab Service, Incorporated, operated taxicabs in the city of Albany. It has a garage, and part of its service was rendered by taxicabs on calls sent in to the garage. In addition to this, however, it stationed taxicabs in various public places in the city, where they stood awaiting and desiring engagement by any person who was free from reasonable or legal objections and was able to pay the required fare. The taxicab in which

plaintiff was riding was one of the latter class. When a person engaged one of these cabs on a public stand, it became subject to his orders as to destination and duration of service, and the proffered engagement of any other person would not be accepted while it was engaged in carrying out the first engagement, even though there was room for other people. The company did not put in use the same number of cabs each day. It pursued with them no definite routes; had no schedule of any kind; the fares were fixed by it, and were not in any way controlled by the Public Service Commission. There was in the city of Albany an ordinance which required a license fee for use of taxicabs and which imposed a penalty upon any driver who refused to convey any person within certain limits within the city, and which limits included the service being rendered for plaintiff at the time of his accident. The taxicab company had taken out, and was operating under, such a license.

We think that upon these facts it has been properly held that the taxicab was a public conveyance and that the company which operated it was a common carrier.

In answer to the first question involved, it is difficult to see how the taxicab in use on this occasion can be regarded as other than a "public conveyance." We are not now considering the status of a cab which might be ordered by special call from the garage, as a conveyance might be ordered from a liveryman, but the case of one which was stationed upon the street for the purpose of securing business from anyone who might come along, who seemed to be an acceptable customer. Such a conveyance, stationed in a public place awaiting and accepting for carriage, subject to reasonable regulations which will be discussed later, any member of the public who desired it, and upon terms apparently uniform and common to all, seems clearly to be a public conveyance. It is a public conveyance because indiscriminate-

ly it conveys the public. It is not private because its use is not limited to certain persons and particular occasions, or governed by special terms. If any persuasive authority is needed for this proposition, it is found in the case of *Terminal Taxicab Co. v. District of Columbia*, 241 U. S. 252, 253, 60 L. ed. 984, 986, 36 Sup. Ct. Rep. 583, 584, Ann. Cas. 1916D, 765. This case considered a statute relating to public utilities, which latter were defined as including "every corporation . . . controlling or managing any agency or agencies for public use for the conveyance of persons," and it was held that the law applied to a company which carried passengers to and from hotels and railroad terminals, respectively, under contracts which gave it the exclusive right to solicit taxicab business from persons at either place. This was only part of the public, and it was assumed that there was the same feature of control by the first person engaging a taxicab as appears in this case, yet it was held that such cabs were for "public use for the conveyance of persons."

We then come to the remaining question whether the Yellow Taxicab Service was a "common carrier" for passenger service, in respect of the taxicab in which plaintiff was riding at the time he received his injuries. And again, in this connection, it may be stated that the status of the company in respect of such a cab, and in respect of those stationed in its garage and employed by and on special call for special purposes, is not necessarily the same. I think, and for the purposes of this discussion shall assume, that as to such latter taxicabs it would more nearly have the character of a liveryman and would not be a common carrier. *Stanley v. Steele*, 77 Conn. 688, 69 L.R.A. 561, 60 Atl. 640, 2 Ann. Cas. 342, 18 Am. Neg. Rep. 20; *McGregor v. Gill*, 114 Tenn. 521, 108 Am. St. Rep. 919, 86 S. W. 318; *Siegrist v. Arnot*, 86 Mo. 200, 205, 56 Am. Rep. 425; *Erickson v. Barber Bros.* 83 Iowa, 367, 49 N. W. 838;

Copeland v. Draper, 157 Mass. 558, 19 L.R.A. 283, 34 Am. St. Rep. 314, 32 N. E. 944; Conn. v. Hunsberger, 224 Pa. 154, 25 L.R.A. (N.S.) 372, 132 Am. St. Rep. 770, 73 Atl. 324, 16 Ann. Cas. 504.

This immediate question will be discussed on the theory that the taxicab which was used by the plaintiff was stationed upon a public street and in a public place, intended to serve, and serving indiscriminately, those of the public who might desire it, under common conditions and upon common rates of fare. I am aware that it will be contended by the appellant that this is not an accurate statement of the situation, because the services were subject to certain conditions, limitations, and restrictions, and therefore there will be considered, first, these limitations, for the purpose of determining whether in any substantial or legal sense they did change the status of the taxicab as I have stated it to be.

It is said that the taxicab company did not at all times furnish the same number of cabs for public service, that it would not receive for carriage persons subject to certain objections, that it fixed its own rates of fare and moved from no fixed termini on fixed routes or regular schedule, and, lastly, that when it had received for carriage one individual, or one group of individuals, it was not open to other engagement until that trip had been finished. It is also said in attempted solution of this question that the company operating the taxicab would not be subject to action if it refused to accept a passenger, and that it was not subject to the high measure of liability which attaches to a common carrier. So far as concerns these last propositions, they seem to me to involve an argument which moves backward, and which attempts to determine a status by consideration of results which flow from the status if established. The liabilities which have been mentioned cannot be regarded as creating the status of a common carrier; they arise from the

condition of being a common carrier, if that is once established.

I do not think that any of the special conditions and limitations which have been mentioned destroy or impair the fundamental and substantial character of the operator of the taxicab in question. We can easily see that there is nothing decisive in the facts that the company did not at all times operate the same number of cabs, that it rejected undesirable persons, as those intoxicated or diseased, proposing to use its conveyances, and that it fixed its own rates of fare. These are all privileges commonly exercised by common carriers subject to statute or contract and to the modern device of regulation by public service commissions, and except for such control or regulation, even a railroad company would not be regarded as losing or shedding its character of a common carrier, if, from day to day, it varied the number of its trains, rejected undesirable persons as passengers, or fixed its fares.

Neither has it ever been regarded or held to be indispensable to the creation of the status of common carrier that its conveyances should move between fixed termini upon fixed routes. It is true that until modern times common carriers, taking the ordinary stagecoach as an illustration, did ordinarily thus move; but no case has been cited or found which holds that such characteristics are indispensable. In fact, the contrary has been held. *Parmelee v. Lowitz*, 74 Ill. 116, 24 Am. Rep. 276; *Pennewill v. Cullen*, 5 Harr. (Del.) 238. It has even been held that fixed charges are not an essential attribute of a common carrier of goods. *Jackson Architectural Iron Works v. Hurlbut*, 158 N. Y. 34, 70 Am. St. Rep. 432, 52 N. E. 665.

This leaves the limitation upon service which is most urgently emphasized by appellant, namely, the one that when the taxicab had been engaged by one member, or group of members, of the public, no other person was received for carriage.

even though room was still left in the conveyance, until the first trip had been completed. This, in our judgment, did not take defendant out of the character of common carrier. As has been said in a thoughtful discussion of this general question in respect of this particular feature: "It would seem that in every case of general obligation to serve, the custom of service qualifies the nature of the duty." *Columbia L. Rev. Dec. 1917*, pp. 710, 713.

The custom under which, as we know by ordinary observation, a taxicab such as that in which plaintiff was riding, after having accepted from the public an individual or a group of individuals, refuses to receive others, is not only well-nigh universal, but is almost indispensable. Moving on no definite route, but having taken passengers for delivery at one destination, it could not well or conveniently discharge its service to them if it received other individuals desiring to go to another destination or in an opposite direction. It does not absolutely and unqualifiedly refuse to serve these latter people, but simply relegates them to service by another conveyance. Its refusal to carry the public goes no farther than conditions and limitations which it can reasonably and conveniently make, and more than this a common carrier is not required to do.

While a company operating sleeping cars is not a common carrier, it still is engaged in rendering public and common service, and it has been held that such a company is not compelled to sell an upper berth, although unoccupied, when the entire section has been engaged by another occupant. *Searles v. Mann Boudoir Car Co. (C. C.) 45 Fed. 330*; *Nevin v. Pullman Palace Car Co. 106 Ill. 222, 46 Am. Rep. 688*. An hotelkeeper is not compelled to accommodate a proposed guest by setting up an extra bed in a room already engaged, although there is plenty of space in such apartment for such extra bed. *Browne v. Brandt, [1902] 1 K. B. 696, 2 B. R. C. 680, 71 L. J. K. B.*

9 A.L.R.—98.

N. S. 367, 50 Week. Rep. 654, 86 L. T. N. S. 625, 18 Times L. R. 399. And as was held in the case of *Terminal Taxicab Co. v. Kutz, 241 U. S. 252, 60 L. ed. 984, P.U.R.1916D, 972, 36 Sup. Ct. Rep. 583, Ann. Cas. 1916D, 765*, above cited, the status of a taxicab as a "public" conveyance is not impaired by the observance of a custom or regulation such as we are now commenting on, and of course the feature of indiscriminate public service, there said not to be impaired by such regulation, is the essence of, and foundation upon which rest, the character and status of a common carrier.

Therefore, as we think, subject to these particular features which regulated without destroying its service, the owner of this cab was engaged in indiscriminately carrying such members of the public as might apply on common terms, and it came within the definition of a common carrier.

As we well know, the vocation of a common carrier of passengers is an evolution from that of a common carrier of goods. Classical definition of the latter is "any man undertaking for hire to carry the goods of all persons indifferently." *Gisbourn v. Hurst (1710) 1 Salk. 249, 91 Eng. Reprint, 220*. And again: "To bring a person within the description of a common carrier he must exercise it as a public employment; he must undertake to carry goods for persons generally, and he must hold himself out as ready to engage in the transportation of goods for hire as a business, not as a casual occupation *pro hac vice*." *Story, Bailm. § 495*.

In extension of this definition, the common carrier of passengers has been with accuracy defined as "one who undertakes for hire to carry all persons indifferently who may apply for passage. To constitute one a common carrier it is necessary that he should hold himself out as such. This may be done not only by advertising, but by actually engaging in the business and pursuing the occupation as an employment." *Thomp. Carr. Pass. p. 26, note 1*.

The meaning and extent of these definitions of a common carrier are emphasized by recognized definitions of a private carrier.

"Private carriers for hire are such as make no public profession that they will carry for all who apply, but who occasionally, or upon the particular occasion, undertake for compensation to carry the goods of others upon such terms as may be agreed upon. They are not common carriers because they do not make the carriage of goods for others a business, and do not hold themselves out to the public as ready and willing to carry indifferently for all persons any particular class of goods, or goods of any kind whatever." Hutchinson, Carr. 3d ed. § 35.

The learned counsel for the appellant in his earnest and thorough argument for a different view calls to our attention many cases asserted to lead to a different conclusion. Some of these are, in our opinion, so readily distinguishable from the present one that it is unnecessary to comment on them at length. There are, however, cited four cases which merit brief comment, for the purpose of distinguishing them from the present case.

In *Darnell v. Fidelity & C. Co.* (Tenn. Sup. Ct.) reported in 46 Ins. L. J. 523, the taxicab involved had been employed on a special call to the garage, and the business of the owner and operator of it was described "as in the nature of a livery stable business." As has already been indicated, we think that the status of such a conveyance may readily be distinguished from that of the conveyance in which plaintiff was riding.

Oppenheimer v. Maryland C. Co. 70 Pa. Super. Ct. 383, dealt with an automobile which was hired under special contract from one who, so far as appears, kept a garage and did not station his cars upon the street for public service, and the court disposed of the case on the theory that it involved and was controlled by the principles applicable to a livery stable keeper.

The case of *New York v. Hexamer*, 59 App. Div. 4, 69 N. Y. Supp. 198, involved the consideration of a licensing ordinance, and it was simply held that the right to license the business of hackmen, and to fix a license, did not authorize the passage of an ordinance imposing a license fee upon a person engaged in conducting a livery stable in New Jersey, and who at intervals sent his carriages into the city of New York for the purpose of meeting the steamers of the Trans-Atlantic Line and conveying the passengers to their respective destinations. It was the view of the court that such a person, so conducting a livery stable and sending forth his hackmen, was not "a public hackman."

The case of *Brown v. New York C. & H. R. R. Co.* 75 Hun, 355, 27 N. Y. Supp. 69, involved the question whether an owner of two carriages with teams of horses, which were used in the transportation of passengers about the city of Niagara Falls, was a common carrier within the meaning of a statute regulating the admission of persons upon the station premises of the defendant for the purpose of soliciting custom. There are contradictory expressions in the opinion upon the question of common carrier. It is stated that the plaintiff's business did come within the general definition of a common carrier, but that ordinarily, in speaking of a common carrier, hackmen were not understood to be included therein. The important fact in respect of the decision, however, is that the question whether the plaintiff was a common carrier or not was not necessary to the disposition of the case, which proceeded to the same conclusion whether he was or was not.

On the other hand, we think that there is quite an abundance of decisions, some of them accompanied by well-considered opinions, which support the view that the operator of the modern public taxicab, or of its prototype, the old-fashioned public hack, was and is a common carrier. *Cushing v. White*, 101 Wash. 172,

L.R.A.1918F, 463, 172 Pac. 229; Carlton v. Boudar, 118 Va. 521, 4 A.L.R. 1480, 88 S. E. 174; Primrose v. Casualty Co. of America, 232 Pa. 210, 37 L.R.A.(N.S.) 618, 81 Atl. 212; Georgia L. Ins. Co. v. Easter, 189 Ala. 472, L.R.A.1915C, 456, 66 So. 514; Casualty Co. v. Joiner, — Tex. Civ. App. —, 178 S. W. 806; Lemon v. Chanslor, 68 Mo. 341, 30 Am. Rep. 799; Lewark v. Parkinson, 73 Kan. 553, 5 L.R.A.(N.S.) 1069, 85 Pac. 601, 20 Am. Neg. Rep. 81.

We think also that the Terminal Taxicab Co. Case, above cited, when carefully considered, strongly tends to sustain the view which we have taken.

We therefore are led to the conclusion that the judgment appealed from should be affirmed, with costs.

Chase, Hogan, Cardozo, McLaughlin, and Crane, JJ., concur with Elkus, J., and Hiscock, Ch. J., concurs in opinion, in which all concur.

ANNOTATION.

Accident insurance: taxicab as a public conveyance provided by a common carrier within provision for double or increased indemnity.

It will be observed that in the reported case (ANDERSON v. FIDELITY & C. Co. ante, 1544), a taxicab equipped with a taximeter, cruising along the streets of a city, offering its services to the first comer, looking for "fares" to any place within the city limits, at a fixed price to be controlled by the distance recorded by the taximeter, was held a public conveyance provided by a common carrier for passenger service, within the meaning of a clause of an accident policy providing for double the amounts otherwise specified, in case of injury sustained "while in or on a public conveyance . . . provided by a common carrier for passenger service," and there was held no force in the contention that the conveyance was a public one if all the seats were occupied, but a private one if only two or three of the four available seats were taken.

The conclusion in this case appears to be correct and finds support in other similar cases.

Thus, in Primrose v. Casualty Co. of America (1911) 232 Pa. 210, 37 L.R.A. (N.S.) 618, 81 Atl. 212, a provision of an accident policy for double indemnity in case of injuries received "while riding as a passenger in or on a public conveyance provided for passenger service, and propelled by steam, compressed air, gasoline," was held applicable where the insured was injured while a passenger in a taxicab, hired from one engaged in the business of

letting automobiles to the public generally for hire, whose chauffeur drove and controlled the vehicle. The court said: "The contention of the learned counsel for the appellant is that the double indemnity clause is applicable only to the case of a person occupying a place for which he pays a fare in a railway car or conveyance operated for the common use of himself and of such promiscuous persons as may happen to take passage en route, over which conveyance he exercises no control. It is to be noted that the clause was inserted by the insurer itself in the policy of insurance which it issued to the insured, and if it intended that the same should have the restricted meaning for which its counsel now contend, it could have readily so worded the clause. The insurance company could have so framed it that there would now be no doubt that the appellee could not insist that it was intended to extend to her claim. It is next to be remembered that, as the words used in the clause are the language of the insurer, a salutary rule of construction requires them to be construed most favorably to the insured, . . . and, for the same reason, if the clause is capable of two interpretations equally reasonable, that is to be adopted which is most favorable to the insured. . . . If the language of the policy is doubtful or obscure, it will be construed most unfavorably to the insurer. . . . A contract of in-

insurance must have a reasonable interpretation, such as was probably in the contemplation of the parties when it was made; and when the words of a policy are, without violence, susceptible of two interpretations, that which will sustain a claim to the indemnity it was the object of the assured to obtain should be preferred. . . . As applied to the admitted facts in the present case, we regard the double indemnity clause as having but one meaning. The Pennsylvania Taximeter Cab Company was engaged in the business of hiring automobiles to the public,—‘to the public generally,’ is the language of the witnesses describing its business. ‘Anybody at all’ who was financially responsible could hire one. The secretary and treasurer of the company testified: ‘They would be hired to anyone for rides, or for other personal transportation as passengers, from wherever they might get them to wherever they might want to go.’ The machines, however, were never turned over to the control and management of those who hired them, but were always operated by a chauffeur or driver in the employ of the company. All that those who rode in them did was to direct where they were to go. They were as much passengers in them as they would have been if riding in a specially chartered car of a railroad company, from which all but themselves were excluded, the only difference being that, as automobiles do not run on rails, the occupants could select their own traveling route; and it is not to be pretended that the double indemnity clause does not include passengers riding on a specially chartered railroad car. The words ‘public conveyance provided for passenger service and propelled by gasoline,’ are to receive a reasonable meaning. All conveyances are either for public or private use. The automobile in the case at bar was not one for merely private use. It belonged to a company which, as already stated, was engaged in the business of hiring automobiles for general public use. The use of no one of its machines was limited to any particular person, but anyone able to pay

the price for the privilege of riding in it, while it was under the control of and being operated by one of the company’s employees, could do so. In some cases a fare per head was charged for the use of the machine for a stipulated time, or for a specified journey; in other instances, there was a charge for the use of the car of so much by the hour, and under this arrangement the deceased and his friends hired the car in which they were riding.”

And the decision in *Primrose v. Casualty Co. of America* (Pa.) *supra*, was relied upon in *Fidelity & C. Co. v. Joiner* (1915) — Tex. Civ. App. —, 178 S. W. 806, where it was held that the insured was riding in “a public conveyance provided by a common carrier for passenger service,” within a provision of an accident policy for double indemnity, at the time he was injured, it appearing that he was riding in an automobile rented from one who operated a hotel and livery business and rented automobiles to anyone who was willing to pay according to his schedule of charges established, and who always furnished a driver with the cars.

It has been held that the insured was not, at the time of his injury, “a passenger in or on a public conveyance provided by a common carrier for passenger service” within the meaning of a provision of an accident policy for double indemnity in case of injuries sustained while so riding, where it appeared that, at the time of the insurer’s injury, he was riding in an automobile hired from the proprietor of a garage who owned several automobiles which he was accustomed to hire to the public for such times and rates as agreed upon with the hirers. *Oppenheimer v. Maryland Casualty Co.* (1919) 70 Pa. Super. Ct. 382. The court said: “The owner of the car was a private individual. His cars were his to do with as he chose. His cars operated along no route, had no point of starting or destination except the will of the patron who hired them. He had no schedule of tariffs or rates for their use. He could charge more on a wet day than on a dry one, and as

much more as his bailee was willing to pay. He could exact more compensation for driving into a country where the roads were bad than elsewhere. In a word, the rate he was to receive was the subject-matter of contract between him and his prospective patron. So far as this record shows he had never applied for nor received any certificate of public convenience from the Public Service Commission, and was in no way amenable to the orders or decrees of that body. We think it would be an unwarrantable extension of the meaning of the term 'common carrier' to hold that the relations between the owner of the car and the parties who hired it, under the contract referred to, were those of passenger and common carrier, instead of the ordinary relation of bailor and bailee. Neither in form nor in substance can we see that such contract differed in any material way from a

similar one made with a livery stable keeper for the use of a carriage and team of horses."

And in *Darnell v. Fidelity & C. Co.* (1915) 46 Ins. L. J. (Tenn.) 523, where the insured was killed while riding in an automobile owned and operated by a company organized to conduct and carry on a general passenger and baggage business, and which charged a fixed rate to all customers, and admitted to its cabs all persons applying who paid the compensation, the court, without opinion, reversed the lower court's decision that the insured, when killed, was "in or on a public conveyance . . . provided by a common carrier for passenger service," within the meaning of an accident policy providing for increased liability in case of injury while riding in such conveyances. There is nothing in this case to indicate the line of reasoning adopted in reaching its conclusion. J. T. W.

DES MOINES UNION RAILWAY COMPANY

v.

CHICAGO GREAT WESTERN RAILWAY COMPANY, Appt.

Iowa Supreme Court—April 13, 1920.

(— Iowa, —, 177 N. W. 90.)

Contracts — to pay taxes — construction.

1. Income taxes and excise taxes not in force when the contract was made are not within a provision of a contract by one railroad company, obtaining terminal facilities from another, to pay a portion of all taxes or assessments, special or otherwise, and public charges of every kind and nature that shall or may be taxed or assessed against the lessor or its property during the term.

[See note on this question beginning on page 1566.]

Definition — taxation.

2. Taxation, in its broadest and most general sense, includes every charge or burden imposed by the sovereign power upon person, property, or property rights, for the use and support of the government and to enable it to discharge its appropriate functions.

[See 26 R. C. L. 13, 14.]

Contracts — purpose of construction.

3. The end and purpose of the construction of an agreement is to arrive

at the real meaning and intent of the parties.

[See 6 R. C. L. 835, 836.]

— court will place itself in position of parties.

4. In ascertaining the meaning of parties to a contract the court will, to the best of its ability, place itself in the situation occupied by the parties when the contract was made.

[See 6 R. C. L. 849.]

Definition — excise tax.

5. The term "excise tax" denotes an inland duty or impost upon certain specified articles of manufacture, or

sale or license fees exacted by law as the price of the privilege to engage in a given line of trade or business.

[See 26 R. C. L. 236.]

(Salinger, J., dissents.)

APPEAL by defendant from a judgment of the District Court for Polk County (Guthrie, J.) in favor of plaintiff in an action brought to recover from defendant one third of certain income and corporation taxes alleged to have been paid by plaintiff. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Carr, Carr, & Cox, for appellant:

It is the duty of the court to discover and give effect to the intention of the parties, so that the performance of the contract may be enforced according to the sense in which they mutually understood it at the time it was made.

Walker v. Douglas, 70 Ill. 445; Jacobs v. Jacobs, 42 Iowa, 600; Corbett v. Berryhill, 29 Iowa, 157, 14 Mor. Min. Rep. 671.

In construing a contract greater regard is to be given to the clear intent of the parties than to any particular words they may have used.

Johnson County v. Wood, 84 Mo. 489; Chesapeake & O. Canal Co. v. Hill, 15 Wall. 94, 21 L. ed. 64; Nash v. Towne, 5 Wall. 689, 18 L. ed. 527; Walker v. Douglas, 70 Ill. 445; Mathews v. Phelps, 61 Mich. 327, 1 Am. St. Rep. 581, 28 N. W. 109; Radell v. Sharlan, 66 Wis. 138, 28 N. W. 136; A. Leschen & Sons Rope Co. v. Mayflower Gold Min. & Reduction Co. 35 L.R.A.(N.S.) 1, 97 C. C. A. 463, 173 Fed. 857.

Courts in construing contracts will take into consideration not only the language used, but the circumstances which surrounded the making of the contract, the situation and relation of the parties to it, and the object in view inducing the making of the contract.

Chamberlain v. Brown, 141 Iowa, 540, 120 N. W. 334; Maxwell v. McCall, 145 Iowa, 687, 124 N. W. 760; Kenigsberg v. Reininger, 159 Iowa, 548, 141 N. W. 407; Heinz v. Roberts, 135 Iowa, 748, 110 N. W. 1034.

General words in a contract must be given their usual and primary meaning at the time of the execution of the contract.

Asa G. Candler v. Georgia Theater Co. 148 Ga. 188, L.R.A.1918F, 389, 96 S. E. 226.

Where the meaning of any particular clause in a contract is in question, the entire contract must be taken into

consideration and construed together, rather than construing the language of the particular clause alone.

Jacobs v. Jacobs, 42 Iowa, 600; Nash v. Towne, 5 Wall. 689, 18 L. ed. 527.

In a contract where specific words are followed by words of sweeping or general import, the words of general import shall be construed as referring only to matters and things of the same class as those specifically mentioned.

Jones v. Island Creek Coal Co. 79 W. Va. 532, 91 S. E. 391; Mahaffy v. Mahaffy, 63 Iowa, 55, 18 N. W. 685; Davis v. Western Home Ins. Co. 81 Iowa, 496, 10 L.R.A. 359, 25 Am. St. Rep. 509, 46 N. W. 1073; Beck v. Economy Coal Co. 149 Iowa, 24, 127 N. W. 1109; Johnson County v. Wood, 84 Mo. 489.

When the true meaning of the contract is in dispute, harsh or unreasonable results flowing from one construction should cause the court to search the contract diligently, to see if it is capable of some more reasonable construction which the parties really intended.

Losee v. Brunson, 141 Ill. App. 326.

Where one construction of a contract will make it unreasonable, unfair, or unusual, and another construction equally consistent with the language thereof will make it reasonable, fair, and just, the latter construction will prevail.

A. Leschen & Sons Rope Co. v. Mayflower Gold Min. & Reduction Co. 35 L.R.A.(N.S.) 1, 97 C. C. A. 465, 173 Fed. 855; MacDonald v. Aetna Indemnity Co. 90 Conn. 226, 96 Atl. 926; General Acci. F. & L. Assur. Corp. v. Louisville Home Teleph. Co. 175 Ky. 96, L.R.A.1917D, 952, 193 S. W. 1031; R. F. Conway Co. v. Chicago, 274 Ill. 369, 113 N. E. 703.

Messrs. Parrish & Cohen, for appellee:

A tax upon the income from real estate is a tax upon the real estate itself.

Pollock v. Farmers' Loan & T. Co. 157

U. S. 429, 555, 578, 39 L. ed. 759, 810, 818, 15 Sup. Ct. Rep. 673, 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912.

An annual franchise or license tax is a tax against the corporation.

New Jersey v. Anderson, 203 U. S. 483, 51 L. ed. 284, 27 Sup. Ct. Rep. 137; United States v. Baltimore & O. R. Co. 17 Wall. 322, 21 L. ed. 597.

The doctrine of surplusage does not apply to contracts, and while meaningless words may be disregarded, those with a meaning must be considered.

Decorah v. Kesselmeier, 45 Iowa, 136; Capital City Gaslight Co. v. Des Moines, 93 Iowa, 547, 61 N. W. 1066; Finance Co. v. Anderson, 106 Iowa, 429, 76 N. W. 748; Winnebago County State Bank v. Hustel, 119 Iowa, 115, 93 N. W. 70.

It is a settled rule of construction that, if possible, every word and phrase of a contract are to be given their appropriate meaning and effect.

McArthur v. Board, 119 Iowa, 562, 93 N. W. 580.

Every part of a statute should, if possible, be upheld and given its appropriate force.

Misch v. Russell, 136 Ill. 22, 12 L.R.A. 125, 26 N. E. 528; Jewell v. Nuhn, 173 Iowa, 112, 155 N. W. 174, Ann. Cas. 1918D, 353.

Weaver, Ch. J., delivered the opinion of the court:

The plaintiff is a corporation owning a railway and, in connection therewith, certain terminal facilities in the city of Des Moines. The defendant is also a corporation owning and operating a line of railway extending from Chicago in the state of Illinois, to and through the city of Des Moines, and thence to Kansas City in the state of Missouri. In the record before us the plaintiff is spoken of as the "Des Moines Company" and the defendant as the "Chicago Company," and for convenience they will be so designated in this opinion.

On July 2, 1896, the plaintiff and the corporation then owning the Chicago Railway Company entered into a written contract by which the Chicago Company was granted the right to the use of a portion of the property of the Des Moines Company located in the latter city, and the Des Moines Company on its part also undertook to render certain

services for the Chicago Company. The contract was to continue in force for the term of twenty-five years. Among stipulations of said contract is one upon the proper interpretation and effect of which this case is made to turn. The 9th section or clause of the contract sets forth the considerations which the Chicago Company is to render or pay to the Des Moines Company for the agreement so entered into by the latter. Among these considerations are the following:

"9. The Chicago Company, in consideration of the grants and provisions hereof, agrees to pay to the Des Moines Company in the manner and at the times hereinafter specified, the following sums, to wit:

"Fifth. One third of all taxes or assessments, special or otherwise, and public charges of every kind and nature that shall or may be taxed or assessed against the Des Moines Company or its property during the aforesaid term of years."

Provision was further made for the keeping and rendering of mutual accounts and for monthly payments.

Later, the Chicago Company, named in this contract, was succeeded in the ownership and control of said railway by the defendant in this case, and by agreement thereafter made between plaintiff and defendant the latter assumed the liability of its predecessor thereunder.

This action is brought at law by the Des Moines Company to recover an amount which it alleges is due and payable to it under the terms of said contract. The alleged facts upon which that claim is founded, as stated in the petition, are that in each of the years 1914, 1915, and 1916 the United States of America assessed against plaintiff and its property an income tax aggregating for said three years the sum of \$6,263.18, which assessments have been paid and discharged in full by the plaintiff, and that defendant thereby became charged with the

duty under its contract, above quoted, to repay to the plaintiff the one-third part of said levies. The petition further alleges that in the year 1917 the United States assessed against the plaintiff an excise tax on the estimated value of its capital stock, to the amount of \$428.50, and thereafter a further tax of like character for the year 1918, to the amount of \$938.50,—all of which has been paid by the plaintiff, and for one third of which amount it demands a recovery from the defendant.

To this petition the defendant demurred on grounds which may be briefly stated as follows: That the defendant's covenant, as shown by reference to the contract, does not provide for payment by it of the income taxes or excise taxes imposed on the plaintiff by the Federal government, nor is such obligation in any manner to be implied from the terms of the contract, nor does the language thereof evidence any such intent.

The trial court overruled the demurrer, and defendant, electing to stand thereon, declined to plead over, and excepted to the ruling. Judgment was thereupon entered in plaintiff's favor for the amount of its demand, and defendant appeals.

The particular clause of the contract on which the plaintiff's claim is based is in the above-quoted agreement of the defendant "to pay one third of all taxes or assessments, special or otherwise, and public charges of every kind and nature that shall or may be taxed or assessed against the Des Moines Company or its property during the term."

The demurrer admits the making of the contract and defendant's obligation to contribute to the payment of the taxes therein specified, but it is contended that such agreement does not cover or include the income tax or excise tax imposed by the United States and paid by the appellee. It is this question of construction to which we must address ourselves.

I. "Taxes," "taxation," and "assessments" are words in very common and familiar use, the meaning and effect of which are not ordinarily open to serious question, but, like most other words in our language, their scope and application vary according to the nature of the subject under discussion and the circumstances under which they are used. Taxation, in its broadest and most general sense, includes every charge or burden imposed

**Definition—
taxation.**

by the sovereign power upon persons, property, or property rights, for the use and support of the government and to enable it to discharge its appropriate functions, and in that broad definition there is included a proportionate levy upon persons or property and all the various other methods and devices by which revenue is exacted from persons and property for public purposes. It is only occasionally, however, that the word "tax" or "taxation" is used in this all-embracing and sweeping sense, and legislatures, courts, and the people have come to differentiate between "general" taxes, "ordinary" taxes, "property" taxes, "excise" taxes, "inheritance" taxes, "occupation" taxes, "special" taxes or assessments, "franchise" taxes, "poll" taxes, "license" taxes, "income" taxes, "excess profits" taxes, and various other methods by which contributions to the public revenues are enforced.

When, therefore, we are called to consider a contract in which one party has covenanted with another to pay taxes, and the question arises as to the scope and extent of that obligation, the terms of the covenant are ordinarily open to construction. The end and purpose of the construction of an agreement is to arrive at the real meaning and intent of the parties. To that end we must consider first the natural import of the words or language the parties have chosen for its expression, and read it in the

**Contracts—
purpose of
construction.**

light of its context, as well as in the light of the circumstances under which it was made. Thus reading the contract before us, we are brought to inquire whether the words "taxes" and "assessments" must be given their broadest and most general signification, or will the intent of the parties be better effectuated by so limiting it as not to include the income tax and excise tax which the plaintiff has been required to pay? At the time when the contract was made and for a considerable period of years thereafter, there was no law requiring payment of either an income tax or excise tax, nor was there any apparent reason for anticipating such a change in the policy or manner of raising public revenues. This fact alone would probably not be a sufficient answer or defense to the plaintiff's claim, but it is one of the pertinent facts or circumstances which the court may consider as bearing upon the intent of the parties. *Love v. Howard*, 6 R. I. 116; *Second Universalist Soc. v. Providence*, 6 R. I. 235.

See also, as to the bearing of such fact upon the question of the intent of the parties, *King v. Raab*, 123 Iowa, 635, 636, 99 N. W. 306.

In *Bolling v. Stokes*, 2 Leigh, 178, 21 Am. Dec. 606, decided by the Virginia court, a lessee covenanted with the owner of the property to pay a specified yearly rent "besides all taxes and other public dues in any manner accruing" upon the premises, which rent should be paid half yearly, "besides taxes and public dues of every kind." During the term of the lease the street was paved, and the cost assessed upon the property. The lessee paid the assessment, and later sued the owner to recover the expense so incurred. In sustaining the plaintiff's right to recover, the court says that "the words of the tenant's covenant are very strong," but they "may be satisfied by the application of them to the ordinary and usual taxes and public dues. To extend

them to an expense unknown by the parties, incalculable as to amount, uncertain as to time, and in which the lessee could have no certain interest, would be to disregard all the circumstances under which the contract was made. . . . There was nothing by which it could be estimated, like the usual and customary taxes and public dues. . . . It was an uncertain and extraordinary assessment."

The Massachusetts court, speaking upon the subject, says: "In a covenant for the payment of taxes by a lessee, it is to be ascertained by construction what was contemplated by the parties in the use of the terms employed. Those terms are not necessarily to be taken in their strict legal signification." *Harvard College v. Boston*, 104 Mass. 483. Further discussing the matter of construction, it is said in the same case that "it may be affected by the character, situation, and condition of the estate, the mode and purpose of the occupation by the tenant, and by all the circumstances of the particular case. Much weight is sometimes given to the consideration that the assessment in question is of a kind in use or authorized at the time the covenant was entered into, or, on the other hand, of a novel and newly authorized nature."

This is not to deny that where the words of the contract appear to have been chosen advisedly, and are such as clearly indicate a mutual intent to provide for all possible forms of taxation, such intent will be given effect by the courts. Such intent is not, however, conclusively established by the use of sweeping general terms, if, by a proper application of the rule of *ejusdem generis* or other recognized canon of construction, the covenants of the parties "may be satisfied by the application of them" to less burdensome obligations. *Bolling v. Stokes*, *supra*.

In an English case, *Jeffrey v. Neale*, L. R. 6 C. P. 240, the court, speaking of a lessee's covenant,

says: "It has been frequently held that in cases of this nature some amount of qualification must be placed on words which, at first sight, might be capable of a very extensive signification."

For example, it has been held that a covenant to pay "all taxes and other public dues" imposes no obligation to pay other than the customary and annual "taxes and public dues." See *Bolling v. Stokes*, *supra*.

So, also, it is held that a covenant to pay "all and every the United States, state, and local taxes, duties, and imposts" does not include special assessments (*Pettibone v. Smith*, 150 Pa. 118, 17 L.R.A. 423, 24 Atl. 693), although it is there admitted that such assessments are levied by virtue of the taxing power of the state, and do constitute a species of taxation.

In *Love v. Howard*, *supra*, decided by the Rhode Island court, the same rule was applied to a covenant which bound the tenant to pay "all assessments and taxes of every kind." So, too, an agreement to pay "all taxes, assessments, and municipal or government charges, general and special, ordinary and extraordinary, of every nature and kind whatsoever, which . . . during the life of this lease become payable (a) levied, imposed, or assessed upon any land hereby demised; or (b) levied, imposed, or assessed upon any interest of the lessor in or under this lease; or (c) which the lessor shall be required to pay by reason of or on account of his interest in said land and improvements or in or under this lease,"—does not impose upon the lessee any obligation to pay an inheritance tax which had been exacted by the state from the lessor's executor during the term of the lease. Other precedents along this line are not wanting, and the rules of construction to which we have adverted are well established.

The cases cited sufficiently illustrate the solicitude of the courts to ascertain and give effect to the real

intent of the contracting parties. In performing that duty the court will, to the best of its ability, place itself

—court will place itself in position of parties.

in the situation occupied by the parties when the contract was made, "so as to view the circumstances as they viewed them, and so to judge of the meaning of the words and of the correct application . . . to the things described." *Nash v. Towne*, 5 Wall. 689, 18 L. ed. 527; *Chesapeake & O. Canal Co. v. Hill*, 15 Wall. 105, 21 L. ed. 69.

Were the concrete question, in the form here presented, an entirely new one, it would fall readily within the scope of the principles illustrated by the cited precedents, and compel the conclusion that payment of an income tax which might possibly be levied under some law not yet in being was not within the contemplation of the parties, and is not required by the terms of the covenant.

—to pay taxes—construction.

But we are not left to dispose of the matter as one of first impression, and in so far as the courts have spoken, they are in harmony with the conclusion here stated.

First in order of time, so far as our investigation has gone, we have the case of *Van Rensselaer v. Denison*, 8 Barb. 23. There the lessee in a perpetual lease covenanted to pay "all ordinary and extraordinary taxes, charges, and assessments," and this undertaking was held not to include any obligation to pay the taxes assessed against the landlord upon the rents payable to him. The rule so applied was confirmed in *Woodruff v. Oswego Starch Factory*, 70 App. Div. 481, 74 N. Y. Supp. 961, and recognized also in *Robinson v. Allegheny County*, 7 Pa. 161. Later the *Woodruff Case* appears to have reached the court of last resort in New York (see 177 N. Y. 23, 68 N. E. 994), and the judgment below was affirmed. The covenant in that case was much broader and more inclusive in its terms than is the one we are now considering.

The tenant there agreed to pay "all taxes, charges, and assessments, ordinary and extraordinary, which shall be taxed, charged, imposed, or assessed on the hereby demised premises and privileges, or any part thereof, or on the said parties of the first part, their heirs and assigns, in respect thereof." The court, though expressly recognizing that in legal theory it may be said that a tax upon rents or income from real estate is in a sense a tax upon land, holds that such taxes are not within the covenant. The fact that the court in that case lays some stress on the effect of an act of the legislature, making such rents or income a distinct item for the purposes of taxation, does not, in principle, differentiate the question there decided from the one in this case, but rather makes more complete their parallelism, because the effect of the Federal income tax is in all respects similar to that which was occasioned by the New York statute, in that it segregates or sets apart the income as a distinct or separate item for taxing purposes.

Later, the same question came before the Pennsylvania court under circumstances not materially unlike those admitted by the demurrer in this case. There the Catawissa Railroad Company leased its road and equipment to the Philadelphia & Reading Company for a long term of years. By the terms of the lease the latter company undertook to pay "all taxes, charges, and assessments which, during the continuance of the term hereby demised, shall be assessed or imposed under any existing or future law, on the demised premises or any part thereof, or on the business there carried on, or on the receipts, gross or net, derived therefrom, or upon the several issues of bonds or the interest thereon, or upon the capital stock of the Catawissa Company or the dividends thereon, or upon the franchises of the said company, for the payment or collection of any of which said taxes the Catawissa Company may otherwise be or become liable or ac-

countable under any lawful authority whatever." [Catawissa R. Co. v. Philadelphia & R. R. Co. 255 Pa. 269, 99 Atl. 807.] As in the case at bar, the lessor company was subsequently assessed with an income tax under the Federal statute, and, having paid it, brought action to recover the amount from the lessee. The case thus stated is, to use a common expression, "on all fours" with our own. As in our case, also, the trial court held with the leasing company that the tenant company was liable. On appeal, that judgment was reversed on the ground that an income tax levied on the rents paid to the lessor is not in any proper sense imposed upon the demised premises, nor on the business there carried on, nor on the receipts, gross or net, derived therefrom, nor upon the capital stock of the lessor company or the dividends thereon, nor on the franchises of that company.

Still more recently, a like case arose in Massachusetts. *Codman v. American Piano Co.* 229 Mass. 285, 118 N. E. 344. There the lessee covenanted to pay "all taxes and assessments whatsoever which may be payable for or in respect of the leased premises during the term thereof, except assessments for betterments." A Federal income having been assessed to and paid by the lessor, suit was brought therefor against the tenant. In a previous case that court had permitted a recovery by the landlord against his tenant for income tax paid, because, by the express terms of the lease, the latter had agreed to pay all taxes, including those "levied upon or in respect of the rent payable" under the contract (*Suter v. Jordan Marsh Co.* 225 Mass. 34, 113 N. E. 580), but there being no such covenant in the *Codman Case*, a recovery was denied. Discussing the question, the court says: "Manifestly taxes upon the real estate come within the terms of the covenant. . . . On the other hand, we cannot construe the phrase in question as including within its terms a tax as-

sessed by the Federal government to the lessor upon the rents reserved under the lease. Such an assessment is upon an entirely distinct kind of property than is the assessment upon the real estate. While under the Federal Income Tax Law, a tax on rent is a tax on land, and so a direct tax, yet a tax on land is not a tax on rent; the defendant did not covenant to pay taxes for or in respect of the rent; his undertaking is to pay the taxes for or in respect of the premises. . . . In construing the covenant, it is plain that taxation upon real estate means one thing, and taxation upon income means another. . . . The fundamental fact on which the rights of the parties depend is that the defendant never agreed to pay the taxes on the rent. . . . The words chosen by the parties cannot fairly be extended by us beyond their natural or ordinary meaning, and therefore the defendant cannot be held liable for taxes which the covenant, neither by express words nor reasonable implication, obliged him to pay."

In the case from which we have quoted, the plaintiff, as does counsel for appellee in this case, lays much stress on language used by the Supreme Court of the United States, in *Pollock v. Farmers' Loan & T. Co.* 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673, to the effect that "a tax upon the income from real estate is a tax upon the real estate itself," and from this it is argued that the appellant's general undertaking in the lease to pay one third of "all taxes and assessments, special or otherwise, and public charges of every kind and nature," must therefore be construed to include payment of the income tax.

As is well pointed out in the cited Massachusetts case, we can get the true meaning and effect of the language quoted from *Pollock v. Farmers' Loan & T. Co.*, only by reading it in connection with the question there decided. The case arose under the Income Tax Law of 1894, and the court was considering whether taxes upon in-

comes from land and from certain other sources were direct or indirect, within the meaning of the provision of the Federal Constitution governing the apportioning of direct taxation among the states of the Union, and it is with reference to that proposition the court did say that "an annual tax upon the annual value or annual user of real estate appears to us the same in substance as an annual tax on the real estate, which would be paid out of the rent or income."

It was therefore held that, because a tax upon the land is direct, a tax upon rent of land is also direct.

Of this holding it is said in *Codman v. American Piano Co.* supra, that "the decision in the *Pollock* Case, that a tax on rents of real estate is a direct tax, and that therefore the Federal Income Law, which provided for a tax upon such rents, was unconstitutional, related only to the constitutional power of Congress to tax incomes. The court did not consider or decide that a tax on rent was a tax for or in respect to the premises from which the rent was derived. That is a wholly different question."

It should also be noticed that the *Pollock* Case was before the court again on rehearing (see 158 U. S. 618, 39 L. ed. 1119, 15 Sup. Ct. Rep. 913), and a further opinion was written. In that opinion the scope and intent of the original opinion is quite carefully limited, as follows: "Our previous decision was confined to the consideration of the validity of the tax on the income from real estate, and on the income from municipal bonds. The question thus limited was whether such taxation was direct or not, in the meaning of the Constitution; and the court went no farther, as to the tax on the income from real estate, than to hold that it fell within the same class as the source whence the income was derived,—that is, that a tax upon the realty and a tax upon the receipts therefrom were alike direct."

By an amendment to the Federal

Constitution since adopted, the question at issue in the Pollock Case is foreclosed against further discussion, for the apportionment of direct taxes among the states is no longer required. See 16th Amendment, adopted February 25, 1913. There is nothing in the precedent cited, or in others of like import, to which our attention has been called, which requires the court to hold that a tenant's covenant to pay all taxes or assessments imposed upon the demised premises, or upon the lessor with respect thereto, includes any obligation on the tenant's part to pay an income tax assessed by the Federal government upon the lessor's income so derived. If it be competent for the parties to contract for such extreme breadth of obligation, and for the purposes of this case it may be taken for granted, it is to be said there is no such express obligation to be found in the contract sued upon, nor is it necessarily or even reasonably to be implied from the language used.

II. To a great extent, what we have said with reference to the claim to recover the amount of income tax paid is equally applicable to the item of so-called special excise tax paid by plaintiff to the United States. The term "excise tax" is one scarcely capable of exact definition. It has been variously applied, but perhaps more often than otherwise it denotes an inland duty

or impost upon certain specified articles of manufacture or sale; or, still more familiarly, it has reference to license fees, exacted by law as the price of the privilege to engage in a given line of trade or business. 3 Words & Phrases, 2548.

The Federal statute in question (Act of Congress of September 8, 1916) appears to employ the word more nearly in the latter sense, for it is there described as a "special excise tax with respect to the carrying on or doing business by such corporation." Fed. Stat. Anno. Supp. 1918, p. 282, Comp. Stat. § 5980a.

It is not a tax upon the leased property in the hands of the tenant, nor a tax upon the tenant's business, nor is it exacted of the tenant as a condition or price of its right or privilege to use the demised premises. It is, at most, a condition placed upon the right of the plaintiff corporation to do business of any kind, whether the business be with the defendant or with any third party, or be business with reference to the terminal facilities leased to the defendant, or to any separate and distinct matter or enterprise in which it sees fit to engage, wholly foreign to the business relations between lessor and this lessee. It is sufficient to say the plaintiff's covenant does not contemplate payment of such a charge. The question is touched upon in *Jersey City Gaslight Co. v. United Gas Improv. Co.* (C. C.) 46 Fed. 264, which is affirmed in 7 C. C. A. 250, 17 U. S. App. 170, 58 Fed. 323. There the lessee of the plaintiff company had undertaken to pay "all assessments and taxes . . . on the real and personal property, franchises, capital stock, or gross receipts of" the lessor. Plaintiff having been required by statute to pay a certain percentage of its gross receipts "by way of license for its corporate franchise," it was held that the tenant was not liable for its repayment. The court denied the plaintiff's theory that the tax or fee paid was in the nature of a franchise tax, and therefore chargeable to plaintiff under the express terms of the lease, but held it was rather a charge or tax exacted by way of a license to do business, and therefore not recoverable. See also *Chesapeake & O. R. Co. v. Louisville & N. R. Co.* 154 Ky. 637, 157 S. W. 1107.

For the reasons stated, we hold that the plaintiff is not entitled to recover upon either item of its claim, and that the trial court erred in overruling the demurrer to the petition. The judgment appealed from is therefore reversed.

Preston, Evans, Gaynor, and Stevens, JJ., concur.

Salinger, J., dissents.

ANNOTATION.

Covenant to pay taxes as including income taxes.

There seems to be no doubt that a lessee may expressly covenant to pay any rental or income tax assessed to or exacted from the lessor by virtue of the rent reserved in a lease.

At least, in *Suter v. Jordan Marsh Co.* (1916) 225 Mass. 34, 113 N. E. 580, where a lease required the lessee to pay "all taxes and assessments . . . upon or in respect of the rent payable," it was held that a Federal income tax imposed upon the rental was a tax "upon or in respect of the rent" within the meaning of the covenant, so as to render the lessee liable therefor. Again, in *Kimball v. Cotting* (1918) 229 Mass. 541, L.R.A.1918C, 1189, 118 N. E. 866, where a lessee covenanted to pay any taxes or excises assessed upon the rent, payable under the lease "as rental or income," it was held that the lessee was liable for the Federal income tax on the rent reserved in the lease. So, in *Kimball v. Cotting* (1919) 234 Mass. 172, 125 N. E. 551, it was held that the covenant construed in the next preceding case applied to the additional or surtax on the rental reserved in the lease, although this mode of taxation came into existence after the date of the lease. And in *Philadelphia, G. & N. R. Co. v. Philadelphia & R. R. Co.* (1919) 265 Pa. 32, 108 Atl. 528, a covenant to pay all taxes and assessments upon the rent payable under a lease was held to include a war excess profits tax assessed against the lessor on account of such rentals. And in *North Pennsylvania R. Co. v. Philadelphia & R. R. Co.* (1915) 249 Pa. 326, 95 Atl. 100, where a lease of railroad property provided that the lessee should pay "all taxes and assessments . . . upon the yearly payments" of rent, and all taxes imposed upon the demised premises, it was held that the covenants clearly obligated the lessee to pay a Federal income tax imposed upon the rent received by the lessor. And again in *Philadelphia City Pass. R. Co. v. Philadelphia Rapid Transit Co.* (1919) 263 Pa. 561, 107 Atl. 329,

where a covenant in a street railway lease provided that the lessee should pay "all taxes, charges, and assessments now or hereafter lawfully imposed" upon the lessor, or for which it would in any wise be liable on account of its "earnings," or "profits," it was held that the covenant applied both to a Federal income tax and the war excess profits tax, notwithstanding such taxes were not in existence at the time of the execution of the lease.

And in Pennsylvania it has been held that a covenant in a lease in fee that the lessee would pay the rent reserved, clear of all charges and assessments whatsoever, includes a tax assessed to the lessor on the ground rent, as well as a tax upon the ground itself, so that the lessee could not deduct the same from the rent. *Peart v. Phipps* (1807) 4 Yeates (Pa.) 386. And see *Robinson v. Allegheny County* (1847) 7 Pa. 161.

However, it is seemingly well settled that the words of a general covenant to pay taxes assessed against demised premises cannot fairly be extended beyond their natural or ordinary meaning, in consequence of which the covenantor cannot be held liable for the payment of an income tax, where the covenant, neither by express words nor reasonable implication, obliges him to pay the same. *DES MOINES UNION R. Co. v. CHICAGO G. W. R. Co.* (reported herewith) ante, 1557; *Codman v. American Piano Co.* (1918) 229 Mass. 285, 118 N. E. 344; *Park Bldg. Co. v. George P. Yost Fur Co.* (1919) — Mich. —, 175 N. W. 431; *Woodruff v. Oswego Starch Factory* (1903) 177 N. Y. 23, 68 N. E. 994, affirming (1902) 70 App. Div. 481, 74 N. Y. Supp. 961; *Van Rensselaar v. Dennison* (1850) 8 Barb. (N. Y.) 23; *Robinson v. Allegheny County* (1847) 7 Pa. 161; *Catawissa R. Co. v. Philadelphia & R. R. Co.* (1916) 255 Pa. 269, 99 Atl. 807; *Little Schuylkill Nav. R. & Coal Co. v. Philadelphia & R. R. Co.* (1918) 69 Pa. Super. Ct. 122.

Application of this rule is illustrated

by the decision in the reported case (*DES MOINES UNION R. CO. v. CHICAGO G. W. R. CO.*), where the lessee covenanted to pay a specified proportion of all taxes or assessments, special or otherwise, and public charges of every kind and nature that shall or may be taxed or assessed against the grantor or its property. This was upon the theory that the words of a covenant, unless clear, should not be extended so as to make it unduly burdensome, and that the covenant under consideration neither expressly nor impliedly obligated the lessee to pay a Federal income tax imposed upon the rent reserved in the lease. It will also be remembered that the court recognized the distinction between a tax upon property itself, and a tax upon the rent thereof.

So, in *Catawissa R. Co. v. Philadelphia & R. R. Co.* (1916) 255 Pa. 269, 99 Atl. 807, where a lessee covenanted to pay all taxes imposed under any existing or future law on the demised premises, or on the business there carried on, or on the receipts derived therefrom, or upon the capital stock of the lessor, or the dividends thereon, or upon the franchise, it was held that nothing in the covenant imposed upon the lessee any duty to pay a Federal income tax upon the lessor's rental, the court saying that the income tax was not imposed by the government upon "the demised premises, or any part thereof," nor "on the business there carried on," nor "on the receipts, gross or net, derived therefrom," nor "upon the capital stock . . . or the dividends thereon," nor "upon the franchises of the said company," but rather "was imposed upon the rental received by the lessor from the lessee." This decision was followed in *Little Schuylkill Nav. R. & Coal Co. v. Philadelphia & R. R. Co.* (Pa.) *supra*, which involves similar facts and principles.

And in *Codman v. American Piano Co.* (1918) 229 Mass. 285, 118 N. E. 344, where a lessee covenanted merely to pay "all taxes and assessments whatsoever which may be payable for or in respect of the leased premises," it was held that the covenant did not include a Federal income tax which

had been levied on the rent reserved in the lease. In this case the court pointed out a distinction between taxes on real estate itself, and taxes on rents as income, which was said to be a separate and independent estate, and maintained that the phrase "for or in respect of," in the covenant, meant taxes relating directly to the real estate itself. The court also expressly distinguished *Suter v. Jordan Marsh Co.* (1916) 225 Mass. 34, 113 N. E. 580, *supra*, on the ground that in the case at bar the covenant in the lease contained no agreement that the lessees would pay taxes assessed upon or in respect of the rent payable under the lease, as did the covenant in the *Suter Case*.

And in *Park Bldg. Co. v. George P. Yost Fur Co.* (1919) — Mich. —, 175 N. W. 431, where the lease required the lessee to pay all taxes, "ordinary and extraordinary, of every name, nature, and kind whatsoever . . . levied or imposed upon said premises, . . . and any personal tax levied or assessed upon" the lessor, "which may be assessed, levied, or imposed upon the leasehold estate," and expressly provided that the intent of the covenant was to insure to the lessor a net rental, not chargeable with any burdens by way of taxes, or otherwise, resulting in the diminution of the same, it was held that the lease did not obligate the lessee to pay the lessor's Federal income tax upon the rent reserved in the lease. The court said that "the lessor's income tax, as applied to this leased property, is not a tax 'levied upon said premises,' . . . but is, in its process of levy and assessment, a direct personal tax against him, inseparable from him and his annual income, beginning and ending with him. . . . The tone and tenor of this contract throughout are directed with careful description to the leased premises, the taxes thereon, and rental therefor, which the lessee must pay during the long life of the lease, extending into succeeding generations. To that end and extent the intent of the parties is made plain to a certainty by clear expression, with appropriate names and descriptive

terms which, by recognized rule of construction, limit general words and terms superadded to the same general character or kind as the things previously specified. They contain no suggestion that, in addition to all taxes on the premises and nominated rent, the lessee must also pay his landlord's personal income tax, a matter of greater moment and easier description than certain of the requirements clearly and distinctly specified. It is not an unreasonable presumption that, had the contracting parties had in mind, agreed upon, or intended to impose payment of the landlord's income tax on the lessee, they would have expressed the intent in equally clear and positive language, with appropriate descriptive terms, which they could readily have done without multiplying words. In the reflected light of the matters dealt with in detail with descriptive terms, and the context surrounding the generalizing language under consideration, we are constrained to agree with the following conclusion of the trial court: 'In addition to the foregoing, it is also my conclusion that it cannot be held that the minds of the contracting parties met upon the proposition that the lessee should pay the landlord's income tax.'"

In *Woodruff v. Oswego Starch Factory* (1903) 177 N. Y. 23, 68 N. E. 994, affirming (1902) 70 App. Div. 481, 74 N. Y. Supp. 961, it was held that a New York statute, providing for the taxation of rents reserved in any lease in fee to the person entitled to receive the same as personal property, did not require that a tenant who had covenanted to pay all taxes, charges, and assessments on the demised premises, or on the lessor, his heirs, or assigns in respect thereof, should pay the tax imposed on the lessor on the rents reserved under the lease. In reaching this conclusion, Gray, J., argued in part as follows: "The actual controversy between these parties relates to the construction to be given to the covenant in question. The liability under this covenant is of a twofold nature. The lessee is to pay all taxes, ordinary and extraordinary,

which shall be imposed upon the demised premises, and he is also required to pay such as shall be imposed on the lessors 'in respect thereof.' The taxes in question were not assessed upon the demised premises. A tax upon rents may, doubtless, be regarded, in legal theory, as a tax upon the land; but, while as a general proposition that may be true, it has no influence upon the question here. The legislature has, for the purposes of taxation, separated the rents reserved in such leases from the real estate demised, and hence the question arises under the language of this covenant, whether, notwithstanding the legislative action, the covenantor is liable for the taxes against the lessors, as being taxes assessed in respect of the demised premises. Is the assessment, in such a case, in relation to the property demised, or is it in relation, essentially, to the rents or income therefrom? The ordinary meaning of the words employed, read in connection with the provisions of the statute, should influence our judgment. It was the view of the learned court below that the taxes to which the covenant related must be such as were directed specifically against the demised property, or against the lessors in respect of, or on account of such property, and that an assessment against the lessor upon the rents reserved under a lease, not based upon or measured by the lands leased, was not a tax in respect of the demised premises. I am inclined to that view." And upon similar facts, a like conclusion was reached in *Van Rensselaar v. Dennison* (1850) 8 Barb. (N. Y.) 23, the theory of the decision being that a tax upon the rental reserved in a lease is neither a tax charged or assessed upon the leased "premises," nor a tax upon the lessor "for and in respect of such premises." So in *Pennsylvania (Robinson v. Allegheny County)* (1847) 7 Pa. 161, it was held that a covenant in a lease in perpetuity, obligating the lessee to pay all taxes assessed on the demised premises without any deduction from the rent, did not include a tax assessed upon the ground rent.

Of course, a lessee may covenant for

exemption from payment of any income tax imposed upon the lessor with respect to the rent reserved in the lease. Thus, in *Rensselaer & S. R. Co. v. Delaware & H. Co.* (1915) 168 App. Div. 699, 154 N. Y. Supp. 739, which reversed (1915) 88 Misc. 639, 152 N. Y. Supp. 376, and which was affirmed without opinion in (1916) 217 N. Y. 692, 112 N. E. 1072, in construing a lease in perpetuity of a railroad with covenants by the lessee to pay all taxes and assessments upon the premises demised, and upon the business done upon the road, but exempting him from payment of the then present income tax, or any tax thereafter to be imposed upon the rental, it was held that a Federal income tax, imposed under the Laws of 1913 upon the rental reserved in the lease, was not chargeable to the lessee. Kellogg, J., said: "There is a broad distinction between a tax upon leased property and an income tax upon the rental. An income tax is not a tax upon specific property, but is a tax upon the annual net gain of the individual or corporation, received from its business, the use of its property, or otherwise. The obligation of a tenant to pay taxes upon demised property rests solely upon the terms of the lease. In the absence of an agreement upon that subject, they must be borne by the landlord. By the eighteenth subdivision of the lease the tenant agrees to pay the taxes levied and imposed upon the demised property. This income tax is clearly not a tax imposed upon that property. The tenant is also to pay the tax upon the business done upon the said railroads. The lease assumed, and probably correctly, that at the time there was a tax upon the business done by the railroads, or upon their earnings, and contemplated that a change in the law as to the manner of levying that tax should not affect the defendant's liability. This income tax is not the tax referred to as the tax upon the business done. The dividends to be paid by the defendant bear no relation to the business done,

9 A.L.R.—99.

and must be paid, whether the operation of the road is profitable or unprofitable. If the road is not operated, or is operated at a loss, the defendant must still pay the rental. The rental does not come from the earnings of the road, but is a direct obligation upon the defendant company for which the earnings from its other property, and all of its property, is liable. It is true for a nonpayment of the rental the lease may be forfeited, but the rental is a general liability against the defendant company, without reference to the earnings of the leased property. The income tax is based, not upon the earnings of the roads, but upon the amount of rental agreed to be paid, and is the same whether the earnings are large or small. It is a tax arising, not from the business of the roads, but from the lease. The plaintiff is in receipt of a net income under the lease, upon which the government of the United States has imposed a tax. Subdivision 19 has made clear the intent of the parties that a tax of the nature of the then income tax is not a tax contemplated by subdivision 18. The fact that for many years the plaintiff and its stockholders were relieved from an income tax is no reason why, when such a tax is again imposed (but for a less amount), they should ask the defendant to pay it. It is a tax of like nature, taking the place of the former tax, and the exemption of subdivision 18 makes it clear that the intention of the parties was that it must come from the plaintiff or its stockholders, and not from the defendant. The lease contemplates that the amount of the dividends payable to the stockholders will be decreased by whatever income tax may be imposed upon account of such dividends. The plaintiff having paid the tax, the burden falls upon the stockholders. The United States authorities treated the dividends payable to the stockholders as income of the plaintiff corporation; the argument has proceeded upon that theory, and we have so considered it."

G. J. C.

MARK EISNER, Collector of United States Internal Revenue for the Third District of the State of New York, Plff. in Err.,

v.

MYRTLE H. MACOMBER.

United States Supreme Court — March 8, 1920.

(252 U. S. 189, 64 L. ed. —, 40 Sup. Ct. Rep. 189.)

Internal revenue — income tax — stock dividends.

1. Congress was given no power by the Income Tax Amendment to the Federal Constitution to tax, without apportionment, as income of a stockholder in a corporation, a stock dividend made lawfully and in good faith against accumulated profits earned by the corporation since the adoption of such amendment. Such dividends are not income.

[See note on this question beginning on page 1594.]

— construction of Income Tax Amendment — apportionment of direct tax.

2. The Income Tax Amendment to the Federal Constitution should not be extended by loose construction so as to repeal or modify, except as applied to income, those provisions of the Constitution that require an apportionment according to population for direct taxes upon property, real and personal.

[See 23 R. C. L. 990, 991; 26 R. C. L. 146.]

Definition — income.

3. Income is the gain derived from capital, from labor, or from both com-

bined, including profits gained through a sale or conversion of capital assets.

[See 26 R. C. L. 147, 149.]

Corporation — character of stock dividends.

4. A declared stock dividend is no more than a book adjustment, in essence not a dividend, but the opposite.

Internal revenue — apportionment of direct tax — stockholder's interest in undivided profits.

5. The constitutional inhibition against the taxation by Congress without apportionment of a stockholder's interest in the undivided accumulated earnings of a corporation is not removed by the adoption of the Income Tax Amendment.

(Mr. Justice Brandeis, Mr. Justice Clarke, Mr. Justice Holmes, and Mr. Justice Day dissent.)

ERROR to the District Court of the United States for the Southern District of New York to review a judgment in favor of plaintiff in an action brought to recover back the amount of an income tax paid on a stock dividend. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. William L. Frierson, Assistant Attorney General, for plaintiff in error:

Income, in general, as used in both the Corporation Excise Tax Law of 1909 and the Income Tax Law of 1913, has been defined as the gain derived from capital, from labor, or from both combined.

Stratton's Independence v. Howbert, 231 U. S. 415, 58 L. ed. 292, 34 Sup. Ct. Rep. 136; *Doyle v. Mitchell Bros. Co.* 247 U. S. 183, 185, 62 L. ed. 1058, 1059, 38 Sup. Ct. Rep. 467.

Stockholders have such an interest in the earnings and profits of a corporation that the same are within the power of Congress to tax as income even before they are divided.

Collector v. Hubbard (*Brainard v. Hubbard*) 12 Wall. 1, 20 L. ed. 272; *Southern P. Co. v. Lowe*, 247 U. S. 330, 336, 62 L. ed. 1142, 1147, 38 Sup. Ct. Rep. 540; *Lynch v. Turrish*, 247 U. S. 221, 228, 62 L. ed. 1087, 1092, 38 Sup. Ct. Rep. 537; *Bailey v. New York C. & H. R. R. Co.* 22 Wall. 604, 635, 636, 22 L. ed. 840, 848, 849; *Lynch v. Hornby*,

(252 U. S. 189, 64 L. ed. —, 40 Sup. Ct. Rep. 189.)

247 U. S. 389, 343, 62 L. ed. 1149, 1151, 38 Sup. Ct. Rep. 543.

Congress having the right to tax undivided profits, this right cannot be destroyed by the issuance of stock certificates to represent such undivided profits, and since the certificates of stock issued in this case represent earnings of the corporation accruing subsequent to March 1, 1913, they are clearly made taxable as income by the Act of 1916.

Peabody v. Eisner, 247 U. S. 347, 62 L. ed. 1152, 38 Sup. Ct. Rep. 546; Bailey v. New York C. & H. R. R. Co. 22 Wall. 604, 635, 22 L. ed. 840, 848; Swan Brewery Co. v. Rex [1914] A. C. 234, 83 L. J. P. C. N. S. 134, 110 L. T. N. S. 211, 30 Times L. R. 199.

The Act of 1916, however, expressly taxes stock dividends, and hence Towne v. Eisner, 245 U. S. 418, 62 L. ed. 372, L.R.A.1918D, 254, 38 Sup. Ct. Rep. 158, and of Lynch v. Hornby, 247 U. S. 389, 62 L. ed. 1149, 38 Sup. Ct. Rep. 543, are not controlling.

In the Act of 1916, Congress was clearly within its power when it declared that by "dividends" it meant either cash or stock dividends, in accordance with the meaning of the term as understood and construed by the courts of most of the states.

Pritchitt v. Nashville Trust Co. 96 Tenn. 472, 33 L.R.A. 856, 36 S. W. 1064; Thomas v. Gregg, 78 Md. 545, 44 Am. St. Rep. 310, 28 Atl. 565; McLouth v. Hunt, 154 N. Y. 179, 39 L.R.A. 230, 48 N. E. 548; Pabst's Will, 146 Wis. 330, 131 N. W. 739; Lord v. Brooks, 52 N. H. 72; Hite v. Hite, 93 Ky. 257, 19 L.R.A. 173, 40 Am. St. Rep. 189, 20 S. W. 778; Moss's Appeal, 83 Pa. 264, 24 Am. Rep. 164; Paris v. Paris, 10 Ves. Jr. 185, 32 Eng. Reprint, 815; Tax Comr. v. Putnam (Trefry v. Putnam) 227 Mass. 522, L.R.A.1917F, 806, 116 N. E. 904; Re Osborne, 209 N. Y. 450, 50 L.R.A. (N.S.) 510, 103 N. E. 723, 823, Ann. Cas. 1915A, 298; Goodwin v. McGaughey, 108 Minn. 248, 122 N. W. 6.

Messrs. Charles E. Hughes and George Welwood Murray, for defendant in error:

The tax is sought to be laid upon the property in question solely by reason of ownership, and cannot be sustained unless it is authorized by the 16th Amendment.

Pollock v. Farmers' Loan & T. Co. 158 U. S. 601, 637, 39 L. ed. 1108, 1125, 15 Sup. Ct. Rep. 912; Brushaber v. Union P. R. Co. 240 U. S. 1, 18, 19, 60 L. ed.

493, 501, 502, L.R.A.1917D, 414, 36 Sup. Ct. Rep. 236, Ann. Cas. 1917B, 713; Flint v. Stone Tracy Co. 220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; Stratton's Independence v. Howbert, 231 U. S. 399, 58 L. ed. 285, 34 Sup. Ct. Rep. 136; Doyle v. Mitchell Bros. Co. 247 U. S. 179, 182, 183, 62 L. ed. 1054, 1058, 38 Sup. Ct. Rep. 467; Hays v. Gauley Mountain Coal Co. 247 U. S. 189, 191, 192, 62 L. ed. 1061, 1062, 38 Sup. Ct. Rep. 470; Stanton v. Baltic Min. Co. 240 U. S. 103, 60 L. ed. 546, 36 Sup. Ct. Rep. 278; William E. Peck & Co. v. Lowe, 247 U. S. 165, 172, 62 L. ed. 1049, 1050, 38 Sup. Ct. Rep. 432; Southern P. Co. v. Lowe, 247 U. S. 380, 385, 62 L. ed. 1142, 1147, 38 Sup. Ct. Rep. 540.

The fundamental fact is that there was no gain or income to the defendant in error by virtue of the receipt of the additional shares constituting the stock dividend. The value of the shares held by the defendant in error was not increased by the increase in the number of shares. The shareholder was no richer than before.

Towne v. Eisner, 245 U. S. 418, 62 L. ed. 372, L.R.A.1918D, 254, 38 Sup. Ct. Rep. 158.

The tax cannot be sustained as a tax laid upon the shareholder's interest in the undivided profits of the corporation. Apart from the serious question of the validity of such a tax as an income tax, that was not the scheme of the act. It is sought to lay the tax in question upon the so-called "stock dividend" *per se*; that is, upon the mere readjustment of the evidence of a capital interest already owned.

Collector v. Hubbard (Brainard v. Hubbard) 12 Wall. 1, 20 L. ed. 272; Gibbons v. Mahon, 136 U. S. 549, 560, 34 L. ed. 525, 527, 10 Sup. Ct. Rep. 1057; Michigan C. R. Co. v. Collector (Michigan C. R. Co. v. Slack) 100 U. S. 595, 598, 25 L. ed. 647, 648; United States v. Erie R. Co. 106 U. S. 327, 329, 331, 27 L. ed. 151, 154, 1 Sup. Ct. Rep. 223; Barnes v. Philadelphia & R. R. Co. 17 Wall. 294, 309, 319, 21 L. ed. 544, 548, 551; United States v. Baltimore & O. R. Co. 17 Wall. 822, 21 L. ed. 597; Stockdale v. Atlantic Ins. Co. 20 Wall. 323, 329, 337, 22 L. ed. 348, 350, 353; Bailey v. New York C. & H. R. R. Co. 22 Wall. 604, 22 L. ed. 840; Bailey v. New York C. & H. R. R. Co. 106 U. S. 109, 27 L. ed. 81; Memphis & C. R. Co. v. United States, 108 U. S. 228, 234, 27 L. ed. 711, 713, 2 Sup. Ct. Rep. 482; United

States v. Louisville & N. R. Co. 38 Fed. 829; Pollock v. Farmers Loan & T. Co. 157 U. S. 578, 601, 636, 39 L. ed. 818, 826, 838, 15 Sup. Ct. Rep. 673; Southern P. Co. v. Lowe, 247 U. S. 330, 336, 62 L. ed. 1142, 1147, 88 Sup. Ct. Rep. 540; Hytkon v. United States, 3 Dall. 171, 1 L. ed. 556; Pacific Ins. Co. v. Soule, 7 Wall. 433, 443, 19 L. ed. 95, 98; Veazie Bank v. Fenno, 8 Wall. 533, 541, 19 L. ed. 482, 485; Brushaber v. Union P. R. Co. 240 U. S. 1, 19, 60 L. ed. 493, 502, L.R.A.1917D, 414, 86 Sup. Ct. Rep. 236, Ann. Cas. 1917B, 713; Towne v. Eisner, 245 U. S. 418, 62 L. ed. 372, L.R.A. 1918D, 254, 38 Sup. Ct. Rep. 158.

So far as the present question is concerned, the word "income" in the 16th Amendment has no broader meaning than the word "income" in the Income Tax Act of 1913, under which the question arose in the Towne Case.

Towne v. Eisner, *supra*; Lynch v. Hornby, 247 U. S. 344, 345, 62 L. ed. 1151, 1152, 38 Sup. Ct. Rep. 543; Swan Brewery Co. v. Rex [1914] A. C. 231, 83 L. J. P. C. N. S. 134, 110 L. T. N. S. 211, 30 Times L. R. 199; Tax Comr. v. Putnam (Trefry v. Putnam) 227 Mass. 522, L.R.A.1917F, 806, 116 N. E. 904.

Stock dividends of the sort here in question are not income within the meaning of the 16th Amendment.

People ex rel. Union Trust Co. v. Coleman, 126 N. Y. 433, 12 L.R.A. 762, 27 N. E. 818; Kaufman v. Charlottesville Woolen Mills, 93 Va. 673, 25 S. E. 1003; Williams v. Western U. Teleg. Co. 93 N. Y. 162; DeKoven v. Alsop, 205 Ill. 809, 68 L.R.A. 587, 68 N. E. 930; Gray v. Hemenway, 212 Mass. 239, 98 N. E. 789; Spooner v. Phillips, 62 Conn. 62; 16 L.R.A. 461, 24 Atl. 524; Green v. Bissell, 79 Conn. 547, 3 L.R.A. (N.S.) 1011, 118 Am. St. Rep. 156, 65 Atl. 1066, 9 Ann. Cas. 287; Terry v. Eagle Lock Co. 47 Conn. 141; Brinley v. Grou, 50 Conn. 66, 47 Am. Rep. 617; Bouch v. Sproule, L. R. 12 App. Cas. 385, 56 L. J. Ch. N. S. 1037, 57 L. T. N. S. 345, 36 Week. Rep. 193; Jones v. Evans [1913] 1 Ch. 23, 82 L. J. Ch. N. S. 12, 107 L. T. N. S. 604, 57 Sol. Jo. 60, 19 Manson, 397; Carson v. Carson [1915] 1 Ir. R. 321; Guinness v. Guinness, 6 Sc. Sess. Cas. 5th series, 104; Minot v. Paine, 99 Mass. 101, 96 Am. Dec. 705; Davis v. Jackson, 152 Mass. 58, 23 Am. St. Rep. 801, 25 N. E. 21; D'Ooge v. Leeds, 176 Mass. 558, 57 N. E. 1025; Hyde v. Holmes, 198 Mass. 287, 84 N. E. 318; Brown's Petition, 14 R. I. 371, 51 Am. Rep. 897; Billings v. Warren, 216

Ill. 281, 74 N. E. 1050; Lancaster Trust Co. v. Mason, 152 N. C. 660, 136 Am. St. Rep. 851, 68 S. E. 235; Great Western Min. & Mfg. Co. v. Harris, 63 C. C. A. 51, 123 Fed. 321; Kepner v. United States, 195 U. S. 100, 49 L. ed. 114, 24 Sup. Ct. Rep. 797, 1 Ann. Cas. 655; Latimer v. United States, 223 U. S. 501, 56 L. ed. 526, 32 Sup. Ct. Rep. 242.

A genuine dividend constitutes a debt between the corporation and the shareholders.

King v. Paterson & H. R. R. Co. 29 N. J. L. 504; Hunt v. O'Shea, 69 N. H. 600, 45 Atl. 480; Lockhart v. Van Alstyne, 31 Mich. 76, 18 Am. Rep. 156; Stoddard v. Shetucket Foundry Co. 34 Conn. 542.

There has been a general agreement that stock dividends declared during a trust life estate, which are based on earnings made by the corporation prior to the creation of the trust, are not income,—a position fatal to the contention that stock dividends are income per se.

Re Osborne, 209 N. Y. 450, 50 L.R.A. (N.S.) 510, 103 N. E. 723, 823, Ann. Cas. 1915A, 298; Day v. Faulks, 81 N. J. Eq. 173, 88 Atl. 384.

In the case of a stock dividend, he obtains nothing but an evidence of what he already owns; he has no freedom to invest or not invest; and the investment is permanently capitalized.

Davis v. Jackson, 152 Mass. 58, 23 Am. St. Rep. 801, 25 N. E. 21.

Income may be defined as the gain derived from capital, from labor, or from both combined.

Stratton's Independence v. Howbert, 231 U. S. 399, 415, 58 L. ed. 285, 292, 34 Sup. Ct. Rep. 136; Doyle v. Mitchell Bros. Co. 247 U. S. 179, 185, 62 L. ed. 1054, 1059, 38 Sup. Ct. Rep. 467; Seligman, Income Tax, p. 19.

Of course it is not denied that income may be in the form of property, although it is well settled that, in construing an income tax act, income is taken to mean money in the absence of any special provision of law to the contrary, and not the mere expectation of receiving it.

United States v. Schillinger, 14 Blatchf. 71, Fed. Cas. No. 16,228.

Mere appreciation in value of capital assets is not to be called income.

Gray v. Darlington, 15 Wall. 63, 66, 21 L. ed. 45, 46; Lynch v. Turrish, 247 U. S. 221, 231, 62 L. ed. 1087, 1093, 38 Sup. Ct. Rep. 537; Baldwin Locomotive Works v. McCoach, 136 C. C. A. 660, 221

Fed. 59; *Lynch v. Hornby*, 247 U. S. 339, 62 L. ed. 1149, 38 Sup. Ct. Rep. 543; *Tebrau (Johore) Rubber Syndicate v. Farmer*, 5 Income Tax Cas. 658; *Stevens v. Hudson Bay Co.* 5 Income Tax Cas. 424; *Assets Co. v. Inland Revenue*, 4 Sc. Sess. Cas. 4th series, 578.

Messrs. George W. Wickersham and Charles Robinson Smith, as amici curiæ:

Stock dividends represent capital, and do not constitute income.

Gibbons v. Mahon, 136 U. S. 549, 34 L. ed. 525, 10 Sup. Ct. Rep. 1057; *Towne v. Eisner*, 245 U. S. 418, 62 L. ed. 372, L.R.A.1918D, 254, 38 Sup. Ct. Rep. 158.

If gains in general and paper gains may properly be considered income, then this would hold true of mere appreciation in value of real estate or of personal property that is not sold,—a gain that is not realized. But this sort of appreciation or gain in capital value can never constitute income within the 16th Amendment.

Gray v. Darlington, 15 Wall. 63, 21 L. ed. 45; *Lynch v. Turrish*, 247 U. S. 221, 231, 62 L. ed. 1087, 1093, 38 Sup. Ct. Rep. 537; *Baldwin Locomotive Works v. McCoach*, 186 C. C. A. 660, 221 Fed. 59; *Towne v. Eisner*, supra.

It cannot be doubted that the sort of gain referred to by the court as constituting income was a realized gain, not the gain of mere appreciation in value.

Stratton's Independence v. Howbert, 231 U. S. 399, 415, 58 L. ed. 285, 292, 34 Sup. Ct. Rep. 136; *Doyle v. Mitchell Bros. Co.* 247 U. S. 183, 185, 62 L. ed. 1058, 1059, 38 Sup. Ct. Rep. 467.

Language used in a statute which has a settled and well-known meaning sanctioned by judicial decision is presumed to be used in that sense by the legislative body.

Latimer v. United States, 223 U. S. 501, 56 L. ed. 526, 32 Sup. Ct. Rep. 242; *Kepner v. United States*, 195 U. S. 100, 124, 49 L. ed. 114, 122, 24 Sup. Ct. Rep. 797, 1 Ann. Cas. 655; *The Abbottsford*, 98 U. S. 440, 25 L. ed. 168.

Mr. Justice Pitney delivered the opinion of the court:

This case presents the question whether, by virtue of the 16th Amendment, Congress has the power to tax, as income of the stockholder and without apportionment,

a stock dividend made lawfully and in good faith against profits accumulated by the corporation since March 1, 1913.

It arises under the Revenue Act of September 8, 1916 (chap. 463, 39 Stat. at L. 756 et seq., Comp. Stat. § 6336a, Fed. Stat. Anno. Supp. 1918, p. 312), which, in our opinion (notwithstanding a contention of the government that will be noticed), plainly evinces the purpose of Congress to tax stock dividends as income.¹

The facts, in outline, are as follows:

On January 1, 1916, the Standard Oil Company of California, a corporation of that state, out of an authorized capital stock of \$100,000,000, had shares of stock outstanding, par value \$100 each, amounting in round figures to \$50,000,000. In addition, it had surplus and undivided profits invested in plant, property, and business, and required for the purposes of the corporation, amounting to about \$45,000,000, of which about \$20,000,000 had been earned prior to March 1, 1913, the balance thereafter. In January, 1916, in order to readjust the capitalization, the board of directors decided to issue additional shares sufficient to constitute a stock dividend of 50 per cent of the outstanding stock, and to transfer from

¹ Title I.—Income Tax.

Part I.—On Individuals.

Sec. 2 (a) That, subject only to such exemptions and deductions as are hereinafter allowed, the net income of a taxable person [shall include gains, profits, and income derived . . . , also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever: Provided, That the term "dividends" as used in this title shall be held to mean any distribution made or ordered to be made by a corporation, . . . out of its earnings or profits accrued since March first, nineteen hundred and thirteen, and payable to its shareholders, whether in cash or in stock of the corporation, . . . which stock dividend shall be considered income, to the amount of its cash value.

surplus account to capital stock account an amount equivalent to such issue. Appropriate resolutions were adopted, an amount equivalent to the par value of the proposed new stock was transferred accordingly, and the new stock duly issued against it and divided among the stockholders.

Defendant in error, being the owner of 2,200 shares of the old stock, received certificates for 1,100 additional shares, of which 18.07 per cent, or 198.77 shares, par value \$19,877, were treated as representing surplus earned between March 1, 1913, and January 1, 1916. She was called upon to pay, and did pay under protest, a tax imposed under the Revenue Act of 1916, based upon a supposed income of \$19,877 because of the new shares; and an appeal to the commissioner of internal revenue having been disallowed, she brought action against the collector to recover the tax. In her complaint she alleged the above facts, and contended that in imposing such a tax the Revenue Act of 1916 violated art. 1, § 2, cl. 3, and art. 1, § 9, cl. 4, of the Constitution of the United States, requiring direct taxes to be apportioned according to population, and that the stock dividend was not income within the meaning of the 16th Amendment. A general demurrer to the complaint was overruled upon the authority of *Towne v. Eisner*, 245 U. S. 418, 62 L. ed. 372, L.R.A.1918D, 254, 38 Sup. Ct. Rep. 158; and, defendant having failed to plead further, final judgment went against him. To review it, the present writ of error is prosecuted.

The case was argued at the last term, and reargued at the present term, both orally and by additional briefs.

We are constrained to hold that the judgment of the district court must be affirmed: First, because the question at issue is controlled by *Towne v. Eisner*, *supra*; secondly, because a re-examination of the question, with the additional light thrown upon it by elaborate argu-

ments, has confirmed the view that the underlying ground of that decision is sound, that it disposes of the question here presented, and that other fundamental considerations lead to the same result.

In *Towne v. Eisner*, the question was whether a stock dividend made in 1914 against surplus earned prior to January 1, 1913, was taxable against the stockholder under the Act of October 3, 1913 (chap. 16, 38 Stat. at L. 114, 166, Comp. Stat. § 5291, 2 Fed. Stat. Anno. 2d ed. p. 724), which provided (§ B, p. 167) that net income should include "dividends," and also "gains or profits and income derived from any source whatever." Suit having been brought by a stockholder to recover the tax assessed against him by reason of the dividend, the district court sustained a demurrer to the complaint. 242 Fed. 702. The court treated the construction of the act as inseparable from the interpretation of the 16th Amendment; and, having referred to *Income Tax Cases* (*Pollock v. Farmers' Loan & T. Co.*) 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912, and quoted the Amendment, proceeded very properly to say (p. 704): "It is manifest that the stock dividend in question cannot be reached by the Income Tax Act, and could not, even though Congress expressly declared it to be taxable as income, unless it is in fact income." It declined, however, to accede to the contention that in *Gibbons v. Mahon*, 136 U. S. 549, 34 L. ed. 525, 10 Sup. Ct. Rep. 1057, "stock dividends" had received a definition sufficiently clear to be controlling, treated the language of this court in that case as obiter dictum in respect of the matter then before it (p. 706), and examined the question as *res nova*, with the result stated. When the case came here, after overruling a motion to dismiss, made by the government upon the ground that the only question involved was the construction of the statute, and not its constitutionality, we dealt upon the merits with the question of construction

only, but disposed of it upon consideration of the essential nature of a stock dividend, disregarding the fact that the one in question was based upon surplus earnings that accrued before the 16th Amendment took effect. Not only so, but we rejected the reasoning of the district court, saying (245 U. S. p. 426): "Notwithstanding the thoughtful discussion that the case received below, we cannot doubt that the dividend was capital as well for the purposes of the Income Tax Law as for distribution between tenant for life and remainderman. What was said by this court upon the latter question is equally true for the former. 'A stock dividend really takes nothing from the property of the corporation, and adds nothing to the interests of the shareholders. Its property is not diminished, and their interests are not increased.

. . . The proportional interest of each shareholder remains the same. The only change is in the evidence which represents that interest, the new shares and the original shares together representing the same proportional interest that the original shares represented before the issue of the new ones.' *Gibbons v. Mahon*, 136 U. S. 549, 559, 560, 34 L. ed. 525, 527, 528, 10 Sup. Ct. Rep. 1057. In short, the corporation is no poorer and the stockholder is no richer than they were before. *Logan County v. United States*, 169 U. S. 255, 261, 42 L. ed. 737, 739, 18 Sup. Ct. Rep. 361. If the plaintiff gained any small advantage by the change, it certainly was not an advantage of \$417,450, the sum upon which he was taxed. . . . What has happened is that the plaintiff's old certificates have been split up in effect and have diminished in value to the extent of the value of the new."

This language aptly answered not only the reasoning of the district court, but the argument of the Solicitor General in this court, which discussed the essential nature of a stock dividend. And if, for the reasons thus expressed, such a dividend

is not to be regarded as "income" or "dividends" within the meaning of the Act of 1913, we are unable to see how it can be brought within the meaning of "incomes" in the 16th Amendment; it being very clear that Congress intended in that act to exert its power to the extent permitted by the Amendment. In *Towne v. Eisner* it was not contended that any construction of the statute could make it narrower than the constitutional grant; rather the contrary.

The fact that the dividend was charged against profits earned before the Act of 1913 took effect, even before the Amendment was adopted, was neither relied upon nor alluded to in our consideration of the merits in that case. Not only so, but had we considered that a stock dividend constituted income in any true sense, it would have been held taxable under the Act of 1913 notwithstanding it was based upon profits earned before the Amendment. We ruled at the same term, in *Lynch v. Hornby*, 247 U. S. 339, 62 L. ed. 1149, 38 Sup. Ct. Rep. 543, that a cash dividend extraordinary in amount, and in *Peabody v. Eisner*, 247 U. S. 347, 62 L. ed. 1152, 38 Sup. Ct. Rep. 546, that a dividend paid in stock of another company, were taxable as income, although based upon earnings that accrued before adoption of the Amendment. In the former case, concerning "corporate profits that accumulated before the act took effect," we declared (pp. 343, 344): "Just as we deem the legislative intent manifest to tax the stockholder with respect to such accumulations only if and when, and to the extent that, his interest in them comes to fruition as income, that is, in dividends declared, so we can perceive no constitutional obstacle that stands in the way of carrying out this intent when dividends are declared out of a pre-existing surplus. . . . Congress was at liberty under the Amendment to tax as income, without apportionment, everything that became income, in the ordinary sense of the

word, after the adoption of the Amendment, including dividends received in the ordinary course by a stockholder from a corporation, even though they were extraordinary in amount and might appear upon analysis to be a mere realization in possession of an inchoate and contingent interest that the stockholder had in a surplus of corporate assets previously existing." In *Peabody v. Eisner* (pp. 349, 350), we observed that the decision of the district court in *Towne v. Eisner* had been reversed "only upon the ground that it related to a stock dividend which in fact took nothing from the property of the corporation and added nothing to the interest of the shareholder, but merely changed the evidence which represented that interest;" and we distinguished the *Peabody* Case from the *Towne* Case upon the ground that "the dividend of Baltimore & Ohio shares was not a stock dividend, but a distribution in specie of a portion of the assets of the Union Pacific."

Therefore, *Towne v. Eisner* cannot be regarded as turning upon the point that the surplus accrued to the company before the act took effect and before adoption of the Amendment. And what we have quoted from the opinion in that case cannot be regarded as obiter dictum, it having furnished the entire basis for the conclusion reached. We adhere to the view then expressed, and might rest the present case there; not because that case in terms decided the constitutional question, for it did not; but because the conclusion there reached as to the essential nature of a stock dividend necessarily prevents its being regarded as income in any true sense.

Nevertheless, in view of the importance of the matter, and the fact that Congress in the Revenue Act of 1916 declared (39 Stat. at L. 757, chap. 463, Comp. Stat. § 6336b, Fed. Stat. Anno. Supp. 1918, p. 312) that a "stock dividend shall be considered income, to the amount of its cash value," we will deal at length with

the constitutional question, incidentally testing the soundness of our previous conclusion.

The 16th Amendment must be construed in connection with the taxing clauses of the original Constitution and the effect attributed to them before the Amendment was adopted. In *Income Tax Cases* (*Pollock v. Farmers Loan & T. Co.*) 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912, under the Act of August 27, 1894 (chap. 349, § 27, 28 Stat. at L. 509, 553), it was held that taxes upon rents and profits of real estate and upon returns from investments of personal property were in effect direct taxes upon the property from which such income arose, imposed by reason of ownership; and that Congress could not impose such taxes without apportioning them among the states according to population, as required by art. 1, § 2, cl. 3, and § 9, cl. 4, of the original Constitution.

Afterwards, and evidently in recognition of the limitation upon the taxing power of Congress thus determined, the 16th Amendment was adopted, in words lucidly expressing the object to be accomplished: "Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration." As repeatedly held, this did not extend the taxing power to new subjects, but merely removed the necessity which otherwise might exist for an apportionment among the states of taxes laid on income. *Brushaber v. Union P. R. Co.* 240 U. S. 1, 17-19, 60 L. ed. 493, 501, 502, L.R.A.1917D, 414, 36 Sup. Ct. Rep. 236, Ann. Cas. 1917B, 713; *Stanton v. Baltic Min. Co.* 240 U. S. 103, 112 et seq., 60 L. ed. 546, 553, 36 Sup. Ct. Rep. 278; *William E. Peck & Co. v. Lowe*, 247 U. S. 165, 172, 178, 62 L. ed. 1049-1051, 38 Sup. Ct. Rep. 482.

A proper regard for its genesis, as well as its very clear language,

requires also that this Amendment shall not be extended by loose construction, so as to repeal or modify, except as applied to income, those provisions of the Constitution that require an apportionment according to population for direct taxes upon property, real and personal. This limitation still has an appropriate and important function, and is not to be overridden by Congress or disregarded by the courts.

In order, therefore, that the clauses cited from article 1 of the Constitution may have proper force and effect, save only as modified by the Amendment, and that the latter also may have proper effect, it becomes essential to distinguish between what is and what is not "income," as the term is there used; and to apply the distinction, as cases arise, according to truth and substance, without regard to form. Congress cannot by any definition it may adopt conclude the matter, since it cannot by legislation alter the Constitution, from which alone it derives its power to legislate, and within whose limitations alone that power can be lawfully exercised.

The fundamental relation of "capital" to "income" has been much discussed by economists, the former being likened to the tree or the land, the latter to the fruit or the crop; the former depicted as a reservoir supplied from springs, the latter as the outlet stream, to be measured by its flow during a period of time. For the present purpose we require only a clear definition of the term "income," as used in common speech, in order to determine its meaning in the Amendment; and, having formed also a correct judgment as to the nature of a stock dividend, we shall find it easy to decide the matter at issue.

After examining dictionaries in common use (Bouvier's Law Dict.; Standard Dict.; Webster's Int. Dict.; Century Dict.), we find little to add to the succinct definition adopted in

two cases arising under the Corporation Tax Act of August 5, 1909 [36 Stat. at L. 11, chap. 6], (*Stratton's Independence v. Howbert*, 231 U. S. 399, 415, 58 L. ed. 285, 292, 34 Sup. Ct. Rep. 136; *Doyle v. Mitchell Bros. Co.* 247 U. S. 179, 185, 62 L. ed. 1054, 1059, 38 Sup. Ct. Rep. 467): "Income may be defined as the gain derived from capital, from labor, or from both combined," provided it be understood to include profit gained through a sale or conversion of capital assets, to which it was applied in the *Doyle Case* (pp. 183, 185).

Brief as it is, it indicates the characteristic and distinguishing attribute of income, essential for a correct solution of the present controversy. The government, although basing its argument upon the definition as quoted, placed chief emphasis upon the word "gain," which was extended to include a variety of meanings; while the significance of the next three words was either overlooked or misconceived,—"*derived from capital*,"—"the gain derived from capital," etc. Here we have the essential matter: *not a gain accruing to capital*, not a *growth or increment of value in the investment*; but a *gain*, a *profit*, something of exchangeable value *proceeding from the property, severed from the capital*, however invested or employed, and *coming in*, being "*derived*," that is, *received or drawn by the recipient* (the taxpayer) for his *separate* use, benefit, and disposal; that is income derived from property. Nothing else answers the description.

The same fundamental conception is clearly set forth in the 16th Amendment—"incomes, from whatever source derived,"—the essential thought being expressed with a conciseness and lucidity entirely in harmony with the form and style of the Constitution.

Can a stock dividend, considering its essential character, be brought within the definition? To answer this, regard must be had to the na-

Internal revenue
—construction
of Income Tax
Amendment—
apportionment
of direct tax.

Definition—
income.

ture of a corporation and the stockholder's relation to it. We refer, of course, to a corporation such as the one in the case at bar, organized for profit, and having a capital stock divided into shares to which a nominal or par value is attributed.

Certainly the interest of the stockholder is a capital interest, and his certificates of stock are but the evidence of it. They state the number of shares to which he is entitled and indicate their par value and how the stock may be transferred. They show that he or his assignors, immediate or remote, have contributed capital to the enterprise, that he is entitled to a corresponding interest proportionate to the whole,—entitled to have the property and business of the company devoted during the corporate existence to attainment of the common objects,—entitled to vote at stockholders' meetings, to receive dividends out of the corporation's profits if and when declared, and, in the event of liquidation, to receive a proportionate share of the net assets, if any, remaining after paying creditors. Short of liquidation, or until dividend declared, he has no right to withdraw any part of either capital or profits from the common enterprise; on the contrary, his interest pertains not to any part, divisible or indivisible, but to the entire assets, business, and affairs of the company. Nor is it the interest of an owner in the assets themselves, since the corporation has full title, legal and equitable, to the whole. The stockholder has the right to have the assets employed in the enterprise, with the incidental rights mentioned; but, as stockholder, he has no right to withdraw, only the right to persist, subject to the risks of the enterprise, and looking only to dividends for his return. If he desires to dissociate himself from the company, he can do so only by disposing of his stock.

For bookkeeping purposes, the company acknowledges a liability in form to the stockholders equivalent to the aggregate par value of their stock, evidenced by a "capital

stock account." If profits have been made and not divided, they create additional bookkeeping liabilities under the head of "profit and loss," "undivided profits," "surplus account," or the like. None of these, however, gives to the stockholders as a body, much less to any one of them, either a claim against the going concern for any particular sum of money, or a right to any particular portion of the assets or any share in them unless or until the directors conclude that dividends shall be made and a part of the company's assets segregated from the common fund for the purpose. The dividend normally is payable in money, under exceptional circumstances in some other divisible property; and when so paid, then only (excluding, of course, a possible advantageous sale of his stock or winding-up of the company) does the stockholder realize a profit or gain which becomes his separate property, and thus derive income from the capital that he or his predecessor has invested.

In the present case, the corporation had surplus and undivided profits invested in plant, property, and business, and required for the purposes of the corporation, amounting to about \$45,000,000, in addition to outstanding capital stock of \$50,000,000. In this the case is not extraordinary. The profits of a corporation, as they appear upon the balance sheet at the end of the year, need not be in the form of money on hand in excess of what is required to meet current liabilities and finance current operations of the company. Often, especially in a growing business, only a part, sometimes a small part, of the year's profits, is in property capable of division; the remainder having been absorbed in the acquisition of increased plant, equipment, stock in trade, or accounts receivable, or in decrease of outstanding liabilities. When only a part is available for dividends, the balance of the year's profits is carried to the credit of undivided profits, or surplus, or some other account having like significance. If thereafter the

company finds itself in funds beyond current needs, it may declare dividends out of such surplus or undivided profits; otherwise it may go on for years conducting a successful business, but requiring more and more working capital because of the extension of its operations, and therefore unable to declare dividends approximating the amount of its profits. Thus the surplus may increase until it equals or even exceeds the par value of the outstanding capital stock. This may be adjusted upon the books in the mode

Corporation—
character of
stock dividends.

adopted in the case at bar—by declaring a “stock dividend.” This, however, is no more than a book adjustment, in essence not a dividend but rather the opposite; no part of the assets of the company is separated from the common fund, nothing distributed except paper certificates that evidence an antecedent increase in the value of the stockholder’s capital interest resulting from an accumulation of profits by the company, but profits so far absorbed in the business as to render it impracticable to separate them for withdrawal and distribution. In order to make the adjustment, a charge is made against surplus account with corresponding credit to the capital stock account, equal to the proposed “dividend;” the new stock is issued against this and the certificates delivered to the existing stockholders in proportion to their previous holdings. This, however, is merely bookkeeping that does not affect the aggregate assets of the corporation or its outstanding liabilities; it affects only the form, not the essence of the “liability” acknowledged by the corporation to its own shareholders, and this through a readjustment of accounts on one side of the balance sheet only, increasing “capital stock” at the expense of “surplus;” it does not alter the pre-existing proportionate interest of any stockholder, or increase the intrinsic value of his holding or of the aggregate holdings of the other stockholders as they stood be-

fore. The new certificates simply increase the number of the shares, with consequent dilution of the value of each share.

A “stock dividend” shows that the company’s accumulated profits have been capitalized, instead of distributed to the stockholders or retained as surplus available for distribution in money or in kind should opportunity offer. Far from being a realization of profits of the stockholder, it tends rather to postpone such realization, in that the fund represented by the new stock has been transferred from surplus to capital, and no longer is available for actual distribution.

The essential and controlling fact is that the stockholder has received nothing out of the company’s assets for his separate use and benefit; on the contrary, every dollar of his original investment, together with whatever accretions and accumulations have resulted from employment of his money and that of the other stockholders in the business of the company, still remains the property of the company, and subject to business risks which may result in wiping out the entire investment. Having regard to the very truth of the matter, to substance, and not to form, he has received nothing that answers the definition of income within the meaning of the 16th Amendment.

Being concerned only with the true character and effect of such a dividend when lawfully made, we lay aside the question whether in a particular case a stock dividend may be authorized by the local law governing the corporation, or whether the capitalization of profits may be the result of correct judgment and proper business policy on the part of its management, and a due regard for the interests of the stockholders. And we are considering the taxability of bona fide stock dividends only.

We are clear that not only does a stock dividend really take nothing from the property of the corporation and add nothing to that of the shareholder, but that the antecedent

accumulation of profits evidenced thereby, while indicating that the shareholder is the richer because of an increase of his capital, at the same time shows he has not realized or received any income in the transaction.

It is said that a stockholder may sell the new shares acquired in the stock dividend; and so he may, if he can find a buyer. It is equally true that if he does sell, and in doing so realizes a profit, such profit, like any other, is income, and so far as it may have arisen since the 16th Amendment is taxable by Congress without apportionment. The same would be true were he to sell some of his original shares at a profit. But if a shareholder sells dividend stock, he necessarily disposes of a part of his capital interest, just as if he should sell a part of his old stock, either before or after the dividend. What he retains no longer entitles him to the same proportion of future dividends as before the sale. His part in the control of the company likewise is diminished. Thus, if one holding \$60,000 out of a total \$100,000 of the capital stock of a corporation should receive, in common with other stockholders, a 50 per cent stock dividend, and should sell his part, he thereby would be reduced from a majority to a minority stockholder, having six fifteenths instead of six tenths of the total stock outstanding. A corresponding and proportionate decrease in capital interest and in voting power would befall a minority holder should he sell dividend stock; it being in the nature of things impossible for one to dispose of any part of such an issue without a proportionate disturbance of the distribution of the entire capital stock, and a like diminution of the seller's comparative voting power,—that "right preservative of rights" in the control of a corporation. Yet, without selling, the shareholder, unless possessed of other resources, has not the wherewithal to pay an income tax upon the dividend stock. Nothing could more clearly show that to tax a

stock dividend is to tax a capital increase, and not income, than this demonstration that in the nature of things it requires conversion of capital in order to pay the tax.

Throughout the argument of the government, in a variety of forms, runs the fundamental error mentioned,—a failure to appraise correctly the force of the term "income" as used in the 16th Amendment, or at least to give practical effect to it. Thus, the government contends that the tax "is levied on income derived from corporate earnings," when in truth the stockholder has "derived" nothing except paper certificates which, so far as they have any effect, deny him present participation in such earnings. It contends that the tax may be laid when earnings "are received by the stockholder," whereas he has received none; that the profits are "distributed by means of a stock dividend," although a stock dividend distributes no profits; that under the Act of 1916 "the tax is on the stockholder's share in corporate earnings," when in truth a stockholder has no such share, and receives none in a stock dividend; that "the profits are segregated from his former capital, and he has a separate certificate representing his invested profits or gains," whereas there has been no segregation of profits, nor has he any separate certificate representing a personal gain, since the certificates, new and old, are alike in what they represent,—a capital interest in the entire concerns of the corporation.

We have no doubt of the power or duty of a court to look through the form of the corporation and determine the question of the stockholder's right, in order to ascertain whether he has received income taxable by Congress without apportionment. But, looking through the form, we cannot disregard the essential truth disclosed; ignore the substantial difference between corporation and stockholder; treat the entire organization as unreal; look upon stockholders as partners, when

they are not such; treat them as having in equity a right to a partition of the corporate assets, when they have none; and indulge the fiction that they have received and realized a share of the profits of the company which in truth they have neither received nor realized. We must treat the corporation as a substantial entity separate from the stockholder, not only because such is the practical fact, but because it is only by recognizing such separateness that any dividend—even one paid in money or property—can be regarded as income of the stockholder. Did we regard corporation and stockholders as altogether identical, there would be no income except as the corporation acquired it; and while this would be taxable against the corporation as income under appropriate provisions of law, the individual stockholders could not be separately and additionally taxed with respect to their several shares even when divided, since if there were entire identity between them and the company they could not be regarded as receiving anything from it, any more than if one's money were to be removed from one pocket to another.

Conceding that the mere issue of a stock dividend makes the recipient no richer than before, the government nevertheless contends that the new certificates measure the extent to which the gains accumulated by the corporation have made him the richer. There are two insuperable difficulties with this: In the first place, it would depend upon how long he had held the stock whether the stock dividend indicated the extent to which he had been enriched by the operations of the company; unless he had held it throughout such operations, the measure would not hold true. Secondly, and more important for present purposes, enrichment through increase in value of capital investment is not income in any proper meaning of the term.

The complaint contains averments respecting the market prices of stock such as plaintiff held, based

upon sales before and after the stock dividend, tending to show that the receipt of the additional shares did not substantially change the market value of her entire holdings. This tends to show that in this instance market quotations reflected intrinsic values,—a thing they do not always do. But we regard the market prices of the securities as an unsafe criterion in an inquiry such as the present, when the question must be, not what will the thing sell for, but what is it in truth and in essence.

It is said there is no difference in principle between a simple stock dividend and a case where stockholders use money received as cash dividends to purchase additional stock contemporaneously issued by the corporation. But an actual cash dividend, with a real option to the stockholder either to keep the money for his own or to reinvest it in new shares, would be as far removed as possible from a true stock dividend, such as the one we have under consideration, where nothing of value is taken from the company's assets and transferred to the individual ownership of the several stockholders and thereby subjected to their disposal.

The government's reliance upon the supposed analogy between a dividend of the corporation's own shares and one made by distributing shares owned by it in the stock of another company calls for no comment beyond the statement that the latter distributes assets of the company among the shareholders, while the former does not; and for no citation of authority except *Peabody v. Eisner*, 247 U. S. 347, 349, 350, 62 L. ed. 1152, 1154, 38 Sup. Ct. Rep. 546.

Two recent decisions proceeding from courts of high jurisdiction, are cited in support of the position of the government. *Swan Brewery Co. v. Rex* [1914] A. C. 231, 83 L. J. P. C. N. S. 134, 110 L. T. N. S. 211, 30 Times L. R. 199, arose under the Dividend Duties Act of western Australia, which provided that "dividend" should include

"every dividend, profit, advantage, or gain intended to be paid or credited to or distributed among any members or directors of any company," except, etc. There was a stock dividend, the new shares being allotted among the shareholders pro rata; and the question was whether this was a distribution of a dividend within the meaning of the act. The Judicial Committee of the Privy Council sustained the dividend duty upon the ground that, although "in ordinary language the new shares would not be called a dividend," nor would the allotment of them be a distribution of a dividend," yet, within the meaning of the act, such new shares were an "advantage" to the recipients. There being no constitutional restriction upon the action of the law-making body, the case presented merely a question of statutory construction, and manifestly the decision is not a precedent for the guidance of this court when acting under a duty to test an act of Congress by the limitations of a written Constitution having superior force.

In *Tax Comr. v. Putnam* (Trefry v. Putnam) (1917) 227 Mass. 522, L.R.A.1917F, 806, 116 N. E. 904, it was held that the 44th Amendment to the Constitution of Massachusetts, which conferred upon the legislature full power to tax incomes, "must be interpreted as including every item which by any reasonable understanding can fairly be regarded as income" (pp. 526, 531); and that under it a stock dividend was taxable as income, the court saying (p. 535): "In essence the thing which has been done is to distribute a symbol representing an accumulation of profits, which, instead of being paid out in cash, is invested in the business, thus augmenting its durable assets. In this aspect of the case the substance of the transaction is no different from what it would be if a cash dividend had been declared, with the privilege of subscription to an equivalent amount of new shares." We cannot accept this

reasoning. Evidently, in order to give a sufficiently broad sweep to the new taxing provision, it was deemed necessary to take the symbol for the substance, accumulation for distribution, capital accretion for its opposite; while a case where money is paid into the hand of the stockholder with an option to buy new shares with it, followed by acceptance of the option, was regarded as identical in substance with a case where the stockholder receives no money and has no option. The Massachusetts court was not under an obligation, like the one which binds us, of applying a constitutional amendment in the light of other constitutional provisions that stand in the way of extending it by construction.

Upon the second argument, the government, recognizing the force of the decision in *Towne v. Eisner*, 245 U. S. 418, 62 L. ed. 372, L.R.A.1918D, 254, 88 Sup. Ct. Rep. 158, and virtually abandoning the contention that a stock dividend increases the interest of the stockholder or otherwise enriches him, insisted as an alternative that, by the true construction of the Act of 1916, the tax is imposed not upon the stock dividend, but rather upon the stockholder's share of the undivided profits previously accumulated by the corporation; the tax being levied as a matter of convenience at the time such profits become manifest through the stock dividend. If so construed, would the act be constitutional?

That Congress has power to tax shareholders upon their property interests in the stock of corporations is beyond question; and that such interests might be valued in view of the condition of the company, including its accumulated and undivided profits, is equally clear. But that this would be taxation of property because of ownership, and hence would require apportionment under the provisions of the Constitution, is settled beyond peradventure by previous decisions of this court.

The government relies upon *The Collector v. Hubbard* (Brainard v. Hubbard) (1870) 12 Wall. 1, 17, 20 L. ed. 272, 278, which arose under § 117 of the Act of June 30, 1864 (chap. 173, 13 Stat. at L. 223, 282, Comp. Stat. § 6368, 4 Fed. Stat. Anno. 2d ed. p. 324), providing that "the gains and profits of all companies, whether incorporated or partnership, other than the companies specified in this section, shall be included in estimating the annual gains, profits, or income of any person entitled to the same, whether divided or otherwise." The court held an individual taxable upon his proportion of the earnings of a corporation although not declared as dividends, and although invested in assets not in their nature divisible. Conceding that the stockholder for certain purposes had no title prior to dividend declared, the court nevertheless said (p. 18): "Grant all that, still it is true that the owner of a share of stock in a corporation holds the share with all its incidents, and that among those incidents is the right to receive all future dividends; that is, his proportional share of all profits not then divided. Profits are incident to the share to which the owner at once becomes entitled provided he remains a member of the corporation until a dividend is made. Regarded as an incident to the shares, undivided profits are property of the shareholder, and as such are the proper subject of sale, gift, or devise. Undivided profits invested in real estate, machinery, or raw material for the purpose of being manufactured are investments in which the stockholders are interested, and when such profits are actually appropriated to the payment of the debts of the corporation they serve to increase the market value of the shares whether held by the original subscribers or by assignees." In so far as this seems to uphold the right of Congress to tax without apportionment a stockholder's interest in accumulated earnings

prior to dividend declared, it must be regarded as overruled by *Income Tax Cases* (*Pollock v. Farmers' Loan & T. Co.*) 158 U. S. 601, 627, 628, 637, 39 L. ed. 1108, 1122, 1125, 15 Sup. Ct. Rep. 912. Conceding *The Collector v. Hubbard* was inconsistent with the doctrine of that case, because it sustained a direct tax upon property not apportioned among the states, the government nevertheless insists that the 16th Amendment removed this obstacle, so that now the *Hubbard* Case is authority for the power of Congress to levy a tax on the stockholder's share in the accumulated profits of the corporation even before division by the declaration of a dividend of any kind. Manifestly this argument must be rejected, since the Amendment applies to income only, and what is called the stockholder's share in the accumulated profits of the company is capital, not income. As we have pointed out, a stockholder has no individual share in accumulated profits, nor in any particular part of the assets of the corporation, prior to dividend declared.

Internal revenue
—apportionment
of direct tax—
stockholder's
interest in un-
divided profits.

Thus, from every point of view, we are brought irresistibly to the conclusion that neither under the 16th Amendment nor otherwise has Congress power to tax without apportionment a true stock dividend made lawfully and in good faith, or the accumulated profits behind it, as income of the stockholder. The Revenue Act of 1916, in so far as it imposes a tax upon the stockholder because of such dividend, contravenes the provisions of article 1, § 2, cl. 3, and article 1, § 9, cl. 4, of the Constitution, and to this extent is invalid notwithstanding the 16th Amendment.

—income tax—
stock dividends.

Judgment affirmed.

Mr. Justice Brandeis delivered the following dissenting opinion:

Financiers, with the aid of law-

yers, devised long ago two different methods by which a corporation can, without increasing its indebtedness, keep for corporate purposes accumulated profits, and yet, in effect, distribute these profits among its stockholders. One method is a simple one. The capital stock is increased; the new stock is paid up with the accumulated profits; and the new shares of paid-up stock are then distributed among the stockholders pro rata as a dividend. If the stockholder prefers ready money to increasing his holding of the stock in the company, he sells the new stock received as a dividend. The other method is slightly more complicated. Arrangements are made for an increase of stock to be offered to stockholders pro rata at par, and, at the same time, for the payment of a cash dividend equal to the amount which the stockholder will be required to pay to the company, if he avails himself of the right to subscribe for his pro rata of the new stock. If the stockholder takes the new stock, as is expected, he may indorse the dividend check received to the corporation and thus pay for the new stock. In order to insure that all the new stock so offered will be taken, the price at which it is offered is fixed far below what it is believed will be its market value. If the stockholder prefers ready money to an increase of his holdings of stock, he may sell his right to take new stock pro rata, which is evidenced by an assignable instrument. In that event the purchaser of the rights repays to the corporation, as the subscription price of the new stock, an amount equal to that which it had paid as a cash dividend to the stockholder.

Both of these methods of retaining accumulated profits while in effect distributing them as a dividend had been in common use in the United States for many years prior to the adoption of the 16th Amendment. They were recognized equivalents. Whether a particular corporation employed one or the

other method was determined sometimes by requirements of the law under which the corporation was organized; sometimes it was determined by preferences of the individual officials of the corporation; and sometimes by stock market conditions. Whichever method was employed, the resultant distribution of the new stock was commonly referred to as a stock dividend. How these two methods have been employed may be illustrated by the action in this respect (as reported in *Moody's Manual*, 1918 Industrial, and the *Commercial & Financial Chronicle*) of some of the Standard Oil companies, since the disintegration pursuant to the decision of this court in 1911. *Standard Oil Co. v. United States*, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A. (N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734.

(a) *Standard Oil Co. (of Indiana)*, an Indiana corporation. It had on December 31, 1911, \$1,000,000 capital stock (all common), and a large surplus. On May 15, 1912, it increased its capital stock to \$30,000,000, and paid a simple stock dividend of 2,900 per cent in stock.¹

(b) *Standard Oil Co. (of Nebraska)*, a Nebraska corporation. It had on December 31, 1911, \$600,000 capital stock (all common), and a substantial surplus. On April 15, 1912, it paid a simple stock dividend of 33½ per cent, increasing the outstanding capital to \$800,000. During the calendar year 1912 it paid cash dividends aggregating 20 per cent: but it earned considerably more, and had at the close of the year again a substantial surplus. On June 20, 1913, it declared a further stock dividend of 25 per cent, thus increasing the capital to \$1,000,000.²

(c) *The Standard Oil Co. (of Kentucky)*, a Kentucky corporation. It had on December 31, 1913,

¹ *Moody's*, p. 1544; *Commercial & Financial Chronicle*, vol. 94, p. 831; vol. 98, pp. 1005, 1076.

² *Moody's*, p. 1548; *Commercial & Financial Chronicle*, vol. 94, p. 771; vol. 96, p. 1428; vol. 97, p. 1434; vol. 98, p. 1541.

\$1,000,000 capital stock (all common) and \$3,701,710 surplus. Of this surplus \$902,457 had been earned during the calendar year 1913, the net profits of that year having been \$1,002,457 and the dividends paid only \$100,000 (10 per cent). On December 22, 1913, a cash dividend of \$200 per share was declared payable on February 14, 1914, to stockholders of record January 31, 1914; and these stockholders were offered the right to subscribe for an equal amount of new stock at par, and to apply the cash dividend in payment therefor. The outstanding stock was thus increased to \$3,000,000. During the calendar years 1914, 1915, and 1916, quarterly dividends were paid on this stock at an annual rate of between 15 per cent and 20 per cent, but the company's surplus increased by \$2,847,614, so that on December 31, 1916, it had a large surplus over its \$3,000,000 capital stock. On December 15, 1916, the company issued a circular to the stockholders, saying:

"The company's business for this year has shown a very good increase in volume and a proportionate increase in profits, and it is estimated that by January 1, 1917, the company will have a surplus of over \$4,000,000. The board feels justified in stating that if the proposition to increase the capital stock is acted on favorably, it will be proper in the near future to declare a cash dividend of 100 per cent; and to allow the stockholders the privilege pro rata according to their holdings, to purchase the new stock at par, the plan being to allow the stockholders, if they desire, to use their cash dividend to pay for the new stock."

The increase of stock was voted. The company then paid a cash dividend of 100 per cent, payable May 1, 1917, again offering to such stockholders the right to subscribe for an equal amount of new stock at par and to apply the cash dividend in payment therefor.

Moodys Manual, describing the
9 A.L.R.—100.

transaction with exactness, says first that the stock was increased from \$3,000,000 to \$6,000,000, "a cash dividend of 100 per cent, payable May 1, 1917, being exchanged for one share of new stock, the equivalent of a 100 per cent stock dividend." But later in the report, giving, as customary in the Manual, the dividend record of the company, the Manual says: "A stock dividend of 200 per cent was paid February 14, 1914, and one of 100 per cent on May 1, 1917." And in reporting specifically the income account of the company for a series of years ending December 31, covering net profits, dividends paid, and surplus for the year, it gives, as the aggregate of dividends for the year 1917, \$660,000 (which was the aggregate paid on the quarterly cash dividend—5 per cent January and April; 6 per cent July and October); and adds in a note: "In addition a stock dividend of 100 per cent was paid during the year." The Wall Street Journal of May 2, 1917, p. 2, quotes the 1917 "high" price for Standard Oil of Kentucky as "375 ex. stock dividend."

It thus appears that among financiers and investors the distribution of the stock by whichever method effected is called a stock dividend; that the two methods by which accumulated profits are legally retained for corporate purposes and at the same time distributed as dividends are recognized by them to be equivalents; and that the financial results to the corporation and to the stockholders of the two methods are substantially the same—unless a difference results from the application of the Federal Income Tax Law.

³ Moodys, p. 1547; Commercial & Financial Chronicle, vol. 97, pp. 1589, 1827, 1903; vol. 98, pp. 76, 457; vol. 103, p. 2348. Poor's Manual of Industrials (1918), p. 2240, in giving the "Comparative Income Account" of the company, describes the 1914 dividend as "Stock dividend paid (200 per cent)—\$2,000,000;" and describes the 1917 dividend as "\$3,000,000 special cash dividend."

Mrs. Macomber, a citizen and resident of New York, was, in the year 1916, a stockholder in the Standard Oil Company (of California), a corporation organized under the laws of California and having its principal place of business in that state. During that year she received from the company a stock dividend representing profits earned since March 1, 1913. The dividend was paid by direct issue of the stock to her according to the simple method described above, pursued also by the Indiana and Nebraska companies. In 1917 she was taxed under the Federal law on the stock dividend so received at its par value of \$100 a share, as income received during the year 1916. Such a stock dividend is income as distinguished from capital, both under the law of New York and under the law of California; because in both states every dividend representing profits is deemed to be income, whether paid in cash or in stock. It had been so held in New York, where the question arose as between life tenant and remainderman (*Lowery v. Farmers' Loan & T. Co.* 172 N. Y. 137, 64 N. E. 796; *Re Osborne*, 209 N. Y. 450, 50 L.R.A.(N.S.) 510, 103 N. E. 723, 823, Ann. Cas. 1915A, 298); and also, where the question arose in matters of taxation (*People ex rel. Pullman Co. v. Glynn*, 130 App. Div. 332, 114 N. Y. Supp. 460, 198 N. Y. 605, 92 N. E. 1097). It has been so held in California, where the question appears to have arisen only in controversies between life tenant and remainderman. *Re Duffill*, — Cal. —, 183 Pac. 337.

It is conceded that if the stock dividend paid to Mrs. Macomber had been made by the more complicated method pursued by the Standard Oil Company of Kentucky, that is, issuing rights to take new stock pro rata and paying to each stockholder simultaneously a dividend in cash sufficient in amount to enable him to pay for this pro rata of new stock to be purchased, the dividend so paid to

him would have been taxable as income, whether he retained the cash or whether he returned it to the corporation in payment for his pro rata of new stock. But it is contended that, because the simple method was adopted of having the new stock issued direct to the stockholders as paid-up stock, the new stock is not to be deemed income, whether she retained it or converted it into cash by sale. If such a different result can flow merely from the difference in the method pursued, it must be because Congress is without power to tax as income of the stockholder either the stock received under the latter method or the proceeds of its sale; for Congress has, by the provisions in the Revenue Act of 1916, expressly declared its purpose to make stock dividends, by whichever method paid, taxable as income.

The 16th Amendment, proclaimed February 25, 1913, declares:

"The Congress shall have power to lay and collect taxes on incomes from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration."

The Revenue Act of September 8, 1916, chap. 463, 39 Stat. at L. 756, 757, Comp. Stat. §§ 6336a, 6336b, Fed. Stat. Anno. Supp. 1918, pp. 312, 314, provided:

"That the term 'dividends,' as used in this title, shall be held to mean any distribution made or ordered to be made by a corporation, . . . out of its earnings or profits accrued since March first, nineteen hundred and thirteen, and payable to its shareholders, whether in cash or in stock of the corporation, . . . which stock dividend shall be considered income, to the amount of its cash value."

Hitherto powers conferred upon Congress by the Constitution have been liberally construed, and have been held to extend to every means appropriate to attain the end sought. In determining the scope of the power the substance of the transaction, not its form, has been

regarded. *Martin v. Hunter*, 1 Wheat. 304, 326, 4 L. ed. 97, 102; *M'Culloch v. Maryland*, 4 Wheat. 316, 407, 415, 4 L. ed. 579, 601, 603; *Brown v. Maryland*, 12 Wheat. 419, 446, 6 L. ed. 678, 688; *Craig v. Missouri*, 4 Pet. 410, 433, 7 L. ed. 903, 911; *Jarrolt v. Moberly*, 103 U. S. 580, 585, 587, 26 L. ed. 492-494; *Legal Tender Case*, 110 U. S. 421, 444, 28 L. ed. 204, 213, 4 Sup. Ct. Rep. 122; *Burrow-Giles Lithographic Co. v. Sarony*, 111 U. S. 53, 58, 28 L. ed. 349, 351, 4 Sup. Ct. Rep. 279; *United States v. Realty Co.* 163 U. S. 427, 440, 441, 442, 41 L. ed. 215, 219, 220, 16 Sup. Ct. Rep. 1120; *South Carolina v. United States*, 199 U. S. 437, 448, 449, 50 L. ed. 261, 264, 265, 26 Sup. Ct. Rep. 110, 4 Ann. Cas. 737. Is there anything in the phraseology of the 16th Amendment or in the nature of corporate dividends which should lead to a departure from these rules of construction and compel this court to hold that Congress is powerless to prevent a result so extraordinary as that here contended for by the stockholder?

First: The term "income," when applied to the investment of the stockholder in a corporation, had, before the adoption of the 16th Amendment, been commonly understood to mean the returns from time to time received by the stockholder from gains or earnings of the corporation. A dividend received by a stockholder from a corporation may be either in distribution of capital assets or in distribution of profits. Whether it is the one or the other is in no way affected by the medium in which it is paid, nor by the method or means through which the particular thing distributed as a dividend was procured. If the dividend is declared payable in cash, the money with which to pay it is ordinarily taken from surplus cash in the treasury. But (if there are profits legally available for distribution, and the law under which the company was incorporated so permits) the company may raise the money by dis-

counting negotiable paper; or by selling bonds, scrip, or stock of another corporation then in the treasury; or by selling its own bonds, scrip, or stock then in the treasury; or by selling its own bonds, scrip, or stock issued expressly for that purpose. How the money shall be raised is wholly a matter of financial management. The manner in which it is raised in no way affects the question whether the dividend received by the stockholder is income or capital; nor can it conceivably affect the question whether it is taxable as income.

Likewise, whether a dividend declared payable from profits shall be paid in cash or in some other medium is also wholly a matter of financial management. If some other medium is decided upon, it is also wholly a question of financial management whether the distribution shall be, for instance, in bonds, scrip, or stock of another corporation or in issues of its own. And if the dividend is paid in its own issues, why should there be a difference in result dependent upon whether the distribution was made from such securities then in the treasury or from others to be created and issued by the company expressly for that purpose? So far as the distribution may be made from its own issues of bonds, or preferred stock created expressly for the purpose, it clearly would make no difference in the decision of the question whether the dividend was a distribution of profits, that the securities had to be created expressly for the purpose of distribution. If a dividend paid in securities of that nature represents a distribution of profits, Congress may, of course, tax it as income of the stockholder. Is the result different where the security distributed is common stock?

Suppose that a corporation, having power to buy and sell its own stock, purchases, in the interval between its regular dividend dates, with moneys derived from current

profits, some of its own common stock as a temporary investment, intending at the time of purchase to sell it before the next dividend date, and to use the proceeds in paying dividends, but later, deeming it inadvisable either to sell this stock or to raise by borrowing the money necessary to pay the regular dividend in cash, declares a dividend payable in this stock:—Can anyone doubt that in such a case the dividend in common stock would be income of the stockholder, and constitutionally taxable as such? See *Green v. Bissell*, 79 Conn. 547, 8 L.R.A.(N.S.) 1011, 118 Am. St. Rep. 156, 65 Atl. 1056, 9 Ann. Cas. 287; *Leland v. Hayden*, 102 Mass. 542. And would it not likewise be income of the stockholder, subject to taxation, if the purpose of the company in buying the stock so distributed had been from the beginning to take it off the market and distribute it among the stockholders as a dividend, and the company actually did so? And proceeding a short step further: Suppose that a corporation decided to capitalize some of its accumulated profits by creating additional common stock and selling the same to raise working capital, but, after the stock has been issued and certificates therefor are delivered to the bankers for sale, general financial conditions make it undesirable to market the stock, and the company concludes that it is wiser to husband, for working capital, the cash which it had intended to use in paying stockholders a dividend, and, instead, to pay the dividend in the common stock which it had planned to sell: Would not the stock so distributed be a distribution of profits, and hence, when received, be income of the stockholder, and taxable as such? If this be conceded, why should it not be equally income of the stockholder, and taxable as such, if the common stock created by capitalizing profits had been originally created for the express purpose of being distributed as a

dividend to the stockholder who afterwards received it?

Second: It has been said that a dividend payable in bonds or preferred stock created for the purpose of distributing profits may be income and taxable as such, but that the case is different where the distribution is in common stock created for that purpose. Various reasons are assigned for making this distinction. One is that the proportion of the stockholder's ownership to the aggregate number of the shares of the company is not changed by the distribution. But that is equally true where the dividend is paid in its bonds or in its preferred stock. Furthermore, neither maintenance nor change in the proportionate ownership of a stockholder in a corporation has any bearing upon the question here involved. Another reason assigned is that the value of the old stock held is reduced approximately by the value of the new stock received, so that the stockholder, after receipt of the stock dividend, has no more than he had before it was paid. That is equally true whether the dividend be paid in cash or in other property; for instance, bonds, scrip, or preferred stock of the company. The payment from profits of a large cash dividend, and even a small one, customarily lowers the then market value of stock because the undivided property represented by each share has been correspondingly reduced. The argument which appears to be most strongly urged for the stockholders is, that when a stock dividend is made, no portion of the assets of the company is thereby segregated for the stockholder. But does the issue of new bonds or of preferred stock created for use as a dividend result in any segregation of assets for the stockholder? In each case he receives a piece of paper which entitles him to certain rights in the undivided property. Clearly, segregation of assets in a physical sense is not an essential of income. The year's gains of a partner are taxable as income, although

there, likewise, no segregation of his share in the gains from that of his partners is had.

The objection that there has been no segregation is presented also in another form. It is argued that until there is a segregation, the stockholder cannot know whether he has really received gains; since the gains may be invested in plant or merchandise or other property and perhaps be later lost. But is not this equally true of the share of a partner in the year's profits of the firm, or, indeed, of the profits of the individual who is engaged in business alone? And is it not true, also, when dividends are paid in cash? The gains of a business, whether conducted by an individual, by a firm, or by a corporation, are ordinarily reinvested in large part. Many a cash dividend honestly declared as a distribution of profits proves later to have been paid out of capital, because errors in forecast prevent correct ascertainment of values. Until a business adventure has been completely liquidated, it can never be determined with certainty whether there have been profits unless the returns have at least exceeded the capital originally invested. Business men, dealing with the problem practically, fix necessarily periods and rules for determining whether there have been net profits,—that is, income or gains. They protect themselves from being seriously misled by adopting a system of depreciation charges and reserves. Then, they act upon their own determination whether profits have been made. Congress in legislating has wisely adopted their practices as its own rules of action.

Third: The government urges that it would have been within the power of Congress to have taxed as income of the stockholder his pro rata share of undistributed profits earned, even if no stock dividend representing it had been paid. Strong reasons may be assigned for such a view. See *Collector v. Hubbard* (*Brainard v. Hubbard*) 12

Wall. 1, 20 L. ed. 272. The undivided share of a partner in the year's undistributed profits of his firm is taxable as income of the partner, although the share in the gain is not evidenced by any action taken by the firm. Why may not the stockholder's interest in the gains of the company? The law finds no difficulty in disregarding the corporate fiction whenever that is deemed necessary to attain a just result. *Linn & L. Timber Co. v. United States*, 236 U. S. 574, 59 L. ed. 725, 35 Sup. Ct. Rep. 440; see *Morawetz, Priv. Corp.* 2d ed. §§ 227-231; *Cook, Corp.* 7th ed. §§ 663, 664. The stockholder's interest in the property of the corporation differs, not fundamentally but in form only, from the interest of a partner in the property of the firm. There is much authority for the proposition that, under our law, a partnership or joint stock company is just as distinct and palpable an entity in the idea of the law, as distinguished from the individuals composing it, as is a corporation.⁴ No reason appears why Congress, in legislating under a grant of power so comprehensive as that authorizing the levy of an income tax, should be limited by the particular view of the relation of the stockholder to the corporation and its property which may, in the absence of legislation, have been taken by this court. But we have no occasion to decide the question whether Congress might have taxed to the stockholder his undivided share of the corporation's earnings. For Congress has in this act limited the income tax to that share of the stockholder in the earnings which is, in effect, distributed by means of the stock dividend paid. In oth-

⁴ See "Some Judicial Myths," by Francis M. Burdick, 22 *Harvard L. Rev.* 393, 394-396; *The Firm as a Legal Person*, by William Hamilton Cowles, 57 *Cent. L. J.* 343, 348; *The Separate Estates of Nonbankrupt Partners*, by J. D. Brannan, 20 *Harvard L. Rev.* 589-592; compare 7 *Harvard L. Review*, p. 426; vol. 14, p. 222; vol. 17, p. 194.

er words, to render the stockholder taxable there must be both earnings made *and* a dividend paid. Neither earnings without dividend, nor a dividend without earnings, subjects the stockholder to taxation under the Revenue Act of 1916.

Fourth: The equivalency of all dividends representing profits, whether paid in cash or in stock, is so complete that serious question of the taxability of stock dividends would probably never have been made if Congress had undertaken to tax only those dividends which represented profits earned during the year in which the dividend was paid, or in the year preceding. But this court, construing liberally not only the constitutional grant of power, but also the Revenue Act of October 3, 1913 [38 Stat. at L. 114, chap. 16, Comp. Stat. § 5291, 2 Fed. Stat. Anno. 2d ed. p. 724], held that Congress might tax, and had taxed, to the stockholder, dividends received during the year, although earned by the company long before, and even prior to the adoption of the 16th Amendment. *Lynch v. Hornby*, 247 U. S. 389, 62 L. ed. 1149, 38 Sup. Ct. Rep. 543.⁵ That rule, if indiscriminately applied to all stock dividends representing profits earned, might, in view of corporate practice, have worked considerable hardship, and have raised serious questions. Many corporations, without legally capitalizing any part of their profits, had assigned definitely some part or all of the annual balances remaining after paying the usual cash dividends, to the uses to which permanent capital is ordinarily applied. Some of the corporations doing this

transferred such balances on their books to "Surplus" account,—distinguishing between such permanent "Surplus" and the "Undivided Profits" account. Other corporations, without this formality, had assumed that the annual accumulating balances carried as undistributed profits were to be treated as capital permanently invested in the business. And still others, without definite assumption of any kind, had so used undivided profits for capital purposes. To have made the revenue law apply retroactively so as to reach such accumulated profits, if and whenever it should be deemed desirable to capitalize them legally by the issue of additional stock distributed as a dividend to stockholders, would have worked great injustice. Congress endeavored in the Revenue Act of 1916 to guard against any serious hardship which might otherwise have arisen from making taxable stock dividends representing accumulated profits. It did not limit the taxability to stock dividends representing profits earned within the tax year or in the year preceding; but it did limit taxability to such dividends representing profits earned since March 1, 1913. Thereby stockholders were given notice that their share also in undistributed profits accumulating thereafter was at some time to be taxed as income. And Congress sought by § 3 to discourage the postponement of distribution for the illegitimate purpose of evading liability to surtaxes.

Fifth: The decision of this court, that earnings made before the adoption of the 16th Amendment, but paid out in cash dividend after its adoption, were taxable as income of the stockholder, involved a very liberal construction of the Amendment. To hold now that earnings both made and paid out after the adoption of the 16th Amendment cannot be taxed as income of the stockholder, if paid in the form of a stock dividend, involves an exceeding narrow construction of it. As said by Mr. Chief Justice Mar-

⁵ The hardship supposed to have resulted from such a decision has been removed in the Revenue Act of 1916, as amended, by providing in § 21 (b) that such cash dividends shall thereafter be exempt from taxation if, before they are made, all earnings made since February 28, 1913, shall have been distributed. Act of October 3, 1917, chap. 63, § 1211, 40 Stat. at L. 838; Act of February 24, 1919, chap. 18, § 201 (b), 40 Stat. at L. 1059, Comp. Stat. § 6336½b.

shall in *Brown v. Maryland*, 12 Wheat. 419, 446, 6 L. ed. 678, 688: "To construe the power so as to impair its efficacy would tend to defeat an object, in the attainment of which the American public took, and justly took, the strong interest which arose from a full conviction of its necessity."

No decision heretofore rendered by this court requires us to hold that Congress, in providing for the taxation of stock dividends exceeded the power conferred upon it by the 16th Amendment. The two cases mainly relied upon to show that this was beyond the power of Congress are *Towne v. Eisner*, 245 U. S. 418, 62 L. ed. 372, 38 L.R.A. (N.S.) 254, 38 Sup. Ct. Rep. 158, which involved a question not of constitutional power, but of statutory construction, and *Gibbons v. Mahon*, 136 U. S. 549, 34 L. ed. 525, 10 Sup. Ct. Rep. 1057, which involved a question arising between life tenant and remainderman. So far as concerns *Towne v. Eisner* we have only to bear in mind what was there said (p. 425): "But it is not necessarily true that income means the same thing in the Constitution and the [an] act." ⁶ *Gibbons v. Mahon* is even less an authority for a narrow construction of the power to tax incomes conferred by the 16th Amendment. In that case the court was required to determine how, in the administration of an estate in the District of Columbia, a stock dividend, representing profits, received after the decedent's death, should be disposed of as between life tenant and remainderman. The question was in essence: What shall the intention of the testator be presumed to have been? On this

question there was great diversity of opinion and practice in the courts of English-speaking countries. Three well-defined rules were then competing for acceptance; two of these involve an arbitrary rule of distribution, the third equitable apportionment. See *Cook, Corp.* 7th ed. §§ 552-558.

1. The so-called English rule, declared in 1799, by *Branderv. Branderv.* 4 Ves. Jr. 800, 31 Eng. Reprint, 414, that a dividend representing profits, whether in cash, stock, or other property, belongs to the life tenant if it was a regular or ordinary dividend, and belongs to the remainderman if it was an extraordinary dividend.

2. The so-called Massachusetts rule, declared in 1868 by *Minot v. Paine*, 99 Mass. 101, 96 Am. Dec. 705, that a dividend representing profits, whether regular, ordinary, or extraordinary, if in cash, belongs to the life tenant, and if in stock, belongs to the remainderman.

3. The so-called Pennsylvania rule, declared in 1857 by *Earp's Appeal*, 28 Pa. 368, that where a stock dividend is paid, the court shall inquire into the circumstances under which the fund had been earned and accumulated out of which the dividend, whether a regular, an ordinary, or an extraordinary one, was paid. If it finds that the stock dividend was paid out of profits earned since the decedent's death, the stock dividend belongs to the life tenant; if the court finds that the stock dividend was paid from capital or from profits earned before the decedent's death, the stock dividend belongs to the remainderman.

This court adopted in *Gibbons v. Mahon* as the rule of administration for the District of Columbia the so-called Massachusetts rule, the opinion being delivered in 1890 by Mr. Justice Gray. Since then the same question has come up for decision in many of the states. The so-called Massachusetts rule, although approved by this court, has found favor in only a few states.

⁶ Compare *Rugg, Ch. J.*, in *Tax Comr. v. Putnam* (*Trefry v. Putnam*) 227 Mass. 522, 533, L.R.A.1917F, 806, 116 N. E. 904: "However strong such an argument might be when urged as to the interpretation of a statute, it is not of prevailing force as to the broad considerations involved in the interpretation of an amendment to the Constitution, adopted under the conditions preceding and attendant upon the ratification of the 44th Amendment."

The so-called Pennsylvania rule, on the other hand, has been adopted since by so many of the states (including New York and California) that it has come to be known as the "American rule." Whether, in view of these facts and the practical results of the operation of the two rules, as shown by the experience of the thirty years which have elapsed since the decision in *Gibbons v. Mahon*, it might be desirable for this court to reconsider the question there decided, as some other courts have done (see 29 *Harvard L. Rev.* 551), we have no occasion to consider in this case. For, as this court there pointed out (p. 560), the question involved was one "between the owners of successive interests in particular shares," and not, as in *Bailey v. New York C. & H. R. R. Co.* 22 Wall. 604, 22 L. ed. 840, a question, "between the corporation and the government, and [which] depended upon the terms of a statute carefully framed to prevent corporations from evading payment of the tax upon their earnings."

We have, however, not merely argument, we have examples which should convince us that "there is no inherent, necessary, and immutable reason why stock dividends should always be treated as capital." *Tax Comr. v. Putnam* (*Trefry v. Putnam*) 227 Mass. 522, 533, L.R.A. 1917F, 806, 116 N. E. 904. The supreme judicial court of Massachusetts has steadfastly adhered, despite ever-renewed protest, to the rule that every stock dividend is, as between life tenant and remainderman, capital, and not income. But, in construing the Massachusetts income tax amendment, which is substantially identical with the Federal Amendment, that court held that the legislature was thereby empowered to levy an income tax upon stock dividends representing profits. The courts of England have, with some relaxation, adhered to their rule that every extraordinary dividend is, as between life tenant and remainderman, to be deemed capital. But in 1913 the judicial committee

of the Privy Council held that a stock dividend representing accumulated profits was taxable like an ordinary cash dividend. *Swan Brewery Co. v. Rex* [1914] A. C. 231. In dismissing the appeal these words of the chief justice of the supreme court of western Australia were quoted (p. 236), which show that the facts involved were identical with those in the case at bar: "Had the company distributed the £101,450 among the shareholders, and had the shareholders repaid such sums to the company as the price of the 81,160 new shares, the duty on the £101,450 would clearly have been payable. Is not this virtually the effect of what was actually done? I think it is."

Sixth: If stock dividends representing profits are held exempt from taxation under the 16th Amendment, the owners of the most successful businesses in America will, as the facts in this case illustrate, be able to escape taxation on a large part of what is actually their income. So far as their profits are represented by stock received as dividends, they will pay these taxes not upon their income, but only upon the income of their income. That such a result was intended by the people of the United States when adopting the 16th Amendment is inconceivable. Our sole duty is to ascertain their intent as therein expressed.⁷ In terse, comprehensive language befitting the Constitution, they empowered Congress "to lay and collect taxes on incomes, from whatever source derived." They intended to include thereby everything which,

⁷ Compare *Rugg, Ch. J., Tax Comr. v. Putnam, supra*: "It is a grant from the sovereign people, and not the exercise of a delegated power. It is a statement of general principles, and not a specification of details. Amendments to such a charter of government ought to be construed in the same spirit and according to the same rules as the original. It is to be interpreted as the Constitution of a state, and not as a statute or an ordinary piece of legislation. Its words must be given a construction adapted to carry into effect its purpose."

by reasonable understanding, can fairly be regarded as income. That stock dividends representing profits are so regarded, not only by the plain people, but by investors and financiers, and by most of the courts of the country, is shown beyond peradventure, by their acts and by their utterances. It seems to me clear, therefore, that Congress possesses the power which it exercised to make dividends representing profits, taxable as income, whether the medium in which the dividend is paid be cash or stock; and that it may define, as it has done, what dividends representing profits shall be deemed income. It surely is not clear that the enactment exceeds the power granted by the 16th Amendment. And, as this court has so often said, the high prerogative of declaring an act of Congress invalid should never be exercised except in a clear case.* "It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body by which any law is passed, to presume in favor of its validity, until its violation of the Constitution is proved beyond a reasonable doubt." *Ogden v. Saunders*, 12 Wheat. 213, 270, 6 L. ed. 606, 625.

Mr. Justice Clarke concurs in this opinion.

Mr. Justice Holmes, dissenting:

I think that *Towne v. Eisner*, 245

U. S. 418, 62 L. ed. 372, L.R.A. 1918D, 254, 38 Sup. Ct. Rep. 158, was right in its reasoning and result, and that on sound principles the stock dividend was not income. But it was clearly intimated in that case that the construction of the statute then before the court might be different from that of the Constitution. 245 U. S. 425. I think that the word "incomes" in the 16th Amendment should be read in a "sense most obvious to the common understanding at the time of its adoption." *Bishop v. State*, 149 Ind. 223, 280, 39 L.R.A. 278, 63 Am. St. Rep. 279, 48 N. E. 1038; *State ex rel. West v. Butler*, 70 Fla. 102, 133, 69 So. 771. For it was for public adoption that it was proposed. *M'Culloch v. Maryland*, 4 Wheat. 316, 407, 4 L. ed. 579, 601. The known purpose of this Amendment was to get rid of nice questions as to what might be direct taxes, and I cannot doubt that most people not lawyers would suppose when they voted for it that they put a question like the present to rest. I am of opinion that the Amendment justifies the tax. See *Tax Comr. v. Putnam* (*Trefry v. Putnam*) 227 Mass. 522, 532, 533, L.R.A. 1917F, 806, 116 N. E. 904.

Mr. Justice Day concurs in this opinion.

*"It is our duty, when required in the regular course of judicial proceedings, to declare an act of Congress void if not within the legislative power of the United States; but this declaration should never be made except in a clear case. Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule." *Sinking Fund Cases*, 99 U. S. 700, 718, 25 L. ed. 496, 501 (1879). See also *Legal Tender Cases*, 12 Wall. 457, 531, 20 L. ed. 287, 305 (1871); *Trade Mark Cases*, 100 U. S. 82, 96, 25 L. ed. 550, 553

(1879). See *American Doctrine of Constitutional Law*, by James B. Thayer, 7 *Harvard L. Rev.* 129, 142.

"With the exception of the extraordinary decree rendered in the *Dred Scott Case*, . . . all of the acts or the portions of the acts of Congress invalidated by the courts before 1868 related to the organization of courts. Denying the power of Congress to make notes legal tender seems to be the first departure from this rule." Haines, *American Doctrine of Judicial Supremacy*, p. 288. The first legal tender decision was overruled in part two years later (1871), *Legal Tender Cases*, 12 Wall. 457, 20 L. ed. 287, and again in 1884, *Legal Tender Cases*, 110 U. S. 421, 28 L. ed. 204, 4 Sup. Ct. Rep. 122.

ANNOTATION.

Stock dividends as income for purposes of taxation.

There has been considerable diversity of opinion, both judicial and otherwise, as to whether or not stock dividends representing accumulated profits earned by a corporation constitute income within the meaning of that term as used in the various Federal Income Tax Acts passed pursuant to the 16th Amendment of the Constitution; but the decision in the reported case (*EISNER v. MACOMBER*, ante, 1570) seems to definitely settle the question in accordance with the view that stock dividends representing surplus earnings of a corporation are not income within the meaning of the Income Tax Amendment, and that Congress, therefore, has no right to impose an income tax thereon. It will be recalled that the Income Tax Act of 1913 contained no express provision regarding stock dividends, and that the Supreme Court of the United States in *Towne v. Eisner* (1918) 245 U. S. 418, 62 L. ed. 372, L.R.A.1918D, 254, 38 Sup. Ct. Rep. 158, held that a stock dividend representing surplus profits which had been transferred to the corporation's capital account was not income within the meaning of that act. That decision reversed (1917) 242 Fed. 702, in effect overruled *Southern P. Co. v. Lowe* (1917) 238 Fed. 847, which was reversed in (1918) 247 U. S. 330, 62 L. ed. 1142, 38 Sup. Ct. Rep. 540, and in the main was in accord

with the decisions in *Lynch v. Turrish* (1916) 149 C. C. A. 649, 236 Fed. 653 (which was affirmed in (1918) 247 U. S. 221, 62 L. ed. 1087, 38 Sup. Ct. Rep. 537), and *Lynch v. Hornby* (1917) 247 U. S. 339, 62 L. ed. 1149, 38 Sup. Ct. Rep. 543. All of those cases involved stock dividends representing earnings accrued before the Act of 1913 went into effect. The Income Tax Acts of 1916, etc., evinced an intention upon the part of Congress to tax stock dividends, and thus gave rise to the question presented and decided in the *MACOMBER CASE* as regards stock dividends from earnings accumulated after adoption of the Income Tax Amendment. In the opinion of the majority the court was controlled by its decision in the *Towne Case*, although the Treasury Department had expressly ruled to the contrary. And, as a matter of fact, the Supreme Court decision in *Towne v. Eisner* (U. S.) supra, which involved the construction of the Statute of 1913, and its decision in the reported case, which involved the construction of the 16th Amendment to the Federal Constitution, were both based upon similar reasoning; namely, that a stock dividend, because of its nature, is not essentially a dividend, and its declaration is not a payment of income, but rather is a mere book adjustment. G. J. C.

L. E. BARTON et al., Appts.,

v.

LAVISA MATTHEWS.

Arkansas Supreme Court — December 15, 1919.

(— Ark. —, 216 S. W. 693.)

Subrogation — right of one paying only portion of debt.

One paying only a portion of a debt due by an heir to one of his creditors is not entitled to be subrogated to the rights of the creditor against the heir's interest in the property.

[See note on this question beginning on page 1596.]

APPEAL by defendants from a decree of the Pope County Chancery Court (Sellers, Ch.) in favor of complainant in a suit brought to quiet title to certain land. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. R. S. Hudson for appellants.

Mr. R. W. Holland, for appellee:

Plaintiff, having paid Mary J. Matthews for her full share in the estate, certainly had an equity in her interest, and the court will not destroy that equity to create one for the appellant, who purchased at judicial sale with notice of plaintiff's title.

Guynn v. McCauley, 32 Ark. 97; Black v. Walton, 32 Ark. 321.

The whole debt of the original creditor must be paid, or at least he must be satisfied before appellant can assert his right to be subrogated to the right of the original judgment creditor, Turnbow.

Jones v. Harris, 90 Ark. 51, 117 S. W. 1077; Richeson v. National Bank, 96 Ark. 594, 132 S. W. 913; Bank of Fayetteville v. Lorwein, 76 Ark. 245, 88 S. W. 919, 6 Ann. Cas. 202.

Smith, J., delivered the opinion of the court:

A. J. Matthews in his lifetime owned the south half of the north-east quarter of section 34, township 8 north, range 20 west, and executed a mortgage thereon, in which his wife Lavisa joined, to one T. M. Neal, to secure a debt of \$1,650. Matthews died, and a suit was brought against his widow and heirs to foreclose this mortgage. In the decree rendered in that cause it is recited that L. E. Barton tendered into court the sum of \$3,000 as his bid for the land, and that bid was accepted and a commissioner appointed to execute a deed to Barton. The mortgage debt, which appears to have been reduced to the sum of \$744.50, was ordered to be first paid, and the sum of \$1,600 was ordered appropriated and applied to the payment of the purchase price of the south half of the southwest quarter of section 26, township 8 north, range 20 west, which the widow had bought as a homestead for herself and her children, and the remainder was ordered to be paid to certain of the children. This decree was rendered December 11, 1916.

There were ten of these children, one of whom was named Mary J. Matthews, and against whom a judgment for \$720 was rendered in the chancery court on September 16, 1916, in favor of one J. W. Turnbow. On November 1, 1916, Mary J. Matthews executed to her mother a deed of her interest in the land in section 84, and about that time the other adult children did likewise.

On September 13, 1917, an execution issued on the Turnbow judgment, which was levied on the undivided interest of Mary J. Matthews in the land in section 34, whereupon Barton brought suit to restrain the sheriff from selling that interest. A decree was entered in that cause on October 19, 1917, in which the court found that the interest of Mary J. Matthews in the land in section 84, after discharging the mortgage indebtedness, was \$200, and that Turnbow was entitled to receive, by virtue of his judgment and execution thereunder, the sum of \$200 from the sale of said land. The court thereupon ordered that Barton pay to Turnbow the sum of \$200, whereupon he "should be subrogated to all the rights of said J. W. Turnbow under said judgment to the extent of the present interest of the said Mary J. Matthews as heir at law of the said A. J. Matthews." No question is raised as to the validity of either of these decrees.

Thereafter Lavisa Matthews, the widow of A. J. Matthews, brought this suit against Barton and Mary J. Matthews to quiet her title to the land in section 26; and an answer and cross complaint was filed by Barton, in which he prayed that he be subrogated to all the rights of J. W. Turnbow against the said Mary J. Matthews in and to her one-tenth interest in the estate of A. J. Matthews, deceased. The relief prayed by the widow was granted, and that prayed by Barton was de-

nied, and this appeal has been prosecuted from that decree.

The court properly denied Barton's prayer for subrogation, for the reason that he had paid a portion only of the debt due Turnbow. In *Richeson v. National Bank*, 96 Ark. 601, 132 S. W. 915, we quoted from *Bank of Fayetteville v. Lorwein*, 76 Ark. 245, 88 S. W. 919, 6 Ann. Cas. 202, the following statement of the law: "Before the surety can claim the right to the benefit of any of the securities, he must first pay the entire debt of the principal for the payment of which the securities were given. As is said in the case of *Bank of Fayetteville v. Lorwein*, supra: "The right of subrogation cannot be enforced until the whole debt is paid, and until the creditor be wholly satisfied there ought to and can be no interference with his rights or his securities which might, even by bare possibility, prejudice

or embarrass him in any way in the collection of the residue of his claim.' *Sheldon, Subrogation*, § 127; 4 Pom. Eq. Jur. § 1419, 27 Am. & Eng. Enc. Law, 210; *McConnell v. Beattie*, 34 Ark. 113, and cases cited in *Bank of Fayetteville v. Lorwein*, supra."

See also *Sheldon, Subrogation*, 2d ed. §§ 14, 70; *Jones v. Harris*, 90 Ark. 51, 55, 117 S. W. 1077; *Plunkett v. State Nat. Bank*, 90 Ark. 86, 88, 117 S. W. 1079; *State ex rel. Luck v. Atkins*, 53 Ark. 303, 13 S. W. 1097; *McConnell v. Beattie*, 34 Ark. 113; *Schoonover v. Allen*, 40 Ark. 132, 137, 138; *New Jersey Midland R. Co. v. Wortendyke*, 27 N. J. Eq. 658; *Morrow v. United States Mortg. Co.* 96 Ind. 21; *Lumbermen's Ins. Co. v. Sprague*, 59 Minn. 208, 60 N. W. 1101; *Muller v. Flavin*, 13 S. D. 595, 610, 83 N. W. 687; *Featherstone v. Emerson*, 14 Utah, 12, 45 Pac. 713; *Kyner v. Kyner*, 6 Watts, 221.

Decree affirmed.

ANNOTATION.

Payment of entire claim of third person as condition of subrogation.

I. General rule:

- a. Rule stated, 1596.
- b. Part payment by principal, 1599.

II. Application of rule:

- a. Surety or indorser, 1600.
- b. Person interested in encumbered property, 1605.
- c. Insurer, 1607.

III. Exceptions to rule:

- a. Conventional subrogation, 1607.
- b. Acquiescence of creditor, 1608.
- c. Estoppel, 1609.
- d. Prevention of multiplicity of suits, 1609.

I. General rule.

a. Rule stated.

The general rule is that a person is not entitled to be subrogated to the rights or securities of a creditor until the claim of the creditor against the debtor has been paid in full.

United States.—*Columbia Finance & F. Co. v. Kentucky Union R. Co.* (1894) 9 C. C. A. 264, 22 U. S. App. 54, 60 Fed. 794; *Browder v. Hill* (1905) 69 C. C. A. 499, 136 Fed. 821; *National Bank v. Rockefeller* (1909) 98 C. C. A. 8, 174 Fed. 22; *Illinois Surety Co. v. United States* (1915) 141 C. C. A. 421, 226 Fed. 665; *United States Fidelity*

& G. Co. v. Union Bank & T. Co. (1915) 143 C. C. A. 30, 228 Fed. 448; *Peoples v. Peoples Bros.* (1918) 254 Fed. 489; *New Amsterdam Casualty Co. v. Astoria* (1919) 256 Fed. 560. Compare *Re Lawrence* (1881) 5 Fed. 349.

Alabama.—*Atherton v. Tesch* (1919) 202 Ala. 448, 80 So. 832.

Arkansas.—*McConnell v. Beattie* (1879) 34 Ark. 113; *Boone County Bank v. Byrum* (1900) 68 Ark. 71, 56 S. W. 532; *Bank of Fayetteville v. Lorwein* (1905) 76 Ark. 245, 88 S. W. 919, 6 Ann. Cas. 202; *Jones v. Harris* (1909) 90 Ark. 51, 117 S. W. 1077; *Plunkett v. State Nat. Bank* (1909) 90 Ark. 86, 117 S. W. 1079; *Richeson v.*

National Bank (1910) 96 Ark. 594, 132 S. W. 913. And see the reported case (*BARTON v. MATTHEWS*, ante 1594). See also *Schoonover v. Allen* (1882) 40 Ark. 132; *State ex rel. Luck v. Atkins* (1890) 53 Ark. 303, 13 S. W. 1097.

California.—*McDermott v. Mitchell* (1879) 53 Cal. 616; *Finnell v. Jas. H. Goodman & Co. Bank* (1909) 156 Cal. 18, 103 Pac. 483; *Henshaw v. Homeland Co.* (1918) 177 Cal. 381, 170 Pac. 828.

Connecticut.—*Belcher v. Hartford Bank* (1843) 15 Conn. 381; *Stamford Bank v. Benedict* (1848) 15 Conn. 437.

Delaware.—*Fulton v. Harrington* (1885) 7 Houst. 182, 30 Atl. 956.

Georgia.—*Bridges v. Nicholson* (1856) 20 Ga. 90; *Carter v. Neal* (1858) 24 Ga. 346, 71 Am. Dec. 136; *Cherry v. Singleton* (1880) 66 Ga. 206; *Wilkins v. Gibson* (1901) 113 Ga. 31, 84 Am. St. Rep. 204, 38 S. E. 374.

Illinois.—*Darst v. Bates* (1863) 51 Ill. 439; *Conwell v. McCowan* (1870) 53 Ill. 363; *Rice v. Rice* (1883) 108 Ill. 199; *Loeb v. Fleming* (1884) 15 Ill. App. 503; *State Bank v. Bryan* (1914) 186 Ill. App. 207.

Indiana.—*Zook v. Clemmer* (1873) 44 Ind. 15; *Vert v. Voss* (1881) 74 Ind. 565; *Rice v. Morris* (1881) 82 Ind. 204; *Carithers v. Stuart* (1882) 87 Ind. 424; *Morrow v. United States Mortg. Co.* (1884) 96 Ind. 21; *Anderson v. Wilson* (1884) 100 Ind. 402; *Opp v. Ward* (1890) 125 Ind. 241, 21 Am. St. Rep. 220, 24 N. E. 974; *Stuckman v. Roose* (1897) 147 Ind. 402, 46 N. E. 680; *Springer v. Foster* (1901) 27 Ind. App. 15, 60 N. E. 720; *Fife v. Ohio Invest. Co.* (1912) 52 Ind. App. 108, 100 N. E. 692; *American Fidelity Co. v. East Ohio Sewer Pipe Co.* (1913) 53 Ind. App. 335, 101 N. E. 671; *Maryland Casualty Co. v. Cincinnati, C. C. & St. L. R. Co.* (1919) — Ind. App. —, 124 N. E. 774. See also *Rooker v. Benson* (1882) 83 Ind. 250; *Johnson v. Amana Lodge* (1883) 92 Ind. 150.

Iowa.—*Street v. Beal* (1864) 16 Iowa, 68, 85 Am. Dec. 504; *Massie v. Wilson* (1864) 16 Iowa, 390; *Johnson v. Harmon* (1865) 19 Iowa, 56; *Knowles v. Rablin* (1865) 20 Iowa, 101; *Jefferson v. Century Sav. Bank* (1909) 143 Iowa, 83, 120 N. W. 308;

James v. Day (1873) 37 Iowa, 161. Compare *Keokuk v. Love* (1870) 31 Iowa, 119; *Gilbert v. Gilbert* (1874) 39 Iowa, 657.

Kansas.—*Bartholomew v. First Nat. Bank* (1897) 57 Kan. 594, 47 Pac. 519.

Kentucky.—*Rice v. Downing* (1851) 12 B. Mon. 44; *Gaskill v. Huffaker* (1899) 20 Ky. L. Rep. 1555, 49 S. W. 770; *Willingham v. Ohio Valley Bkg. & T. Co.* (1900) 22 Ky. L. Rep. 158, 56 S. W. 706, 57 S. W. 467. See also *Hopkinsville Bank v. Rudy* (1867) 2 Bush, 326; *Lusk v. Hopper* (1867) 3 Bush, 179.

Louisiana.—*State ex rel. Moore v. Perkins* (1905) 114 La. 302, 38 So. 196; *Board of Health v. Teutonia Bank & T. Co.* (1915) 137 La. 422, 68 So. 748, Ann. Cas. 1916B, 1251; *Pickett v. Bates* (1848) 3 La. Ann. 627.

Maryland.—*Hollingsworth v. Floyd* (1827) 2 Harr. & G. 87; *Union Bank v. Edwards* (1829) 1 Gill & J. 346; *Neptune Ins. Co. v. Dorsey* (1850) 3 Md. Ch. 334; *Lawson v. Snyder* (1851) 1 Md. 71; *Grove v. Brien* (1851) 1 Md. 438; *Swan v. Patterson* (1854) 7 Md. 164; *Virginia v. State* (1870) 82 Md. 501. Compare *Bullock v. Campbell* (1850) 9 Gill, 182; *McKnew v. Duvall* (1877) 45 Md. 501.

Massachusetts.—*Richardson v. Washington Bank* (1842) 3 Met. 586; *Wilcox v. Fairhaven Bank* (1863) 7 Allen, 270. Compare *Child v. New York & N. E. R. Co.* (1880) 129 Mass. 170.

Michigan.—*Shutes v. Woodard* (1885) 57 Mich. 213, 23 N. W. 775; *Banking Comrs. v. Chelsea Sav. Bank* (1910) 161 Mich. 691, 125 N. W. 424, affirmed on rehearing (1910) 161 Mich. 704, 127 N. W. 351.

Minnesota.—*Knoblauch v. Fogle-song* (1888) 38 Minn. 459, 38 N. W. 366; *London & Northwest American Mortg. Co. v. Fitzgerald* (1893) 55 Minn. 71, 56 N. W. 464; *Lumbermen's Ins. Co. v. Sprague* (1894) 59 Minn. 208, 60 N. W. 1101. Compare *Nettle-ton v. Ramsey County Land & Loan Co.* (1893) 54 Minn. 395, 40 Am. St. Rep. 342, 56 N. W. 128.

Mississippi.—*Bank of England v. Tarleton* (1851) 23 Miss. 178; *Lee v. Griffin* (1856) 31 Miss. 632; *Magee v. Leggett* (1873) 48 Miss. 139; *Good v.*

Golden (1895) 73 Miss. 91, 55 Am. St. Rep. 486, 19 So. 100; *Fidelity & D. Co. v. Wilkinson County* (1915) 109 Miss. 879, 69 So. 865.

Missouri.—*Ames v. Huse* (1893) 55 Mo. App. 422; *Fisher v. Columbia Bldg. & L. Asso.* (1894) 59 Mo. App. 430; *Mathews v. Switzler* (1870) 46 Mo. 301.

Nebraska.—*Skinkle v. Huffman* (1897) 52 Neb. 20, 71 N. W. 1004.

New Hampshire.—*Gannett v. Blodgett* (1859) 39 N. H. 150. See also *Morrison v. Citizens Nat. Bank* (1889) 65 N. H. 253, 9 L.R.A. 282, 23 Am. St. Rep. 89, 20 Atl. 300.

New Jersey.—*New Jersey Midland R. Co. v. Wortendyke* (1876) 27 N. J. Eq. 658; *Comins v. Culver* (1882) 35 N. J. Eq. 94; *Wyckoff v. Noyes* (1882) 36 N. J. Eq. 227; *New Jersey Bldg. & L. & Invest. Co. v. Cumberland Land & Improv. Co.* (1895) 53 N. J. Eq. 644, 38 Atl. 964; *McKenna v. Corcoran* (1905) 70 N. J. Eq. 627, 61 Atl. 1026, affirmed in (1906) 71 N. J. Eq. 308, 71 Atl. 1134.

New York.—*Gifford v. Rising* (1891) 35 N. Y. S. R. 849, 12 N. Y. Supp. 430; *Sickels v. Herold* (1895) 15 Misc. 116, 36 N. Y. Supp. 488; *McGrath v. Carnegie Trust Co.* (1917) 221 N. Y. 92, 116 N. E. 787, reversing (1916) 171 App. Div. 143, 157 N. Y. Supp. 42.

North Carolina.—*Thompson v. Humphrey* (1880) 88 N. C. 416. See also *Journal Pub. Co. v. Barber* (1914) 165 N. C. 478, 81 S. E. 694.

Oklahoma.—*Marks v. Baum Bldg. Co.* (1918) — Okla. —, 175 Pac. 818.

Pennsylvania.—*Burns v. Huntingdon Bank* (1830) 1 Penr. & W. 395; *Kyner v. Kyner* (1837) 6 Watts, 221; *Coates's Appeal* (1844) 7 Watts & S. 99; *Pennsylvania Bank v. Potius* (1840) 10 Watts, 148; *Allegheny Nat. Bank v. Petty* (1887) 4 Sadler, 456, 19 W. N. C. 78, 7 Atl. 788; *Nesbit v. Martin* (1887) 4 Pa. Co. Ct. 95, affirmed in (1888) 118 Pa. 138, 4 Am. St. Rep. 584, 12 Atl. 442; *Sowers's Appeal* (1888) 1 Monaghan, 49, 15 Atl. 898; *Hoover v. Epler* (1866) 52 Pa. 522; *Brough's Estate* (1872) 71 Pa. 460; *Brice's Appeal* (1880) 95 Pa. 145; *Insurance Co. of N. A. v. Fidelity Title & T. Co.* (1889) 123 Pa. 523, 2 L.R.A.

586, 10 Am. St. Rep. 546, 16 Atl. 791; *Forest Oil Co's Appeal* (1888) 118 Pa. 138, 4 Am. St. Rep. 584, 12 Atl. 442; *Musgrave v. Dickson* (1896) 172 Pa. 629, 51 Am. St. Rep. 765, 33 Atl. 705; *Gawthrop Co. v. Fibre Specialty Co.* (1917) 257 Pa. 349, 101 Atl. 760.

Rhode Island.—See *Church's Petition* (1888) 16 R. I. 231, 14 Atl. 874; *Chapman v. Cooney* (1904) 25 R. I. 657, 57 Atl. 928.

Tennessee.—*Knaff v. Knoxville Bkg. & T. Co.* (1916) 133 Tenn. 655, 182 S. W. 232, Ann. Cas. 1917C, 1181; *Motley v. Harris* (1878) 1 Lea, 577; *Harlan v. Sweeny* (1878) 1 Lea, 682. See also *Gilliam v. Esselman* (1857) 5 Sneed, 86.

Texas.—*Cason v. Connor* (1892) 83 Tex. 26, 18 S. W. 668; *Slaughter v. Boyce* (1914) — Tex. Civ. App. —, 170 S. W. 259; *Foos Gas Engine Co. v. Fairview Land & Cattle Co.* (1916) — Tex. Civ. App. —, 185 S. W. 382. See also *Beville v. Boyd* (1897) 16 Tex. Civ. App. 491, 41 S. W. 670, 42 S. W. 318.

Utah.—*Featherstone v. Emerson* (1896) 14 Utah, 12, 45 Pac. 713.

Virginia.—*Grubbs v. Wysors* (1879) 82 Gratt. 127; *Phenix Ins. Co. v. First Nat. Bank* (1889) 85 Va. 765, 2 L.R.A. 667, 17 Am. St. Rep. 101, 8 S. E. 719; *Sipe v. Taylor* (1906) 106 Va. 231, 55 S. E. 542.

West Virginia.—*Neal v. Buffington* (1896) 42 W. Va. 327, 26 S. E. 172.

England.—*Farebrother v. Wodehouse* (1856) 23 Beav. 18, 53 Eng. Reprint, 7, 2 Jur. N. S. 1178, 26 L. J. Ch. N. S. 81, 5 Week. Rep. 12; *Gedye v. Matson* (1858) 25 Beav. 310, 53 Eng. Reprint, 655; *Cooper v. Jenkins* (1863) 32 Beav. 337, 55 Eng. Reprint, 132, 1 New Reports, 383; *Ex parte Rushforth* (1805) 10 Ves. Jr. 409, 32 Eng. Reprint, 903, 8 Revised Rep. 10. Compare *Leicestershire Bkg. Co. v. Hawkins* (1900) 16 Times L. R. 317.

Canada.—*National F. Ins. Co. v. McLaren* (1886) 12 Ont. Rep. 682.

"The doctrine of substitution only applies where the principal has been wholly paid. It cannot be permitted where he has been in part only." *Pennsylvania Bank v. Potius* (1840) 10 Watts (Pa.) 148.

"In general, it is said, a surety is not entitled to the remedies of the creditor upon or for any partial payment, nor unless the debt is fully paid and satisfied; and until satisfaction the creditor will be left in full control and possession of the debt and the remedies for its recovery, although he may be bound to use them for the benefit of the surety." *Motley v. Harris* (1878) 1 Lea (Tenn.) 577.

"The payment of the whole debt for which the surety is liable is essential to subrogation. . . . The equity of subrogation does not arise from the mere obligation to pay; it springs alone from payment. The liability of the surety for the remainder of the debt continued as well after as before such payment, and until the entire debt is paid the surety has no such equity as will entitle him to the active aid of a court of equity." *Columbia Finance & T. Co. v. Kentucky Union R. Co.* (1894) 9 C. G. A. 264, 22 U. S. App. 54, 60 Fed. 794.

"It is well established that one who is liable to pay the debt of another cannot assert his right of subrogation until he pays the debt in full,—at least, so far as the rights of a principal creditor are concerned. In order to put himself in position to ask for subrogation, he must pay the debt. Even payment of a part of the debt does not establish his right to subrogation." *Jones v. Harris* (1909) 90 Ark. 51, 117 S. W. 1077.

A statement of the rule very frequently quoted with approval is that in *New Jersey Midland R. Co. v. Wortendyke* (1876) 27 N. J. Eq. 658, wherein the court said: "The right of subrogation cannot be enforced until the whole debt is paid; and until the creditor be satisfied, there ought and can be no interference with his rights or his securities, which might, even by bare possibility, prejudice or embarrass him in any way in the collection of the residue of his claim."

"The reason of this rule is that the person ultimately entitled to subrogation cannot be permitted to interfere with or delay injuriously the right of a principal creditor to pursue every remedy open to him for the collection

of his debt." *Jones v. Harris* (Ark.) supra.

In *Columbia Finance & T. Co. v. Kentucky Union R. Co.* (Fed.) supra, the reason for the rule was stated by the court as follows: "The payment of the whole debt for which the surety is liable is essential to subrogation. If the surety, upon making a partial payment, became entitled to subrogation pro tanto, and thereby became entitled to the position of an assignee of the property to the extent of such payment, it would operate to place such surety upon a footing of equality with the holders of the unpaid part of the debt, and in case the property was insufficient to pay the remainder of the debt for which the guarantor was bound, the loss would logically fall proportionately upon the creditor and upon the surety. Such a result would be grossly inequitable."

In *Hollingsworth v. Floyd* (1827) 2 Harr. & G. (Md.) 91, the court said: "It would not subserve the ends of justice to consider the assignment of an entire debt to a surety as effected by operation of law, where he had paid but a part of it and still owed a balance to the creditor; and this court would not countenance such an anomaly as a pro tanto assignment, the effects of which could only be to give distinct interests in the same debt to both creditor and surety."

In *Harlan v. Sweeny* (1878) 1 Lea (Tenn.) 682, the reason for the rule was said to be that "subrogation is the creature of equity, and will never be allowed to the prejudice of the creditor."

In *Opp v. Ward* (1890) 125 Ind. 241, 21 Am. St. Rep. 220, 24 N. E. 974, it was said that the reason for the rule is that the law will not permit the right of action to enforce the security to be divided between the creditor and the surety, nor allow the debtor to be subjected to the inconvenience of two actions instead of one.

b. Part payment by principal.

The rule that payment of the whole debt is prerequisite to subrogation goes no further than to require the payment of the entire sum due to the creditor. Although the surety pays

only a part of the debt, if the balance is paid by the principal, the surety is entitled to be subrogated to the creditor's rights to the extent of the amount paid by him.

Georgia.—*Wilkins v. Gibson* (1901) 113 Ga. 31, 84 Am. St. Rep. 204, 38 S. E. 374.

Indiana.—*Vert v. Voss* (1881) 74 Ind. 565.

Kentucky.—*Barnes v. Barnes* (1903) 24 Ky. L. Rep. 1732, 72 S. W. 282.

Mississippi.—*Magee v. Leggett* (1873) 48 Miss. 139.

New Jersey.—*Comins v. Culver* (1882) 85 N. J. Eq. 94.

New York.—See *Gifford v. Rising* (1891) 35 N. Y. S. R. 849, 12 N. Y. Supp. 430.

North Carolina.—*Journal Pub. Co. v. Barber* (1914) 165 N. C. 478, 31 S. E. 694.

South Carolina.—*Bowen v. Barksdale* (1890) 33 S. C. 142, 11 S. E. 640.

Texas.—*Foos Gas Engine Co. v. Fairview Land & Cattle Co.* (1916) — Tex. Civ. App. —, 185 S. W. 382.

West Virginia.—*Neal v. Buffington* (1896) 42 W. Va. 327, 26 S. E. 172.

"It seems, however, that if the debt be actually discharged, the junior encumbrancer would be entitled to subrogation to the extent of the amount he contributed, though the balance of the debt was paid by the debtor or by a third person." *Wilkins v. Gibson* (Ga.) *supra*.

In *Magee v. Leggett* (Miss.) *supra*, it was said: "We do not understand the rule as requiring that the 'surety' must make entire payment; it is enough if the creditor has been fully paid, part by the principal debtor, and part by the surety. In such a case, subrogation will accrue pro tanto to the extent of his payment."

In *Comins v. Culver* (N. J.) *supra*, it appeared that a judgment was recovered against Hetfield and Culver. From this judgment an appeal was taken, and one Potter became surety on the appeal bond. The judgment was affirmed, and on it a portion of the debt was realized, Potter paying the balance. It was held that he was entitled to be subrogated pro tanto to the rights of the judgment creditor.

In *Foos Gas Engine Co. v. Fairview Land & Cattle Co.* (Tex.) *supra*, it was held that a surety on a note which was collaterally secured, who had been compelled to pay part of the debt, was entitled to subrogation to the extent of the amount paid by him, the balance of the debt having been paid by the principal. The court said: "Appellant's position that the whole debt, secured by the collateral, is required to be paid before subrogation can exist, . . . is not applicable to this case. The cases and the rule must be applied to the facts. Literally, the appellant states the general rule correctly, but there can be no objection where one is obligated and required to make a partial payment of a whole debt, dropping in behind the principal creditor as to the fund, as was done in this case."

II. Application of rule.

a. Surety or indorser.

The rule that full payment of the debt is prerequisite to subrogation has been most commonly applied in denying relief to a surety or indorser who, having paid part of the debt for which he was secondarily liable, seeks to be subrogated to the rights of the creditor.

United States.—*Columbia Finance & T. Co. v. Kentucky Union R. Co.* (1894) 22 U. S. App. 54, 9 C. C. A. 264, 60 Fed. 794; *Browder v. Hill* (1905) 69 C. C. A. 499, 136 Fed. 821; *National Bank v. Rockefeller* (1909) 98 C. C. A. 8, 174 Fed. 22; *Illinois Surety Co. v. United States* (1915) 141 C. C. A. 421, 226 Fed. 665; *United States Fidelity & G. Co. v. Union Bank & T. Co.* (1915) 143 C. C. A. 30, 228 Fed. 448; *Peoples v. Peoples Bros.* (1918) 254 Fed. 489; *New Amsterdam Casualty Co. v. Astoria* (1919) 256 Fed. 560. Compare *Re Lawrence* (1881) 5 Fed. 349.

Alabama.—*Atherton v. Tesch* (1919) 202 Ala. 448, 80 So. 832.

Arkansas.—*McConnell v. Beattie* (1879) 34 Ark. 113; *Bank of Fayetteville v. Lorwein* (1905) 76 Ark. 245, 88 S. W. 919, 6 Ann. Cas. 202; *Plunkett v. State Nat. Bank* (1909) 90 Ark. 86, 117 S. W. 1079; *Richeson v. National*

Bank (1910) 96 Ark. 594, 132 S. W. 913.

California.—McDermott v. Mitchell (1879) 53 Cal. 616; Finnell v. Jas. H. Goodman & Co. Bank (1909) 156 Cal. 18, 103 Pac. 483; Henshaw v. Homeland Co. (1918) 177 Cal. 381, 170 Pac. 826.

Connecticut.—Belcher v. Hartford Bank (1843) 15 Conn. 381; Stamford Bank v. Benedict (1843) 15 Conn. 437.

Delaware.—Fulton v. Harrington (1885) 7 Houst. 182, 30 Atl. 856.

Georgia.—Bridges v. Nicholson (1856) 20 Ga. 90; Carter v. Neal (1858) 24 Ga. 346, 71 Am. Dec. 136; Cherry v. Singleton (1880) 66 Ga. 206.

Illinois.—Darst v. Bates (1869) 51 Ill. 439; Conwell v. McCowan (1870) 53 Ill. 363; State Bank v. Bryan (1914) 186 Ill. App. 207, affirmed on other grounds in (1915) 263 Ill. 151, 108 N. E. 1004.

Indiana.—Zook v. Clemmer (1873) 44 Ind. 15; Rice v. Morris (1881) 82 Ind. 204; Rooker v. Benson (1882) 83 Ind. 250; Carithers v. Stuart (1882) 87 Ind. 424; Opp v. Ward (1890) 125 Ind. 241, 21 Am. St. Rep. 220, 24 N. E. 974; American Fidelity Co. v. East Ohio Sewer Pipe Co. (1913) 53 Ind. App. 335, 101 N. E. 671.

Iowa.—Keokuk v. Love (1870) 31 Iowa, 119; James v. Day (1873) 37 Iowa, 164; Jefferson v. Century Sav. Bank (1909) 143 Iowa, 83, 120 N. W. 308.

Kansas.—Bartholomew v. First Nat. Bank (1897) 57 Kan. 594, 47 Pac. 519.

Kentucky.—Hopkinsville Bank v. Rudy (1867) 2 Bush, 326; Lusk v. Hopper (1867) 3 Bush, 179; Gaskill v. Huffaker (1899) 20 Ky. L. Rep. 1555, 49 S. W. 770; Willingham v. Ohio Valley Bkg. & T. Co. (1900) 22 Ky. L. Rep. 158, 56 S. W. 706, 57 S. W. 467. Compare Barnes v. Barnes (1903) 24 Ky. L. Rep. 1732, 72 S. W. 282.

Louisiana.—Pickett v. Bates (1848) 3 La. Ann. 627; State ex rel. Moore v. Perkins (1905) 114 La. 302, 38 So. 196; Board of Health v. Teutonia Bank & T. Co. (1915) 137 La. 422, 68 So. 748, Ann. Cas. 1916B, 1251.

Maryland.—Hollingsworth v. Floyd (1827) 2 Harr. & G. 87; Maryland Union Bank v. Edwards (1829) 1 Gill 9 A.L.R.—101.

& J. 346; Neptune Ins. Co. v. Dorsey (1850) 3 Md. Ch. 334; Lawson v. Snyder (1851) 1 Md. 71; Swan v. Patterson (1854) 7 Md. 164; Virginia v. State (1870) 32 Md. 501. Compare Bullock v. Campbell (1850) 9 Gill, 182.

Massachusetts.—Richardson v. Washington Bank (1842) 3 Met. 536; Wilcox v. Fairhaven Bank (1863) 7 Allen, 270; Child v. New York & N. E. R. Co. (1880) 129 Mass. 170.

Michigan.—Banking Comrs. v. Chelsea Sav. Bank (1910) 161 Mich. 691, 125 N. W. 424, affirmed on rehearing (1910) 161 Mich. 704, 127 N. W. 351.

Minnesota.—Nettleton v. Ramsey County Land & Loan Co. (1893) 54 Minn. 395, 40 Am. St. Rep. 342, 56 N. W. 128; Lumbermen's Ins. Co. v. Sprague (1894) 59 Minn. 208, 60 N. W. 1101.

Mississippi.—Bank of England v. Tarleton (1851) 23 Miss. 178; Magee v. Leggett (1873) 48 Miss. 139; Good v. Golden (1895) 73 Miss. 91, 55 Am. St. Rep. 486, 19 So. 100; Fidelity & D. Co. v. Wilkinson County (1915) 109 Miss. 879, 69 So. 865.

Missouri.—Ames v. Huse (1893) 55 Mo. App. 422; Fisher v. Columbia Bldg. & L. Asso. (1894) 59 Mo. App. 430; Mathews v. Switzler (1870) 46 Mo. 301.

New Hampshire.—Morrison v. Citizens Nat. Bank (1889) 65 N. H. 253, 9 L.R.A. 282, 23 Am. St. Rep. 39, 20 Atl. 300.

New Jersey.—New Jersey Midland R. Co. v. Wortendyke (1876) 27 N. J. Eq. 658; McKenna v. Corcoran (1905) 70 N. J. Eq. 627, 61 Atl. 1026, affirmed in (1906) 71 N. J. Eq. 303, 71 Atl. 1134.

New York.—Gifford v. Rising (1891) 35 N. Y. S. R. 849, 12 N. Y. Supp. 430; Sickels v. Herold (1895) 15 Misc. 116, 36 N. Y. Supp. 488, modified on other grounds in (1896) 149 N. Y. 332, 43 N. E. 852; McGrath v. Carnegie Trust Co. (1917) 221 N. Y. 92, 116 N. E. 787, reversing (1916) 171 App. Div. 143, 157 N. Y. Supp. 42.

North Carolina.—Thompson v. Humphrey (1880) 83 N. C. 416; Journal Pub. Co. v. Barber (1914) 165 N. C. 478, 81 S. E. 694.

Pennsylvania.—Gawthrop Co. v.

Fibre Specialty Co. (1917) 257 Pa. 349, 101 Atl. 760; Burns v. Huntingdon Bank (1830) 1 Penr. & W. 395; Kyner v. Kyner (1837) 6 Watts, 221; Pennsylvania Bank v. Potius (1840) 10 Watts, 148; Coates's Appeal (1844) 7 Watts & S. 99; Allegheny Nat. Bank v. Petty (1887) 4 Sadler, 456, 19 W. N. C. 78, 7 Atl. 788; Nesbit v. Martin (1887) 4 Pa. Co. Ct. 95, affirmed in (1888) 118 Pa. 138, 4 Am. St. Rep. 584, 12 Atl. 442; Sowers's Appeal (1888) 1 Monaghan, 49, 15 Atl. 898; Hoover v. Epler (1866) 52 Pa. 522; Brough's Estate (1872) 71 Pa. 460; Brice's Appeal (1880) 95 Pa. 145; Forest Oil Co's Appeal (1888) 118 Pa. 138, 4 Am. St. Rep. 584, 12 Atl. 442; Musgrave v. Dickson (1896) 172 Pa. 629, 51 Am. St. Rep. 765, 33 Atl. 705.

Rhode Island.—Church's Petition (1888) 16 R. I. 231, 14 Atl. 874.

Tennessee.—Motley v. Harris (1878) 1 Lea, 577; Harlan v. Sweeny (1878) 1 Lea, 682; Gilliam v. Esselman (1857) 5 Sneed, 86; Knaff v. Knoxville Bkg. & T. Co. (1916) 133 Tenn. 655, 182 S. W. 232, Ann. Cas. 1917C, 1181.

Texas.—Foos Gas Engine Co. v. Fairview Land & Cattle Co. (1916) — Tex. Civ. App. —, 185 S. W. 382; Slaughter v. Boyce (1914) — Tex. Civ. App. —, 170 S. W. 259.

Virginia.—Grubbs v. Wysors (1879) 32 Gratt. 127; Sipe v. Taylor (1906) 106 Va. 231, 55 S. E. 542.

West Virginia.—Neal v. Buffington (1896) 42 W. Va. 327, 26 S. E. 172.

England.—Ex parte Rushforth (1805) 10 Ves. Jr. 409, 32 Eng. Reprint, 903, 8 Revised Rep. 10; Farebrother v. Wodehouse (1856) 23 Beav. 18, 53 Eng. Reprint, 7, 2 Jur. N. S. 1178, 26 L. J. Ch. N. S. 81, 5 Week. Rep. 12; Gedy v. Matson (1858) 25 Beav. 310, 53 Eng. Reprint, 655; Cooper v. Jenkins (1863) 32 Beav. 337, 55 Eng. Reprint, 132, 1 New Reports, 383.

Thus, in *Willingham v. Ohio Valley Bkg. & T. Co.* (1900) 22 Ky. L. Rep. 158, 57 S. W. 467, it appeared that the maker of a note deposited with a bank two policies of life insurance, from which the bank might realize a sum by surrender, as security for the note and for other debts owed by

the maker to the bank. It was held that a surety who had been compelled to pay the note was not entitled to subrogation while the other debts owed by the maker to the bank were still unpaid. The court said: "If all the debts were paid, either by the application of the insurance money or from the collateral, and any fund or security be left in the hands of appellee, appellant might be entitled to be substituted to the rights of appellee, or to have an accounting; but on the admission of appellant such facts do not appear."

Similarly, it was shown in *State Bank v. Bryan* (1914) 186 Ill. App. 207, that collateral was pledged to secure the payment of several notes with different sureties. In passing on the right of the sureties for the first note to subrogation, the court said: "Had appellants paid the note and the collateral had been pledged to secure that note alone, they would have been subrogated to the rights of the creditor in the collateral; but that was not the case. A creditor cannot be compelled to surrender collateral on the payment of a part only of the debt it secures, and it is quite clear that sureties paying a part of the debt only cannot enforce the right of subrogation in the same way and to the same extent as in cases where the entire debt is paid."

It appeared in *National Bank v. Rockefeller* (1909) 98 C. C. A. 8, 174 Fed. 22, that a corporation gave its note for a specified sum to a bank, depositing other notes as collateral to secure the payment of the first note, and also as security for any other debt which the corporation might owe the bank. It was held that a guarantor who paid the note was not entitled to be subrogated to the rights of the bank in the collateral, where it appeared that a prior indebtedness of the corporation to the bank remained unpaid.

So, in *Illinois Surety Co. v. United States* (1915) 141 C. C. A. 421, 226 Fed. 665, it appeared that a bond was given by a bank as principal and a surety company as surety on the designation of the bank as a depository

of moneys for bankrupt estates. In an action against the surety company by the United States for the use and benefit of a trustee in bankruptcy, it was held that no right of subrogation existed until the government should have obtained from the principal or the surety, payment not merely of the penalty, but of the debtor's entire obligation.

It appeared in *Plunkett v. State Nat. Bank* (1909) 90 Ark. 86, 117 S. W. 1079, that the payee of a note, signed by the maker for the accommodation of a third person, held as collateral certain other notes deposited with him by the third person. It was held that the accommodation maker could not demand subrogation without having first paid the entire amount of the note, and could not force the maker into a court of equity for the purpose of enforcing the collection of the collateral.

So, it was shown in *Peoples v. Peoples Bros.* (1918) 254 Fed. 489, that a surety company signed a contractor's bond conditioned for the payment by the contractor of all claims for labor performed or material furnished in the performance of the contract. A receiver was afterwards appointed for the contractor, and the surety company thereupon paid the amount of its bond into court, the bond amounting to 64.8 per cent of the claims of creditors. Subsequently the receiver completed the contract, and the surety company sought to be subrogated to the fund paid to the receiver. It was held that the surety company was not entitled to subrogation until the claims for labor and material had been paid in full. The court said: "In the present case the creditors protected by the bond, namely, the materialmen, have not been paid in full. They are entitled as creditors of the contractor to look for payment to the fund paid by the city and the railroad to the receiver upon completion of the contract, and until they are paid in full the surety has no equity superior to theirs. The surety is merely a general creditor of Peoples Brothers to the extent of the amount which it paid

into court, thus relieving the contractor, its principal, to that extent."

There was involved in *State ex rel. Moore v. Perkins* (1905) 114 La. 302, 38 So. 196, a bond given by a sheriff, conditioned that he should pay into the state treasury all licenses and taxes collected. The surety on the bond, on default of the principal, paid the entire amount of the bond, but was denied the right of subrogation, as the debt of which the bond secured a part had not been paid in full.

In *Sieckels v. Herold* (1895) 15 Misc. 116, 36 N. Y. Supp. 488, it appeared that the state bank examiner objected to certain securities of the nominal value of \$65,000, which he found among the assets of a bank, and which he deemed impaired the capital of the bank to the extent of \$50,000. The directors of the bank gave their notes to the extent of \$50,000, and the state superintendent of banking sanctioned the continuance of business by the bank. Subsequently the bank was closed, and the directors sought subrogation to the rejected securities. In denying the right, the court said: "Treating the defendant and the makers of the other notes as sureties entitled to subrogation with respect to the \$65,000 of questionable assets which their notes were intended to secure, the receiver's right to hold such assets until the whole indebtedness of the sureties is paid cannot be disputed, and until payment of the whole \$50,000 by the sureties they are not entitled to such assets."

The plaintiff in *Thompson v. Humphrey* (1880) 83 N. C. 416, who was surety on a guardian's bond, having been compelled to pay to one of the wards the amount of a judgment recovered in a suit on the bond, instituted an action to become subrogated to the rights of the guardian against one to whom the latter had loaned the money of the wards. The plaintiff was held not to be entitled to subrogation, it appearing that the guardian did not settle with all the other wards, but it was held that the debt due should be paid into court to await an adjustment of the rights of the parties.

The evidence disclosed in *Swan v. Patterson* (1854) 7 Md. 164, that a mortgage was assigned by the mortgagee to one person, and the equity of redemption was transferred by the mortgagor to another, who created subsequent encumbrances on the property and gave his notes, with an indorser as surety, to the assignee of the original mortgage, "for interest due thereon." These interest notes were paid at maturity by the indorser, who claimed, by reason of such payment, to be subrogated to this extent, to the rights of the original mortgagee, and therefore entitled to priority over the subsequent mortgages. It appeared that he took no assignment from the original mortgagee. The court rejected his claim, saying: "It may be that . . . when he . . . indorsed these notes he supposed he would have the benefit of the security held by the creditor; but if this was his view, he should have entitled himself to such indemnity by an agreement to that effect, or by an assignment *pro tanto* when the notes were paid."

In *Rooker v. Benson* (1882) 83 Ind. 250, it was held that where a mortgage debt is divided into two distinct parts, and a surety for one of the parts pays it, he may at once be regarded as an assignee *pro tanto* of the security, though his rights must be postponed to the rights of the creditor or the assignee until the other part of the debt shall have been paid.

The rule has been applied in several instances where a bank having public funds on deposit has become insolvent, and the surety on a bond given to secure the deposits has been compelled to pay the loss to the extent of the amount named in the bond, the amount paid, however, being less than the total claim against the bank. In such cases it has been held that the surety is not entitled to share in the dividends paid by the insolvent bank to its creditors for an amount proportionate to that which the payment made by him bears to the total claims due by the bank to the principal. *Fidelity & D. Co. v. Wilkinson County* (1915) 109 Miss. 879, 69 So. 865; *Banking Comrs. v. Chelsea Sav. Bank*

(1910) 161 Mich. 691, 125 N. W. 424, affirmed on rehearing (1910) 161 Mich. 704, 127 N. W. 351; *Board of Health v. Teutonia Bank & T. Co.* (1915) 137 La. 422, 68 So. 748, Ann. Cas. 1916B, 1251; *Knaffl v. Knoxville Bkg. & T. Co.* (1915) 133 Tenn. 655, 182 S. W. 232, Ann. Cas. 1917C, 1181. See also *Peoples v. Peoples Bros. (Fed.)* supra, this subdivision, wherein the same principle is applied to a bond of a different character. Compare *Ex parte Rushforth* (1805) 10 Ves. Jr. 409, 32 Eng. Reprint, 903, 8 Revised Rep. 10.

Thus, the petitioner in *Knaffl v. Knoxville Bkg. & T. Co.* (Tenn.) supra, was a surety on a bond to secure a city in the deposit of money in a bank. The bank having become insolvent, the surety was obliged to pay the amount of the bond to the city, and thereupon sought to be subrogated to the rights of the city. The petition did not aver that this payment was in full of all sums of money deposited by the city, but, on the contrary, it was admitted that the city had on deposit more than the amount of the bond, and had received only a 30 per cent dividend. A demurrer to the petition was sustained, *Fancher, J.*, saying: "A surety is not entitled to subrogation until the debt is paid in full, the creditor in the meantime left in control of the debt and all the remedies for collection. A *pro tanto* assignment or subrogation will not be allowed." But in *Ex parte Rushforth* (Eng.) supra, a bond with surety in the sum of \$10,000 was conditional for the payment of such sums as should be advanced to the principal. The sum of \$20,000 was advanced to the principal, who then became bankrupt. The surety paid the penalty and sought subrogation against the estate of the principal. In delivering the opinion of the court Lord Eldon said: "I think the bankers are not entitled in equity to say, as against the surety, that their demand is more than \$10,000, the amount of the bond he has given, upon which he would be *prima facie* entitled to stand in their place; as to the residue of their debt, they ought to be considered, if I may so express it, as their own insurers."

It has been held that where several notes are secured by a mortgage, and a personal judgment is obtained on the first note due, a surety who is compelled to pay that judgment cannot be subrogated to the creditor's mortgage security, unless he pays the entire claim secured by the mortgage, or the same is otherwise satisfied without exhausting the mortgaged property. *Atherton v. Tesch* (1919) 202 Ala. 448, 80 So. 832; *Vert v. Voss* (1881) 74 Ind. 565; *Rice v. Morris* (1881) 82 Ind. 204; *Carithers v. Stuart* (1882) 87 Ind. 424; *London & N. W. American Mortg. Co. v. Fitzgerald* (1893) 55 Minn. 71, 56 N. W. 464. See also *Wilcox v. Fairhaven Bank* (1863) 7 Allen (Mass.) 270. Compare *Nettleton v. Ramsey County Land & Loan Co.* (1893) 54 Minn. 395, 40 Am. St. Rep. 342, 56 N. W. 128.

Thus, in *Atherton v. Tesch* (Ala.) supra, the court said: "It appears without dispute that the mortgage was given to secure a single debt,—that is, the purchase price of real estate remaining unpaid,—and the notes were executed for the convenience of the parties, for the proper distribution of said debts among those interested therein, and payable in instalment periods, evidently for the convenience of the mortgagor. We have but a single security for all the notes, which represented in fact but one debt." But in *Nettleton v. Ramsey County Land & Loan Co.* (Minn.) supra, wherein the defendant invoked the rule that the surety was not entitled to be subrogated until he had paid the entire debt, the court said: "But that is not applicable where separate notes or instalments are paid, and the remedy is upon the promise or contract of the principal debtor to pay an entire debt payable in instalments, and not the apportionment or application for his benefit of securities in the hands of the creditor."

b. Person interested in encumbered property.

The rule that there is no right to subrogation until the entire debt is paid is applicable to the case of a junior mortgagee, or other person interested in encumbered property, who

pays off a part of the senior encumbrance, the right of subrogation being denied in such a case.

Georgia.—*Wilkins v. Gibson* (1901) 113 Ga. 31, 84 Am. St. Rep. 204, 38 S. E. 374.

Indiana.—*Morrow v. United States Mortg. Co.* (1884) 96 Ind. 21; *Anderson v. Wilson* (1885) 100 Ind. 402; *Stuckman v. Roose* (1897) 147 Ind. 402, 46 N. E. 680; *Springer v. Foster* (1901) 27 Ind. App. 15, 60 N. E. 720.

Illinois.—*Loeb v. Fleming* (1884) 15 Ill. App. 503.

Iowa.—*Street v. Beal* (1864) 16 Iowa, 68, 85 Am. Dec. 504; *Massie v. Wilson* (1864) 16 Iowa, 390; *Johnson v. Harmon* (1865) 19 Iowa, 56; *Knowles v. Rablin* (1865) 20 Iowa, 101; *Hubbard v. Le Barron* (1900) 110 Iowa, 443, 81 N. W. 681. Compare *Gilbert v. Gilbert* (1874) 39 Iowa, 657.

Michigan.—*Shutes v. Woodard* (1885) 57 Mich. 213, 23 N. W. 775.

Minnesota.—*Knoblauch v. Fogle-song* (1888) 38 Minn. 459, 38 N. W. 366.

Nebraska.—*Skinkle v. Huffman* (1897) 52 Neb. 20, 71 N. W. 1004.

New Hampshire.—*Gannett v. Blodgett* (1859) 39 N. H. 150.

New Jersey.—*Wyckoff v. Noyes* (1882) 36 N. J. Eq. 227.

Oklahoma.—*Marks v. Baum Bldg. Co.* (1918) — Okla. —, 175 Pac. 818.

Pennsylvania.—*Sowers's Appeal* (1888) 1 Monaghan, 49, 15 Atl. 898.

Rhode Island.—*Chapman v. Cooney* (1904) 25 R. I. 657, 57 Atl. 928.

Texas.—*Cason v. Connor* (1892) 83 Tex. 26, 18 S. W. 668.

Utah.—*Featherstone v. Emerson* (1896) 14 Utah, 12, 45 Pac. 713.

Thus, in *Johnson v. Harmon* (1865) 19 Iowa, 56, it appeared that the plaintiff was a junior and the defendant a senior mortgagee of certain real property. The senior mortgage was foreclosed, the plaintiff not being made a party. The defendant, on an execution issued on the order of foreclosure, purchased the property for a sum less than the debt secured by the mortgage. The plaintiff thereupon brought a proceeding to redeem by paying the sum at which the property was bid in under the execution, and the defendant in-

sisted that he could redeem only by paying the debt secured by his mortgage. The court below sustained the defendant's view, and on appeal this judgment was affirmed.

So, in *Knowles v. Rablin* (1865) 20 Iowa, 101, the same rule was applied to a similar state of facts, the court saying: "Another limitation upon the right of redemption from a mortgage is that the person seeking to redeem must pay not only the amount bid by the mortgagee at the foreclosure sale, but must pay the whole mortgage debt. . . . In case the redemption is so made, the party redeeming will be subrogated to all the rights of such senior mortgagee. The plaintiff not having tendered a sufficient amount to entitle him to redeem, nor offered to pay whatever sum might be found due, or to pay any other sum than the amount so tendered, did not show himself entitled to any relief."

Similarly, in *Loeb v. Fleming* (1884) 15 Ill. App. 503, the court said: "In order to be entitled to subrogation or substitution, by operation of law, to the rights and interests of the senior mortgagee in lands, by redemption, the party redeeming must pay the entire amount of an encumbrance which is senior to his own estate."

It was likewise said, in *Street v. Beal* (1864) 16 Iowa, 68, 85 Am. Dec. 504: "The rule seems to be well settled that a purchaser of a portion of the mortgage property cannot redeem the mortgage without paying the whole debt, in which event, it may be stated, he will stand in the place of the party whose interest in the estate he discharges, and will hold it till the others interested with him pay their shares of the debt, according to the proportional value of the respective parties."

To the same effect is *Knoblauch v. Foglesong* (1888) 38 Minn. 459, 38 N. W. 366, wherein the court said: "No court of equity would subrogate a party to the rights of a mortgagee under a first mortgage, when he also held a second mortgage for the payment of which the party seeking the subrogation was liable, unless he paid both mortgages."

In *Featherstone v. Emerson* (Utah) supra, it was said: "As a general rule, the right of subrogation cannot be enforced until the whole debt is paid or tendered to the creditor. . . . Until the creditor is paid, there cannot ordinarily be any interference with his security which might prejudice or embarrass him in collecting the balance of his claim."

A junior encumbrancer, who has paid the interest and certain instalments on the principal of the prior encumbrance is not, in the absence of some special agreement, entitled to subrogation until the whole debt has been paid; that is, the rights of the mortgagee must be entirely divested before another person can be substituted, by mere operation of law, in his place, as respects those rights, so as to have them vest in him. *Chapman v. Cooney* (1904) 25 R. I. 657, 57 Atl. 928.

One who pays a part of a series of notes secured by a chattel mortgage is not entitled to be subrogated to the rights of the creditor until all of the notes for which the security is given have been paid. *Cason v. Connor* (1892) 83 Tex. 26, 18 S. W. 668.

In *Hubbard v. Le Barron* (1900) 110 Iowa, 443, 81 N. W. 681, the plaintiff, who had paid part of the amount of a chattel mortgage, sought to be subrogated to the mortgagee's rights, to the extent of the payment made. In denying the right of subrogation, the court said: "Binkley's debt has been only partially paid. Under no circumstances would the right claimed exist, except on full satisfaction of the prior encumbrance."

Not only the entire debt, but the expenses incurred in enforcing the mortgage, must be paid. *Shutes v. Woodward* (1885) 57 Mich. 213. And see *McKenna v. Corcoran* (1905) 70 N. J. Eq. 627, 61 Atl. 1026, affirmed in (1906) 71 N. J. Eq. 303, 71 Atl. 1134.

However, it has been held that when the indebtedness secured by a prior lien is payable in instalments, a junior lienholder may, on the payment of an instalment for the protection of his own security, be subrogated, as against the debtor, to the

rights of the holder of the senior lien, subject to any balance due to the holder thereof. *J. B. Watkins Land Mortg. Co. v. Williams* (1901) 63 Kan. 30, 64 Pac. 976; *Skinkle v. Huffman* (1897) 52 Neb. 20, 71 N. W. 1004; *New Jersey Bldg. Loan & Invest. Co. v. Cumberland & Improv. Co.* (1895) 53 N. J. Eq. 644, 33 Atl. 964; *Penn v. Atlantic & G. W. R. Co.* (1871) 3 Ohio Dec. Reprint, 512; *Marks v. Baum Bldg. Co.* (1918) — Okla. —, 175 Pac. 818. And see *Schell City Bank v. Reed* (1893) 54 Mo. App. 94, wherein the same principle was applied to the payment of one of several mortgages.

Thus, in *New Jersey Bldg. Loan & Invest. Co. v. Cumberland & Improv. Co.* (1895) 53 N. J. Eq. 644, 33 Atl. 964, supra, *Beasley, Ch. J.*, said: "The moneys in question were paid on the first mortgage by the second mortgagee, in order to strengthen his own security. Unless such payments are to be regarded as mere gratuities to the mortgagor, which, conspicuously, was not the intention, they of right should be made to inure to the benefit of him who paid them, and this equitable result can be brought about by a resort to the doctrine of subrogation."

c. Insurer.

An insurer is not entitled to be subrogated to the rights of the insured unless the payment by the insurer constitutes full satisfaction of the claim of the insured against the person as to whom subrogation is sought. *Maryland Casualty Co. v. Cincinnati, C. C. & St. L. R. Co.* (1919) — Ind. App. —, 124 N. E. 774; *Insurance Co. of N. A. v. Fidelity Title & T. Co.* (1889) 123 Pa. 523, 2 L.R.A. 586, 10 Am. St. Rep. 546, 16 Atl. 791; *Kernochan v. New York Bowery F. Ins. Co.* (1858) 17 N. Y. 428; *Newcomb v. Cincinnati Ins. Co.* (1872) 22 Ohio St. 382, 10 Am. Rep. 746; *Phenix Ins. Co. v. First Nat. Bank* (1889) 85 Va. 765, 2 L.R.A. 667, 17 Am. St. Rep. 101, 8 S. E. 719; *National F. Ins. Co. v. McLaren* (1886) 12 Ont. Rep. 682.

In *Phenix Ins. Co. v. First Nat. Bank*, 85 Va. 765, 2 L.R.A. 667, 17 Am. St. Rep. 101, 8 S. E. 719, supra, the question involved was whether an insurer, who had paid a loss to a mort-

gagee, the amount thereof covering only a part of the mortgage debt, could acquire, as against the mortgagee, a right to take and demand the evidence of the debt secured, to the amount of the loss paid by it. It was held that the creditor's debt must be paid in full before the insurer could be subrogated to his rights.

It was shown in *Maryland Casualty Co. v. Cincinnati, C. C. & St. L. R. Co.* (Ind.) supra, that an employee of a construction company, while working on a railroad bridge, was injured by the negligent act of the railroad company, and the employer was ordered to pay him weekly compensation for a stipulated period of time. The insurance company thereupon instituted action against the railroad company, claiming that as it was obligated by the law of the state to pay all medical and hospital expenses for the first thirty days of the injury, and had in fact paid such expenses, and as it was also liable for the payment of the compensation award, it should be subrogated to the rights of the injured employee. It was held that the right of subrogation did not exist in favor of the insurance company until the entire amount of the award had been paid.

III. Exceptions to rule.

a. Conventional subrogation.

Where there is a conventional subrogation, resulting from an express agreement with the creditor to the effect that the security held by him shall be assigned to the person paying or shall be kept alive for his benefit, it is no objection that it extends to a part only of the debt. *Loeb v. Fleming* (1884) 15 Ill. App. 503; *Springer v. Foster* (1901) 27 Ind. App. 15, 60 N. E. 720; *Maryland Casualty Co. v. Cincinnati, C. C. & St. L. R. Co.* (1919) — Ind. App. —, 124 N. E. 774; *Morrow v. United States Mortg. Co.* (1884) 96 Ind. 21; *Brice's Appeal* (1880) 95 Pa. 145. See also *Stuckman v. Roose* (1896) 147 Ind. 402, 46 N. E. 680.

Thus, in *Morrow v. United States Mortg. Co.* (1884) 96 Ind. 21, supra, the court said: "If Morrow had paid and taken up the coupon notes in con-

troversy as a junior encumbrancer merely, and without any express agreement with the mortgage company, he would, at his option, have become subrogated to the rights of the company in the notes, subject only to the condition that he could not enforce their payment as a lien against the mortgaged property while any part of the mortgage debt thereafter to become due remained unpaid. . . . But the express agreement which the evidence tended to establish was that Morrow, on paying and taking up the notes, should be permitted to hold them in the same manner as the company had theretofore held them, that is to say, as a prior and subsisting lien, enforceable against the mortgaged property by appropriate foreclosure proceedings. That amounted, in legal effect, to a waiver on the part of the company of its right to insist upon a postponement of Morrow's claim for reimbursement until the remainder of the mortgage debt was satisfied, as it might have done in the absence of such an agreement, and fairly overcame the presumption, which would have been otherwise operative against him, that he took up the coupon notes merely to protect his title acquired through the junior mortgage."

This principle was likewise recognized in *Stuckman v. Roose* (Ind.) *supra*, wherein it was said: "The findings do not support a claim to conventional subrogation, that is, where, by the agreement of the creditor and the party making the partial payment, the amount paid is to be kept on foot for the protection of the latter. Such subrogation has recognition, upon the authorities. . . . But subrogation in the absence of such agreement is not permitted, where the debt is not fully paid."

b. Acquiescence of creditor.

Though there is no such agreement as to constitute a conventional subrogation, if the creditor acquiesces in or consents to the assertion of a subrogation *pro tanto*, by one who has paid a portion of the debt, no one else is entitled to object thereto. *Boone County Bank v. Byrum* (1900) 68 Ark. 71, 56 S. W. 532; *Fisher v. Columbia*

Bldg. & L. Asso. (1894) 59 Mo. App. 430; *Journal Pub. Co. v. Barber* (1914) 165 N. C. 478, 81 S. E. 694; *Motley v. Harris* (1878) 1 Lea (Tenn.) 577; *Gedye v. Matson* (1858) 25 Beav. 310, 53 Eng. Reprint, 655.

Thus, in *Fisher v. Columbia Bldg. & L. Asso.* (1894) 59 Mo. App. 430, *supra*, the court, after stating the general rule, said: "But this is a matter entirely between the surety and the creditor holding the securities. The principal debtor and other creditors can make no such objection to the right of subrogation. As to them it is immaterial whether the surety has or has not completely satisfied the debt. If the creditor holding the securities shall see proper to admit the surety, who has made a partial payment, to a proportionate share therein, it does no legal or equitable wrong to their interests, and they cannot be heard to object."

So, in *Journal Pub. Co. v. Barber* (1914) 165 N. C. 478, 81 S. E. 694, the court said: "It is contended that a payment of a part of the secured debt is not sufficient to induce the court to act in behalf of the plaintiff. But this is an erroneous view of the principle invoked, in its application to the facts. The general principle undoubtedly is that such a payment will not be sufficient, but there are exceptions to this rule. . . . *Pro tanto* subrogation applies except where it interferes with the rights of the creditor holding the security, and a part payment is sufficient, as against the debtor and mortgagor, to raise the equity in behalf of the one who has made the partial payment. He is entitled to the benefit of the equity, but subordinate to the creditor's prior right, and the latter must not be prejudiced by allowing it."

In *Motley v. Harris* (1878) 1 Lea (Tenn.) 577, it was held that creditors in a trust deed, other than those to whom the surety was bound, could not object to a subrogation on payment of only a part of the debt. The court, referring to the general rule, said: "It is clear, however, we think, that this rule is applicable in strictness only to the rights of the surety as against the creditor who was the se-

curity, and is for his protection alone, or mainly for his benefit. He is left in entire control of the debt and all securities for the payment, until it is satisfied. This is manifestly just, and is the principle on which it rests. . . . But the principle does not apply when the objection comes from other creditors, as in this case, who seek to gain an advantage by subrogating the rights of this security to their claims by asserting a right which only belongs to the creditor who holds the security."

So it has been said that it is not essential to the right of subrogation that the surety should have paid the entire amount of the debt in money, provided the creditor is satisfied. *Knighton v. Curry* (1878) 62 Ala. 404; *Schoonover v. Allen* (1882) 40 Ark. 132; *Ft. Jefferson Improv. Co. v. Du-poyster* (1902) 112 Ky. 792, 2 L.R.A. (N.S.) 263, 66 S. W. 1048; *Nettleton v. Ramsey County Land & Loan Co.* (1898) 54 Minn. 395, 40 Am. St. Rep. 342, 56 N. W. 128; *Combs v. Candler* (1897) 95 Va. 7, 27 S. E. 815.

c. Estoppel.

If by mutual mistake, or by reason of representations of the creditor, a part payment is believed to be in full, the person making it is entitled to subrogation, the creditor being estopped to deny his right thereto. *Cason v. Connor* (1892) 83 Tex. 26, 18 S. W. 668; *Sowers's Appeal* (1888) 1 Monaghan (Pa.) 49, 15 Atl. 898.

Thus, in *Cason v. Connor* (Tex.) supra, it appeared that a chattel mortgage was given to secure a series of promissory notes. The intervener, having paid some of the notes, claimed the right to be subrogated to the security. The court said: "We are of the opinion that if the intervener paid the \$160 to the plaintiffs, under the belief arising from the conduct or representations of the plaintiffs, made to him, that this amount was the full extent of their claim to or lien upon the mortgaged property, then, if he was thereby misled or deceived, he should be allowed a priority of liens, and would be entitled to the satisfaction of his claim out of the property before the plaintiffs should be permitted to

participate in the proceeds of the sale of such property."

It was shown in *Sowers's Appeal* (Pa.) supra, that the purchaser of land which was encumbered with two mortgages paid into court money to pay the senior mortgage, but, through an error of calculation about interest and costs, not quite enough was paid in. It was held that he became subrogated to the rights of the judgment creditor to the extent of the payment.

d. Prevention of multiplicity of suits.

Subrogation has been granted in case of a part payment, only in order to prevent a multiplicity of suits, or a circuitry of action, where no detriment will result to the creditor from allowing subrogation. *State ex rel. Luck v. Atkins* (1890) 53 Ark. 303, 13 S. W. 1097; *Lusk v. Hopper* (1867) 3 Bush (Ky.) 179.

In *State ex rel. Luck v. Atkins* (Ark.) supra, it was held that to avoid circuitry of action a court of equity would allow the sureties on the bond of a deceased guardian to be subrogated to the right of the wards to subject the guardian's homestead to the payment of a debt due by him to the wards, before requiring the sureties to pay the amount of the guardian's default, it appearing that the wards, as children and heirs of the guardian, were entitled to hold the homestead.

So, in *Lusk v. Hopper* (Ky.) supra, holding that in a suit to foreclose a vendor's lien a surety who had not paid the debt in full might be subrogated to the lienholder's rights, the court said: "Although S. Lusk, as surety, could not be subrogated to the lien of Pearl on the land until he had paid the debt to the creditor, still, if he had paid the debt, he would have had the right to subrogation; and, as the suit was in equity, it was proper that the chancellor should have enforced the lien, to save a multiplicity of suits, and especially as the creditor asked that it should be done."

So it seems that, on part payment, the surety is entitled, the debt being due, to go into equity by a bill of quia timet against the creditor and the debtor, and compel the latter to make

payment, so as to exonerate himself from responsibility, and in such suit the surety may have subrogation to the creditor's liens after satisfaction out of the debtor's property of the balance due the creditor.

Neal v. Buffington (1896) 42 W. Va. 327, 26 S. E. 172, wherein it was said: "A surety cannot have a decree in his favor for the money, or compel the creditor to assign, or cede, or in any way detract from his securities until full payment. Till then he cannot prejudice the creditor. But when he pays part, he is substituted to the creditor's lien to that extent, subject to the creditor's priority for the balance. But before paying anything he

has rights. On the principle of *quia timet*, he can sue to compel the principal to pay the debt, to his relief." See also *Moore v. Topliff* (1883) 107 Ill. 241. Compare *Darst v. Bates* (1869) 51 Ill. 439; *Conwell v. McCowan* (1870) 53 Ill. 363.

And it has been held that, although sureties are not entitled to subrogation until they have paid the entire debt of the principal, a court of equity, in foreclosing a mortgage, will decree that if the sureties pay the debt they shall be subrogated to the rights of the mortgagee. *Manning v. Ferguson* (1897) 103 Iowa, 561, 72 N. W. 762. And see *Keokuk v. Love* (1870) 31 Iowa, 119. W. F. F.

THOMAS C. MILLARD, Trustee, etc., of New Milford Hat Company,
Bankrupt,

v.

WILLIAM G. GREEN et al., Appts.

Connecticut Supreme Court of Errors — May 7, 1920.

(— Conn. —, 110 Atl. 177.)

Pledge — of stocks as collateral security — bona fide purchaser.

1. A bank which takes stocks from a customer as collateral security for his existing note is not a bona fide purchaser for value with respect to the rights of third persons.

[See note on this question beginning on page 1619.]

Trust — purchase of stocks with funds of corporation.

2. The purchase by a subordinate officer of a corporation, with its funds and without authority of the corporation or a superior officer, of stocks in his own name, renders him a constructive trustee for the corporation.

[See 26 R. C. L. 1235.]

— effect of knowledge of treasurer.

3. The mere fact that the treasurer of a corporation knew that a subordinate officer of the corporation was using its funds to purchase stocks in his own name does not destroy the trust character of the transaction.

— resulting trust.

4. A resulting trust is based on intention presumed or implied from the circumstances of the transaction.

[See 26 R. C. L. 1214.]

— constructive trust — intention.

5. A constructive trust is not based on intention, but arises in invitum for the purpose of working out justice in the most effective manner.

[See 26 R. C. L. 1232.]

Pledge — effect as between pledgeor and pledgee.

6. As between pledgeor and pledgee of stocks, a pre-existing debt is sufficient consideration to render the pledgee a bona fide purchaser for value.

[See 21 R. C. L. 662.]

Bills and notes — transfer as collateral security — effect.

7. A negotiable note, transferred before due in the regular course of business as collateral security for a pre-existing debt, is taken free from equities between the original parties thereto.

[See 3 R. C. L. 1058.]

Corporation — stock as negotiable instrument.

8. Certificates of corporate stocks are not negotiable instruments within the rule that a pledge for a pre-existing debt transfers them free from equities. [See 8 R. C. L. 850, 851.]

Sale — certificate of stock as document of title.

9. A certificate of stock in a corporation is not a negotiable document of title within the meaning of the Uniform Sales Act.

Laches — failure to assert title to stock.

10. A corporation is not guilty of laches in asserting title to stock purchased with its funds by its officer, and pledged by him as collateral for his individual debts, if the pledge was not made until the day it assigned its property in bankruptcy, and it had no knowledge of the pledge.

[See 10 R. C. L. 399, 405.]

Bankruptcy — effect of solvency when trust was created.

11. That a corporation was solvent when its officer purchased stocks with its funds in his own name and pledged them as collateral security for his own debts does not prevent its trustee in bankruptcy from asserting title to the stocks against the pledgee.

Corporation — diversion of funds by officer — who bears loss.

12. The mere fact that an officer of a corporation diverts its funds to the purchase of stocks in his own name, which he pledges as collateral security for his own debts, does not throw the loss on the corporation if the pledgee was not a bona fide purchaser.

Pledge — of stock — effect of absence of transfer.

13. A pledge of stock by delivery, without regular transfer, leaves the pledgee subject to the equities of third persons and the *cestui que trust*.

[See 21 R. C. L. 648, 649.]

APPEAL by defendants from a judgment of the Superior Court for Litchfield County (Kellogg, J.) in favor of plaintiff in an action brought to recover certain stock standing in the name of defendant Green, bought by him with the funds of the bankrupt company, and pledged to the defendant bank to secure his personal indebtedness to the bank. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. William F. Henney and John F. Addis for appellants.

Messrs. J. Moss Ives, William H. Cable, and Frederick H. Wiggins, for appellee.

The facts found establish a constructive trust.

Pom. Eq. Jur. § 1051; Lewisohn v. Stoddard, 78 Conn. 600, 63 Atl. 621; Booth's Appeal, 35 Conn. 165; Preston v. Preston, 202 Pa. 515, 52 Atl. 192; Gilbert v. Hewetson, 79 Minn. 326, 79 Am. St. Rep. 486, 82 N. W. 655; Taylor v. Plumer, 3 Maule & S. 562, 2 Rose, 415, 16 Revised Rep. 361; Jackson v. Pleasanton, 95 Va. 654, 29 S. E. 680; Bresnihan v. Sheehan, 125 Mass. 11; Hunter v. Robbins, 117 Fed. 920; Re Schoenfield, 190 Fed. 53, affirmed in 122 C. C. A. 624, 204 Fed. 488; Trenton Bkg. Co. v. McKelway, 8 N. J. Eq. 84; Seacoast R. Co. v. Wood, 65 N. J. Eq. 530, 56 Atl. 337; American Sugar Ref. Co. v. Fancher, 145 N. Y. 552, 27 L.R.A. 757, 40 N. E. 206; Day v. Roth, 18 N. Y. 448; Squires's Appeal, 70 Pa. 268; 3 Story, Eq. 14th ed. § 1663, p. 303; Wilson v. Moore, 1 Myl. & K. 337,

39 Eng. Reprint, 709; National Mahaiwe Bank v. Barry, 125 Mass. 20; Newton v. Porter, 69 N. Y. 138, 25 Am. Rep. 152; Bispham, Eq. 8th ed. §§ 91 & 92.

The complaint supports a judgment based on a constructive trust.

Verzier v. Convard, 75 Conn. 1, 52 Atl. 255; Church v. Sterling, 16 Conn. 388; Bostleman v. Bostleman, 24 N. J. Eq. 103; Lieberum v. Nussenbaum, — Conn. —, 108 Atl. 663; Lockhart v. Leeds, 195 U. S. 427-437, 49 L. ed. 263-269, 25 Sup. Ct. Rep. 76; Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909; Ambrosius v. Ambrosius, 152 C. C. A. 351, 239 Fed. 473; Lusk v. Bush, 117 C. C. A. 655, 199 Fed. 369; Schmid v. Lancaster Ave. Theatre Co. 244 Pa. 373, 91 Atl. 363; Sacket v. Hillhouse, 5 Day, 551; Whitfield v. Cates, 59 N. C. (6 Jones, Eq.) 137; Adams v. Kehler Mill. Co. 36 Fed. 212; Maring v. Meeker, 263 Ill. 136, 105 N. E. 31; Wootten v. Burch, 2 Md. Ch. 190; Street v. Thompson, 131 Ill. App. 550, affirmed in 229 Ill. 613, 82 N. E. 367; Nesbitt v. Cavender, 27 S. C. 1, 2 S. E. 702; Peters v. Peters, 137

App. Div. 635, 122 N. Y. Supp. 363; Reddick v. Keesling, 129 Ind. 132, 28 N. E. 316.

The defendant bank has no equity superior to that of plaintiff.

Waterman v. Buckingham, 79 Conn. 286, 64 Atl. 212; Hayden v. Charter Oak Driving Park, 63 Conn. 142, 27 Atl. 232; Bronson Electric Co. v. Rheubottom, 122 Mich. 608, 81 N. W. 563; Orb v. Coapstick, 136 Ind. 313, 36 N. E. 278; Schuster v. Jones, 22 Ky. L. Rep. 568, 58 S. W. 595.

Laches is no defense.

Robert v. Finberg, 85 Conn. 557, 84 Atl. 366; Sullivan v. Portland & K. R. Co. 94 U. S. 807, 24 L. ed. 324; Hartford v. Mechanics' Sav. Bank, 79 Conn. 39, 68 Atl. 658; Fisk's Appeal, 81 Conn. 433, 71 Atl. 559; Coxe v. Huntsville Gaslight Co. 106 Ala. 373, 17 So. 626; Central Bank v. Thayer, 184 Mo. 61, 82 S. W. 142; Vance v. Mottley, 92 Tenn. 310, 21 S. W. 593; National Bank v. Wade, 84 Fed. 10.

Gager, J., delivered the opinion of the court:

This action is brought by the trustee in bankruptcy of the New Milford Hat Company to recover certain stock standing in the name of the defendant W. G. Green, bought by him with the funds of the hat company, and by him pledged to the First National Bank of New Milford to secure his personal indebtedness to the bank.

Two questions arise upon the record: First, did the defendant, W. G. Green, hold the securities herein-after described, in his own right, or as trustee for the New Milford Hat Company? Second, if Green held these securities as trustee for the hat company, did his pledge of the securities to the defendant bank give the bank a claim superior to that of the hat company, or its trustee in bankruptcy?

The essential facts with reference to the first question are these: S. S. Green, a brother of W. G., was majority stockholder, treasurer, and active financial officer of the hat company; W. G. Green was a stockholder and assistant treasurer, and one Barnes, an uncle of the Greens, was a stockholder and president. These three owned all the stock.

From the beginning the Greens were borrowers from the hat company, and made advances to and kept ledger accounts with the company, the balances appearing upon these accounts fluctuating from one side to the other from time to time. W. G. Green's ledger account was not accurate, and, when accurately stated, showed that he was in fact heavily indebted to the hat company at all times during the transactions on which this action is based. Between 1905 and 1909, W. G. Green bought with funds of the hat company, in four blocks at different dates, 102 shares of the capital stock of the New Milford Water Co., and took title in his own name. Between 1907 and 1912, Green also bought with the funds of the hat company, in six blocks at different dates, 41 shares of the First National Bank of New Milford, and took title in his own name. He also bought 3 shares of stock and 3 bonds of the New York realty owners in the same way. In these purchases Green had no intent or purpose to make investments for the hat company. The title to these stocks remained in W. G. Green, and they were in his possession and control until they were hypothecated by him to the bank, as will be described later. The funds of the hat company used by W. G. Green in the purchase of these stocks were never charged to his account upon the books of the company, nor did it appear in what way he obtained the funds of the hat company. He was credited with interest and dividends therefrom. Why he was so credited does not appear, otherwise than that he was at all times in debt to the hat company. At all times when said stocks were bought by W. G. Green, his brother, S. S. Green, treasurer and financial manager of the hat company, had full knowledge of these stock purchases. The hat company became insolvent between 1907 and 1915, but the expert accountants were unable to ascertain at what time between these dates the insolvency occurred. The

hat company filed its voluntary petition in bankruptcy May 26, 1915, and was adjudged bankrupt on July 2, 1915, when the plaintiff became trustee.

This statement of facts unmis- takably shows a case where a sub- ordinate financial officer of a com- pany uses funds of the company to buy stocks in his own name, with no intention or purpose to make in- vestments for the company, and without authority or direction of the company or any superior officer. This situation makes the officer so

Trust—purchase of stocks with funds of corporation.

buying these stocks a constructive trustee of these stocks for the company.

The statement of the finding is brief, but comprehensive and con- clusive that he used the funds of the company, not for the purposes of the company, but to buy stocks to hold and use for himself. There is no suggestion from the books or elsewhere of a loan or a gift to W. G. Green of the funds used in pur- chasing the stocks, nor any dis- closure of the methods by which W. G. Green gained control of the hat company funds, other than can be implied from his fiduciary position as assistant treasurer. The mere fact that S. S. Green, treasurer of the company, knew of this transac- tion, is not sufficient of itself to qualify the effect of the finding as

—effect of knowledge of treasurer.

to the use of the funds. In the ab- sence of any ex-

planation, the legal interpretation of the finding admits of but one con- clusion, as just stated, that W. G. Green became constructive trustee for the hat company. Whether the hat company was a family concern or not, and whether at the time of the purchase of the stocks it was sol- vent or insolvent, are immaterial. On the finding, he used the funds of the company, intentionally, for his own benefit. Parenthetically, we should say that the finding that the hat company became insolvent be- tween 1907 and 1915, but that the court was unable to find at what

time between these dates, cannot be used affirmatively to establish the insolvency before 1915, and all these stocks were bought prior to 1915.

That W. G. Green became by these transactions a constructive trustee is well established by the authorities. In Pomeroy's Equity Jurisprudence, 4th ed. vol. 3, §§ 1044 et seq., the subject of constructive trusts is elaborately discussed. In § 1044, Mr. Pomeroy says: "Con- structive trusts include all those in- stances in which a trust is raised by the doctrines of equity for the purpose of working out justice in the most efficient manner, where there is no intention of the parties to create such a relation, and in most cases contrary to the intention of the one holding the legal title, and where there is no express or im- plied written or verbal declaration of the trust. They arise when the legal title to property is obtained by a person in violation, express or im- plied, of some duty owed to the one who is equitably entitled, and when the property thus obtained is held in hostility to his beneficial rights of ownership. As the trusts of this class are imposed by equity, con- trary to the trustee's intention and will, upon property in his hands, they are often termed trusts in invitum; and this phrase furnishes a criterion generally accurate and sufficient for determining what trusts are truly 'constructive.' An exhaustive analysis would show, I think, that all instances of construc- tive trusts, properly so called, may be referred to what equity denomi- nates fraud, either actual or con- structive, as an essential element and as their final source."

In § 1045 Mr. Pomeroy says: "The specific instances in which equity impresses a constructive trust are numberless,—as number- less as the modes by which property may be obtained through bad faith and unconscientious acts."

Again, in § 1051, it is said: "A constructive trust arises whenever another's property has been wrong- fully appropriated and converted

into a different form. If one person, having money or any kind of property belonging to another in his hands, wrongfully uses it for the purchase of lands, taking the title in his own name, or if a trustee or other fiduciary person wrongfully converts the trust fund into a different species of property, taking to himself the title, or if an agent or bailee wrongfully disposes of his principal's securities, and with the proceeds purchases other securities in his own name,—in these and all similar cases equity impresses a constructive trust upon the new form or species of property, not only while it is in the hands of the original wrongdoer, but as long as it can be followed and identified in whosoever hands it may come except into those of a bona fide purchaser for value, and without notice; and the court will enforce the constructive trust for the benefit of the beneficial owner or original cestui que trust who has thus been defrauded."

And in the note to this section it is further said: "In order that this species of trust may arise, it is not indispensable that the conventional relation of trustee and cestui que trust, or even any fiduciary relation, should exist between the original wrongdoer and the beneficial owner, although such relation generally exists in these cases. Where securities had been stolen, and transferred and sold by the thief, a trust was held impressed upon them and on their proceeds in the hands of the transferee with notice,"—citing *Newton v. Porter*, 69 N. Y. 133, 25 Am. Rep. 152; *Bank of America v. Pollock*, 4 Edw. Ch. 215.

See also *Tecumseh Nat. Bank v. Russell*, 50 Neb. 277, 69 N. W. 763; *Lightfoot v. Davis*, 198 N. Y. 261, 29 L.R.A. (N.S.) 119, 139 Am. St. Rep. 817, 91 N. E. 582, 19 Ann. Cas. 747. Also, in treating of trusts *ex maleficio*, Mr. Pomeroy, in § 1053, says: "In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments,

. . . or under any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same. . . . The forms and varieties of these trusts which are termed *ex maleficio* and *ex delicto*, are practically without limit. The principle is applied wherever it is necessary for the obtaining of complete justice, although the law may also give the remedy of damages against the wrongdoer."

It is, perhaps, not very important to attempt to determine exactly under which of Pomeroy's classes of constructive trusts the present case comes, because it is very apparent from the finding that the assistant treasurer was, without warrant or authority, using the funds of the company for his own benefit, in the purchase of the stocks in question, and should be accountable to the company, in the absence of any action on the part of the company which showed a loan or gift, as a holder of the securities as trustee. The authorities are numerous, and a considerable number are collected in notes to the citations from Pomeroy. See also Story, on Eq. 14th ed. § 1663.

In the oral argument there was some discussion over the fact that in the complaint, and in the conclusion of the trial judge, the transaction was characterized as a resulting trust. The essential fact was that W. G. Green held these stocks in trust for the —resulting trust— company. A resulting trust is based on intention presumed or implied from the circumstances of the transaction. The essentials have recently been stated in *Fox v. Shanley*, 94 Conn. —, 109 Atl. 249. As seen above, a constructive trust is not based on intention, but arises in invi- —constructive trust—
—intention.
tum for the purpose of working out justice in the most efficient manner.

The ultimate result is not affected by the classification, and our disagreement with the trial judge on this point does not at all affect the correctness of his conclusion that the trust relationship existed. That a trust exists, whether resulting or constructive, is enough to support the judgment.

If, as we hold, these stocks in the hands of W. G. Green were impressed with a constructive trust in favor of the hat company, then the question arises as to the right of the defendant bank to hold them against the trustee in bankruptcy of the hat company, as pledgee to secure an indebtedness of W. G. Green.

As bearing upon this question the further facts are that, on and before May 26, 1915, the defendant W. G. Green was, and for some considerable time had been, indebted to the defendant bank in the sum of \$24,000, or more, evidenced by demand notes; that on or about May 26, 1915, which was the day the hat company filed its voluntary petition in bankruptcy, an officer of the bank requested the defendant W. G. Green to furnish collateral, and Green thereupon delivered the stocks above mentioned to the bank as collateral for his notes. The stocks stood in the name of W. G. Green, and bore no evidence that the hat company had any right or title to them. W. G. Green's brother, S. S. Green, as stated above, had, as treasurer of the hat company, full knowledge of the transaction by which W. G. Green obtained these stocks. This same S. S. Green was also president of the defendant bank at the time that W. G. Green pledged these stocks to the bank, but the finding does not state what officer of the bank made the request for collateral. It does not appear that the bank either gave anything or made any promise in return for the delivery of this collateral by W. G. Green, or made any extension of time for payments, and the court finds explicitly that at the time of such delivery the defendant bank did not either actually pay or part

with any valuable consideration, or in any way alter its legal condition for the worse. This last finding necessarily excludes any agreement for an extension of time. Under such a state of facts the bank was not the bona fide purchaser for value and without notice, and gained no more interest in these stocks than W. G. Green himself had, which was nothing.

The defendant bank argues that it was a bona fide purchaser for value, because there was a pre-existing debt for which the stocks were assigned as collateral. As between pledgor and pledgee the pledgor's pre-existing debt is consideration enough to support the pledge, so far as the pledgor has any beneficial interest in the stocks assigned or delivered

Pledge—of stocks as collateral security—bona fide purchaser.

—effect as between pledgor and pledgee.

as collateral. But under our law it is quite otherwise where the doctrine of consideration is invoked to defeat the equitable interest of a third party in the stock pledged. In *Hayden v. Charter Oak Driving Park*, 63 Conn. 142, 27 Atl. 232, this court (Torrence, J.) said: "It is perhaps, for the purposes of this case, sufficiently accurate to say that a bona fide purchaser is one who has bought property, without notice of the claims of third parties thereto, upon the faith that no such claims exist, and who has therefore actually paid or parted with some valuable consideration, or has in some way altered his legal condition for the worse."

In *Salisbury Sav. Soc. v. Cutting*, 50 Conn. 113, it was held that where a note was given for the total amount of prior occasional advances, and a mortgage then given to secure this note, the mortgagee was not a purchaser for value so as to shut out the equities of a prior mortgage given before the mortgagor acquired title, and for money advanced at the time the mortgage was given. In *Jones on Mortgages*, vol. 1, § 460, it is said: "The mort-

gage or deed made to secure a pre-existing debt does not constitute the grantee a purchaser for value in good faith. The former, although given upon a valid consideration as between the parties, is not regarded as a purchaser for a valuable consideration which will entitle the mortgagee to protection against prior equities, although he had no notice of them when he took the mortgage. He must have parted with some value or some right upon the faith of the mortgage, and at the time of it, to entitle him to protection as a purchaser, . . . but a mortgage to secure an antecedent debt is perfectly valid as between the parties, and as against all others who had at the time no equitable interest in the property. . . . The mortgagee for an antecedent debt acquires a lien upon the property to the extent of the mortgagor's equitable interest at the time."

In Thompson on Corporations, vol. 4, 2d ed., § 4234, it is said: "The pledgee of stock to secure an antecedent debt of the pledgeor is not a bona fide purchaser for value, and therefore holds it subject to any lien which is valid against the pledgeor, though he has neither actual nor constructive notice thereof,"—citing *Schuster v. Jones*, 22 Ky. L. Rep. 568, 58 S. W. 595.

The foregoing states the prevailing rule, as well as the rule in this state, although there are some authorities inconsistent with it. See also Pom. Eq. Jur. § 749. The rule, as above stated, applies equally to pledge of collateral securities. 14 C. J. p. 736, § 1120; *Jones, Collateral Securities*, §§ 107a, 469.

The defendant bank further claims that because these certificates did not show that anyone other than W. G. Green, pledgeor, had any interest in them, they so far partook of the character of negotiable paper that, upon delivery or assignment to the bank as security for a pre-existing debt, the bank was to be deemed a purchaser for value in the same way as if the collaterals had been negotiable instruments in-

dorsed over before maturity, and cites *National City Bank v. Wagner*, 132 C. C. A. 533, 216 Fed. 473. It is undoubted law "that a negotiable note transferred before due in the regular course of business to a creditor, in payment of, or as

Bills and notes—transfer as collateral security—effect.

security for, a pre-existing debt, is taken in good faith for a valuable consideration, and is collectable in the hands of the creditor, notwithstanding any equities . . . between the original parties thereto." *Roberts v. Hall*, 37 Conn. 205, 9 Am. Rep. 308, citing *Brush v. Scribner*, 11 Conn. 388, 29 Am. Dec. 303, and *Bridgeport City Bank v. Welch*, 29 Conn. 475, and in turn cited and followed in *Rockville Nat. Bank v. Citizens' Gaslight Co.* 72 Conn. 581, 45 Atl. 361. See also *Jones, Collateral Securities*, § 111. But it is equally well settled that a certificate of stock is not a negotiable instrument. *Jones, Collateral Securities*, § 461; 3 R. C. L. pp. 850, 851; 7 R. C. L. p. 213; 14 C. J. p. 664; *Cook, Corp.* 6th ed. § 412. And furthermore, such a certificate does not conform to the definition of a negotiable instrument as contained in the Negotiable Instruments Act. Gen. Stat. § 4359.

Corporation—stock as negotiable instrument.

It is quite true that this court, in *Bridgeport Nat. Bank v. New York & N. H. R. Co.* 30 Conn. 275, said: "The certificate, accompanied by the assignment and power of attorney thus executed in blank, has perhaps a species of negotiability, although of a peculiar character, but one necessary to the public convenience, and to which it is no objection that the instrument has a seal."

This was said only with reference to the effect of a blank power of attorney, executed under seal, as a method of transfer. This quality is sometimes described as "quasi negotiability." 2 *Cook, Corp.* § 413. It appears, however, to be founded upon the doctrine of estoppel, and

not upon the law merchant with reference to negotiable paper negotiated before maturity. Upon this point, Cook says, § 416: "Indeed to such an extent has the law of estoppel been applied to protect a bona fide purchaser of stock that, excepting in cases of certificates transferred in blank, and lost or stolen without negligence on the part of the owner, a bona fide purchaser is protected now in almost every instance where he would be protected if he were purchasing a promissory note or other negotiable instrument."

In other words, the so-called quasi negotiability of certificates of stock does not, in general, arise from the negotiable character of the certificates, but because a somewhat similar result is reached through extrinsic facts upon which estoppel with reference to the transfer of the certificate may be based. Moreover, we have already seen that the bank was in no sense a bona fide purchaser, and therefore has suffered no loss by taking the certificates, and, having suffered no loss, lays no foundation for invoking the doctrine of estoppel.

We have examined the case of *National City Bank v. Wagner*, supra, upon which the defendant appears to rely upon this claim. That case assumes the similarity of stock certificates to negotiable commercial paper to be of such extent that it constitutes certificates negotiable paper, and then applies the rule as to negotiable paper, as generally held, and as stated in the Negotiable Instruments Act, to stock certificates. We think that this assumption is, in the present state of the law, without convincing force. But the decision is really based upon Illinois doctrine conceded to be contrary to the weight of authority, and stated by the court to be this: That "the pledgee of an ordinary chattel, given to secure a pre-existing debt, is protected as against the defrauded vendor thereof."

The force of this claim, of course,
9 A.L.R.—102.

is that a pre-existing debt makes the pledgee a purchaser for value. The learned court in this case also refers to the provisions of the Uniform Negotiable Instruments Act (Gen. Stat. 1918, §§ 4358-4547), the Uniform Sales Act, §§ 4668-4743, the Uniform Warehouse Receipts Act, §§ 4553-4612, the Uniform Bills of Lading Act, §§ 4613-4667, and the Uniform Stock Certificate Act, §§ 3469-3490. None of these acts, except the latter, so far as we can discover, either in terms or by necessary implication, include certificates of stock within their provisions. As we have seen, the Negotiable Instruments Act, in its definition, clearly does not include certificates of stock.

That the Sales Act should apply, it must be held that a certificate of stock is a negotiable document of title. The definition in the act, Gen. Stat. § 4742, excludes the claim: A "document of title to goods" includes any bill of lading, dock warrant, warehouse receipt or order for the delivery of goods or any other document used in the ordinary course of business in the sale or transfer of goods, as proof of the possession or control of the goods or authorizing, or purporting to authorize, the possessor of the document to transfer or receive, either by indorsement or by delivery, goods represented by such document."

It is apparent from the definition that its scope under the Sales Act is limited to such documents as will authorize the holder to obtain specific goods from whoever has possession of them, such possessor ordinarily being a common carrier or a warehouseman. A certificate of stock, while it shows the fractional interest in the property of a corporation to which the owner of the certificate is entitled, in no way entitles the owner to the possession of any specific goods, or to any property whatever, except by way of dividends or a distributive share on the dissolution and winding up of the corporation.

Sale—certificate of stock as document of title.

Whether the Uniform Transfer Act has any relation to a case like this is quite immaterial, because our act was not passed until 1917, and long after the transactions now under consideration. For these reasons we cannot subscribe to the doctrine that the defendant seeks to draw from the case last referred to.

The defendant bank also claims that the hat company has been guilty of laches with reference to this claim; that it is now too late for the company to assert title, and therefore the trustee cannot. It does not appear so to us. The last of this collateral was not purchased until October, 1912, and the petition in bankruptcy was filed in May, 1915. Under the circumstances this is rather a short time on which to

Laches—failure to assert title to stock.

base laches, even if the other essential elements were not wanting. The collateral did not come into the possession of the bank until the very day of the assignment in bankruptcy. The record does not disclose any affirmative action or any representations of the hat company, or the knowledge of anyone representing the hat company at the time of, or in connection with, the pledge, other than W. G. Green himself. It does not appear that the bank ever knew that W. G. Green had these securities until the day they were pledged, unless such knowledge is imputable to the bank, because S. S. Green, its president, knew the situation as financial manager of the hat company. Knowledge of the bank imputed in that way would be fatal to the claim of the bank, as the notice and knowledge of its president of the equitable interest of the hat company so as to constitute the bank a taker with notice of the equities of the hat company. As already seen, the bank was in no way misled by any conduct of the hat company, and parted with nothing by taking the collateral. In *Hartford v. Mechanics' Sav. Bank*, 79 Conn. 41, 63 Atl. 659, it is said: "There is no merit in the defense of

laches. That exists only where there has been such a delay in the assertion of a claim as naturally to prejudice him against whom the claim is set up. *Waterman v. A. & W. Sprague Mfg. Co.* 55 Conn. 554, 574, 12 Atl. 240. Nothing appears in this case to indicate that the defendant has lost anything by the course taken by the plaintiff."

See Pom. Eq. Jur. 4th ed. § 1442. Moreover, laches was not pleaded in the present case. *Robert v. Finberg*, 85 Conn. 557, 84 Atl. 366, though it was claimed on argument in the court below.

We do not see any merit in the further claim that, if the hat company were solvent when these securities were purchased with its funds by W. G. Green, then the trustee in bankruptcy has no claim to them. As stated above, there is no certain finding of insolvency prior to 1915, at which time all the securities had been purchased.

We cannot see that solvency or insolvency affects the continued existence of the constructive trust and the equitable property right of the hat company, and no claim is made but that, if it existed at the time of the assignment in bankruptcy, it passed by operation of law to the trustee.

Nor do we think there is anything in the claim that, because W. G. Green was an officer of the hat company, therefore the company should bear the loss caused by the fraud of its own officers. That would depend upon the circumstances of the case. Where, as here, its funds are converted into definite stocks, and these stocks are found in the hands of one who is not a bona fide purchaser for value without notice, there is nothing to prevent the hat company from enforcing its claim as a

constructive trustee at any time. It might also be that the bank, on account of the fact that S. S. Green was both president of the bank and financial manager of the hat com-

Bankruptcy—effect of solvency when trust was created.

Corporation—diversion of funds by officer who bears loss.

pany, not only parted with nothing for the stock, but received it with notice. As the finding is silent with reference to the actual participation of S. S. Green in the management of the affairs of the bank, and the proper decision of the case does not require it, we leave this question as to notice undecided.

What we have said refers specifically to the shares of stock. From the finding it appears that 3 bonds of the New York Realty Owners were purchased and pledged in the same way as the stock, and were included in the judgment of return. There is no further finding with reference to these bonds, no special claim has been made distinguishing them from the stock, and no reference is made to them in the briefs, nor was there any claim as to these bonds, as we recollect it, upon the oral argument, and no claim referring specifically to the bonds appears to have been made in the court below. It was evidently assumed that these bonds, so far as the substance of the transaction was concerned, stood in no different position from the stock. In the absence of any such claim and of any details in the finding, we are not at liberty to assume any real distinction between the bonds and the stock, and must leave the judgment undisturbed as to them.

There was some claim made by

the defendant bank that, as holder of the legal title, the bank would have priority of right. What we have said applies even if the stocks were regularly transferred by assignment and power of attorney executed in blank, but it is noticeable that nowhere is it found that such transfer was made. The finding is only that the securities were delivered. If there was delivery merely, with no transfer, the bank would be the equitable pledgee. Such a pledge may be made, but it is called an imperfect pledge, making suit in equity necessary for its enforcement, and leaving the pledgee subject to the equities of third persons and cestui que trust. *Cook, Corp.* § 465; *Thomp. Corp.* 2d ed. 4203; *Pledge of stock — effect of absence of transfer.*

Colebrooke, Collateral Securities, 2d ed. § 277. But we do not see that the plaintiff bases any claim on this distinction, and it may be that the term "delivery" was not used in the finding with the idea of drawing this distinction, especially as the judgment file calls for a transfer and delivery of the stocks, not mere delivery; therefore, this decision is not based on delivery alone without the ordinary assignment and power of attorney, whether executed to a person named or in blank.

There is no error.

The other Judges concur.

ANNOTATION.

Pledgee of corporate stock as security for an antecedent debt as a bona fide purchaser within the rule which protects such purchasers against the equities of third persons.

A pledgee who takes corporate stock as a mere security for a pre-existing debt is not a purchaser for value within the rule that protects such purchasers against the equities of third parties in the stock. *Bank of Tupelo v. Thompson* (1914) 186 Ala. 600, 65 So. 147; *MILLARD v. GREEN* (reported herewith) ante, 1610; *National Safe Deposit, Sav. & T. Co. v. Gray* (1898) 12 App. D. C. 276; *Schuster v. Jones*

(1900) 22 Ky. L. Rep. 568, 58 S. W. 595; *Bronson Electric Co. v. Rheubottom* (1900) 122 Mich. 608, 81 N. W. 563; *Darling v. Potts* (1898) 118 Mo. 506, 24 S. W. 461; *Watson v. Sidney F. Woody Printing Co.* (1893) 56 Mo. App. 145; *Cleveland v. State Bank* (1865) 16 Ohio St. 236, 38 Am. Dec. 445; *State Nat. Bank v. Scales* (1916) — Okla. —, 159 Pac. 925; *King v. Mellon Nat. Bank* (1910) 227 Pa. 22, 75

Atl. 832; *Crawford v. Dollar Sav. Fund & T. Co.* (1912) 236 Pa. 206, 84 Atl. 694; *Linnard's Appeal* (1886) 2 Sadler (Pa.) 195, 21 W. N. C. 40, 3 Atl. 840. The acceptance of a certificate of stock as a payment was held not to make the purchaser a purchaser for value, in *Weaver v. Barden* (1872) 49 N. Y. 286.

The only dissent from the foregoing theory is found in *National City Bank v. Wagner* (1914) 132 C. C. A. 533, 216 Fed. 473, writ of certiorari denied in (1914) 235 U. S. 698, 59 L. ed. 431, 35 Sup. Ct. Rep. 199, where it is held that a pre-existing debt is sufficient to make a pledgee of the stock certificate a holder for value. The court, in *Martin v. Bankers' Trust Co.* (1916) 18 Ariz. 55, 156 Pac. 87, Ann. Cas. 1918E, 1240, inclines to the view of the Federal case on the theory that shares of stock are similar to negotiable instruments in this regard, but the point was not necessary to decision. One who took scrip certificates as security for an antecedent indebtedness from a stockbroker, who held them for the owner, was held entitled to hold the same as against the owner in *Rumball v. Metropolitan Bank* (1877) L. R. 2 Q. B. Div. (Eng.) 194, 46 L. J. Q. B. N. S. 346, 36 L. T. N. S. 240, 25 Week. Rep. 366, but there is no discussion of the effect of antecedent indebtedness. The decision is based upon the theory that the certificates were negotiable instruments, and also upon the principle of estoppel. The Federal court, in the above case, concluded upon this question that stock certificates are to be "dealt with in the same way as commercial paper." And see the Arizona case above cited. According to the majority rule, commonly known as the "Federal" rule, one who takes commercial paper as collateral security for a pre-existing debt is deemed to have given value therefor. Note in 31 L.R.A.(N.S.) 287. The court in *National Safe Deposit, Sav. & T. Co. v. Gray* (1898) 12 App. D. C. 276, supra, recognizes this rule as to negotiable instruments, but holds that stock certificates are not negotiable for the purpose, and applies a different rule. That stock certificates are not negotiable instruments is asserted in *Watson*

v. Sidney F. Woody Printing Co. (1893) 56 Mo. App. 145. And see the reported case (*MILLARD v. GREEN*, ante, 1610). It is a matter of interest that all the cases, with the exception of *National Safe Deposit, Sav. & T. Co. v. Gray* (D. C.) supra, the reported case (*MILLARD v. GREEN*), and *State Nat. Bank v. Scales* (1916) — Okla. —, 159 Pac. 926, supra, which have denied that a pledgee of corporate stock for a pre-existing indebtedness is a bona fide holder, were decided in jurisdictions which adhere to the minority rule, commonly known as the "New York" rule, in case of negotiable paper taken as collateral security for a pre-existing indebtedness, and hold that the transfer is not a holder for value, or at least so held prior to the Negotiable Instruments Act.

Under the general rule above stated, the real owner of the stock, who has invested the pledgee with the indicia of ownership, but for a limited purpose, may assert his rights against the stock. *Bank of Tupelo v. Thompson* (1914) 186 Ala. 600, 65 So. 147; *State Nat. Bank v. Scales* (Okla.) supra. The real owner who has pledged the stock to the pledgee may assert his rights as against the pledgee. *National Safe Deposit, Sav. & T. Co. v. Gray* (D. C.) supra. The corporation may enforce a lien upon the stock. *Bronson Electric Co. v. Rheubottom* (1900) 122 Mich. 608, 81 N. W. 563.

It is the general theory of the cases that, if the pledgee changes his position to his prejudice in relation to the pre-existing indebtedness, the pledgee does become a purchaser for value so as to entitle him to defeat the equities of the true owner of the stock; if he does not change his position to his prejudice, he is not entitled to defeat the claim of the true owner. *National Safe Deposit, Sav. & T. Co. v. Gray* (1898) 12 App. D. C. 276. A surrender at the time of receiving a pledge of the stock, or thereafter, of other collaterals or other security securing the pre-existing indebtedness, makes the pledgee a holder for value. *King v. Mellon Nat. Bank* (1910) 227 Pa. 22, 75 Atl. 832; *Crawford v. Dollar Sav. Fund & T. Co.* (1912) 236 Pa. 206,

84 Atl. 694. A pledgee who accepts a new note, and surrenders the old note and a mortgage securing the same, is a holder for value and entitled to hold the stock as against the true owner. *Swigart v. Stoops* (1917) 204 Ill. App. 194.

It has been stated that a pledgee who receives the stock as security for a note given for the cancellation of a pre-existing indebtedness is a holder for value. *Fowles v. National Bank* (1914) 167 Cal. 653, 140 Pac. 271. In this case, at least a part of the stock in question had been pledged at the time of incurring the pre-existing indebtedness, and, upon a subsequent payment of part of the same, a note was given for the balance and the stock repledged. Whether the note extended the time for the payment of the indebtedness does not appear. Where the note based on the pre-existing indebtedness extends the time of payment, it is held that a pledgee who receives the stock as security for the note is a bona fide holder. *Just v. State Sav. Bank* (1903) 132 Mich. 600, 94 N. W. 200; *Johnson v. First Nat. Bank* (1909) 132 App. Div. 524, 117 N. Y. Supp. 539, affirmed without opinion in (1911) 200 N. Y. 593, 94 N. E. 1095; *American Nat. Bank v. Dew* (1917) 175 N. C. 79, 94 S. E. 708. A demand note for a pre-existing indebtedness has been held not to make the pledgee a holder for value. *Bronson Electric Co. v. Rheubottom* (1900) 122 Mich. 608, 81 N. W. 563. The court says that "this note might have been sued immediately by the bank, and, if sued, Rheubottom and Bond could not set up by way of defense any agreement to forbear suit. . . . The bank had the same right to immediately sue this note which it had to sue before the note was given. . . . It parted with nothing when the stock was assigned to it, and we do not think it can be said it was an innocent purchaser for value."

Where the stock is pledged to secure a contemporaneous note, the pledgee is a holder for value as to the entire debt, although the consideration is, in part, a pre-existing indebtedness. *Gurley v. Reed* (1906) 190 Mass. 509,

77 N. E. 642. But see *National Safe Deposit, Sav. & T. Co. v. Gray* (1898) 12 App. D. C. 276, *infra*. If the pledgee gives further credit on the security of a pledge, which secures also an antecedent indebtedness, he is a bona fide purchaser. *Bank of Tupelo v. Thompson* (1914) 186 Ala. 600, 65 So. 147.

Where the pledgee has given value, the real owner of the stock, who merely pledged it to the pledgeor, cannot assert his rights as against the pledgee, according to this theory. *Fowles v. National Bank* (1914) 167 Cal. 653, 140 Pac. 271. The real owner, who invested the pledgeor with the indicia of ownership for a certain limited purpose, cannot assert his right against the pledgee. *Ibid.*; *Gurley v. Reed* (1906) 190 Mass. 509, 77 N. E. 642; *King v. Mellon Nat. Bank* (1910) 227 Pa. 22, 75 Atl. 832. The real owner cannot recover where the pledgeor wrongfully had the stock transferred to his own name, upon a purchase thereof with funds of the real owner. *Johnson v. First Nat. Bank* (1909) 132 App. Div. 524, 117 N. Y. Supp. 39, affirmed without opinion in (1911) 200 N. Y. 593, 94 N. E. 1095. The rights of the pledgee are superior to the equities of the corporation. *Just v. State Sav. Bank* (1903) 132 Mich. 600, 94 N. W. 200.

Where stock is wrongfully pledged, in part for a present indebtedness, and in part for a pre-existing indebtedness, the owner is entitled to recover the stock upon payment of the present indebtedness. *National Safe Deposit, Sav. & T. Co. v. Gray* (1898) 12 App. D. C. 276. But see *Gurley v. Reed* (1906) 190 Mass. 509, 77 N. E. 642, *supra*.

It has been held that a bank which has received a pledge of corporate stock, under an agreement that it is to be collateral in whatever indebtedness the pledgeor might then or thereafter owe the bank, cannot sustain its claim to being a bona fide purchaser for value because of the fact that thereafter the pledgeor overdrew his account, where there was no evidence that at the time the collateral was pledged the bank agreed to permit an

overdraft, or that the overdraft arose in any different manner than the overdraft which stood upon the books of the bank at the time the stock was

pledged, and where thereafter the overdraft was paid in full by a deposit. *State Nat. Bank v. Scales* (1916) — Okla. —, 159 Pac. 925. W. A. E.

ALLEN BILDERBACK et al., Appts.,

v.

MRS. FLORENCE CLARK et al.

CHARLES M. BILDERBACK et al., Appts.

Kansas Supreme Court — May 8, 1920.

(106 Kan. 737, 189 Pac. 977.)

Adoption — effect of agreement as to property.

1. The petition alleged that a childless widow, seeking to adopt her brother's minor child, agreed with the father that she would deed to the child such portion of her estate as she desired the child to have, and the remainder of her estate would go to her brothers and sisters. The next day formal adoption proceedings, embracing consent of the father, were consummated, whereby the child became, under the adoption statute, the child and heir of the foster parent. The foster parent died intestate. Held, the preadoption agreement was void, and the child inherited her foster mother's estate.

[See note on this question beginning on page 1627.]

Appeal — absence of error.

2. The proceedings resulting in findings by the jury that a deed by the foster mother to her adopted daughter was not given in settlement of the child's expectancy as heir examined, and held to be free from error.

Adoption — effect.

3. A statutory adoption proceeding creates all the legal incidents of the natural relation of parent and child, and the child becomes entitled to the

same rights of person and property as if it were a child born of the person adopting it.

[See 1 R. C. L. 611, 612, 618.]

— purpose of statutes.

4. The aim and end of adoption statutes is the welfare of the child, and the theory is that such welfare will be best promoted by giving an adopted child the status of a natural one.

[See 1 R. C. L. 594.]

Headnotes 1 and 2 by BURCH, J.

APPEAL by plaintiffs and defendants Bilderback et al. from a judgment of the District Court for Atchison County (Jackson, J.) in favor of the other defendants in an action brought to recover property belonging to the estate of Sarah E. Wilkins, deceased. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. J. M. Challiss, W. P. Waggener, Walter Brown, and A. E. Crane, for appellants:

The preadoption agreement was valid and binding upon the parties and upon the persons for whose benefit it was made.

Cathcart v. Myers, 97 Kan. 727, 156 Pac. 751; *Newton v. Lyon*, 62 Kan. 306,

62 Pac. 1000; *Johnson v. Hubble*, 10 N. J. Eq. 337, 66 Am. Dec. 773; *Rice v. Hartman*, 84 Va. 251, 4 S. E. 621; *Smith v. Cameron*, 92 Kan. 652, 52 L.R.A. (N.S.) 1057, 141 Pac. 596; *Bichel v. Oliver*, 77 Kan. 696, 95 Pac. 396; *James v. Manning*, 79 Kan. 830, 101 Pac. 628; *Harris v. Harper*, 48 Kan. 418, 29 Pac. 697; *Gilmore v. Asbury*, 64

(106 Kan. 737, 189 Pac. 977.)

Kan. 383, 67 Pac. 864; 19 Am. & Eng. Enc. Law, 2d ed. 1236, 1287; McLure v. Koen, 25 Colo. 284, 53 Pac. 1058.

The contract set up in the petition is definite and certain in its terms.

26 Am. & Eng. Enc. Law, 2d ed. 38; Lawrence v. Saratoga Lake R. Co. 36 Hun, 473; Engle v. White, 104 Mich. 15, 62 N. W. 154; Brown v. Ward, 110 Iowa, 123, 81 N. W. 247; Ottumwa, C. F. & St. P. R. Co. v. McWilliams, 71 Iowa, 164, 32 N. W. 315.

The contract with reference to the description of the property meets the requirements of the law.

Anderson v. Anderson, 75 Kan. 117, 9 L.R.A. (N.S.) 229, 88 Pac. 743; Bichel v. Oliver, 77 Kan. 696, 95 Pac. 396; Phillips v. Bishop, 92 Kan. 313, 140 Pac. 834; Cathcart v. Myers, 97 Kan. 727, 156 Pac. 751; Smith v. Cameron, 92 Kan. 652, 52 L.R.A. (N.S.) 1057, 141 Pac. 596; Roehl v. Haumesser, 114 Ind. 311, 15 N. E. 345; Wilson v. Boyce, 92 U. S. 320, 23 L. ed. 608; Twiss v. George, 33 Mich. 253.

Messrs. James W. Orr and Charles J. Conlon, for appellees:

To enforce specific performance of a contract, the contract itself must be definite in terms and susceptible of enforcement.

Wall's Appeal, 111 Pa. 461, 56 Am. Rep. 288, 5 Atl. 224; Fair v. Nelson, 96 Kan. 13, 149 Pac. 432; Lennen v. Ogden, 98 Kan. 747, 161 Pac. 904; Wright v. Wright, 31 Mich. 380; Steele v. Steele, 161 Mo. 566, 61 S. W. 815; Bichel v. Oliver, 77 Kan. 696, 95 Pac. 396; Barrett v. Geisinger, 148 Ill. 98, 35 N. E. 354; Purcell v. Miner (Purcell v. Coleman) 4 Wall 517, 18 L. ed. 435; Williams v. Morris, 95 U. S. 444-458, 24 L. ed. 360-363; Semmes v. Worthington, 88 Md. 298; Stem v. Nysonger, 69 Iowa, 512, 29 N. W. 433; Cutsinger v. Ballard, 115 Ind. 93, 17 N. E. 206; Taylor v. Higgs, 202 N. Y. 65, 95 N. E. 30; Hamlin v. Stevens, 177 N. Y. 39, 69 N. E. 118; Rousseau v. Rouss, 180 N. Y. 116, 72 N. E. 916; Tousey v. Hastings, 194 N. Y. 79, 86 N. E. 831; Lea v. Polk County Copper Co. 21 How. 493-504, 16 L. ed. 203-207; Holt v. Tuite, 188 N. Y. 17, 80 N. E. 364; Holmes v. Connable, 111 Iowa, 298, 82 N. W. 780; Graham v. Graham, 34 Pa. 480; Baumann v. Kusian, 164 Cal. 582, 45 L.R.A. (N.S.) 757, 129 Pac. 986; Blanc v. Connor, 167 Cal. 719, 141 Pac. 217; Lonergan v. Daily, 266 Ill. 189, 107 N. E. 460; Richardson v. Orth, 40 Or. 252, 66 Pac. 925, 69 Pac. 455; Collins v. Harrell, 219 Mo.

279, 118 S. W. 432; Hawkins v. Doe, 60 Or. 437, 119 Pac. 754, Ann. Cas. 1914A, 765; Kirk v. Middlebrook, 201 Mo. 245, 100 S. W. 450; Oliver v. Johnson, 238 Mo. 359, 142 S. W. 274; Walker v. Bohanan, 243 Mo. 119, 147 S. W. 1024.

Burch, J., delivered the opinion of the court:

The action was one by brothers, sisters, nephews, and nieces of Sarah E. Wilkins, deceased, to recover property belonging to her estate, from her adopted daughter, Dollie E. Woods, and from grantees of Dollie E. Woods and others. The plaintiffs were defeated, and, together with certain defendants interested with them, appeal.

Sarah E. Wilkins, a widow and childless, desired to adopt Dollie, the fourteen-year-old daughter of her brother, John Bilderback. A conversation relating to the subject occurred at the home of John Bilderback on Sunday, January 24, 1892, and on the next day formal adoption proceedings were consummated in the probate court. Afterwards Dollie married George Woods, and had one child, Michael Wilkins Woods. In July, 1914, Mrs. Wilkins executed and delivered to Dollie E. Woods a deed, the material portions of which read as follows:

"This indenture, made this 6th day of July, A. D. 1914, between Sarah E. Wilkins, widow, of Atchison county, in the state of Kansas, of the first part, and Dollie E. Wilkins Woods, of Atchison county, in the state of Kansas, and the grantees who are hereinafter named, of the second part, witnesseth: That the said party of the first part, in consideration of the sum of \$2,000 to her cash in hand paid, the receipt of which is hereby acknowledged, and of the support and maintenance, care and other valuable considerations heretofore for many years furnished by Dollie E. Wilkins Woods, does by these presents grant, bargain, sell, and convey unto said Dollie E. Wilkins Woods, one of the parties of the second part, all of the following-

described real estate, situated in the county of Atchison and state of Kansas, to wit: [Description]—all the aforesaid property for the life of the said Dollie E. Wilkins Woods and till her death.

"At the death of the said Dollie E. Wilkins Woods all the aforesaid property shall go to Michael Wilkins Woods, son of the said Dollie E. Wilkins Woods, for his life and till his death.

"At the death of the said Michael Wilkins Woods the estate in remainder in fee shall go to the issue of the said Michael Wilkins Woods and to the heirs of the body of the said Dollie E. Wilkins Woods who may be born after the date of this deed;

"Provided, that if the said Michael Wilkins Woods leaves no issue and the said Dollie E. Wilkins Woods leave no bodily heirs, the above said estate in the fee shall vest in and to Florence Clark and Norah Donnelly and to their bodily heirs, or to the survivors of the said persons who are living when the said Michael Wilkins Woods and the said Dollie E. Wilkins Woods are dead."

It is said that the real estate conveyed by this deed was worth about \$40,000. Mrs. Wilkins died intestate on March 8, 1915, leaving a large estate, and leaving her adopted daughter as her sole heir.

The petition contained two causes of action. The substance of the first cause of action was that the adoption was based on a contract between Mrs. Wilkins and John Bilderback, whereby he relinquished his daughter and consented to the adoption on consideration of the oral promise of Mrs. Wilkins that she would give Dollie such share of her estate as she desired Dollie to have, and the rest of her estate would go to her brothers and sisters and their heirs. Performance of the contract, by means of the adoption proceedings and the deed referred to, was alleged, and the prayer was for the entire Wilkins estate, real and personal.

Included in the first cause of action were allegations that Dollie ac-

cepted the deed as her share of her foster mother's estate, and orally released the remainder to her foster mother's natural heirs, and so estopped herself from claiming the property sued for. This feature of the first cause of action was made the basis of a second cause of action, which will be considered separately.

John Bilderback married twice. Dollie was the daughter of his first wife, who died a few days after Dollie's birth. Mrs. Wilkins took the child and reared it. A. C. (Curtis) Bilderback was John's brother. The two brothers and their wives were present when the adoption of Dollie was discussed, and the four persons were witnesses at the trial. John Bilderback testified as follows: "On that day Mrs. Wilkins said to me that she wanted to adopt Dollie, and I said, 'What are you going to give her in the end?' I had nothing to do with her, as Mrs. Wilkins had raised her, and she said she would give her a good education, and that she would give her a good start, so she can make a good living without work. A. C. Bilderback said he would not do it if he were her, as Dollie would get all of her property, and she said, 'No; she will not, as I will deed her what I want her to have.' I said, 'All right, then.' On the next day I went to Atchison and consented to the adoption. I agreed to Dollie being adopted. Curtis objected to her getting all of the property, and Sarah said she would not. She said she would do as she pleased with the balance."

John Bilderback's wife testified as follows: "At the time we lived south of Pardee, in Atchison county. Mrs. Wilkins talked to my husband in my presence about the adoption of Dollie. She asked my husband to consent to her adoption of Dollie, and he asked what she would do for Dollie. She said, 'I will give her a good education and a start in this world's goods, and that is more than you can do;' and A. C. Bilderback said, 'I would not do that, as this girl will get all you got;' and she said, 'No; she will not; I will give

her all that I want her to have by deed,' and she turned to John and said, 'Are you satisfied?' and he said, 'Yes.' John wanted to know what she was going to give her if she took her. Curtis did not want it that way. They did not ask Mrs. Wilkins to give them anything. She said she would give Dollie a good education and a good start in the world, but she did not intend to give her all of it. She did not say she would give it to John and Curtis, but to her heirs when she was ready to. She did not mention any names. John expressed his satisfaction with what Mrs. Wilkins said she would do for Dollie, and he went next day to carry it out."

A. C. Bilderback's wife testified as follows: "I remember being at John Bilderback's home in January, 1892, when there was a talk about adopting Dollie. John and his family, Aunt Sarah (meaning Mrs. Wilkins), my husband, and myself were there, and it was on Sunday. Aunt Sarah said she wanted to adopt her, and she would give her part of her property and take care of her and school her. My husband objected and said, 'You are fixing it so she will get all of your property,' and she said, 'No; I will give her just what I want her to have by deed.' After that John said, 'All right.' My husband objected to Aunt Sarah adopting her, as he said it would give Dollie all of her property, and she said, 'I will give her what I want her to have.'"

A. C. Bilderback did not testify regarding the claimed contract.

There was testimony regarding statements made by Mrs. Wilkins years after the adoption, as to what she intended to do for Dollie, as to what would go with the rest of her property, and as to what she had done for Dollie. While this testimony may be regarded as corroborative, all the testimony establishing the terms of the claimed contract has been reproduced.

The court withdrew the first cause of action from consideration by the jury, by an instruction

which, after stating the agreement on which the plaintiff relied, reads as follows: "It has been determined by the court that there is not sufficient evidence in the case upon which the plaintiffs and defendants in like interest are entitled to recover under such claimed contract or agreement, and, even if there was sufficient evidence of such, the claimed contract or agreement is void in law as without consideration and against public policy, and the plaintiffs and defendants in like interest are not entitled to recover by reason of such claimed contract and agreement."

The instruction was correct on all the grounds stated.

The plaintiffs must depend on what influenced John Bilderback's mind. Unless his consent to the adoption were given on the condition and the promise that Mrs. Wilkins would divert all her estate not deeded to Dollie from the statutory channel of descent to her natural heirs, they have no case.

John Bilderback's concern was not for himself and his brothers and sisters and their progeny, but for his daughter. What would his sister do for Dollie? He was told what would be done for Dollie. Curtis Bilderback did not address himself to John and say, "I would not do it if I were you." He addressed himself to his sister, and cautioned her against the adoption, because the girl would get all her property. The response of Mrs. Wilkins to Curtis vindicated herself against the charge of shortsightedness respecting her estate, and disclosed her present notion as to how she would deal with it. The response to John as to what she would do for Dollie, so far as it related to property, had included merely "a good start," "a start in this world's goods," or "part of her property." The response to Curtis included deeding to Dollie what she wanted Dollie to have. After that John said he was satisfied. With reference to Mrs. Wilkins's natural heirs getting part of her property, Curtis Bilder-

back's wife went no further than to say that Dollie was not to get all the property, but only that which would be deeded to her. John Bilderback's wife said that, after Dollie was provided for, the property was to be given "to her heirs when she was ready to." John Bilderback, who alone could make the contract to enrich himself and Curtis and the rest, out of what would otherwise be Dollie's inheritance, testified that his sister said she would do as she pleased with the remainder of her property, after Dollie was provided for. The result is

there was no evidence from which the contract sued on could be deduced, by any fair, just, or reasonable inference.

While the foregoing effectively disposes of the first cause of action, it is necessary to consider further the instruction whereby it was withdrawn from the jury, because the instruction was referred to by the court when directing the jury respecting the second cause of action.

If the contract sued on were made and proved, it was without valid consideration, was contrary to public policy, and void.

Adoption creates a status,—the domestic relation of parent and child. The statute requires the adoption proceeding to be recorded on the journal of the court. The record must include a declaration that the child is "the child and heir" of the person adopting it. At the conclusion of the proceeding, all the legal incidents of the natural relation of parent and child attach to the

new status, and the child becomes entitled to the same rights of person and property as if it were the child by birth of the person adopting it. Gen. Stat. 1915, §§ 6362, 6363; *Dreyer v. Schrick*, 105 Kan. 495, 185 Pac. 30. The natural parent must freely and voluntarily consent to the adoption. This consent includes consent to all the legal consequences of adoption. The result is that the contract made

on Sunday between John Bilderback and Mrs. Wilkins, whereby they attached limitations to the domestic status which Dollie was to gain, was abrogated on Monday by legal proceedings in which they were both participants.

It is elementary law that the aim and end of adoption statutes is the welfare of children.

The theory of the ^{—purpose of} adoption statute is ^{statutes.}

that such welfare will be best promoted by giving an adopted child the status of a natural child. An incident of that status is capacity to inherit in case of the parent's intestacy. The care with which that capacity is conferred by the adoption statute has been indicated. In the *Dreyer Case*, just cited, it was held that adoption of a child by a testator revokes his previously executed will, to the same extent as birth of a child. The statute establishes the public policy of the state, and any contract between the parties interested in an adoption proceeding which would make the result of the proceeding contradict the statute contravenes that policy. It is perfectly true that a foster parent may, by various means, deprive his adopted child of its expectancy, just as a natural parent may disinherit his own child. The fortunes of the child are left to parental consideration; but the fortunes of the child must have parental consideration, and no preadoption contrivance can thwart fulfilment of the statute by embarking an adopted child upon its career stripped of the attributes and privileges of an heir.

The views which have been expressed apply to the subject of consideration. As counsel for Mrs. Woods suggests, it may well be doubted that a parent may barter his child to adoption by another for any valid consideration other than benefit to the child. However this may be, a preadoption agreement which undertakes to place a child in any other relation to its foster parent than heir cannot be claimed as a consideration for yielding consent to

adoption. If by oral bargain, concealed from the court solemnizing the adoption, a parent may sell his child for a share of the child's prospective patrimony, as the contract in this case contemplated, welfare of children may become a mere incident instead of the desideration of adoption proceedings.

Cases are cited in which agreements to give the adopted child all or specified portions of the adopting parent's property have been enforced. The distinction between such agreements and the contract under consideration is clear. They are not derogatory to the child's necessary status as heir; on the contrary, they augment his privileges, by disqualifying the adopting parent from depriving him of the property promised, as the parent might do but for the promise.

The nature of the second cause of action has been indicated. All the evidence introduced in support of the first cause of action was submitted to the jury in connection with the second cause of action. The jury returned a verdict against the plaintiffs, together with two special findings of fact which follow:

Q. 1. Do you find that on July 6, 1914, when the deed to Dollie E. Woods was executed and delivered by Sarah E. Wilkins, it was understood and agreed between the parties that such deed was to be accepted by Dollie E. Woods in full settlement of her expectancy as an heir to the estate of Sarah E. Wilkins?

A. No.

Q. 2. Do you find that Dollie E.

Woods accepted the deed from Sarah E. Wilkins of date July 6, 1914, in full settlement of her expectancy as an heir to any interest in or to the estate of Sarah E. Wilkins, upon the event of the death of Sarah E. Wilkins?

A. No.

It is said the face of the deed contradicts these findings. Manifestly, this is not true, and there was abundant evidence to sustain the findings.

Appeal—
absence of
error.

Complaint is made that two requests for instructions were denied. Not only was the full substance of the requested instructions stated to the jury, but the subjects embraced were much more adequately treated by the court in instructions which were given.

It is said that due consideration by the jury of the second cause of action was prejudiced by the court's condemnation of the first cause of action. This cannot be true, in view of the italicized portion of the following instruction, which the court gave: "In determining the question whether or not Sarah E. Wilkins deeded to Dollie E. Woods certain property in full of her expectancy in her estate, and whether or not Dollie E. Woods accepted the same in full of her expectancy in said estate, it is proper for you to consider all the surrounding circumstances, statements of intention, statements and acts and *agreements, if any, void or otherwise.* . . ."

The judgment of the District Court is affirmed.

Petition for rehearing denied June 10, 1920.

ANNOTATION.

Validity and effect of preadoption agreement derogating from the status or rights of an adopted child as fixed by statute.

The reported case (BILDERBACK v. CLARK, ante, 1622) appears to have been the only one to have declared void a preadoption agreement varying the rights of an adopted child from those fixed by statute, upon the theory

that such an agreement was derogatory to the child and therefore violative of the principle underlying adoption; namely, the welfare of the child adopted. And reason seems to be with the conclusion of the court to the ef-

fect that a preadoption agreement which undertakes to place a child in any other relation to its foster parent than heir cannot form a consideration for yielding consent to adoption.

A few analogous decisions afford some support for the decision in the *BILDERBACK CASE*. Thus, in Pennsylvania, applying the theory that a contract of adoption which is detrimental to the adopted child is against public policy and void, it has been held that a contract undertaking to destroy the identity of the child by concealing its identity from the mother and its parentage from the adopting parents is void as against public policy. *Re Sleep* (1897) 6 Pa. Dist. R. 256. And it has been held that a deed of adoption which, under the statute, raises the relation of parent and child, with all its reciprocal rights and obligations, is not abrogated by a subsequent written statement by the adopting parent that the natural mother may have the child when she so desires. *Re Clements* (1882) 12 Mo. App. 592.

Of course, as is stated in the reported case (*BILDERBACK v. CLARK*, ante, 1622), adopting parents may, as a general rule, enter into contracts which are not derogatory to the child's necessary status as heir, but rather augment his privileges, as, for instance, by agreeing to give the adopted child all or specified portions of the adopting parent's property. Cases where contracts of this character have been enforced are fairly numerous, and the following are cited as illustrative: *Nowack v. Berger* (1895) 133 Mo. 24, 31 L.R.A. 810, 54 Am. St. Rep. 663, 34 S. W. 489 (specific performance of contract to make adopted child an equal heir with own children, should any be born, decreed as against natural children); *Martin v. Long* (1898) 53 Neb. 694, 74 N. W. 43 (contract to give adopted daughter \$500 should she remain with the adopting parents until her majority, and bestowing upon her "equal rights and privileges of children born in lawful wedlock," held to confer upon the adopted child "all the rights of children proper, and, in addition thereto, to secure to her in any event, upon

her majority, the sum specified"); *Pemberton v. Pemberton* (1906) 76 Neb. 669, 107 N. W. 996 (contract of adoption binding foster parents to make the adopted child an equal heir with natural children, specifically enforced against the estate of the deceased foster parents); *Healy v. Healy* (1900) 55 App. Div. 815, 66 N. Y. Supp. 927, affirmed in (1901) 166 N. Y. 624, 60 N. E. 1112 (specifically holding that a contract of adoption whereby the adopted child is promised the share of an own child is not against public policy, and that specific performance would not be denied on the ground that it was unjust to natural children where they received what they would have been entitled to under the law of descent were the adopted child a sister in blood); *Winne v. Winne* (1901) 166 N. Y. 263, 82 Am. St. Rep. 647, 59 N. E. 832 (decreeing specific performance of a contract to give an adopted child the estate of the adopting parent); *Townsend v. Perry* (1910) 124 N. Y. Supp. 143 (holding that an agreement to give an adopted child all of the adopting parent's property should they have no natural children should be enforced); *Quinn v. Quinn* (1894) 5 S. D. 323, 49 Am. St. Rep. 875, 53 N. W. 808 (holding that the only effect of a parol agreement to make a formally adopted child the heir of the foster parent's property, which had been entered into as an inducement to the natural mother to gain her consent to the adoption, was to prevent the adopting parent from depriving the child of his right as heir to his property by any fraudulent transfer or transfer without consideration, or by will made for the purpose of avoiding the agreement). In *Martin v. Long* (Neb.) supra, Irvine, C., said: "It must be borne in mind that the mother of the child was a party to the proceeding and was surrendering her child to others, and that the right to inherit is not absolute, but may be defeated by will. To give an adopted child in that respect the rights and privileges of children proper would be an empty form if all such rights could be defeated by will. The most natural impulse of a mother so situat-

ed, and yielding to others the care of a child, presumably from motives touching only the child's welfare, would be to guard in this respect by requiring a stipulation for something certain when the wardship should cease,—an obligation enforceable as a contract, not one resting in the mere volition of others."

But that where the action is an equitable one, brought for the purpose of enforcing a contract making a different disposition of the property of a deceased person from that which the law prescribes, the court will look with jealousy upon the evidence offered in support of such contract and will

weigh such evidence in the most scrupulous manner, see *Mould v. Rohm* (1916) 274 Ill. 547, 118 N. E. 991, wherein the court refused to decree specific performance of an alleged contract of adoption whereby the adopting parents agreed to will all of their property to the adopted child. This case is merely cited as illustrative of a considerable number of others to the same effect, but which, of course, are not within the scope of the present annotation, which presupposes that there has been a valid adoption either by virtue of statute or by express contract.
G. J. C.

ALGIE P. GULICK et al.

v.

CHARLES FENTON HAMILTON, Plff. in Err.

Illinois Supreme Court — April 21, 1920.

(293 Ill. 126, 127 N. E. 383.)

Easement — private alley — right to light, air, and ventilation.

1. Abutting owners on a private alley have not per se a right to the use of the alley for light, air, and ventilation.

[See note on this question beginning on page 1634.]

Appeal — entry of decree in conformity with mandate.

2. To enter a decree in conformity with the mandate of the highest court is not error.

[See 2 R. C. L. 289.]

Easement — implied right.

3. A reservation of light and air for the use of buildings abutting on a private alley will not be implied.

Judgment — refusal to comply — excuse.

4. One cannot refuse to obey a decree entered in compliance with the mandate of a court having jurisdiction, on the ground that it was erroneous.

[See 15 R. C. L. 859.]

Contempt — refusal to comply with decree — insufficient findings.

5. One cannot be punished for contempt in refusing to comply with a decree which went beyond the findings on which it was based.

— maintaining encroachment on alley.

6. One restoring a private alley to the condition in which it was before he closed it should not be punished for contempt in refusing to obey a decree requiring it to be free and unobstructed as a public alley, where complainants have encroached upon it themselves, and acquiesced for ten years in the encroachment of which they now complain.

ERROR to the Circuit Court for Champaign County (Boggs, J.) to review a judgment in favor of complainants in a suit brought to enjoin defendant from obstructing an alleged alley, and to compel the removal of obstructions placed therein by him. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Green & Palmer, Walter B. Riley, and Oris Barth, for plaintiff in error:

An easement or other incorporeal hereditament in lands can be created only by grant, or by prescription which presumes a grant.

Lake Erie & W. R. Co. v. Whitham, 155 Ill. 514, 28 L.R.A. 612, 46 Am. St. Rep. 355, 40 N. E. 1014; *Tinker v. Forbes*, 136 Ill. 221, 26 N. E. 503; *Girard v. Lehigh Stone Co.* 280 Ill. 484, 117 N. E. 698; *Quincy v. Jones*, 76 Ill. 231, 20 Am. Rep. 243.

An easement, either in gross or appurtenant to lot 12, was reserved by the grantor.

Kuecken v. Voltz, 110 Ill. 264; *Hornor v. Keene*, 177 Ill. 391, 52 N. E. 492; *Schnellbacher v. Jobst*, 271 Ill. 319, 111 N. E. 138; *Strauss v. Putta*, 265 Ill. 57, 106 N. E. 437.

Plaintiffs cannot invoke the rule that there was an "obvious easement existing, apparent at the time of the sale" by Gauch of the tracts now owned by them, as the conditions existing at that time are not shown by the evidence.

Martin v. Murphy, 221 Ill. 632, 77 N. E. 1126; *Cihak v. Klekr*, 117 Ill. 653, 7 N. E. 111; *Newell v. Sass*, 142 Ill. 115, 31 N. E. 176; *Adams v. Gordon*, 265 Ill. 93, 106 N. E. 517.

An easement can only be created by grant, or prescription which presumes a grant; a covenant for an easement can only be enforced in equity by granting specific performance.

Willoughby v. Lawrence, 116 Ill. 22, 56 Am. Rep. 753, 4 N. E. 356; *Gerling v. Lain*, 269 Ill. 337, 109 N. E. 972; *East St. Louis Connecting R. Co. v. East St. Louis*, 182 Ill. 487, 55 N. E. 553.

When the deeds to the Hamilton property were made by Gauch, he, not owning the Gulick and Leseure properties, had no intention of creating any easement appurtenant to lots he did not own.

9 R. C. L. 737, § 5; *Goldstein v. Raskin*, 271 Ill. 253, 111 N. E. 91; *Moline Water Power Co. v. Cox*, 252 Ill. 356, 96 N. E. 1044; *Wagner v. Hanna*, 33 Cal. 111, 99 Am. Dec. 354; *Willoughby v. Lawrence*, 116 Ill. 19, 56 Am. Rep. 753, 4 N. E. 356; *Garrison v. Rudd*, 19 Ill. 558.

Defendant is not chargeable with notice of the terms and provisions of deeds not in his own chain of title.

Thorpe v. Helmer, 275 Ill. 86, 118

N. E. 954; *Rohde v. Rohn*, 232 Ill. 180, 83 N. E. 465.

No easement was created by prescription.

Dexter v. Tree, 117 Ill. 532, 6 N. E. 506; *Doss v. Bunyan*, 262 Ill. 101, 104 N. E. 153; *Anchor v. Stewart*, 270 Ill. 57, 110 N. E. 385; *Chicago v. Borden*, 190 Ill. 444, 60 N. E. 915; *Warren v. Jacksonville*, 15 Ill. 236, 58 Am. Dec. 610.

The change of conditions and the failure of the complainants themselves to keep the alleged alley open bars them from right to relief.

Ewertsen v. Gerstenberg, 186 Ill. 344, 51 L.R.A. 810, 57 N. E. 1051; *Curtis v. Rubin*, 244 Ill. 88, 135 Am. St. Rep. 307, 91 N. E. 84; *Hutchinson v. Ulrich*, 145 Ill. 336, 21 L.R.A. 391, 34 N. E. 556; *Hays v. St. Paul M. E. Church*, 196 Ill. 633, 63 N. E. 1040.

Where a mandatory injunction is asked for, the court should consider the inconvenience and damage that will result to the defendant as well as the benefit to accrue to the complainant from granting the writ, and must determine, in the exercise of a sound discretion, whether the writ shall issue.

Hill v. Kimball, 269 Ill. 398, 110 N. E. 18; *Lloyd v. Catlin Coal Co.* 210 Ill. 460, 71 N. E. 385; *Dunn v. Youmans*, 224 Ill. 34, 79 N. E. 321; *Seeger v. Mueller*, 133 Ill. 86, 24 N. E. 513; *Loomis v. Collins*, 272 Ill. 221, 111 N. E. 999; *Cleveland v. Martin*, 218 Ill. 73, 3 L.R.A.(N.S.) 629, 75 N. E. 772; *American Smelting & Ref. Co. v. Godfrey*, 14 Ann. Cas. 19, note; 22 Cyc. 782; *Starkie v. Richmond*, 155 Mass. 188, 29 N. E. 770; *Kerr, Inj.* 231; 14 R. C. L. p. 308, § 6.

Messrs. Dobbins & Dobbins and F. B. Leonard, Jr., for defendants in error:

Upon the remanding of the cause with directions to grant the relief prayed for in the bill, the lower court could do nothing except to enter the decree which it did in conformity with the remanding order.

Union Nat. Bank v. Hines, 187 Ill. 110, 58 N. E. 405; *Spring Lake Drainage & L. Dist. v. Stead*, 263 Ill. 251, 104 N. E. 1014; *Pittsburg, C. C. & St. L. R. Co. v. Gage*, 286 Ill. 213, 121 N. E. 582.

The 10-foot strip in question being held to be an "alley," and not a mere "passageway," the erection of any pro-

jection over the alley would be an obstruction and encroachment thereon.

Barber v. Allen, 212 Ill. 133, 72 N. E. 33; *Field v. Barling*, 149 Ill. 565, 24 L.R.A. 406, 41 Am. St. Rep. 311, 37 N. E. 850, 28 Cyc. 894; *Hibbard, S. B. & Co. v. Chicago*, 173 Ill. 91, 40 L.R.A. 621, 50 N. E. 256; *People ex rel. Faulkner v. Harris*, 203 Ill. 279, 96 Am. St. Rep. 304, 67 N. E. 785; *J. Burton Co. v. Chicago*, 286 Ill. 888, 86 N. E. 93, 15 Ann. Cas. 965.

The decree entered, having commanded the defendant "to forthwith remove from the west 10 feet of lot 12 all obstructions placed thereon by him, his agents or employees," and restrained him and his employees "from interfering with the use of said strip of ground as a public and private alley," was exactly as prayed for in the bill, and the action of the court in entering that kind of decree cannot now be assigned as error.

Windett v. Ruggles, 151 Ill. 184, 37 N. E. 1021; *Boggs v. Willard*, 70 Ill. 815, 22 Am. Rep. 77; *Kuhn v. Eppstein*, 231 Ill. 316, 83 N. E. 233.

Defendant cannot avail himself of any defense to the entire relief prayed for by the bill which is not set forth in his answer.

Rankin v. Rankin, 216 Ill. 140, 74 N. E. 763; *Dorman v. Dorman*, 187 Ill. 154, 79 Am. St. Rep. 210, 58 N. E. 235; *Froemke v. Marks*, 259 Ill. 147, 102 N. E. 192; *Mehan v. Mehan*, 203 Ill. 180, 67 N. E. 770; *Gibson v. Brown*, 214 Ill. 830, 73 N. E. 578.

Cartwright, J., delivered the opinion of the court:

The defendants in error, *Algie P. Gulick* and *Seeley C. Gulick*, filed their bill in the circuit court of *Champaign county* to enjoin the plaintiff in error, *Charles Fenton Hamilton*, from obstructing an alleged alley on the west 10 feet of lot 12, in block 7, in *Farnham, Clark, & White's addition to Urbana*, which afforded access to the rear of a building occupied for business purposes owned by the defendants in error, and which furnished a means for hauling goods, merchandise, and material to the rear of that building, and to compel plaintiff in error to remove obstructions placed thereon by him. The existence of the alley was disputed by the answer, and the issue was referred to the master in

chancery to take the evidence and report the same with his conclusions of fact and law. It was alleged in the bill that the alley existed by virtue of reservations in deeds, and also that it had been used by the defendants in error and the public generally under an adverse claim of right for more than fifty years. The master took the evidence and reported the same with his conclusions that the deeds under which the defendants in error claimed the alley did not create any easement in their favor, and that there was no alley of any sort as alleged in the bill, and he recommended that a decree should be entered dismissing the bill for want of equity. Upon a hearing of exceptions to the report, they were overruled, and the bill dismissed, and from the decree the defendants in error prosecuted an appeal to this court. On that appeal this court differed with the chancellor to the extent of holding that by virtue of conveyances made by *Jacob P. Gauch*, the original owner of lots 11 and 12, an easement appurtenant to and running with the land was secured to the several grantees, and gave them a 10-foot way for the common uses of an alley by the grantees across the west end of the lots in connection with their property. The decree was reversed and the cause remanded, with directions to grant the relief prayed for in the bill. *Gulick v. Hamilton*, 287 Ill. 367, 122 N. E. 537. The cause was reinstated in the circuit court, and a decree was entered ordering a mandatory injunction against the plaintiff in error forthwith to remove from the west 10 feet of lot 12 all obstructions placed thereon by him, to place the same in as good condition as the same was for public and private travel and passageway prior to the excavation made therein by him, and to desist from thereafter obstructing in any way the west 10 feet of lot 12 and from in any way interfering with the passage of defendants in error and their employees, tenants, and grantees over the same, and from interfering with

the use of said strip of ground as a public and private alley, which substantially followed the language of the prayer of the bill.

The plaintiff in error had erected a three-story brick building upon and over the alleyway, and a controversy arose between the parties as to the extent to which the decree required a removal of that building. The defendants in error contended that the plaintiff in error was required to remove all obstructions by destroying the entire west 10 feet of the building, and the plaintiff in error contended that it would be a compliance with the decree to restore the alley to the condition in which it had existed for about ten years, when occupied by the Walker Opera House Company with its building extending over the alley, supported by iron columns, but not interfering with the use of the alley by defendants in error. Affidavits were filed as to the financial ability of the plaintiff in error to comply with the decree if it required the removal of the entire west end of his building. The court decided that the entire west end of the building should be removed, and, the plaintiff in error failing to remove the same, there was a proceeding against him for contempt of court, and he was fined \$250 and costs. A writ of error was sued out of this court, which was made a supersedeas, and errors are assigned on the entry of the decree on the ground that it was not in accordance with the decision of this court as to the rights of the parties, and also on the judgment finding the plaintiff in error guilty of contempt and imposing a fine.

The decree entered was in conformity with the mandate of this court, and it was not error for the court to enter the decree. *Union Nat. Bank v. Hines*, 187 Ill. 109, 58 N. E. 405; *Spring Lake Drainage & L. Dist. v. Stead*, 263 Ill. 247, 104 N. E. 1014; *Pittsburg, C. C. & St. L. R. Co. v. Gage*, 286 Ill. 213, 121 N. E. 582.

The prayer of the original bill,

however, and the decree entered, were not in accord with the decision of this court concerning the rights of the parties. It was not decided there was a public alley on the strip of ground, but only that there was a private easement for the uses of an alley appurtenant to the several parts of lots 11 and 12 which passed with the dominant estate as an incident thereto under the deeds from Gauch. In the record before the court there was no evidence tending in any degree to prove that there had ever been any dedication to the public or an acceptance by the public of the strip of land for a public alley, which was essential to give it that character. The plaintiff in error was the manager of the Walker Opera House Company, which occupied the premises now owned by him, and that company built an addition to its opera house over the alley, supported by iron columns and concrete footings, which remained there until 1914, when the plaintiff in error tore down the building in preparation for the erection of a new building. There was testimony that the construction was in 1904 or 1905, but the date is fixed as 1904 by a declaration filed in the circuit court against the opera house company. Frank T. Walker owned lot 10 on the east side of the alleged alley and brought his suit in August, 1904, against the opera house company, alleging the existence of the alley and the obstruction of the same by the erection over the alleged alley. If it was a public alley, he was entitled to maintain the suit and recover damages. A demurrer to his declaration was sustained, and judgment was rendered against him. There was also a suit in the circuit court against the city of Champaign, of which the premises had become a part, for a writ of mandamus to compel the city to cause the removal of the projection over the alley. The petition was dismissed by the court upon a demurrer to a plea, and, so far as any right to a public alley was concerned, the question was settled in those suits. In deciding the case on the appeal of the defendants in

Appeal—entry
of decree in
conformity
with mandate.

Bank v. Hines, 187
Ill. 109, 58 N. E.

405; *Spring Lake Drainage & L. Dist. v. Stead*, 263 Ill. 247, 104 N. E. 1014; *Pittsburg, C. C. & St. L. R. Co. v. Gage*, 286 Ill. 213, 121 N. E. 582.

error this court did not go into the details of those proceedings, which was unnecessary, but defined and limited the rights of the parties and the nature of the easement. The decision was that there was a private way for the use of the defendants in error, for whose benefit, with other owners of property, it had been reserved, and that it was not for or to be used by the public.

The alley, as declared by this court, was a private alley, to be kept open and unobstructed for the use and enjoyment of the occupants of the land to which it was appurtenant. *Dexter v. Tree*, 117 Ill. 532, 6 N. E. 506; *Chicago v. Borden*, 190 Ill. 430, 60 N. E. 915. None of the abutting owners had respected the alley as an unobstructed one 10 feet in width. It was proved before the master, and reported by him, that the defendants in error had themselves encroached upon the strip with areaways built out 18 inches, and between the areaways an unloading chute or cellar entrance which projected into the strip approximately 3 feet and 6 inches, leaving 6 feet and 6 inches for the uses of an alley, and a permanent building occupied by Leseure at the north end obstructed the strip 2 feet to the entire height of the building and for a width of 22 feet. The bill alleged the construction by the Walker Opera House Company over the alleyway, supported by iron columns and maintained until the year 1914, and stated that it did not interfere with free and unobstructed passage along the alleyway, and that any person having occasion therefor passed back and forth without hindrance until June 1, 1915, when the plaintiff in error began an excavation in the alley for the erection of his new building. Seeley C. Gulick, one of the defendants in error, testified that when the plaintiff in error contemplated erecting his building he showed the witness an elevation with an archway which was ample room for a team to drive through, and when he started to build the present building he

9 A.L.R.—103.

came to see the witness and asked if it would be all right if he should build over the alley the same as it was before and leave it open below, and the witness said that he would much rather leave the alley open all the way up, but would be satisfied, and not cause him any trouble, if he left it open that way, but afterward the plaintiff in error said he was not going to leave it open. Algie P. Gulick, the other defendant in error, did not engage in this conversation and is not shown to have known anything about it, but it can fairly be taken to represent the attitude of the defendants in error at the time. At any rate, the defendants in error had acquiesced in the projection over the alley for about ten years, and in their bill alleged that it did not interfere with the free and unobstructed use of the alley for access to their premises. It is now insisted that the defendants in error have a right not only to unobstructed passage, but to light and air. If an alley is public, abutting owners have a right to light, air, and ventilation (*Field v. Barling*, 149 Ill. 556, 24 L.R.A. 406, 41 Am.

St. Rep. 311, 37 N. E. 850), but if the alley is not public that is not true as a rule of law (*Dexter v. Tree*, supra), and the character and uses of a private alley can be fixed and regulated by the parties interested. This alley, not being a public one, the right to light and air does not follow as a matter of law. A reservation of light and air for the use of buildings will not be implied, but must ordinarily be expressed, although there must be no interference in that or any other particular with the proper use of a right of way within the terms of the grant. *Barber v. Allen*, 212 Ill. 125, 72 N. E. 33.

The situation here is the same as though a chancellor, after having made findings and declaring the rights of the parties, should enter a decree broader than the findings, and not warranted thereby, and pro-

Easement—
private alley—
right to light,
air, and ventila-
tion.

—implied right.

ceed to enforce the decree by a proceeding for contempt. The fact that the remanding order was entered without observing that the prayer of the bill was more comprehensive than the facts and law would warrant, and that the decree was entered, may be disconcerting; but the question presented to the chancellor on the supplemental proceeding was whether the plaintiff in error merited punishment for failing to comply with the decree. This court had jurisdiction to direct by its mandate the entry of the decree,

Judgment—
refusal to
comply—excuse.

and, when the plaintiff in error was charged with the failure to obey it, he could not say that it was erroneous, since judgments of courts cannot be attacked collaterally where there is jurisdiction. *O'Brien v. People*, 216 Ill. 354, 108 Am. St. Rep. 219, 75 N. E. 108, 3 Ann. Cas. 966. One accused of a failure to comply with an order of a court when charged with contempt may show that without his fault he was unable to comply with the order, and this the plaintiff in error attempted to do; but it is certainly an equally good excuse that the order went beyond the findings upon

Contempt—
refusal to
comply with
decree—insuf-
ficient findings.

which, alone, it was based. If a chancellor, after deciding the rights of the parties in respect to an alley and fixing its character as a private one, should enter a decree providing that it should be kept

open as a public alley where there was no semblance of a right to an alley of that character, and the decree had gone beyond his control by expiration of the term or otherwise, he ought not to punish as for a contempt a failure to comply with the decree, which would be clearly unjust. On such a proceeding it would be proper to look into the findings of the decree and ascertain therefrom what relief would follow according to the rules of equity. The alleyway having been determined to be a private easement, obstructed at one end by a permanent building to the extent of 2 feet, leaving only 8 feet for an alley for the use and benefit of plaintiff in error, and the defendants in error having encroached upon the alley and acquiesced in the erection and maintenance by the opera house company of an extension over the alley which did not interfere with its practical use, the —maintaining encroachment on alley.

plaintiff in error ought not to be punished as for a contempt if he should restore the alley to the condition in which it was before he tore down the opera house to construct his building, as he offered to do in response to the rule to show cause why he should not be punished for contempt.

The judgment against the plaintiff in error for contempt is reversed.

Petition for rehearing denied June 3, 1920.

ANNOTATION.

Implied easement of light and air over private alley or right of way.

This annotation presupposes that there is a conceded right of way.

It will be seen that it is held in the reported case (*GULICK v. HAMILTON*, ante, 1629) that a right of way over a private alley does not include the right to light and air (beyond what is necessary).

In general a grant of a right of way only includes light and air sufficient

for purposes of the way, so that the owner of the fee may in general build over the way if he does not interfere with its convenience as a way.

Connecticut.—*Bittello v. Lipson* (1908) 80 Conn. 497, 16 L.R.A. (N.S.) 193, 125 Am. St. Rep. 121, 69 Atl. 21.

Illinois.—*Barber v. Allen* (1904) 212 Ill. 125, 72 N. E. 33 (as stating the rule); *Rudolph Wurlitzer Co. v.*

State Bank (1919) 290 Ill. 72, 124 N. E. 844; (GULICK v. HAMILTON (reported herewith) ante, 1629.

Massachusetts.—Atkins v. Bordman (1841) 2 Met. 457, 37 Am. Dec. 100; Gerrish v. Shattuck (1882) 132 Mass. 235; Burnham v. Nevins (1887) 144 Mass. 88, 59 Am. Rep. 61, 10 N. E. 494; Duncan v. Goldthwait (1914) 216 Mass. 402, 103 N. E. 901.

Michigan.—Grinnell Bros. v. Brown (1919) 205 Mich. 134, 171 N. W. 399.

New Jersey.—Sutton v. Groll (1886) 42 N. J. Eq. 213, 5 Atl. 901.

New York.—Grafton v. Moir (1892) 130 N. Y. 465, 27 Am. St. Rep. 533, 29 N. E. 974; Andrews v. Cohen (1917) 221 N. Y. 148, 116 N. E. 862.

Pennsylvania.—Duross v. Singer (1909) 224 Pa. 573, 73 Atl. 951; Stevenson v. Stewart (1869) 7 Phila. 293; Carter v. Lebzelter (1910) 45 Pa. Super. Ct. 478; Patterson v. Philadelphia & R. R. Co. (1890) 8 Pa. Co. Ct. 186.

Where there is only the grant of a passageway, then the only light and air grant is such as is necessary to the passageway. Barber v. Allen (1904) 212 Ill. 125, 72 N. E. 33 (as stating the rule).

In Kennedy v. Burgin (1852) 1 Phila. (Pa.) 441, an injunction pendente lite was denied to restrain building over a private way, though the plaintiff was entitled by agreement to the free, open, and uninterrupted use, right, and privilege thereto.

So, a grant of an easement over a driveway for ingress and egress does not prevent the grantor from building over the way above the first story, it not appearing that such building would deprive the grantee of sufficient light and air to use the way as a way. Grinnell Bros. v. Brown (1919) 205 Mich. 134, 171 N. W. 399, *supra*.

And the right of passage for horses, carriages, and carts for the private convenience of the owners of certain lots used for residence purposes, which is created by deed across the back end of such lots "for the use and purpose aforesaid, and no other," is not violated by building over the passage, leaving a space high enough for the uses specified. Hollins v. Demo-

rest (1892) 129 N. Y. 676, 15 L.R.A. 487, 29 N. E. 1093.

So, a reservation of "the right of way through and over the carriage or alleyway" to the stables, to continue as long as the stables are "occupied as private stables," does not reserve the alleyway itself, nor prevent the owner of the entrance from building over the way even if he cuts off some light and air, as long as a suitable passage is left with enough light and air to use it conveniently. Grafton v. Moir (1892) 130 N. Y. 465, 27 Am. St. Rep. 533, 29 N. E. 974, *supra*.

And a grant to build over an alley to a depth equal to that which was then built over does not prevent a deeper building over as long as the alley is not interfered with for its uses as a passageway and watercourse, and there is sufficient light. Duross v. Singer (1909) 224 Pa. 573, 73 Atl. 951, *supra*.

So, the reservation by a grantor of "free liberty of ingress, egress, and regress" over a passageway about 5 feet wide, for carrying wood or any other thing over certain premises, gives him merely a convenient right of passageway, which will not prevent the grantee from building over it, if a space is left for the way so wide, high, and light that it is substantially as convenient for passage as before. Atkins v. Bordman (1841) 2 Met. (Mass.) 457, 37 Am. Dec. 100, *supra* (trespass).

So, one having a private right of footway has no right to have it open to the sky, and cannot enjoin its covering. Gerrish v. Shattuck (1882) 132 Mass. 235; Baker v. Willard (1898) 171 Mass. 220, 40 L.R.A. 754, 50 N. E. 620; Stevenson v. Stewart (1869) 7 Phila. (Pa.) 293; Patterson v. Philadelphia & R. R. Co. (1890) 8 Pa. Co. Ct. 186; Carter v. Lebzelter (1910) 45 Pa. Super. Ct. 478.

Thus, a reservation in a deed of a "passageway 4 feet wide" from a street to a house on an adjoining piece of land will not prevent the grantee from building over the way, leaving a passage of reasonable height. Gerrish v. Shattuck (1882) 132 Mass. 235, *supra*.

Where the plaintiffs' deeds called

for the north side of an alley as a boundary, "together with the free and common use and privilege of the said alley as a passageway and watercourse at all times forever," and the alley was a mere footway 3 feet 11 inches wide, it was held that they were not entitled to enjoin the defendant from building a bridge for its employees at an elevation of over 19 feet. *Patterson v. Philadelphia & R. R. Co.* (1890) 8 Pa. Co. Ct. 186.

The grant of a right and privilege in common with the grantor "in a 5-foot passageway" from the land to a street, and a further reservation to the grantor of the right of using in common with the grantees a strip of land 5-foot wide across the end of the granted premises, to be the passageway, to be maintained and supported at the common expense of the abutters, which passageway reserved is a continuation of the one granted, there being no outlet at one end, without any provision that the way is to be kept open to the sky for light or air or prospect, does not restrict the grantor from building projecting windows over the passageway which do not interfere with the passage. *Burnham v. Nevins* (1887) 144 Mass. 88, 59 Am. Rep. 61, 10 N. E. 494, *supra*.

In *Richardson v. Pond* (1860) 15 Gray (Mass.) 387, which was an action in tort for obstructing a passageway appurtenant to plaintiff's estate by building over it, the reported decision merely refers the case to an assessor, but the court said that, if the plaintiff could not prove that the erection of the building rendered the way so dark and low as to make its use for practical purposes less convenient and beneficial than theretofore, he could not recover.

In *Lipskey v. Heller* (1908) 199 Mass. 310, 85 N. E. 453, where, in the deed creating the easement of a right of way, there was no designation of height, it was held that the owner of the servient tenement might build over such right of way, but that the owner of the easement could not be deprived of the access of light and air in so far as these elements were indispensable to its use for the purpose of a passage-

way of the dimensions which had been established; and there must be left such openings for light and ventilation as might be found necessary for the convenience of travelers.

And in *Weed v. McKeg* (1903) 79 App. Div. 218, 79 N. Y. Supp. 807, where the grantee was to have a right of way through an alley of "free and perfect egress and ingress for the benefit" of certain lots, the alley "to be kept open 9 feet wide from front to rear," the court declined to permit a building so low as 9 feet in the clear.

"If the thing itself, that is, the alleyway, as a distinctive body of land, is granted or reserved, then, of course, the person for whose use the grant or reservation is, has the right to the enjoyment of the light and air without obstruction from earth to heaven." *Barber v. Allen* (1904) 212 Ill. 125, 72 N. E. 33.

In *Crocker v. Cotting* (1902) 181 Mass. 146, 63 N. E. 403, lots laid off from a tract of land and intended for first-class dwellings were sold with the use of a 5-foot passageway in the rear, the fee in which was retained by the owner of the tract until all of the lots had been sold, when it was conveyed in equal portions to the various lot owners. At the time of the sale of one of the lots there had been erected upon it a four-story house with windows overlooking the way, a rear wall of which was coincident with the line of the way. In holding that the way could not be built over, the court said: "The question is one of construction, of ascertaining the intention of the parties in creating the way, and of giving effect to that intention if it can be done consistently with established rules of law. . . . In the absence of anything in the deeds showing whether the way was to be kept open or could be covered over, we are obliged to resort to the attendant circumstances for aid in their construction, and, taking these into account, it seems to us that it was the intention of the parties that the way should be an open way, and that the deeds under which the petitioners and respondents derive their titles should be so construed."

Where a grant of a passageway 20 feet wide expressly provided that it "should not be subject to have any fence or building erected thereon," the grantee was held entitled to have the strip of land for the full width kept open to the sky and to have the construction of a building over it restrained, although it left a sufficient way for passage. *Schwoerer v. Boylston Market Asso.* (1868) 99 Mass. 285.

Where, by the fair construction of a deed of partition describing a passageway or court on which the parties, while owning in common, had built a brick block of four dwellings, and on which one parcel set off by the deed was bounded, it appears that the parties intended to establish what is technically known as a court in cities, and a court of the higher class, which is fit for the front of dwellings, a provision that this space, which is called "Central Court" when designated in any mode in the deed, "shall be left and always lie open for the passageway or court aforesaid, for the common use and benefit of both the said parties and their said respective estates," is infringed by the erection of a bridge 17 feet and 8 inches above the roadway, and 13 feet and 6 inches high, and 10 feet broad, with windows in the sides constituting an obstruction to light and sun in the dwellings fronting on the court. *Salisbury v. Andrews* (1880) 128 Mass. 336.

So a bond given by the commonwealth for a deed of land included in a scheme for the improvement of waste land in a city, which provides that a passageway 16 feet wide is to be laid out in the rear of the premises, to be filled in by the commonwealth, and to be kept open and maintained by the abutters in common, gives no right to build bay windows projecting over the passageway, although high enough so as not to interfere with passage, where it is clear that the passageway was designed as a thoroughfare for horses as well as for travelers afoot, and for use by all who have occasion to seek the rear entrances to the houses. The bond must be construed to provide for a passageway not merely open at the ends, but

open to the sky throughout its entire length. *Atty. Gen. v. Williams* (1885) 140 Mass. 329, 54 Am. Rep. 468, 2 N. E. 80, 3 N. E. 214.

It may be noted that in *Murphey v. Harkar* (1902) 115 Ga. 77, 41 S. E. 585, where the defendant was enjoined from building over an alley, the right to build over it, if any, was in the plaintiff.

The following cases, while not strictly within the scope of this annotation, are of interest in this connection:

Bay windows and a smokestack were held to be encroachments on a strip of land, but the windows were allowed to remain, where the agreement as to the strip was that the parties "do mutually grant to each other a permanent easement in said strip of ground to the end that they may mutually have light and air from and over said strip, and that they may mutually and without obstruction or encroachment have the permanent use of said strip as an alley and passageway for themselves, their tenants, assigns, successors, and legal representatives respectively." *St. Louis Safe Deposit & Sav. Bank v. Kennett* (1903) 101 Mo. App. 371, 74 S. W. 474.

Where a deed bounded the land conveyed in part by the end of a "passageway of 5 feet wide in the clear for light and air," which it provided should always be kept open for the purpose aforesaid, without giving the grantee any other privilege therein, he is entitled to the open and unobstructed passage of light and air from the ground upwards throughout the whole length of the passageway, and the construction of a building therein about 75 feet from his land by subsequent grantees is a violation of his right. *Brooks v. Reynolds* (1870) 106 Mass. 31.

In *Schmoele v. Betz* (1905) 212 Pa. 32, 108 Am. St. Rep. 845, 61 Atl. 525, it was held that the owner of an easement of a right of way might enjoin the erection over it of a balcony and fire escape upon an abutting building used as a theater. The court said that the use of the alleyway as an emergen-

cy exit from the theater imposed an additional servitude upon the alley, and that the danger of dirt, ice, and snow accumulating upon the balcony and fire escape and falling upon persons passing through the alley was an obstruction to, and an interference with, the use of the easement. (In this case, however, the adjoining owner did not own the land subjected to the easement, nor did he have any easement therein).

The Schmoele Case is cited with approval, and followed, in *Mershon v. Walker* (1906) 215 Pa. 41, 64 Atl. 403, the court saying that the cases were so alike in every essential feature that what was said in one case applied to the other, although it does not expressly appear in the latter case that the abutting owner was not also the owner of the fee.

In enjoining a building 8½ feet above a private way, the court said: "In

considering the meaning of the words 'private way' in this conveyance, it is helpful to remember that the right in the way was granted to the owner of land used for business purposes, abutting upon the way. In such a place as this is, buildings might be expected to be erected along the line of the way, such that goods or other property might conveniently be loaded or unloaded through doors or windows at a considerable height above the ground. Perhaps access to the walls or roof of the building from the way, for making repairs, might have been contemplated. The plaintiff is entitled to a right which is convenient for use in connection with such property as his was, and as it reasonably might be expected to become, in the course of development and change produced by the growth of business in the vicinity." *Frost v. Jacobs* (1910) 204 Mass. 1, 90 N. E. 357. B. B. B.

COMBINED INDEX

TO

NOTES AND CASES.

ABANDONMENT.

Of highway, see **HIGHWAYS**.
Of package by passenger. 9-1884.

ABUSE OF PROCESS.

Liability for, see **FALSE IMPRISONMENT**.

ABUTTING OWNERS.

Right of, as to trees in highway, see
HIGHWAYS.

ACCEPTANCE.

Of check, see **CHECKS**.
Of offer, see **CONTRACTS**.
Of highway, see **HIGHWAYS**.

ACCIDENT.

Evidence of declarations as to, see **EVIDENCE**.

ACCIDENT INSURANCE.

See **INSURANCE**.

ACCOMMODATION PAPER.

Liability on, of one signing as comaker.
9-1139.
Contribution between joint accommodation indorsers. 9-1184.

Breach by holder of note of his agreement with accommodation maker to collect the note from the one for whose accommodation it was signed. 9-177.
Release of accommodation maker by failure of bank to apply the deposit account of the maker primarily liable upon the note. 9-177.

ACCOMPLICE.

Corroboration of testimony of, see **EVIDENCE**.

ACCOUNTING.

Admissibility in evidence of books of bank containing deposit account of one from whom an accounting is demanded. 9-157.

ACKNOWLEDGMENT.

Of will by testator, see **WILLS**.

ACQUIESCENCE.

Estoppel by, see **ESTOPPEL**.

ACTION OR SUIT.

As to dismissal or discontinuance, see **DISMISSAL OR DISCONTINUANCE**.
Between husband and wife, see **HUSBAND AND WIFE**.
By or against infants, see **INFANTS**.
To set aside judgment, see **JUDGMENT**.
Limitation of actions or suits, see **LIMITATION OF ACTIONS**.
Stay of, see **MORATORIUM; STAY**.

Condition precedent.

(Criminal prosecution as a condition of a civil action or proceeding for the cancelation of a corporate charter for violation of law. 9-106 (case p. 98).

Defenses.

In proceedings to abate nuisance, see NUISANCES.

Nature; choice.

As to election of remedies, see ELECTION OF REMEDIES.

Abolition of forms of action. 9-1119.

Effect of form of action on relief granted. 9-1119.

At law or in equity. 9-107, 397.

Joinder.

Joinder of parties, see PARTIES.

ADJOINING LANDOWNERS.

As to lateral support, see LATERAL SUPPORT.

ADMINISTRATION.

Of decedent's estate, see EXECUTORS AND ADMINISTRATORS.

ADMISSIONS.

As evidence, see EVIDENCE.

In pleading, see PLEADING.

ADOPTION.

Of child, see PARENT AND CHILD.

ADVERSE CLAIMS.

Conformity of judgment in action to determine, to pleadings and proof. 9-107.

ADVERSE POSSESSION.

Loss of easement by, see EASEMENTS.

Adverse possession of common. 9-1373 (case p. 1367).

Notice of adverse claim. 9-1367.

Effect of agreement of municipality to repay one who has fenced in part of common cost of sidewalk if he should ever be divested of the common. 9-1367.

AGENCY.

See PRINCIPAL AND AGENT.

AGRICULTURE.

See FARMING PARTNERSHIP.

AIR.

Validity of building regulations requiring areas or open spaces for. 9-1040 (case p. 1035).

Implied easement of light and air over private alley or right of way. 9-1634 (case p. 1629).

ALIENATION.

Restraints upon, see COVENANTS AND CONDITIONS.

Suspension of power of, see PERPETUITIES.

ALIMONY.

On annulment of marriage, see MARRIAGE.

ALLEY.

Right of abutting owner on, to easement of light, air, and ventilation. 9-1629.

ALTERATION OF INSTRUMENTS.

Alteration of commercial paper by reducing the amount. 9-1087 (case p. 1082).

General rule as to effect of. 9-1082.

Right to make correction where blank indorsement on note has been filled up to state the contract incorrectly. 9-1082.

ALTERATIONS.

By tenant, see LANDLORD AND TENANT.

Heavy italic type is used for annotations; roman type for cases.

AMBULANCES.

Criminal or penal responsibility of drivers of municipal or state ambulances for violating speed regulations. 9-367.

AMENDMENT.

Of information in proceeding for disbarment, see ATTORNEYS.
Of pleading generally, see PLEADING.
Of statute, see STATUTES.

AMORTIZATION.

Right of carrier to rates which will amortize cost of road. 9-1232 (case p. 1223).

AMOUNT.

Alteration of commercial paper by reducing the amount. 9-1087 (case p. 1082).

ANIMALS.

Joint liability of several independent owners of trespassing animals. 9-945.

ANNULMENT.

Of marriage, see MARRIAGE.

ANTECEDENT DEBT.

As consideration for contract, see CONTRACTS.

APPEAL AND ERROR.

For certified questions, see CASES CERTIFIED.
As to certiorari, see CERTIORARI.

Effect; stay.

Grant of supersedeas upon appeal from denial of writ of prohibition. 9-157.

Assignments of error.
Necessity of. 9-922.

Briefs.

Refusal to consider questions not presented in the briefs. 9-1177.

Exceptions; necessity.
General rule as to. 9-922.

Rules of decision.

On review of judgment dismissing complaint. 9-1884.

Taking as true evidence tending to show negligence, upon appeal from a nonsuit in an action for negligence. 9-554.

Presumptions.

Presumption that necessary inference from proved facts was made by the court. 9-471.

Presumption in favor of judgment below. 9-1028.

Discretionary matters.

Cross-examination of witness. 9-207.

Review of facts.

Findings of fact supported by evidence. 9-107.

Refusal to say there was no proof to go to jury where evidence is conflicting. 9-531.

Finding that broker was procuring cause of sale. 9-1189.

Verdict in criminal case. 9-207.

Review of verdict allowing attorney's fee. 9-233.

Findings of fact by chancellor. 9-1307.

What errors warrant reversal.

Reversal of decision because based upon matters stated in the reply instead of in the petition. 9-1315.

In admission of evidence. 9-94.

Amount of verdict; measure of damages. 9-485.

Setting aside verdict for plaintiff in joint action against two tort-feasors where proof shows they acted independently. 9-933.

Judgment.

Right of supreme court to order judgment in favor of party entitled thereto, though he has not appealed. 9-1.

Necessity of remanding case for decision on merits upon reversal upon appeal from sustaining of exception of no cause of action. 9-1880.

Duty of supreme court to remand case which the intermediate court has reversed without remanding and without finding ultimate facts. 9-1082.

Remanding case with leave to plaintiff to amend the declaration where judgment for plaintiff has been reversed for insufficiency of declaration. 9-933.

Directing entry of proper judgment. 9-1184.

APPLICATION.

Of deposit, see BANKS.

The dash in each citation stands for A.L.R.

APPORTIONMENT.

Of street improvement assessment, see
PUBLIC IMPROVEMENTS.

Right of creditor who accepts a dividend under assignment for benefit of creditors to attack the assignment as fraudulent. 9-360.

APPURTENANCES.

Easements as, see **EASEMENTS.**

ASSIGNMENTS OF ERROR.

On appeal, see **APPEAL AND ERROR.**

ARCHITECT.

Drawing plans for building for a specified lot which cannot be erected thereon because of municipal building regulations. 9-1035.

ASSUMED NAME.

See **NAME.**

ASSUMPSIT.

Right to recover back in an action at law money paid upon an existing judgment, procured by or grounded on fraud or mistake. 9-400 (case pp. 390, 397).

ARMY AND NAVY.

Moratory statutes in war time, see **MORATORIUM.**

ASSUMPTION OF RISK.

By servant, see **MASTER AND SERVANT.**

ARREST.

Civil liability for making, see **FALSE IMPRISONMENT.**

Time at which an arrest is made as affecting its legality. 9-1850 (case p. 1846).

ATHLETIC APPARATUS.

Injury to pupil by. 9-908.

ASSAULT AND BATTERY.

Right to eject customer from store. 9-379 (case p. 374).

Liability for assault in forcibly retaking property sold conditionally 9-1150 (case p. 1177).

ATTACHMENT.

Joint liability where several independent writs were executed simultaneously, each of which alone causes, or tends to produce, some damage. 9-944.

ASSESSMENTS.

For drains and sewers, see **DRAINS AND SEWERS.**

For public improvements generally, see **PUBLIC IMPROVEMENTS.**

Enforcing landlord's lien by. 9-278.

ATTESTATION.

Of will, see **WILLS.**

ASSIGNMENT.

Of judgment, see **JUDGMENT.**

Payee of check as assignee of the fund. 9-1067.

ATTORNEYS.

In general.

Privileged communications to, see EVIDENCE.

Counsel fees on annulment of marriage, see MARRIAGE.

ASSIGNMENT FOR CREDITORS.

Landlord's lien on goods in hands of assignee for creditors of tenant. 9-322.

Validity and enforceability of restrictive covenant in contract for employment of solicitor's clerk. 9-1472.

Heavy italic type is used for annotations; roman type for cases.

Disbarment; suspension.

Moral delinquency or other conduct not affecting court or client as ground for disbarment or suspension of attorney. 9-189 (case p. 183).

Attorney's misconduct with regard to proposed legislation as ground for disbarment. 9-1277 (case p. 1272).

Encouraging divorce litigation as ground for disbarment or suspension. 9-1500 (case p. 1497).

Conviction of attorney for a crime as condition to disbarment for committing the acts constituting the crime. 9-183.

Disbarment because attorney visits disorderly houses. 9-183.

Excessive charge for services as ground for. 9-1272.

Conversion of client's property as ground for. 9-183.

Filing of amended counts in information to make them correspond with the proof. 9-183.

Sufficiency of evidence to sustain charges. 9-1272.

Relation to client.

Power of next friend to appoint counsel for infant. 9-1528.

Services of attorney as a necessary to infant. 9-1528.

Duty of attorney to withdraw from case on learning that client has no cause of action. 9-1076.

Duty to notify client immediately of collection of money and to remit it promptly. 9-183.

- authority.

Power of attorneys in action affecting highway to stipulate for its vacation. 9-1330.

- compensation.

Excessive charge as ground for disbarment, see supra.

What constitutes reasonable attorney's fee in absence of provision in contract or statute fixing amount. 9-237 (case p. 233).

Evidence in action to recover compensation. 9-233.

Reasonableness of fee allowed attorney under oral contract for contingent fee. 9-233.

Amount of allowance to attorney securing estate for infant. 9-1528.

Power of next friend to contract as to amount of counsel fees. 9-1528.

Power of court of law to allow statutory lien for counsel fees. 9-1528.

ATTRACTIVE NUISANCE.

See NEGLIGENCE.

AUTHENTICITY.

Proof of authenticity of letter other than by proof of hand writing or typewriting. 9-984 (cases pp. 972, 981).

AUTHORITY.

Of attorney, see ATTORNEYS.

Question for jury as to, see TRIAL.

AUTOMOBILES.

See also JITNEY BUSES; TAXICABS.

Operation of automobile or automobile truck as a hazardous occupation within meaning of Workmen's Compensation Act. 9-1882 (case p. 1380).

Duty of pedestrian, before crossing street, to look for automobiles approaching on intersecting street. 9-1243 (case p. 1245).

Arresting driver late at night for driving without necessary lights. 9-1346.

Failure of driver to sound warning at curve. 9-1245.

BAGGAGE.

Of passenger, see CARRIERS.

BAILMENT.

Presumption and burden of proof where subject of bailment is destroyed or damaged by fire. 9-559 (case p. 554).

Carrier as bailee of package inadvertently left by passenger. 9-1384.

Liability of bailee as an insurer. 9-554.

Taking as true evidence tending to show negligence, upon appeal from nonsuit in action for failure to return property. 9-554.

BANKRUPTCY.

Claim of one selling to corporation its own stock as provable against its estate in bankruptcy. 9-1296 (case p. 1287).

Discharge in bankruptcy as bar to debt due to foreign creditors. 9-127 (case p. 123).

To whom notice of bankruptcy proceedings must be given. 9-123.

Effect of solvency of corporation when its officer purchased stocks with its funds and pledged them as security for his own debt on right of trustee in bankruptcy for corporation to assert title to them. 9-1610.

BANKS.

In general.

Acceptance of checks by, see CHECKS.

Refusal of bank to produce its books in court. 9-157.

Officers and agents.

Powers of bank president or vice president. 9-1146 (case p. 1139).

Authority of cashier as question for jury. 9-1139.

Authority of cashier in dealing with directors. 9-1139.

Authority of cashier to accept renewal note and release parties to original note. 9-1139.

Authority of cashier to release liability of president upon commercial paper. 9-1139.

Ratification of act of cashier. 9-1139.

Deposits.

Liability of bank which credits paper payable to a corporation to the personal credit of corporate officer who indorsed it, and pays out the proceeds on the latter's personal checks. 9-346 (case p. 340).

Admissibility in evidence of books of bank containing deposit account of one from whom an accounting is demanded. 9-157.

—application of.

Duty of bank to one primarily liable to apply his deposit to an indebtedness owing from him to the bank. 9-181 (case p. 177).

—payment of checks.

Fraud or other defense to check as available against paper issued by drawee bank in payment of check. 9-963 (case p. 960).

Validity, construction, and effect of stipulation or notice as to liability of bank which fails to comply with order stopping payment of check. 9-1069 (case p. 1067).

Obligation of bank to payee of check before its acceptance. 9-1067.
Stopping payment. 9-960, 1067.

BATTERY.

See ASSAULT AND BATTERY.

BAWDY HOUSES.

See DISORDERLY HOUSES.

BENEFITS.

Estoppel by accepting, see ESTOPPEL.
To property assessed for public improvement, see PUBLIC IMPROVEMENT.

BETRAYAL.

Of professional secrets by physician, see PHYSICIANS AND SURGEONS.

BILLS AND NOTES.

In general.

Alteration of, see ALTERATION OF INSTRUMENTS.

As to checks, see CHECKS.

Authority of partner to execute, see PARTNERSHIP.

Certificate of stock as a negotiable instrument. 9-1610.

Question whether one is an indorser or a maker. 9-177.

Liability of accommodation maker. 9-1139.

Protest; notice.

Necessity of protest and notice as between coindorsers of negotiable paper. 9-1188 (case p. 1184).

Indorsement and transfer generally.

Necessity of protest and notice as between coindorsers of negotiable paper. 9-1188 (case p. 1184).

Question whether one is an indorser or a maker. 9-177.

Changing indorsement to correct error. 9-1082.

Contribution between indorsers. 9-1184.

Effect of giving of extra security to one joint indorser. 9-1184.

Rights of transferees.

Right of purchaser in good faith of instrument which has been materially altered. 9-1082.

— who are *bona fide* purchasers.
 Note transferred as collateral security for
 pre-existing debt. 9-1610.

Extension and renewal.

Effect of renewal note as payment. 9-1189.
 Effect of attempted enforcement of re-
 newal note on right to enforce origi-
 nal note. 9-1139.
 Authority of cashier to accept renewal
 note. 9-1189.

Actions; defenses.

Effect of laches, see **LIMITATION OF AC-
 TIONS.**

Breach by holder of note of his agree-
 ment with accommodation maker to
 collect the note from the one for
 whose accommodation it was signed.
 9-177.

BILLS OF DISCOVERY.

See **DISCOVERY AND INSPECTION.**

BLANKS.

Authority to fill blank in check. 9-1082.

BLINDNESS.

Will of blind person. 9-1416 (case p.
 1406).

BOARDS.

Board of education, see **SCHOOLS.**
 Board of equalization, see **TAXES.**

BODY EXECUTION.

See **EXECUTION.**

BONA FIDE PURCHASER.

Of notes, see **BILLS AND NOTES.**
 Of checks, see **CHECKS.**
 Of corporate stock, see **CORPORATIONS.**

*Effect of transfer of tenant's chattels to
 bona fide purchaser on landlord's
 lien thereon for rent. 9-324.*

BONDS.

Bond of executor or administrator, see
EXECUTOR AND ADMINISTRATOR.

Effect on surety of judgment against prin-
 cipal, see **JUDGMENT.**
 Exemption of, from taxation, see **TAXES.**

BOOKS.

Compelling production of, see **DISCOVERY
 AND INSPECTION.**

BREACH OF THE PEACE.

Arrest for, see **ARREST.**

BRIBERY.

Evidence of attempt at bribery by party
 to action. 9-1076.

BRIEFS.

On appeal, see **APPEAL AND ERROR.**

BROKERS.

*Right of real estate broker to commis-
 sions where he was unable to pro-
 cure an offer at the owner's price
 from one whom he interested, and
 who subsequently, without his in-
 tervention, purchased at that price.
 9-1194 (case p. 1189).*

Question for jury as to whether broker
 was procuring cause of sale. 9-1189.
 Review on appeal of finding that broker
 was procuring cause of sale. 9-1189.
 General rule as to when broker is entitled
 to commission. 9-1189.
 Sale after discharge of broker, to customer
 produced by him. 9-1189.

BUILDINGS.

Measure of damages for injury to or de-
 struction of, see **DAMAGES.**
 On leased premises, see **LANDLORD AND
 TENANT.**
 Lateral support for, see **LATERAL SUPPORT.**
 Negligence as to condition of, generally,
 see **NEGLIGENCE.**
 As to party wall, see **PARTY WALL.**
 Negligence as to condition of school build-
 ings, see **SCHOOLS.**

*Validity of building regulation requir-
 ing areas or open spaces for light
 and air. 9-1040 (case p. 1035).*

The dash in each citation stands for A.L.R.

BURDEN OF PROOF.

In general, see EVIDENCE.

BURIAL GROUNDS.

See CEMETERIES.

BUSINESS TRANSACTION.

False representations in business transaction as within statute relating to confidence game. 9-1537 (case p. 1524).

CAFÉS.

See RESTAURANTS.

CANCELATION OF INSTRUMENTS.

Of corporate charter, see CORPORATIONS.

CARRIERS.

As to jitney busses, see JITNEY BUSES.

Fares; passes.

Stipulation releasing carrier from liability for injury to free passenger as affecting liability for gross negligence or wilful or wanton injury. 9-501 (case p. 496).

Personal injuries to passengers.

Limitation of liability in pass, see *supra*.
Measure of damages for injury to passenger, see DAMAGES.

Carrier's duty to passenger while train is going through tunnel. 9-96 (case p. 94).

Evidence in action for. 9-94.

Injury to eye of passenger by cinder when door is left open, contrary to rules, while passing through tunnel. 9-94.

Baggage or property of passenger.

Respective rights of carrier or one in similar relation to owner and finder of property lost or mislaid. 9-1388 (case p. 1384).

Package left by passenger in train as lost or abandoned. 9-1384.

Carrier as bailee of package inadvertently left by passenger. 9-1384.

Freight carriers.

Carriers transporting by motor trucks, see MOTOR TRUCKS.

Governmental control; rates.

Right of carrier to rates which will amortize cost of road. 9-1232 (case p. 1223).

Power of state to change private contract rates. 9-1432, 1435.

Power to compel carrier to render adequate service as a legislative and not judicial power. 9-1223.

Right to rate which shall include interest on investment. 9-1223.

Validity of ruling of Public Service Commission as to rates based in part on personal inspection of road by member of Commission. 9-1223.

Power to regulate rates as a legislative and not judicial power. 9-1223.

CARS.

Duty of buyer or seller to furnish cars for transportation. 9-1502.

CASE.

Liability of physician or surgeon for disclosing professional secrets. 9-1254 (case p. 1250).

Right of victim of practical joke to recover against its perpetrator. 9-364 (case p. 361).

Rudeness of storekeeper to customer as ground for action. 9-374.

CASES CERTIFIED.

Quashing decision because of difference in theory of case; difference in findings on matter not an issue. 9-1315.

CASHIER.

Authority of, see BANKS.

CAUSE.

Presumption and burden of proof as to, see EVIDENCE.

CEMETERIES.

As a "public utility" which city is empowered to purchase or own. 9-1031.

Heavy italic type is used for annotations; roman type for cases.

CHEATING.

By means of false pretenses.

CHECKS

In general GA JARYTALIOO
Alteration of, see ALTERATION OF INSTRUMENTS
On judgment see JUDGMENT ON

Stopping payment of, see BANKS.
Payee of check, see assignment of the fund.
9-1067.

Authority to fill blank in. 9-1082.

Bank's act in placing in mail draft to pay check upon its customer as an acceptance of the check, which it withdraws the draft from the mail. 9-382.

Bona fide holders.
Right to sue for full value of check
which has been materially altered.

See PLEDGE AND COLLATERAL.

ЭО ЯНДОРОВ

.79 Of course, see B. POTIION; or REMEDIES W

~~008-9~~ ~~noted to be~~

CHOSES IN ACTION.

COMMERCIAL EXHIBITION

See FRUSTRATED ADVENTURE.

CHRISTIAN SCIENTIST.

COMMISSIONER OF DEEDS.
Prosecution of, for homicide on ground

ment or amendment. 8-106.
of seeds as grown for the
purpose of amendment. 8-106.

◆◆◆◆◆

COMMISSIONS.

Interstate commerce in 1900

Of brokers see BROKERS

CINDER.

Injury to eye of passenger by 9-94

CIRCUMSTANTIAL EVIDENCE.

To prove genuineness of letter offered in evidence. 9-1861.

CEASE.

Against bankrupt estate, see **BANKRUPTCY**.
 Against decedent's estate, see **EXECUTORS**
 AND **ADMINISTRATORS**.
 Against receivers, see **RECEIVERS**.

COLLATERAL ATTACK.

On judgment, see **JUDGMENT**.
 On confirmation of public improvement
 assessment. 9-590.

COLLATERAL CONTRACTS.

Statute of Frauds as to, see **CONTRACTS**.

COLLATERAL SECURITY.

See **PLEDGE AND COLLATERAL SECURITY**.

COMMERCE.

When person is an interstate passenger.
 9-496.
 Sale of cigarettes. 9-390.

COMMERCIAL FRUSTRATION.

See **FRUSTRATED ADVENTURE**.

COMMISSIONER OF DEEDS.

*Misconduct of attorney as commissioner
 of deeds as ground for his disbar-
 ment or suspension. 9-196.*

COMMISSIONS.

Of brokers, see **BROKERS**.

COMMON.

*Adverse possession of. 9-1378 (case p.
 1367).*

COMMON CARRIERS.

See **CARRIERS**.

COMPENSATION.

Of attorney, see **ATTORNEYS**.
 Of brokers, see **BROKERS**.
 Of next friend of infant, see **INFANT**.

COMPETITION.

Validity of contract to restrain, see **CON-
 TRACTS**.

COMPLAINT.

In criminal prosecution, see **INDICTMENT**,
 ETC.

COMPROMISE AND SETTLEMENT.

Of will contest, see **WILLS**.
*Power of president or vice president of
 bank to compromise corporate rights.
 9-1146 (case p. 1119).*

CONCURRENT REMEDIES.

See **ELECTION OF REMEDIES**.

CONDEMNATION.

Of property, see **EMINENT DOMAIN**.

CONDITIONAL SALE.

See **SALE**.

CONDITIONS.

See **COVENANTS AND CONDITIONS**.

CONFESSION.

Use of, to impeach defendant as witness,
 see **WITNESSES**.

CONFIDENCE GAME.

See **FALSE PRETENSES**.

CONFIDENTIAL COMMUNICATIONS.

See **PRIVILEGED COMMUNICATIONS**.

Heavy italic type is used for annotations; roman type for cases.

CONFIDENTIAL RELATIONS.

Between corporation and officers, see CORPORATIONS.

CONFLICT OF LAWS.

As to war legislation in nature of moratory statute. 9-58.

CONSIDERATION.

For contract, see CONTRACTS.

CONSPIRACY.

To defraud defendant by false claim of injury; evidence of attempt at bribery. 9-1076.

CONSTITUTIONAL LAW.

Delegation of power.
To municipality. 9-590.

Encroachment on judicial power.

Power of legislature to investigate conduct of private person, corporation, or institution. 9-1341 (case p. 1334).

Power of legislature to institute proceedings to secure to individual remedy for, or relief from, alleged wrongs. 9-1334.

Rights of persons and property; equal protection; due process; police power.

Constitutional provision against taking property for public use without compensation, see EMINENT DOMAIN.

Involuntary servitude, see INVOLUNTARY SERVITUDE.

As to privilege of witness, see WITNESSES.

Police power of states. 9-1021.

Necessity that private contract rights yield to public welfare. 9-1420.

— buildings.

Validity of building regulation requiring areas or open spaces for light and air. 9-1040 (case p. 1035).

— carriers.

Power of state to increase franchise rates. 9-1165.

— confiscation, seizure, and destruction of property.

Right to appropriate proceeds of sale of trees removed from highway to use of municipality as against abutting owner. 9-1265.

— contracts.

Impairing obligation of, see *infra*.

— criminal matters.

Constitutionality of statute requiring persons, regardless of financial condition, to engage in some business, profession, occupation, or employment. 9-1366 (case p. 1361).

— guaranties of justice.

War legislation in nature of moratory statute as denial or delay of justice. 9-15.

— impairing obligation of contracts.

War legislation in nature of moratory statute as violation of contract obligation. 9-6 (case p. 1).

Power of state to change private contract rates for public utilities. 9-1423 (case p. 1420).

Power of Public Service Commission to increase franchise rates. 9-1165 (case p. 1148).

— public improvements.

Assessments in excess of benefit conferred. 9-590.

— race discrimination.

Provision in deed discriminating against persons on account of race or color as violation of 14th Amendment. 9-121.

— remedies, procedure, and practice.

Validity of war legislation in nature of moratory statute. 9-6 (case p. 1).

Necessity of notice to abutting owner before sale of trees removed from highway and appropriation of proceeds thereof to municipality. 9-1265.

— waters.

Power of state to increase franchise rates. 9-1165.

CONSTRUCTION.

Of contract, see CONTRACTS.

Of deeds, see DEEDS.

Of pleading, see PLEADING.

The dash in each citation stands for A.L.R.

CONSTRUCTIVE TRUST.

See TRUSTS.

CONTEMPT.

Present inability to pay as defense to contempt proceedings to enforce payment of past instalments of alimony, nonpayment of which was inexcusable. 9-265 (case p. 262).

Refusal to accept subpoena. 9-157.

Refusal to obey decree. 9-1629.

CONTEST.

Of will, see WILLS.

CONTINGENT FEE.

To attorney, see ATTORNEYS.

CONTRACTS.

Impairment of obligation of, see CONSTITUTIONAL LAW.

As to covenants, see COVENANTS AND CONDITIONS.

Sufficiency of evidence as to, see EVIDENCE.

Of infants, see INFANTS.

Of municipal corporations, see MUNICIPAL CORPORATIONS.

Of sale generally, see SALE.

Consideration.

Sufficiency of consideration for restrictive covenant in contract of employment. 9-1479.

Pledges of corporate stock as security for antecedent debt as a bona fide purchaser within the rule which protects such purchasers against equities of third persons. 9-1619 (case p. 1610).

For promise by one purchasing goods from tenant to pay rent due landlord if latter will not attach the property bought. 9-288.

Mutuality.

Sale of season's output. 9-276 (case p. 271).

Effect of lack of mutuality of obligation on validity of restrictive covenant in contract of employment. 9-1480.

Offers and their acceptance.

Withdrawal of, or right to withdraw, letter from mail as affecting consummation of contract. 9-386.

Proposal to be accepted by return mail. 9-271.

Necessity of unconditional acceptance. 9-972.

Right to countermand orders. 9-1502.

Formal requisites; Statute of Frauds.

Construction of statute requiring representations as to credit, etc., of another to be in writing. 9-536 (case p. 531).

Promise by one purchasing goods subject to landlord's lien to pay the rent if the landlord will not attach the goods. 9-288.

Sufficiency of mutual letters to constitute contract in writing. 9-972.

Construction.

Construction of deeds, see DEEDS.

Question for court or jury as to, see TRIAL.

Contract for sale of season's output. 9-276 (case p. 271).

Covenant to pay taxes as including income taxes. 9-1566 (case p. 1557).

Intent of parties. 9-1557.

Agreement to pay taxes as including excise taxes. 9-1557.

— time.

Time as of essence of contract. 9-1502.

Validity; public policy.

Provision in deed discriminating against persons on account of race, color, or religion. 9-120 (cases pp. 107, 115).

Validity of stipulation or notice as to liability of bank which fails to comply with order stopping payment of check. 9-1069 (case p. 1067).

Validity of preadoption agreement derogating from the status or rights of an adopted child as fixed by statute. 9-1627 (case p. 1622).

— restraint of trade and competition.

Validity and enforceability of restrictive covenants in contracts of employment. 9-1456 (case p. 1450).

Agreement of moving picture actor acting for a producer under a pseudonym that he will not use the pseudonym for any other purpose. 9-1484.

Performance; breach.

Measure of damages for breach, see DAMAGES.

Opinion evidence as to compliance with contract. 9-1502.

— excuse for failure of performance.

Rights of parties to contracts the performance of which is interfered with or prevented by war conditions or acts of government in prosecution of war. 9-1509 (cases pp. 1502, 1507).

Excuse for drafting of plans by architect for building which cannot be erected because of municipal building regulations. 9-1035.

Prevention or hindrance by other party. 9-1035.

Rescission.

By infants, see INFANTS.

Of land contracts, see VENDOR AND PURCHASER.

CONTRADICTION.

Of witness, see WITNESSES

CONTRIBUTION.

Between indorsers of note. 9-1184.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE.

CONVENTION HALL.

As "public utility" within constitutional or statutory provision relating to purchase, construction, or repair of public utility by municipal corporation. 9-1034.

CONVERSION.

See TROVER.

CONVICTS.

Sentence and imprisonment of, see CRIMINAL LAW.

CORPORATIONS.

In general.

Service of process on, see WRIT AND PROCESS.

Power of legislature to investigate conduct of private corporation. 9-1341 (case p. 1334).

Charter.

Forfeiture of charter, see *infra*.

Liabilities.

Liability for libel. 9-348.

Officers and agents.

Liability of bank which credits paper payable to a corporation to the personal credit of corporate officer, who indorsed it, and pays out the proceeds on the latter's personal check. 9-346 (case p. 340).

Right of creditors as against directors or officers to whom property of corporation has been transferred for a consideration other than payment of debts due them. 9-1447 (case p. 1438).

General rule as to duty of directors. 9-1438.

Directors as trustees for creditors. 9-1438.

Burden of showing that dealings of directors with corporation were fair and honest. 9-1189.

Officer purchasing stocks with funds of corporation. 9-1610.

Authority of president to indorse checks to his own order and appropriate the money to his personal use. 9-340.

Capital stock and stockholders.

Certificate of stock as a negotiable instrument. 9-1610.

Certificate of stock as a document of title. 9-1610.

— transfers of stock.

Pledgee of corporate stock as security for an antecedent debt as a bona fide purchaser within the rule which protects such purchasers against the equities of third persons. 9-1619 (case p. 1610).

Rights of pledgee of stock by delivery without regular transfer. 9-1610.

— dividends; accumulated earnings.

Stock dividends as income for purposes of taxation. 9-1594 (case p. 1570).

Character of stock dividend. 9-1570.

Effect of Federal income tax on constitutional inhibition against taxation by Congress without apportionment of stockholder's interest in undivided accumulated earnings of corporation. 9-1570.

— stockholders' meetings.

Validity and effect of provisions in will to control voting power of corporate stock. 9-1242 (case p. 1239).

Right of representatives of deceased stockholder to vote. 9-1239.

Dissolution; forfeiture; insolvency.

Criminal prosecution as a condition of a civil action or proceeding for the cancellation of a corporate charter for violation of law. 9-106 (case p. 98).

Effect of statute providing criminal remedy to supersede civil remedy for annulment of franchise. 9-98.

What constitutes abuse of corporate powers justifying forfeiture of charter. 9-98.

— insolvency.

Bankruptcy of corporation, see **BANKRUPTCY**.

Right of creditors as against directors or officers to whom property of a corporation has been transferred for a consideration other than payment of debts due them. 9-1447 (case p. 1438).

Assets as trust fund for creditors. 9-1438.

Foreign corporations.

Service of process on foreign corporation, see **WRIT AND PROCESS**.

CORROBORATION.

Of evidence of accomplice, see **EVIDENCE**.

COUNSEL.

See **ATTORNEYS**.

COUNTERMANDING ORDERS.

Right to countermand orders because of delay in delivery. 9-1502.

COURTS.**In general.**

Contempt of, see **CONTEMPT**.

Prohibition to restrain, see **PROHIBITION**.

Process of, see **WRIT AND PROCESS**.

Power of court to issue or to honor letters rogatory. 9-966 (case p. 963).

Inherent power of courts to dissolve a marriage. 9-1212.

Relation to other departments of government.

Conclusiveness of action of board of equalization on question of fraudulent overvaluation of property. 9-1284 (case p. 1277).

Power of court to set aside finding of Public Service Commission. 9-1223.

Conclusiveness on courts of action of assessing officers as to value of property. 9-1277.

— legislative department.

Encroachment on judicial power, see **CONSTITUTIONAL LAW**.

Determination of territory to be included in assessment district and extent of benefit as legislative question. 9-590.

Power to compel carriers to render adequate service at reasonable rates as a legislative and not judicial power. 9-1223.

— municipal matters.

Review of action as to local improvements. 9-623.

Rules of decision.

Rules of decision in construing statutes, see **STATUTES**.

Erroneous decisions. 9-431.

Rule of property. 9-431.

COVENANTS AND CONDITIONS.

Conditions precedent to suit, see **ACTION OR SUIT**.

Condition as to liability of telegraph company, see **TELEGRAPHS**.

Validity and enforceability of restrictive covenants in contracts of employment. 9-1456 (case p. 1450).

Provision in deed discriminating against persons on account of race, color, or religion. 9-120 (cases pp. 107, 115).

Covenant or condition. 9-107, 115.

Restraints upon alienation. 9-107, 115.

Effect of change in circumstances so that purpose of restriction can no longer be accomplished. 9-107.

CREDIBILITY.

Of witness, see **WITNESSES**.

CREDIT.

Construction of statute requiring representations as to credit of another to be in writing. 9-536 (case p. 531).

CRIME.

Injunction against, see **INJUNCTION.**

CRIMINAL LAW.

As to arrest, see **ARREST.**
 Sufficiency of proof in criminal case, see **EVIDENCE.**
 Civil liability for false arrest and imprisonment, see **FALSE IMPRISONMENT.**
 As to sufficiency of indictment, see **INDICTMENT, ETC.**
 Injunction against crimes or misdemeanors, see **INJUNCTION.**
 As to criminal libel, see **LIBEL AND SLANDER.**
 Violation of Sunday law, see **SUNDAY.**
 As to instructions, see **TRIAL.**
 As to witnesses, see **WITNESSES.**
 See also **FALSE PRETENSES; FORGERY; HOMICIDE; LARCENY; RAPE; VAGRANCY.**

In general.

Criminal or penal responsibility of public officer or employee for violating speed regulation. 9-367 (case p. 365).

Review of verdict on appeal. 9-207.
 Definition of crime. 9-922.

Protection of accused.
Crimination of self. 9-1354.

Sentence and imprisonment.

Right to credit for time served under void sentence. 9-958 (case p. 955).

Correcting at subsequent term of court error in place of commitment. 9-955.

—suspension or stay of sentence.

Refusal, in prosecution for statutory rape, of instruction that court has no power to suspend sentence. 9-336.

CROSS-EXAMINATION.

Of witness, see **WITNESSES.**

CROSSING.

Injury at railroad crossing, see **RAILROADS.**

CUSTOM AND USAGE.

Presumption and burden of proof as to. 9-1326.
 Question for jury as to existence of. 9-1326.

CUSTOMER.

Of store, see **STORE.**

DAMAGES.

In general.
 Relevancy of evidence as to, see **EVIDENCE.**
 Prejudicial error as to measure of. 9-485.
 Preventing unnecessary amount. 9-1326.

On contracts.

Effect of provision for liquidated damages or penalty on enforceability of restrictive covenants in contracts of employment. 9-1481.

Damages for seller's failure to deliver. 9-271.

Personal injuries; death.

Liability of person causing injury for aggravation thereof by accident. 9-255 (case p. 248).
Measure of damages for loss of earning capacity of person engaged in business for himself. 9-510 (case p. 504).

Relevancy of evidence as to. 9-504.
 How earning capacity is to be measured. 9-504.
 Instances of amount. 9-94.

Injury to real property; nuisances; trespass.
 Prejudicial error as to. 9-485.
 Destruction of building by removing lateral support. 9-485.
 Injury to building by removal of party wall. 9-1326.

DANGEROUS ATTRACTIONS.

See **NEGLIGENCE.**

DATUM PLANE.

Effect of failure to establish a datum plane from which grade of street can be established on validity of ordinance accepting street. 9-597.

The dash in each citation stands for A.L.R.

DEAF-MUTE.

As a witness. 9-482 (case p. 480).

DEATH.

Measure of damages for, see **DAMAGES**.

DEBTOR AND CREDITOR.

Assignment for creditors, see **ASSIGNMENT FOR CREDITORS**.

Insolvency of debtor, see **BANKRUPTCY; CORPORATIONS**.

Creditors of corporation, see **CORPORATIONS**.

As to exemption, see **EXEMPTIONS**.

Conveyances fraudulent as to creditors, see **FRAUDULENT CONVEYANCES**.

Joint creditors and debtors, see **JOINT CREDITORS AND DEBTORS**.

DECEDENTS.

Administration of estates of, see **EXECUTORS AND ADMINISTRATORS**.

DECEIT.

See **FRAUD AND DECEIT**.

DECLARATIONS.

Evidence of, see **EVIDENCE**.

DEEDS.

Covenant or condition in, see **COVENANTS AND CONDITIONS**.

Construing according to intent of parties and upon the whole instrument. 9-419.

DEFENDANTS.

Parties defendant, see **PARTIES**.

DELEGATION OF POWER.

By legislature, see **CONSTITUTIONAL LAW**.

DELIVERY.

Of goods sold, see **SALE**.

DEMONSTRATIVE EVIDENCE.

See **EVIDENCE**.

DEMURRER.

In general, see **PLEADING**.

DENTISTS.

Validity and enforceability of restrictive covenant in contract employing dentist. 9-1472.

DEPOSITIONS.

Power of court to issue or to honor letters rogatory. 9-966 (case p. 963).

Duty of court to assist in obtaining. 9-963.

Duty of court honoring letters rogatory to see that witness is not compelled to give privileged testimony. 9-963.

DESCENT AND DISTRIBUTION.

Validity and effect of preadoption agreement derogating from the status or rights of an adopted child as fixed by statute. 9-1627 (case p. 1632).

DIRECTION OF VERDICT.

See **TRIAL**.

DISAFFIRMANCE.

Of infant's contract, see **INFANTS**.

DISBARMENT.

Of attorney, see **ATTORNEYS**.

DISCHARGE.

In bankruptcy, see **BANKRUPTCY**.

DISCONTINUANCE.

Of highway, see **HIGHWAYS**.

Heavy italic type is used for annotations; roman type for cases.

DISCOVERY AND INSPECTION.

Inconvenience or expense as excuse for disobeying subpoena duces tecum. 9-163 (case p. 157).

Necessity for production of documents to warrant issue of subpoena duces tecum. 9-157.

Refusal of bank to produce its books in court. 9-157.

DISCRETION.

Of court as to honoring letters rogatory. 9-963.

DISCRIMINATION.

Race discrimination, see RACE DISCRIMINATION.

DEBASE.

Homicide by improper treatment of. 9-211 (case p. 207).

DISLOYALTY.

As ground for disbarment or suspension of attorney. 9-201.

DISMISSAL OR DISCONTINUANCE.

Consideration on motion to dismiss action, of offers of proof recited in bill of exceptions. 9-348.

Right to use motion to dismiss interchangeably with a demurrer. 9-348.

Rule of decision on review of dismissal of complaint. 9-1884.

DISOBEDIENCE.

As contempt, see CONTEMPT.

DISORDERLY HOUSES.

Disbarment because attorney visits. 9-183.

DISSEISIN.

See ADVERSE POSSESSION.

DISTRICT AND PROSECUTING ATTORNEY.

Misconduct of attorney as prosecuting attorney as ground for disbarment or suspension. 9-197.

Privilege of communications made to prosecuting officers. 9-1109 (case p. 1091).

DIVIDENDS.

See CORPORATIONS.

DIVORCE AND SEPARATION.

In general.

Encouraging divorce litigation as ground for disbarment or suspension of attorney. 9-1500 (case p. 1497).

Construction and effect of statute providing against more than one divorce. 9-1076 (case p. 1070).

Inherent power of courts to dissolve a marriage. 9-1212.

Alimony; suit money; counsel fees. Contempt in refusing to pay, see CONTEMPT.

Right to alimony, counsel fees, or suit money in case of invalid marriage. 9-1222 (case p. 1212).

Prohibition to prevent allowance of. 9-1212.

DOCUMENTARY EVIDENCE.

See EVIDENCE.

DOCUMENTS.

Compelling production of, see DISCOVERY AND INSPECTION.

DOGS.

Joint liability of several independent owners of dogs for injury by them. 9-946.

DRAINS AND SEWERS.

As to assessments for, see PUBLIC IMPROVEMENTS.

The dash in each citation stands for A.L.R.

Sewer as a "public utility" within constitutional or statutory provision relating to purchase, construction, or repair of public utility by municipal corporation. 9-1034.

License to lay sewer across private property. 9-614.

Compelling removal of sewer from property over which it was laid without right. 9-614.

Posting of notices; failure of proof as to. 9-839.

DUE PROCESS OF LAW.

See CONSTITUTIONAL LAW.

DUPLICITY.

In indictment, see INDICTMENT, ETC.

EARNING CAPACITY.

Measure of damages for loss of earning capacity of person engaged in business for himself. 9-510 (case p. 504).

EARNINGS.

Wife's right of action to recover her earnings, see HUSBAND AND WIFE.

EASEMENTS.

In general.

Implied easement upon severance of tract where building is near or encroaches upon the dividing line. 9-488 (case p. 485).

Implied easement of light and air over private alley or right of way. 9-1634 (case p. 1629).

Easement running with the land. 9-485.
Easement in party wall. 9-1326.

Loss of.

Loss of easement by adverse possession or nonuser. 9-423 (case p. 419).

EJECTION.

Of customer from store, see ASSAULT AND BATTERY.

ELBOTION OF REMEDIES.

Exclusiveness of statutory remedy. 9-98.
Effect of statute providing criminal remedy to supersede civil remedy. 9-98.
Effect of attempted enforcement of renewal note on right to enforce original note. 9-1139.

ELECTIONS.

Voting at stockholders' meeting, see CORPORATIONS.

ELECTRICITY.

Liability of electric light or power company for injuries to employee of patron. 9-174 (case p. 165).

ELECTRIC LIGHTS.

Liability of electric light company for injury to employee of patron. 9-174 (case p. 165).

Electric light plant as a public utility within constitutional or statutory provision relating to purchase, construction, or repair of same. 9-1034.
Power of state to change private contract rates. 9-1430 (case p. 1420).

Liability of one contracting to furnish electrical energy for injury to employee caused by permitting the lights to go out. 9-165.

EMBARGO.

Effect of government embargo on shipments on rights under contract of sale. 9-1502.

EMINENT DOMAIN.

Exercise of eminent domain for purpose of irrigating land of private owner. 9-583.

General rule as to exercising for private purpose. 9-578.

Condemning land of one person as site for reservoir from which to irrigate the land of another. 9-578.

Right to compensation for injury to riparian rights by increased flow of stream due to public improvements. 9-1200.

EMPLOYEES.

In general, see MASTER AND SERVANT.

EQUALIZATION.

Board of, see TAXES.

EQUAL PROTECTION OF THE LAWS.

See CONSTITUTIONAL LAW.

EQUITABLE ESTOPPEL.

See ESTOPPEL.

EQUITY.

Question whether action is one at law or in equity, see ACTION AND SUIT.

Review on appeal of findings in equity, see APPEAL AND ERROR.

As to injunction, see INJUNCTION.

Limitation of actions in, see LIMITATION OF ACTIONS.

Subrogation in, see SUBROGATION.

Power of equity to relief against a continuing wrong. 9-614.

General rule as to remedy at law. 9-397.

ERROR.

See APPEAL AND ERROR.

ESTOPPEL.

In general.

Of insurance company, see INSURANCE.

As to validity of public improvement assessment, see PUBLIC IMPROVEMENTS.

Estoppel of creditor to deny right to subrogation of person paying part of claim. 9-1609.

By laches, silence, or acquiescence.

Estoppel or waiver as to validity of assessment. 9-590, 597, 606, 620, 623, 627.

By silence or passive acquiescence when sewer is being laid across one's property. 9-614.

By inconsistency.

Estoppel of one who has acquired adverse title to public common to rely upon his title by accepting from municipality reimbursement of cost of sidewalk. 9-1367.

By receiving benefits.

Creditor's receipt of proceeds of conveyance or transfer by debtor as estopping him to claim that conveyance or transfer was fraudulent. 9-358 (case p. 353).

Loss of right to contest assessment in drainage proceeding by acceptance of benefits. 9-888.

Who affected.

Estoppel of heirs by acts of ancestors. 9-1119.

EVIDENCE.

In general.

Compelling accused to furnish, see CRIMINAL LAW.

Prejudicial error as to. 9-94.

Consideration on motion to dismiss action, of offers of proof recited in bill of exceptions. 9-348.

Judicial notice.

Of fact that motortrucks are operated by gasoline engines or motors. 9-1380.

Presumptions and burden of proof.

Necessity of formal proof of the publication of an ordinance by one seeking advantage of the ordinance. 9-597.

Presumption that letter was received. 9-972.

Burden of showing that dealings of directors with corporation were fair and honest. 9-1139.

Burden of proving proper execution of will. 9-1409.

Existence of custom. 9-1926.

— establishing allegations or claims.

Unnecessary allegations. 9-248.

— knowledge; notice.

Burden of proving testator's knowledge of contents of will executed by blind person. 9-1416.

Burden of proving that debtor had notice of change of ownership of claim against him. 9-123.

Presumption of knowledge of facts by directors when ratifying acts of cashier. 9-1139.

— cause.

Cause of personal injury. 9-1315.

— as to skill, negligence, care.

Presumption and burden of proof where subject of bailment is destroyed or damaged by fire. 9-559 (case p. 554).

Documentary evidence.

Proof of authenticity or genuineness of letter other than by proof of handwriting or typewriting. 9-984 (cases pp. 972, 981).

Proof of authenticity of typewritten letter. 9-981.

Admissibility of book in which ordinances are kept and recorded. 9-480.

Books of bank containing deposit account of one from whom an accounting is demanded. 9-157.

Admissibility against party to action of letter written by him, attempting to keep witness away. 9-981.

Admissibility of letters in action for breach of contract alleged to have been formed by letters. 9-271.

Demonstrative evidence.

Admissibility of photographs accuracy of which is shown by witnesses, although they did not take them. 9-1826.

Opinions and conclusions.

Opinion as to compliance with contract. 9-1502.

Confessions.

Use of confession improperly obtained for purpose of impeaching defendant as a witness. 9-1358 (case p. 1354).

Confession induced by hope or fear. 9-1354.

Failure to warn accused. 9-1354.

Admissions.

Admissions by infant. 9-1076.

Hearsay; declarations; res gestæ.

Admissibility of statements as to gambling on Sunday ball games in suit to enjoin violation of Sunday law. 9-922.

— privileged communications.

Privilege of communication to attorney by client in attempt to establish false claim. 9-1081 (case p. 1076).

Privilege of communication made to public officers. 9-1099 (case p. 1091).

Communications to notary public. 9-1091.

— declarations of third person.
As to accident or injury. 9-94.

— declarations of co-conspirator.
Necessity of prima facie showing of conspiracy before acts and declarations of co-conspirator may be admitted. 9-1091.

Relevancy and materiality.

Evidence of intemperate habits on question of damages from death or personal injuries. 9-1405 (case p. 1401).

Reputation of accused in prosecution for statutory rape. 9-336.

As to value of services rendered by attorney in action for fees. 9-233.

Evidence on question of loss to business by injury to the one conducting it. 9-504.

Condition at other times. 9-1326.

Other crimes. 9-401, 1091.

Proof of attempt by party to suborn witness. 9-981.

Evidence of interference with trial by party on question of fraudulent nature of his claim or defense. 9-981.

Evidence of attempt at bribery by party to action. 9-1076.

Weight, effect, and sufficiency.

Conclusiveness of photographs of scene of accident. 9-504.

Abandonment of highway. 9-419.

Evidence of negligence of corporation in failing to discover president's misappropriation of its funds, in action against bank to recover corporate funds deposited to president's individual account. 9-340.

Knowledge of emancipation of married woman. 9-1299.

Incapacity to make contract. 9-972.

Fraud and bad faith of attorney toward client. 9-1272.

Sufficiency to establish making of contract by correspondence. 9-972.

— criminal cases.

Thief as accomplice of one charged with receiving stolen property, or vice versa, within rule requiring corroboration. 9-1397 (case p. 1393).

Proof of stabbing of policeman as necessary to conviction of riot where the indictment charges such stabbing. 9-549.

EXAMINATION.

Of witness, see WITNESSES.

EXCEPTIONS.

To raise question on appeal, see APPEAL AND ERROR.

EXCISE TAXES.

See INTERNAL REVENUE.

EXECUTION.

Of will, see WILLS.

Heavy italic type is used for annotations; roman type for cases.

Propriety of certified execution in trover by infant to recover property delivered under contract which he has rescinded. 9-1028.

EXECUTORS AND ADMINISTRATORS.

In general.

Publication of notice of administration in fictitious name. 9-1119.

Liability on bond.

Liability of sureties on bond of administratrix who secures her appointment by misrepresenting the decedent's identity or her relationship to him. 9-1138 (case p. 1119).

Conclusiveness against sureties on administrator's bond of judgment against him. 9-1119.

Necessity of setting aside decree for final distribution procured by fraud before surety can be held liable. 9-1119.

Liability for conversion of property by administrator. 9-1119.

Claims against estate.

Meaning of phrase "last sickness" and the like in statutes giving preference to expenses. 9-462.

EXEMPTION.

For taxation, see TAXES.

What is "stock in trade" within Exemption Law. 9-1259 (case p. 1255).

What are "tools," "implements," "instruments," "utensils," or "apparatus" within the meaning of debtor's exemption laws. 9-1029 (case p. 1014).

Proceeds of insurance on exempt property. 9-1255.

EYE.

Measure of damages for injury to. 9-94.

FACTS.

Review of, on appeal, see APPEAL AND ERROR.

Instructions on, see TRIAL.

FALSE IMPRISONMENT.

Joint liability where several independent writs for arrest were executed simultaneously. 9-944.

Time at which an arrest is made as affecting its legality or liability for making it. 9-1350 (case p. 1346).

Liability for false imprisonment of carrier charging passenger who takes package left by other passenger with larceny. 9-1384.

FALSE PRETENSES.

False representations in business transaction as within statute relating to "confidence game." 9-1527 (case p. 1524).

Evidence of other similar acts in prosecution for. 9-401.

Effect of special statute as to false pretenses in passing worthless check on right to prosecute under a general statute. 9-401.

What necessary to render one guilty of obtaining money by the confidence game. 9-1524.

Misrepresentation of identity. 9-1524.

FARMING PARTNERSHIP.

Authority of member of, to execute negotiable paper. 9-372 (case p. 369).

Power of member of, to give chattel mortgage. 9-369.

FELLOW SERVANTS.

See MASTER AND SERVANT.

FICTITIOUS NAME.

See NAME.

FIDUCIARY RELATIONS.

Between corporation and officers, see CORPORATIONS.

FINDER.

Respective rights of carrier, or of one in similar relation to owner, and of finder of property lost or mislaid. 9-1388 (case p. 1384).

FIRE DEPARTMENT.

Criminal or penal responsibility for violating speed regulations. 9-367.
Public fire station as public utility within constitutional or statutory provision relating to purchase, construction, or repair of same. 9-1034.
Fire department as pertaining to the governmental or to the proprietary branch of municipality. 9-143 (case p. 131).

FIRE ESCAPE.

As an attractive nuisance. 9-271 (case p. 267).

FIRES.

Liability of bailee for, see BAILMENT.

PICTURES.

Respective rights of landlord and tenant as to, see LANDLORD AND TENANT.

FLOATAGE.

Rights in stream for, see WATERS.

FOREIGN CREDITORS.

Discharge in bankruptcy as bar to debt due to. 9-127 (case p. 123).

FORFEITURE.

Of corporate charter, see CORPORATIONS.
Of lease, see LANDLORD AND TENANT.
Courts do not favor. 9-438.

FORGERY.

By altering instruments, effect on civil liability, see ALTERATION OF INSTRUMENTS.

Use of fictitious or assumed name. 9-407 (case p. 401).

Sufficiency of indictment for. 9-401.

FRANCHISE.

As a contract, see CONSTITUTIONAL LAW.
Annulment of corporate franchise, see CORPORATIONS.

FRAUD AND DECEIT.

As ground for recovery of payment, see ASSUMPSIT.

Statute of Frauds, see CONTRACTS.

Sufficiency of proof of, see EVIDENCE.

As to false pretenses, see FALSE PRETENSES.

As to fraudulent conveyances, see FRAUDULENT CONVEYANCES.

Action of board of equalization as affecting right to attack assessment on ground of assessor's fraud. 9-1284 (case p. 1277).

In securing check, as available defense against paper issued by drawee bank in payment of check. 9-968.

Fraudulent transactions as ground for disbarment or suspension of attorney. 9-190.

Misrepresentation as regards validity of conveyance or transfer of property as fraud. 9-1051 (case p. 1041).

Liability of sureties on bond of administratrix who secures her appointment by misrepresenting the decedent's identity or her relationship to him. 9-1138 (case p. 1119).

Applicability of statute requiring representations as to credit of another to be in writing to representations made with intent to defraud. 9-540 (case p. 521).

General rule as to misrepresentation of law. 9-1041.

As ground for relief from judgment. 9-1119.

FRAUDS, STATUTE OF.

See CONTRACTS.

FRAUDULENT CONVEYANCES.

Applicability of Bulk Sales Law to chattel mortgages and sales thereunder. 9-473 (cases pp. 468, 471).

Creditor's receipt of proceeds of conveyance or transfer by debtor as estopping him to claim that conveyance or transfer was fraudulent. 9-353 (case p. 353).

Effect of sale in bulk as against creditor whose name was omitted from list furnished by vendor. 9-468.

Heavy italic type is used for annotations; roman type for cases.

Right of innocent purchaser of goods sold in violation of Bulk Sales Law to subrogation to rights of creditors whose claims he has paid. 9-468.
 Insertion in petition for garnishment of proceeds of goods sold in violation of Bulk Sales Law, of allegations regarding the sale. 9-468.

FRONTAGE TAX.

See PUBLIC IMPROVEMENTS.

FRUSTRATED ADVENTURE.

Effect of provision in contract suspending or excusing performance in certain contingencies to exclude doctrine of commercial frustration where performance is interfered with by war. 9-1521.

GAMBLING.

As ground for disbarment or suspension of attorney. 9-208.

GARNISHMENT.

Insertion in petition for garnishment of proceeds of goods sold in violation of Bulk Sales Law, of allegations regarding the sale. 9-468.

GAS.

Oil and gas lease, see MINES.

Joint liability of independent tort-feasors for nuisance in emitting gases. 9-952.

Power of state to change private contract rates. 9-1430.

Power of state to increase franchise rates. 9-1165.

GENUINENESS.

Proof of genuineness of letter other than by proof of handwriting or typewriting. 9-984 (cases pp. 972, 981).

GROSS NEGLIGENCE.

Stipulation releasing carrier from liability for injury to free passenger as affecting liability for gross negligence. 9-501 (case p. 496).

GUARDS.

Provision of Workmen's Compensation Law denying compensation for injury through wilful failure to use. 9-1377 (case p. 1374).

HACKS AND CABS.

As to taxicabs, see TAXICABS.

HAZARDOUS OCCUPATION.

Operation of automobile or automobile truck as a hazardous occupation within meaning of Workmen's Compensation Act. 9-1382 (case p. 1380).

HEARSAY.

Evidence of, see EVIDENCE.

HEIRS.

Action by, on bond of administrator, see EXECUTORS AND ADMINISTRATORS.

Attacking decree of administration for fraud. 9-1119.

Laches of, in invoking fraud of administrator of ancestor. 9-1119.

Subrogation of surety on administrator's bond to rights of heirs against administrator. 9-1119.

Estoppel of heirs by acts of ancestors. 9-1119.

HERBALIST.

Improper treatment of disease by, as homicide. 9-220.

HIGHWAYS.

Injunction as to, see INJUNCTION.

Building and repair of pavements and sidewalks and other public improvements generally, see PUBLIC IMPROVEMENTS.

As to street cleaning, see STREET CLEANING.

Duty of one removing mineral under highway to support surface. 9-1333 (case p. 1330).

Proper parties to ask for mandate to compel desistence from interference with highway. 9-1330.

Power of township officers to consent to interference with. 9-1330.
Validity of ordinance accepting highway. 9-597.

Trees in.

Property rights of abutting owners in trees cut or removed from street or highway. 9-1269 (case p. 1265).

Defects in; injuries to travelers.

Contributory negligence of one injured by striking object temporarily deposited in street. 9-479 (case p. 476).

Abandonment.

Abandonment by nonuser. 9-419.
Sufficiency of evidence of abandonment. 9-419.

Power of attorneys in action affecting highway to stipulate for its vacation. 9-1330.

HOMICIDE.

Improper treatment of disease. 9-211 (case p. 207).

Sufficiency of indictment for. 9-207.

HOSTILITY.

Of possession to make it adverse, see ADVERSE POSSESSION.

HOUSE OF ILL FAME.

See DISORDERLY HOUSES.

HUSBAND AND WIFE.

As to divorce or separation, see DIVORCE AND SEPARATION.

Consent of husband to rendition of services by wife as prerequisite to her recovery therefor. 9-1303 (case p. 1299).

Right of one spouse to enjoin torts of other. 9-1066 (case p. 1064).

Proof of knowledge of emancipation of married woman. 9-1299.

IDENTITY.

Misrepresentation of identity as false pretense. 9-1524.

ILLEGAL ACT.

Rights of parties to contract the performance of which is interfered with by war conditions or acts of government in prosecution of war where performance involves doing of illegal act. 9-1513.

ILL FAME.

Houses of, see DISORDERLY HOUSES.

IMMORALITY.

As ground for disbarment or suspension of attorney. 9-202.

IMPAIRMENT OF OBLIGATIONS.

Of contracts, see CONSTITUTIONAL LAW.

IMPEACHMENT.

Of witness, see WITNESSES.

IMPLIED EASEMENTS.

See EASEMENTS.

IMPRISONMENT.

For crime generally, see CRIMINAL LAW.

IMPROVEMENTS.

Public improvements, see PUBLIC IMPROVEMENTS.

Right to hasten the flow and increase the volume of water in a stream by alterations or improvements in the bed. 9-1211 (case p. 1200).

Right to judgment awarding defendant compensation for improvements in action to determine adverse claims to property. 9-107.

IMPUTED NOTICE.

See NOTICE.

Heavy italic type is used for annotations; roman type for cases.

INCOME.

Definition of. 9-1570.

INCOME TAX.

See TAXES.

INCOMPETENT PERSONS.

Sufficiency of evidence to establish incapacity to make contract. 9-972.

INDICTMENT, INFORMATION, AND COMPLAINT.**Duplicity.**

Charging in one count more than one way in which the defendant was negligent in indictment for negligent homicide. 9-207.

Description of offense.

Sufficiency of information for criminal libel where manner and time of publication are set forth in affidavits attached to information. 9-1091.

Offense of riot. 9-549.

Negligent homicide. 9-207.

Forgery. 9-401.

INDORSEMENT.

Of note, see BILLS AND NOTES.

INDUSTRIAL INSURANCE.

See WORKMEN'S COMPENSATION.

INFANTS.

Negligence towards, see NEGLIGENCE.

Contracts.

Parent's approval or sanction of infant's contract as affecting latter's liability on, or right to disaffirm, it. 9-1080 (case p. 1028).

Effect of infancy of employee on enforceability of restrictive covenant in contract of employment. 9-1483.

Propriety of certified execution in trover by infant to recover property delivered under contract which he has rescinded. 9-1028.

Repayment or restoration by infant on disaffirmance. 9-1028.

Power to employ attorney. 9-1528.
Services of attorney as a necessary. 9-1528.

Actions.

Right of next friend to compensation for services rendered to infant in the litigation. 9-1537 (case p. 1528).

Admissibility in evidence of admissions by. 9-1076.

Who may become next friend of infant. 9-1528.

Power of next friend to admit away infant's rights. 9-1076.

Authority of next friend to compromise. 9-1528.

Power of next friend to appoint counsel for infant. 9-1528.

Power of next friend to contract as to amount of counsel fees. 9-1528.

Reimbursement of next friend for expense of litigation. 9-1528.

INFORMATION.

In disbarment proceedings, see ATTORNEYS.

For criminal offense, see INDICTMENT, ETC.

In quo warranto, see QUO WARRANTO.

INJUNCTION.

Right to join several independent tortfeasors in action for injunction. 9-952.

Right of one spouse to enjoin torts of other. 9-1066 (case p. 1061).

Injunction to enforce restrictive covenants in contracts of employment. 9-1456.

Injunction to prevent violation of Sunday law. 9-925 (case p. 922).

Injunction against commission of crime. 9-922.

Against payment of expenses of legislative investigation. 9-1334.

To prevent stripping of surface from highway to secure coal beneath it. 9-1330.

INSECT.

Injury by, as an accident within meaning of accident insurance policy. 9-529 (case p. 521).

INSOLVENCY.

As to assignment for creditors, see ASSIGNMENT FOR CREDITORS.

As to bankruptcy, see **BANKRUPTCY**.
 Of corporation, see **CORPORATIONS**.
 As to receivers, see **RECEIVERS**.

INSPECTION.

As to discovery and inspection, see **DISCOVERY AND INSPECTION**.

INSTRUCTIONS.

In general, see **TRIAL**.

INSURANCE.

Officers and agents.
 Which party deemed the principal. 9-521.

The contract generally.
 Provisions in a book of instructions to agents deposited with state insurance as part of contract. 9-521.

Estoppel; waiver.
 Estoppel to object that notice of injury was not on proper blank where blank used was furnished by the company. 9-521.

Retaining without objection notice of accident upon blank form furnished by insurer. 9-521.

Notice of loss or injury.
 Waiver of defects or informalities. 9-521.
 Notice of accident on a sickness blank due to mutual mistake. 9-521.

Risk and causes of loss.

Inherent defect in vessel as affecting question whether loss is due to "perils of the sea" within policy of marine insurance. 9-1314 (case p. 1307).

Accident insurance; injury by insect. 9-529 (case p. 521).

Increased hazard. 9-521.

Extent of recovery.

Accident insurance: taxicab as a public conveyance provided by a common carrier within provision for double or increased indemnity. 9-1555 (case p. 1544).

What constitutes entire loss of sight of eye. 9-521.

Interest in proceeds.
 Exemption of life insurance, see **EXEMPTIONS**.

Subrogation of insurer.

Payment of entire claim as condition of right to subrogation. 9-1607.

INTEMPERANCE.

Evidence of intemperate habits on question of damages from death or personal injury. 9-1405 (case p. 1401).

INTENT.

Of parties to contract generally, see **CONTRACTS**.

Construing deed according to intent of parties. 9-419.

INTEREST.

Effect of war legislation in nature of moratory statute on right to interest. 9-44, 66.

INTERNAL REVENUE.

Federal income tax, see **TAXES**.

Meaning of term "excise tax." 9-1557.

Agreement to pay taxes as including excise taxes. 9-1557.

Effect of Federal income tax on constitutional provisions requiring apportionment of direct taxes according to population. 9-1570.

INTERPRETER.

Competency of interpreter for deaf-mute. 9-480.

INTERSTATE COMMERCE.

See **COMMERCE**.

INTOXICATION.

See **INTEMPERANCE**.

INVESTIGATION.

Power of legislature to investigate conduct of private person, corporation or institution. 9-1341 (case p. 1334).

Injunction against payment of expenses of unauthorized legislative investigation. 9-1834.

INVOLUNTARY SERVITUDE.

Constitutionality of statute requiring persons, regardless of financial condition, to engage in some business, profession, occupation, or employment. 9-1866 (case p. 1361).

IRRIGATION.

Exercise of eminent domain for purpose of irrigating land of private owner. 9-583 (case p. 578).

Condemning land of one person as site for reservoir from which to irrigate the land of another. 9-578.

JITNEY BUSES.

See also TAXICABS.

Jurisdiction of Public Service Commission over. 9-1011 (case p. 1007).

JOINDER.

Of parties, see PARTIES.

JOINT CREDITORS AND DEBTORS.

May acts of independent tort-feasors, each of which alone causes or tends to produce some damage, be combined to create a joint liability. 9-939 (case p. 933).

Failure of declaration against joint tort-feasors to show joint liability. 9-933.

JOINT LIABILITY.

See JOINT CREDITORS AND DEBTORS.

JOKES.

See PRACTICAL JOKE.

JUDGES.

Misconduct of attorney as judicial officer as ground for his disbarment or suspension. 9-195.

Privilege of communication made to. 9-1106.

JUDGMENT.

In general.

On appeal, see APPEAL AND ERROR.

Sentence in criminal cases, see CRIMINAL LAW.

Contempt in refusing to obey. 9-1629.

Conformity to pleadings and proof.

Relief under pleadings, see PLEADING.

Judgment for defendant on plea in bar which concludes "to the country." 9-165.

Non obstante veredicto.

Order of judgment non obstante veredicto in accordance with directions of appellate court. 9-1.

Effect and conclusiveness.

On appeal, see APPEAL AND ERROR.

Proceedings to set aside probate decree for fraud as a direct or collateral attack. 9-1119.

Effect of agreed judgment based upon compromise between next friend of infant and opposing party to eliminate question of authority of next friend to bind infant. 9-1528.

Conclusiveness against sureties on administrator's bond of judgment against him. 9-1119.

Assignment.

Necessity of notice of bankruptcy proceedings to assignee of judgment. 9-123.

Relief against.

Recovery back of money paid upon judgment procured by fraud or mistake, see ASSUMPSIT.

On ground that defendant was in the military service of the Federal government at time of rendition of judgment. 9-1.

For fraud. 9-1119.

JUDICIAL NOTICE.

See EVIDENCE.

JUDICIAL POWER.

Encroachment on, see CONSTITUTIONAL LAW.

JURY.

Questions for, see TRIAL.

KNOWLEDGE.

Presumption and burden of proof as to, see EVIDENCE.
Sufficiency of proof of, see EVIDENCE.

LACHES.

Estoppel by, see ESTOPPEL.
In general, see LIMITATION OF ACTIONS.

LAND CONTRACTS.

See VENDOR AND PURCHASER.

LANDLORD AND TENANT.

Lease.
Oil and gas lease, see MINES.
Conditional sale distinguished from lease. 9-1177.

— assignment; subletting.

Landlord's lien on goods of subtenant or assignee for rent. 9-317, 321.

Notice to landlord of subletting. 9-438.
Waiver of provision against subletting. 9-438.

Refusal to enforce provision against subletting where use of premises for purpose for which leased becomes unlawful. 9-438.

— termination; forfeiture.

Refusal to enforce provision against subletting where this would result in a forfeiture. 9-438.

Rights and liabilities of parties.

Covenant to pay taxes as including income taxes. 9-1566.

Right of tenant to make alterations in structures on leased premises. 9-445 (case p. 438).

Effect of provision authorizing use of property for specified purpose to limit its use to such purpose. 9-438.

— rent.

War legislation restricting increase of rent. 9-44.

Right of mortgagee to rent under war legislation in the nature of moratory statute. 9-69.

Subject-matter covered by landlord's statutory lien for rent. 9-300 (cases pp. 278, 283, 288, 294).

Priority of claim for, against receiver. 9-294.

Personal liability of receiver for rent. 9-294.

Necessity of written contract for lien. 9-278.

Enforcing lien by attachment. 9-278.

Promise by one purchasing goods from tenant to pay rent due landlord if latter will not attach the property. 9-288.

What is a "farm" within meaning of statute giving landlord a lien for rent. 9-278.

Lien on property sold conditionally to tenant. 9-283.

Lien on ticket receipts of tenant operating a theater. 9-294.

When lien attaches. 9-283.

Priority of landlord's lien over lien of mortgage by tenant on crops. 9-278.

Loss of lien by laches. 9-294.

LARCENY.

As to receiving stolen property, see RECEIVING STOLEN PROPERTY.

Larceny in taking package left by fellow passenger in car. 9-1384.

LATERAL SUPPORT.

Implied easement of, upon severance of tract where building is near or encroaches upon the dividing line. 9-488 (case p. 485).

As easement running with the land. 9-485.
Liability of one attempting to protect wall of neighbor's building during excavation, for negligence in performing his undertaking. 9-485.

Measure of damages for destruction of building by removal of. 9-485.

LAW.

Misrepresentation as to legal questions affecting title as fraud. 9-1054.

LEASE.

In general, see LANDLORD AND TENANT.
Oil and gas lease, see MINES.

Heavy italic type is used for annotations; roman type for cases.

LEGISLATION.

Attorney's misconduct with regard to proposed legislation as ground for disbarment. 9-1277 (case p. 1272).

LEGISLATURE.

Delegation of power by, see CONSTITUTIONAL LAW.

Power of legislature to investigate conduct of private person, corporation, or institution. 9-1341 (case p. 1334).

LETTERS.

Admissibility in evidence, see EVIDENCE.

Presumption of receipt of letter. 9-972.

Sufficiency of mutual letters to constitute contract in writing. 9-972.

LETTERS ROGATORY.

Power of court to issue or to honor. 9-966 (case p. 963).

LEWDNESS.

As to disorderly houses, see DISORDERLY HOUSES.

LIBEL AND SLANDER.

In general.

Liability of town or municipality for libel or slander. 9-351 (case p. 348).

Liability of corporation. 9-348.

Slander of title.

Recording of instrument purporting to affect title as slander of title. 9-931 (case p. 929).

Criminal liability.

Sufficiency of indictment. 9-1091.

Admissibility in evidence of communications to public officer. 9-1091.

Submitting to jury question whether communications offered in evidence were privileged. 9-1091.

Evidence of subsequent publications. 9-1091.

LICENSE.

Failure of one who has refused permit to lay sewer across his property to take legal steps to prevent its being laid as creating an express license. 9-614.

Effect of silence or passive acquiescence to create irrevocable license. 9-614.

Revocation of general invitation to customer to enter store. 9-374.

LIEN.

Of attorney, see ATTORNEYS.

Of landlord, see LANDLORD AND TENANT.

Subrogation to, see SUBROGATION.

LIFE INSURANCE.

See INSURANCE.

LIGHT.

Validity of building regulations requiring areas or open spaces for. 9-1040 (case p. 1035).

Implied easement of light and air over private alley or right of way. 9-1634 (case p. 1629).

LIGHTS.

On automobiles, see AUTOMOBILES.

Electric lights, see ELECTRIC LIGHTS.

LIMITATION OF ACTIONS.

Adverse possession, see ADVERSE POSSESSION.

Laches.

Estoppel by laches, see ESTOPPEL.

Loss of landlord's lien by laches. 9-294.

Effect of delay in absence of notice. 9-1119.

Effect of laches where suit is brought within limitation period. 9-1139.

Laches of corporation in asserting title to stock purchased with its funds by its officer. 9-1610.

LIMITATION OF LIABILITY.

By carrier, see CARRIERS.

By telegraph company, see TELEGRAPHS.

The dash in each citation stands for A.L.R.

LIQUIDATED DAMAGES.

Effect of provision for, on enforceability of restrictive covenant in contract of employment. 9-1481.

LITIGATION.

Powers of bank president or vice president as to. 9-1146.

LOCAL IMPROVEMENTS.

See PUBLIC IMPROVEMENTS.

LOGGING RAILROADS.

Right to a rate which shall provide for amortization of cost of road. 9-1223.

LOGS AND LOGGING.

Rights in streams for floatage, see WATERS.

LOSS.

Of insured property, cause of, see INSURANCE.

LOST PROPERTY.

Rights of finder of, see FINDER.

Package left by passenger in train as lost property. 9-1384.

MAIL.

See POSTOFFICE.

MALICE.

Necessity of, to make filing of instrument a slander of title. 9-929.

MANSLAUGHTER.

See HOMICIDE.

MANUAL TRAINING EQUIPMENT.

Injury to pupil by. 9-908.

MARINE INSURANCE.

Risks and causes of loss, see INSURANCE.

MARKETABLE TITLE.

See VENDOR AND PURCHASER.

MARRIAGE.

*Subsequent marriage as bar to prosecution for rape. 9-339 (case p. 336).
Right to alimony, counsel fees, or suit money in case of invalid marriage. 9-1222 (case p. 1212).*

MARRIED WOMEN'S ACT.

Effect of, on husband's right to enjoin tort by wife. 9-1064.

MASTER AND SERVANT.

In general.

Validity and enforceability of restrictive covenants in contracts of employment. 9-1456 (case p. 1450).

Liability for injury to servant.

Recovery by injured workman under Workmen's Compensation Act, see WORKMEN'S COMPENSATION.

Right of injured servant to charge several negligent acts or omissions and rely on one or all. 9-248.

— liability to servants of third person.

Liability of electric light or power company for injury to employee of patron. 9-174 (case p. 165).

— servant's assumption of risk.

Question for jury as to, see TRIAL.

Assumption of obvious risk caused by master's negligence. 9-223.

— fellow servants.

Joining employer and vice principal for negligence of latter. 9-248.

Negligence of one operating cage in mine in forgetting to engage the clutch when releasing the brake to lower a cage. 9-248.

Liability of master for acts of servant.

Liability of city for negligence of its officers or agents, see MUNICIPAL CORPORATIONS.

Heavy italic type is used for annotations; roman type for cases.

Liability of seller for act of employee in forcibly retaking property sold conditionally. 9-1182.

Liability of school district for negligence of servants or agents causing injury to pupil. 9-919.

Liability of servants.

Liability of agent, see **PRINCIPAL AND AGENT.**

MATERIALITY.

Of alteration of instrument, see **ALTERATION OF INSTRUMENTS.**

MEETING.

Of stockholders, see **CORPORATIONS.**

MIDWIFE.

Homicide by improper treatment. 9-222.

MINES.

Injury to servants in, see **MASTER AND SERVANT.**

Surface support.

Duty of one removing mineral under highway to support surface. 9-1333 (case p. 1330).

Oil and gas lease.

Construction of provision for free gas in oil and gas lease. 9-89 (case p. 86).

Maintenance of meters upon lines furnishing free gas to the lessor. 9-86.

MINORS.

See **INFANTS.**

MISTAKE.

As ground for recovery of payment, see **ASSUMPSIT.**

MOBS AND RIOTS.

Participation in, as ground for disbarment or suspension of attorney. 9-201.

Unlawful parade as riot. 9-552 (case p. 549).

Sufficiency of indictment to charge offense of riot. 9-549.

Necessity that all present commit some physical act to constitute a riot. 9-549.

Conviction of riot at common law in absence of proof of one element named in statute charging the offense. 9-549.

MORAL DELINQUENCY.

As ground for disbarment of attorney, see **ATTORNEYS.**

MORATORIUM.

Validity and construction of war legislation in nature of moratory statute. 9-6 (case p. 1).

Validity and construction of Soldiers and Sailors Civil Relief Act. 9-81 (case p. 78).

Effect of foreclosure of mortgage without court's order after passage of moratory statute, to render title defective. 9-78.

MORTGAGE.

As to chattel mortgage, see **CHATTEL MORTGAGE.**

Subrogation to rights of mortgagee, see **SUBROGATION.**

Right of mortgagee to rent under war legislation in the nature of moratory statute. 9-69.

Effect of war legislation in nature of moratory statute on right of foreclosure. 9-80, 81 (case p. 78).

Recording of, as slander of title. 9-929.
What constitutes a purchase-money mortgage. 9-1014.

MOTIONS AND ORDERS.

Motion to dismiss, see **DISMISSAL OR DISCONTINUANCE.**

The dash in each citation stands for **A.L.R.**

MOTORCYCLE.

Injury while riding, of one insured in accident policy as an office manager. 9-521.

MOTORTRUCKS.

Jurisdiction of Public Service Commission over carriers transporting by motortrucks. 9-1011.

Operation of, as a hazardous occupation within meaning of Workmen's Compensation Act. 9-1382 (case p. 1380).

MOVING PICTURES.

Agreement of moving picture actor acting for a producer under a pseudonym that he will not use the pseudonym for any other purpose. 9-1484.

MUNICIPAL CORPORATIONS.

In general; powers.

Delegation of power to, see CONSTITUTIONAL LAW.

As to highways, see HIGHWAYS.

Public improvements by, in general, see PUBLIC IMPROVEMENTS.

See also TOWNS.

What are "public utilities" within constitutional or statutory provisions relating to purchase, construction, or repair of same by municipal corporation. 9-1033 (case p. 1031).

Power to contract with public service corporation as to rates. 9-1148.

Ordinances.

Admissibility of ordinances in evidence, see EVIDENCE.

Presumption and burden of proof as to, see EVIDENCE.

Validity of ordinance accepting highway. 9-597.

Liabilities.

Fire department as pertaining to the governmental or to the proprietary branch of municipality. 9-143 (case p. 131).

Liability of municipality for libel or slander. 9-351 (case p. 348).

Liability for injury to pupil in school. 9-911.

General rule as to. 9-131.

Distinction between governmental and ministerial acts. 9-131.

For inadequate enforcement of law. 9-131.

MURDER.

See HOMICIDE.

MUTUALITY.

Of contract, see CONTRACTS.

NAGGING.

Right of husband to enjoin nagging by wife. 9-1064.

NAME.

Of party in notice by publication, see WRIT AND PROCESS.

Forgery by use of fictitious or assumed name. 9-407 (case p. 401).

Notice of probate in fictitious name. 9-1119.

NECESSARIES.

Of infant, see INFANTS.

NECESSITY.

Works of, on Sunday, see SUNDAY.

NEGLIGENCE.

In general.

Of bailee, see BAILMENT.

Of carrier, see CARRIERS.

As to electricity, see ELECTRICITY.

Joint liability for, see JOINT CREDITORS AND DEBTORS.

Of master or servant, see MASTER AND SERVANT.

Liability of municipality for, see MUNICIPAL CORPORATIONS.

Liability of agent for, see PRINCIPAL AND AGENT.

As to proximate cause, see PROXIMATE CAUSE.

In operation of railroad train, see RAILROADS.

Of school district or school officer, see SCHOOLS.

Of telegraph company, see TELEGRAPHS.

Heavy italic type is used for annotations; roman type for cases.

Liability of person causing injury for aggravation thereof by accident.
9-255 (case p. 248).

Failure of depositor signing request to stop payment of check to read the provisions of the request. 9-1067.

Injury to children; dangerous attractions.

Fire escape as an attractive nuisance.
9-271 (case p. 267).

On highway.

Of driver of automobile, see AUTOMOBILES.

Criminal or penal responsibility of public officers or employees for violating speed regulations. 9-367 (case p. 365).

Contributory negligence.

Of person injured by automobile, see AUTOMOBILES.

Of person injured on defective highway, see HIGHWAYS.

Question for jury as to, see TRIAL.

Duty of pedestrian before crossing street to look for vehicles approaching on intersecting street. 9-1248 (case p. 1245).

NEGROES.

As to race discrimination, see RACE DISCRIMINATION.

NEXT FRIEND.

Of infant, see INFANTS.

NIGHTTIME.

Legality of arrest made in the night.
9-1350 (case p. 1340).

NON OBSTANTE VEREDICTO.

See JUDGMENT.

NONSUIT.

See TRIAL.

NONUSER.

Loss of easement by, see EASEMENTS.
Abandonment of highway by, see HIGHWAYS.

NOTARY PUBLIC.

Misconduct of attorney as notary public as ground for his disbarment or suspension. 9-196.

Privilege of communications to. 9-1091.

NOTICE.

In general.

Of adverse claim to property, see ADVERSE POSSESSION.

Of proceedings in bankruptcy, see BANKRUPTCY.

Of protest of note, see BILLS AND NOTES.
Necessity of, to constitute due process, see CONSTITUTIONAL LAW.

Presumption and burden of proof as to, see EVIDENCE.

Sufficiency of proof of, see EVIDENCE.

To insurer of injury or death, see INSURANCE.

Sufficiency of, to confer jurisdiction, see WRIT AND PROCESS.

Sufficiency of notice of nuisance. 9-908.

Effect of delay in absence of notice as laches. 9-1119.

Imputed.

Notice to agent for collection of rents of subletting of the premises as notice to landlord. 9-438.

NUISANCES.

Joint liability of independent tort-feasors for. 9-952.

Sufficiency of notice of nuisance. 9-908.

Liability of school district; lack of notice. 9-908.

Lapse of time as defense. 9-1330.

NUNCUPATIVE WILLS.

See WILLS.

OBJECTIONS.

To raise question on appeal, see APPEAL AND ERROR.

OFFERS.

In general, see CONTRACTS.

The dash in each citation stands for A.L.R.

OFFICERS.**In general.**

Of corporations, see CORPORATIONS.

Municipal liability for acts of, see MUNICIPAL CORPORATIONS.

As to notary public, see NOTARY PUBLIC.

Of township, see TOWNS.

Privilege of communications made to public officers. 9-1099 (case p. 1091).

Liability.

For false imprisonment, see FALSE IMPRISONMENT.

Of school officer, see SCHOOLS.

Criminal or penal responsibility of public officer or employee for violating speed regulation. 9-367 (case p. 365).

OIL.

Oil and gas lease, see MINES.

OPINION.

As evidence, see EVIDENCE.

OPTION.

Offers and their acceptance generally, see CONTRACTS.

ORAL CONTRACTS.

In general, see CONTRACTS.

OSTEOPATH.

Improper treatment of disease by, as homicide. 9-219.

PARADE.

Unlawful parade as riot. 9-552 (case p. 549).

Lawfulness of parade in violation of municipal regulations. 9-549.
What constitutes, within meaning of ordinance requiring permit. 9-549.

PARENT AND CHILD.**Adoption.**

Validity and effect of preadoption agreement derogating from the status or rights of an adopted child as fixed by statute. 9-1627 (case p. 1622).

Aim and end of adoption statutes. 9-1622.
Effect on status or rights. 9-1622.

PARKS.

Park as a "public utility" within constitutional or statutory provision relating to purchase, construction, or repair of public utility by municipal corporation. 9-1034.

PAROL CONTRACTS.

In general, see CONTRACTS.

PAROL EVIDENCE.

See EVIDENCE.

PARTIES.

Who are affected by judgment, see JUDGMENT.

Evidence of interference by party with trial. 9-981.

Joining employer and vice principal for negligence of latter. 9-248.

PARTNERSHIP.

Landlord's lien on individual property of partner for rent. 9-317.

Authority of member of farming partnership to execute negotiable paper. 9-372 (case p. 369).

PART PAYMENT.

Payment of entire claim of third person as condition of subrogation. 9-1596 (case p. 1594).

PARTY WALL.

Right of a co-owner of a party or division wall to remove or demolish his own building. 9-1329 (case p. 1326).

Heavy italic type is used for annotations; roman type for cases.

Easement in. 9-1326.

Damages for injury to building by removal of party wall. 9-1326.

Right of one preventing protection of party wall upon removal of adjoining building, to recover for injury from failure to protect. 9-1326.

PASS.

See CARRIERS.

PASSENGER CARRIERS.

See CARRIERS.

PAYMENT.

Recovery of payments made, see ASSUMPTION.

Stopping payment of check, see BANKS.

Subrogation for, see SUBROGATION.

Of purchase price of property sold, see VENDOR AND PURCHASER.

Fraud or other defense to check as available against paper issued by drawee bank in payment of check. 9-963 (case p. 960).

Effect of renewal note as payment. 9-1139.

PEACE OFFICERS.

Criminal or penal responsibility for violating speed regulations. 9-367.

PENALTIES.

Effect of provision for, on enforceability of restrictive covenant in contract of employment. 9-1481.

PEREMPTORY INSTRUCTIONS.

See TRIAL.

PERFORMANCE.

Of contract, see CONTRACTS.

PERJURY.

Commission of, as ground for disbarment or suspension of attorney. 9-200.

Evidence against party of attempt to suborn witness. 9-981.

PERMIT.

For parade, see PARADES.

PERPETUITIES.

Condition in deed against transferring or leasing property to negroes for period of twenty-five years under penalty of reverter. 9-107.

PERSONAL INJURIES.

Damages for, see DAMAGES.

Presumption and burden of proof as to cause of, see EVIDENCE.

Evidence of declarations as to, see EVIDENCE.

In general, see NEGLIGENCE.

PERSONAL PROPERTY.

Mortgage of, see CHATTEL MORTGAGE.

Sale of, see SALE.

PERSONAL REPRESENTATIVES.

See EXECUTORS AND ADMINISTRATORS.

PHOTOGRAPHS.

Conclusiveness of photographs of scene of accident. 9-504.

PHYSICIANS AND SURGEONS.

Validity and enforceability of restrictive covenant in contract for employment of physician. 9-1472.

Liability of physician or surgeon for disclosing professional secrets. 9-1254 (case p. 1250).

Homicide by improper treatment of disease. 9-211 (case p. 207).

PLACE.

Of imprisonment, see CRIMINAL LAW.

Of delivery of goods sold. 9-271.

The dash in each citation stands for A.L.R.

PLEADING.

In criminal prosecution, see **INDICTMENT**, ETC.

Construction.

Construing declaration most strongly against the pleader. 9-165.

Relief under pleadings.

Effect of prayer for possession in petition to determine adverse claim to authorize judgment awarding possession to plaintiff. 9-107.

Right to judgment awarding defendant compensation for improvements in action to determine adverse claims to property. 9-107.

Reliance on facts stated in reply. 9-1315.

Admissions.

Power of next friend to admit away infant's rights. 9-1076.

Amendments.

Permitting filing of amended counts in information in disbarment proceedings. 9-183.

Declaration or complaint.

Insertion in petition for garnishment of proceeds of goods sold in violation of Bulk Sales Law, of allegations regarding the sale. 9-468.

Charging several negligent acts or omissions and relying on only one. 9-248.

Reply.

Reversal of decision because based upon matters stated in the reply instead of in the petition. 9-1315.

Demurrer.

Right to use motion to dismiss action interchangeably with a demurrer. 9-348.

Because of failure of declaration against joint tort-feasors to show joint liability. 9-933.

PLEDGE AND COLLATERAL SECURITY.

Pledgee as bona fide purchaser of note, see **BILLS' AND NOTES**.

Of corporate stock generally, see **CORPORATIONS**.

Laches of corporation in asserting title to stock purchased with its funds by its officer and pledged by him as collateral. 9-1610.

POLLUTION.

Of water, see **WATERS**.

POOL.

Of corporate stock, see **CORPORATIONS**.

POSSESSION.

Adverse, see **ADVERSE POSSESSION**.

Of mortgaged chattel, see **CHATTEL MORTGAGE**.

POSTOFFICE.

Withdrawal of, or right to withdraw, letter from mail as affecting consummation of contract. 9-356 (case p. 382).

Presumption of receipt of letter. 9-972.

PRACTICAL JOKE.

Right of victim of practical joke to recover against its perpetrator. 9-364 (case p. 361).

PRE-EXISTING DEBT.

As consideration for contract, see **CONTRACTS**.

PRESCRIPTION.

Title by, see **ADVERSE POSSESSION**.

PRESENCE.

At execution of will, see **WILLS**.

PRESIDENT.

Of banks, see **BANKS**.

PRESUMPTIONS.

On appeal, see **APPEAL AND ERROR**.

In general, see **EVIDENCE**.

PRINCIPAL AND AGENT.

Agents of banks, see **BANKS**.

Insurance agent, see **INSURANCE**.

Imputing knowledge of agent to principal, see **NOTICE**.

Heavy italic type is used for annotations; roman type for cases.

Service of process on agent, see WRIT AND PROCESS.

Validity of rule or stipulation making messenger in employment of telegraph company agent of sender in taking message to office for transmission. 9-1235 (case p. 1233).

For which party insurance agent acts. 9-521.

Effect of appointment of receiver for principal to revoke agency. 9-223.

Liability of agent for negligence. 9-165.

PRINCIPAL AND SURETY.

Conclusiveness as to surety of judgment against principal, see JUDGMENT.

Right of surety to subrogation, see SUBROGATION.

Necessity of notice in bankruptcy proceedings to surety who has paid the debt. 9-123.

PRIORITY.

Of chattel mortgage, see CHATTEL MORTGAGE.

Of claims against decedent's estate, see EXECUTOR AND ADMINISTRATOR.

Of claims against receivers, see RECEIVERS.

PRIVATE PURPOSE.

Right to take property under power of eminent domain for, see EMINENT DOMAIN.

PRIVATE RAILROADS.

As to logging railroads, see LOGGING RAILROADS.

PRIVILEGE.

Of witness, see WITNESSES.

PRIVILEGED COMMUNICATIONS.

Evidence of, see EVIDENCE.

PROBATE.

Notice of probate in fictitious name. 9-1119.

PROCESS.

See WRIT AND PROCESS.

PROCESSIONS.

See PARADES.

PRODUCTION OF DOCUMENTS.

See DISCOVERY AND INSPECTION.

PROFESSIONAL SECRETS.

Disclosure of, by physician, see PHYSICIANS AND SURGEONS.

PROHIBITION.

Grant of supersedeas upon appeal from denial of writ of prohibition. 9-157.
Right of supreme court to examine not only the pleadings but the evidence. 9-1212.

PROPERTY.

Condemnation of, see EMINENT DOMAIN.

PROSTITUTION.

Houses of, see DISORDERLY HOUSES.

PROTEST.

Of notes, see BILLS AND NOTES.

PROVABLE CLAIMS.

In bankruptcy, see BANKRUPTCY.

PROXIMATE CAUSE.

Of injury to pupil on school premises. 9-908.

PROXY.

Signature to will of blind person by proxy. 9-1416 (case p. 1409).

Execution of will by; statute as to. 9-1409.

The dash in each citation stands for A.L.R.

PSEUDONYM.

Agreement of moving picture actor acting for a producer under a pseudonym that he will not use the pseudonym for any other purpose. 9-1484.

PUBLIC.

Adverse possession against, see ADVERSE POSSESSION.

PUBLIC IMPROVEMENTS.**In general.**

Street improvements as public utility within constitutional or statutory provision relating to purchase, construction, or repair of same. 9-1034.

Effect on statutory exemption of abutting property from liability for maintenance of street, of adoption by municipality of freeholders' charter. 9-597.
Power of court to review action as to. 9-623.

Assessments.

Loss of right to contest assessment in proceeding for street or sewer improvement by waiver, estoppel, or the like. 9-634 (cases pp. 590, 597, 606, 614, 620, 623, 627).

Loss of right to contest assessment in drainage proceeding by waiver, estoppel, or the like. 9-842 (cases pp. 835, 839).

Power of courts to review action as to. 9-590.

Delegating to municipality power to create assessment district and apportion assessments. 9-590.

Right of one across whose property sewer is laid without right to have assessment for the improvement canceled. 9-614.

Assessment on land occupied by the right of way for a drainage improvement. 9-835.

Assessment levied without proper certificate. 9-835.

Sufficiency of certificate for collection of assessments. 9-835.

Collection of assessment made under void ordinance. 9-620.

Collateral attack on confirmation of assessment. 9-590.

Property subject to assessment. 9-835.

Creation of assessment district by legislature and assessing property according to frontage. 9-590.

Assessment according to benefits. 9-590, 835.

Omission of benefited property from assessment district as violation of rights of one whose property is included. 9-590.

PUBLIC MONEY.

Injunction as to use of, see INJUNCTION.

PUBLIC PROPERTY.

Adverse possession of, see ADVERSE POSSESSION.

PUBLIC PURPOSE.

Justifying exercise of right of eminent domain, see EMINENT DOMAIN.

PUBLIC SERVICE COMMISSIONS.

As to control of carriers and their rates generally, see CARRIERS.

Jurisdiction of Public Service Commission over carriers transporting by motor trucks or busses. 9-1011 (case p. 1007).

Power of Public Service Commission to increase franchise rates. 9-1165 (case p. 1148).

Source of jurisdiction. 9-1007.

Right of Commission to require all producers of natural gas to maintain meters on lines furnishing free gas. 9-86.

Validity of ruling of Public Service Commission as to rates based in part on personal inspection of road by member of Commission. 9-1223.

Power of court to set aside findings. 9-1223.

PUBLIC SERVICE CORPORATIONS.

See also CARRIERS; ELECTRIC LIGHTS; TELEPHONES; WATERS.

What are "public utilities" within constitutional or statutory provisions relating to purchase, construction, or repair of same by municipal corporation. 9-1033 (case p. 1031).

Power of Public Service Commission to increase franchise rates. 9-1165 (case p. 1148).

Power of state to change private contract rates for public utilities. 9-1423 (case p. 1420).

Heavy italic type is used for annotations; roman type for cases.

Inherent power of municipality to regulate rates. 9-1148.

Power of municipality to contract as to rates. 9-1148.

Presumption of abrogation of power to regulate rates. 9-1148.

PUBLIC WATER SUPPLY.

See **WATERS.**

PUNISHMENT.

For crime, see **CRIMINAL LAW.**

QUO WARRANTO.

Criminal prosecution as a condition of a civil action or proceeding for the cancellation of a corporate charter for violation of law. 9-106 (case p. 98).

RACE DISCRIMINATION.

Provision in deed discriminating against persons on account of race or color. 9-120 (cases pp. 107, 115).

RAILROAD COMMISSION.

See **PUBLIC SERVICE COMMISSIONS.**

RAILROADS.

For all questions involving the duty and liability of a street railway company as a carrier to its patrons, or governmental control of street railway companies, see **CARRIERS.**

Status of one at railroad crossing who has walked or intends to walk along tracks. 9-1322 (case p. 1315).

RAPE.

Subsequent marriage as bar to prosecution for rape. 9-339 (case p. 336).

Instructions in prosecution for statutory rape. 9-336.

Evidence of defendant's general reputation in prosecution for statutory rape. 9-336.

RATES.

See **CARRIERS; ELECTRIC LIGHTS; PUBLIC SERVICE CORPORATIONS; TELEPHONES; WATERS.**

RATIFICATION.

Of act of officer or agent of bank, see **BANKS.**

REAL ESTATE AGENTS.

See **BROKERS.**

REAL PROPERTY.

As to adverse possession, see **ADVERSE POSSESSION.**

Covenants and conditions as to, see **COVENANTS AND CONDITIONS.**

Damages for injury to, see **DAMAGES.**

Slander of title, see **LIBEL AND SLANDER.**

Rights, duties and liabilities on transfer of, see **VENDOR AND PURCHASER.**

REASONABLENESS.

Of carrier's rates, see **CARRIERS.**

Question for jury as to, see **TRIAL.**

RECEIVERS.

In general.

Appointment of receiver for railroad as affecting service of process on agent or employee in action against company. 9-228 (case p. 223).

Effect of appointment of receiver for principal to revoke agency. 9-223.

Liability.

Personal liability for rent. 9-294.

Claims against.

Priority of landlord's claim for rent. 9-294.

RECEIVING STOLEN PROPERTY.

Thief as accomplice of one charged with receiving stolen property or vice versa, within rule requiring corroboration. 9-1397 (case p. 1393).

Convicting one committing larceny of receiving stolen goods. 9-1393.

The dash in each citation stands for A.L.R.

Liability of one receiving from another money which he had directed the latter to steal. 9-1393.

RECORDS AND RECORDING LAWS.

Recording of instrument purporting to affect title as slander of title. 9-931 (case p. 929).

REIMBURSEMENT.

Of next friend of infant, see INFANTS.

RELIGIOUS DISCRIMINATION.

Provision in deed discriminating against persons on account of religion. 9-120.

REMANDING.

See APPEAL AND ERROR.

REMEDIES.

Election of, see ELECTION OF REMEDIES.

RENEWAL.

Of note, see BILLS AND NOTES.

RENT.

See LANDLORD AND TENANT.

REPEAL.

Of statute, see STATUTES.

REPLY.

See PLEADING.

REPUTATION.

Evidence of, see EVIDENCE.

RESCISSION.

Of infant's contract, see INFANTS.

Of land contracts, see VENDOR AND PURCHASER.

RES GESTÆ.

See EVIDENCE.

RESTAURANTS.

What is a restaurant, café or victualing house within Sunday Law. 9-428 (case p. 426).

RESTORATION.

On disaffirmance of infant's contract, see INFANTS.

RESTRAINT OF TRADE.

Validity of contracts in restraint of trade, see CONTRACTS.

RESULTING TRUSTS.

See TRUSTS.

REVENUE.

See INTERNAL REVENUE.

REVIEW.

On appeal, see APPEAL AND ERROR.

Of judgment, see JUDGMENT.

Of assessment, see TAXES.

REVOCATION.

Of license from private person, see LICENSE.

RIOTS.

See MOBS AND RIOTS.

RIPARIAN RIGHTS.

In streams for floatage, see WATERS.

Heavy italic type is used for annotations; roman type for cases.

RISK.

Insured against, see **INSURANCE**.

RULES OF DECISION.

See **COURTS**.

RULES OF PROPERTY.

See **COURTS**.

SAFETY APPLIANCES.

Provision of Workmen's Compensation Law denying compensation for injury through wilful failure to use. 9-1377 (case p. 1374).

SAILORS.

Sailors' Civil Relief Act, see **MORATORIUM**.

SALE.

In general.

Measure of damages for breach of contract, see **CONTRACTS**.

Of land generally, see **VENDOR AND PURCHASER**.

Validity and construction of contract for sale of season's output. 9-276 (case p. 271).

Rights of parties to contract performance of which is interfered with by war conditions. 9-1522 (cases pp. 1502, 1507).

Certificate of stock as a negotiable document of title within meaning of Uniform Sales Act. 9-1610.

Duty to furnish cars for transportation. 9-1502.

Passing of title; delivery.

In case of conditional sale, see *infra*.

Passing of title on delivery of goods. 9-271.

Time as of essence of contract. 9-1502.

Claim that buyer should have furnished cars as excuse for delay in delivery. 9-1502.

Right to countermand orders because of delay in delivery. 9-1502.

Question for jury as to reasonableness of time for delivery. 9-1502.

Right of seller unable to deliver at time stipulated because of government orders for war purposes to make deliveries at later period. 9-1507.

Place of delivery. 9-271.

Conditional sale.

Liability for assault or trespass in forcibly retaking property sold conditionally. 9-1180 (case p. 1177).

Landlord's lien on property sold conditionally to tenant. 9-322 (case p. 283).

Conditional sale distinguished from lease. 9-1177.

Retaking property by force as a conversion. 9-1177.

Effect of taking judgment for instalments of purchase price to vest title in the vendee. 9-1177.

SALOONS.

Refusal to enforce provision against subletting in lease for saloon purposes where use of property for such purpose becomes unlawful. 9-438.

SCHOOLS.

Liability of school district, municipal corporation, or school board for injury to pupil. 9-911 (cases pp. 904, 908).

Liability for injury to pupil by scrubbing fluid. 9-904.

Accident to pupil on athletic apparatus or manual training equipment. 9-908.

Proximate cause of injury to pupil. 9-908.

SECRETS.

Disclosure of professional secrets by physician or surgeon, see **PHYSICIANS AND SURGEONS**.

SENTENCE.

For crime, see **CRIMINAL LAW**.

SEPARATION.

See **DIVORCE AND SEPARATION**.

SERVICE.

Of writ, see **WRIT AND PROCESS**.

The dash in each citation stands for **A.L.R.**

SERVICES.

Wife's right of action to recover for, see
HUSBAND AND WIFE.
Of next friend of infant, see INFANTS.
Evidence on question of value of. 9-233.

SERVITUDE.

See INVOLUNTARY SERVITUDE.

SET-OFF AND COUNTERCLAIM.

Application of deposit by bank in the
course of business, see BANKS.

SEWERS.

See DRAINS AND SEWERS.

SHADE TREES.

In highway, see HIGHWAYS.

SHIPPING.

*Right of parties to charter party where
the performance of the contract is in-
terfered with or prevented by war
conditions or acts of government in
prosecution of war. 9-1521 (case
p. 1507).*

SIGHT.

What constitutes entire loss of, within
meaning of accident insurance policy.
9-521.

SIGNATURE.

Of attesting witness, see WILLS.

SILENCE.

Estoppel by, see ESTOPPEL.

SLANDER.

See LIBEL AND SLANDER.

SLANDER OF TITLE.

See LIBEL AND SLANDER.

SLAVES.

Involuntary servitude, see INVOLUNTARY
SERVITUDE.

**SOLDIERS AND SAILORS' CIVIL
RELIEF ACT.**

See MORATORIUM.

SPECIAL LEGISLATION.

See STATUTES.

SPECIAL VERDICT.

See TRIAL.

SPEED.

*Criminal or penal responsibility of public
officer or employee for violating
speed regulation. 9-367 (case p.
365).*

STALE DEMANDS.

See LIMITATION OF ACTIONS.

STATE.

Bonds of, see BONDS.

STATUTE OF FRAUDS.

See CONTRACTS.

STATUTES.

In general.
Exclusiveness of statutory remedy. 9-98.

Special legislation.

*Moratory statute as special legislation.
9-14.*

Heavy italic type is used for annotations; roman type for cases.

Construction.

Meaning of phrase "last sickness," and the like. 9-462 (case p. 459).

Following decisions of other states in constructing state statute. 9-1255.

Repeal.

Effect on existing rights and remedies. 9-597.

Effect on statutory exemption of abutting property from liability for maintenance of street, of adoption by municipality of freeholders' charter. 9-597.

STAY.

Pending appeal, see **APPEAL AND ERROR**.
Moratory statutes, see **MORATORIUM**.

Refusal of motion for final judgment on plea while order for stay remains in force. 9-165.

STIPULATION.

By telegraph company, see **TELEGRAPHS**.

STOCK DIVIDENDS.

See **CORPORATIONS**.

STOPPING PAYMENT.

See **BANKS**.

STORE.

Ejection of customer from, see **ASSAULT AND BATTERY**.

Revocation of license to enter. 9-374.

Rudeness of storekeeper to customer as ground for action. 9-374.

STREET CLEANING.

Street cleaning equipment as a public utility within constitutional or statutory provision relating to purchase, construction, or repair of same. 9-1034.

STREET RAILWAYS.

As carriers, see **CARRIERS**.

Street railway as a public utility within constitutional or statutory provisions relating to purchase or construction of same by municipal corporations. 9-1034.

STREETS.

See **HIGHWAYS**.

SUBLEASE.

See **LANDLORD AND TENANT**.

SUBPENA DUCES TECUM.

Inconvenience or expense as excuse for disobeying. 9-163 (case p. 157).

SUBROGATION.

Payment of entire claim of third person as condition of subrogation. 9-1500 (case p. 1594).

Right of innocent purchaser of goods sold in violation of Bulk Sales Law to subrogation to rights of creditors whose claims he has paid. 9-468.

Subrogation of surety on administrator's bond to rights of heirs against administrator. 9-1119.

SUIT MONEY.

On annulment of marriage, see **MARRIAGE**.

SUNDAY.

Injunction to prevent violation of Sunday law. 9-925 (case p. 922).

Legality of arrest made on Sunday. 9-1350 (case p. 1346).

What is "restaurant," "café," or "victualing house" within Sunday law. 9-428 (case p. 426).

Evidence in suit to enjoin violation of Sunday law. 9-922.

SUPERSEDEAS.

Pending appeal, see **WRIT AND ERROR**.

The dash in each citation stands for **A.L.R.**

SURFACE SUPPORT.

Duty of miner to leave, see **MINES**.

SUSPENSION.

Of attorney, see **ATTORNEYS**.

Of sentence, see **CRIMINAL LAW**.

Of power of alienation, see **PERPETUITIES**.

SWINDLING.

See **FALSE PRETENSES**.

TAXES.

In general.

Assessments for public improvements, see **PUBLIC IMPROVEMENTS**.

Meaning of word "taxation." 9-1557.

Exemptions.

Constitutional enumeration of subjects of tax exemption as affecting power of legislature to free government securities or property from taxation. 9-436 (case p. 431).

Assessment; valuation.

Action of board of equalization as affecting right to attack assessment on ground of assessor's fraud. 9-1284 (case p. 1277).

Right to assail in the courts fraudulent assessment. 9-1277.

Income tax.

*Covenant to pay taxes as including income taxes. 9-1566 (case p. 1557).
Stock dividends as income for purposes of taxation. 9-1594 (case p. 1570).*

Effect of Federal income tax on constitutional provisions requiring apportionment of direct taxes according to population. 9-1570.

TAXICABS.

As to jitney busses, see **JITNEY BUSSES**.

Taxicab as a public conveyance provided by a common carrier within provision of accident insurance policy for double or increased indemnity. 9-1553 (case p. 1544).

TELEGRAPHS.

Validity of rule or stipulation making messenger in employment of telegraph company agent of sender in taking message to office for transmission. 9-1235 (case p. 1233).

TELEPHONES.

Power of state to increase franchise rates. 9-1165.

Power of state to change private contract rates. 9-1435.

THEATERS.

Landlord's lien on ticket receipts of tenant operating a theater. 9-294.

TIME.

As of essence of contract, see **CONTRACTS**.

For delivery of goods sold, see **SALE**.

Question for jury as to reasonableness of, see **TRIAL**.

Vendor's acceptance of payment tendered after time specified as waiver of provision making time of essence of contract. 9-996 (case p. 993).

Time at which an arrest is made as affecting its legality or liability for making it. 9-1350 (case p. 1346).

TITLE.

Slander of title, see **LIBEL AND SLANDER**.

Defects in, see **VENDOR AND PURCHASER**.

TOBACCO.

As to cigarettes, see **CIGARETTES**.

TOOLS.

Exemption of, see **EXEMPTIONS**.

TOWNS.

Liability of town for libel or slander. 9-351 (case p. 348).

Power of township officers to consent to interference with highway. 9-1330.

Distinction between governmental acts and acts done in private capacity. 9-348.

Heavy italic type is used for annotations; roman type for cases.

TREATIES.

Effect of treaty guaranties to aliens on provision in deed discriminating against persons on account of race, color, or religion. 9-122.

TREES.

In street, rights as to, see **HIGHWAYS.**

TRESPASS.

Joint liability for, see **JOINT CREDITORS AND DEBTORS.**
On railroad track, see **RAILROADS.**

Liability for trespass in forcibly retaking property sold conditionally. 9-1180 (case p. 1177).

TRIAL.

In general.

Evidence of interference with, by party. 9-981.

Questions for court or jury.

Construction of contract. 9-1502.

Authority of cashier. 9-1139.

Question whether communications to prosecuting officer offered in evidence were privileged. 9-1091.

Question whether broker was procuring cause of sale. 9-1189.

Question whether any person interested in foreclosure suit was in the military service of the United States. 9-78.

Credibility of witness. 9-1245, 1409.

Custom or usage. 9-1326.

Reasonableness as to time. 9-1502.

Assumption of risk by servant. 9-223.

Taking case from jury.

Prayer to withdraw case from jury as to defendant against whom there is no evidence legally sufficient to charge him with liability. 9-476.

Taking as true evidence tending to show negligence, upon appeal from nonsuit in negligence case. 9-554.

Preventing by direction verdict which court would set aside as unsupported by evidence. 9-1409.

Duty to instruct for defendant when evidence is legally insufficient. 9-1502.

Instructions.

Segregation of fact for the consideration of the jury. 9-476.

Assuming facts. 9-504.

In prosecution for statutory rape. 9-336.

Verdict.

Judgment notwithstanding verdict, see **JUDGMENT.**

Conflict between general and special findings. 9-1014.

TROVER.

Liability of bank which credits paper payable to a corporation to the personal credit of corporate officer who indorsed it and pays out the proceeds on the latter's personal check. 9-346 (case p. 340).

Propriety of certified execution in trover by infant to recover property delivered under contract which he has rescinded. 9-1028.

Liability of administrator's bond for conversion of property by him. 9-1119.

Taking forcible possession under conditional sale contract as conversion. 9-1177.

TRUSTS.

Fiduciary relation between corporation and its officers, see **CORPORATIONS.**

For voting corporate stock, see **CORPORATIONS.**

Assets as trust fund for creditors in case of insolvent corporation, see **CORPORATIONS.**

Constructive.

Purchase by officer of stocks with funds of corporation. 9-1610.

Constructive trust not based on intention. 9-1610.

Resulting trust.

Intention presumed or implied as basis of resulting trust. 9-1610.

Trustees.

Misconduct of attorney as trustee as ground for his disbarment or suspension. 9-193.

TUNNEL.

Carrier's duty to passenger while going through tunnel. 9-96 (case p. 94).

UNIFORM SALES ACT.

Certificate of stock as a negotiable document of title within meaning of Uniform Sales Act. 9-1610.

The dash in each citation stands for A.L.R.

UNLAWFUL ASSEMBLY.

See MOBS AND RIOTS; PARADES.

VACATION.

Of highway, see HIGHWAYS.
Of judgment, see JUDGMENT.

VAGRANCY.

Constitutionality of statute requiring persons, regardless of financial condition, to engage in some business, profession, occupation, or employment. 9-1366 (case p. 1361).

Definition of. 9-1361.

VALUATION.

Of property for taxation, see TAXES.

VENDOR AND PURCHASER.

In general.

Covenants or conditions, see COVENANTS AND CONDITIONS.

Vendor's acceptance of payment tendered after time specified as waiver of provision making time of essence of contract. 9-996 (case p. 993).

Necessity of tender to place vendor in default. 9-993.

Title of vendor.

Effect of foreclosure of mortgage without court's order after passage of moratory statute, to render title defective. 9-78.

Defect not sufficient to raise a reasonable doubt. 9-78.

Rescission.

Election to rescind; what constitutes. 9-993.

Failure to pay consideration as ground for. 9-1438.

VENTILATION.

Easement of. 9-1629.

VERDICT.

See TRIAL.

VICE.

As ground for disbarment or suspension of attorney. 9-202 (case p. 183).

VICE PRESIDENT.

Of bank, see BANKS.

VICE PRINCIPAL.

See MASTER AND SERVANT.

VICTUALING HOUSES.

See RESTAURANTS.

VOTING TRUST.

See CORPORATIONS.

WAIVER.

By insurance company, see INSURANCE.

Of objections to validity of public improvement assessment, see PUBLIC IMPROVEMENTS.

Vendor's acceptance of payment tendered after time specified as waiver of provision making time of essence of contract. 9-996 (case p. 993).

Power of president or vice president of bank to waive corporate rights. 9-1146 (case p. 1110).

Of provision in lease against subletting. 9-438.

Waiver of tender by infant of property received on disaffirmance of contract. 9-1028.

WALLS.

As to party wall, see PARTY WALL.

WANTON INJURY.

See WILFUL INJURY.

WAR.

As to moratory statutes in war time, see MORATORIUM.

Heavy italic type is used for annotations; roman type for cases.

Rights of parties to contracts the performance of which is interfered with or prevented by war conditions or acts of government in prosecution of war. 9-1509 (case p. 1507).

WAR DEPARTMENT.

Criminal or penal responsibility for violating speed regulations. 9-368.

WAREHOUSEMEN.

Liability of bailee generally for injury to goods, see BAILMENT.

WATERCOURSE.

What is. 9-1200.

WATERS.

See also IRRIGATION.

Rights between public and individuals.

Power of state to prohibit or regulate floating of logs. 9-1025 (case p. 1021).

Right to close stream navigable only for floating logs. 9-1021.

Water rights and easements as between individuals.

Right to hasten the flow and increase the volume of water in a stream by alterations or improvements in the bed. 9-1211 (case p. 1200).

What are watercourses. 9-1200.

— obstruction.

Joint liability for obstruction or flooding of stream caused by acts of various independent proprietors. 9-947.

— pollution.

May acts of independent tort-feasors polluting stream be combined to create a joint liability. 9-947 (case p. 933).

— surface waters.

Definition of. 9-1200.

Right to discharge, in mass. 9-1200.

Draining into watercourse. 9-1200.

Water supply.

Power of state to increase franchise rates. 9-1165.

Power of state to change private contract rates. 9-1435.

WILFUL INJURY.

Stipulation releasing carrier from liability for injury to free passenger as affecting liability for wilful or wanton injury. 9-501 (case p. 496).

WILFUL MISCONDUCT.

Of employee seeking recovery under Workmen's Compensation Act, see WORKMEN'S COMPENSATION.

WILLS.

Execution.

Execution of will of blind person. 9-1416 (case p. 1409).

Burden of proving proper execution. 9-1409.

Credibility of witnesses as to. 9-1409.

Execution by proxy; construction of statute as to. 9-1409.

Acknowledgment; sufficiency. 9-1409.

Witness affixing signature in presence of testator. 9-1409.

Contest.

Authority of court to consent to compromise of contest. 9-1528.

Referring to clerk of court question of amount of fees to be allowed next friend as counsel for infant provided for in compromise. 9-1528.

Paying counsel fees out of real property where personalty is consumed by other charges. 9-1528.

Nuncupative wills.

Meaning of phrase "last sickness" in statute as to nuncupative wills. 9-164.

The dash in each citation stands for A.L.R.

Gift upon condition.

Validity and effect of provisions in will to control voting power of corporate stock. 9-1242 (case p. 1239).

WITHDRAWAL.

Of letter from mail, see **POSTOFFICE**.

WITNESSES.**In general.**

Contempt by, see **CONTEMPT**.

Depositions of, see **DEPOSITIONS**.

Discovery by, see **DISCOVERY AND INSPECTION**.

Privileged communications to, see **EVIDENCE**.

Evidence against party of attempt to suborn witness. 9-981.

Admissibility against party to action of letter written by him, attempting to keep witness away. 9-981.

Duty of person to testify. 9-963.

Competency.

Deaf-mute as a witness. 9-482 (case p. 480).

Competency of interpreter for deaf-mute. 9-480.

Cross-examination.

Right to compel accused on cross-examination to testify to statements out of court improperly obtained, which amount to a confession. 9-1358 (case p. 1354).

Review of discretion as to. 9-207.

To discredit witness. 9-207.

Privilege of witness.

Privilege of accused against self-incrimination, see **CRIMINAL LAW**.

Duty of court honoring letters rogatory to see that witness is not compelled to give privileged testimony. 9-963.

Impeachment; discrediting.

Cross-examination for purpose of discrediting, see *supra*.

Use of confession improperly obtained, for purpose of impeaching defendant as a witness. 9-1358 (case p. 1354).

Credibility.

Discrediting, see *ante*.

Credibility as question for jury. 9-1245, 1409.

WORDS AND PHRASES.

Abandonment of property. 9-1384.

Accident. 9-1067.

Apparatus. 9-1020 note.

Betrayal. 9-1250.

Café. 9-428 note.

Clear and satisfactory evidence. 9-1223.

Common carrier. 9-1544.

Constructive trust. 9-1610.

Cost. 9-1540 note.

Crime. 9-922.

Document of title. 9-1610.

Dwelling house. 9-46 note.

Effects. 9-302 note.

Engine. 9-1380.

Enter into possession. 9-33 note.

Entire. 9-521.

Estate for years. 9-288.

Excise tax. 9-1557.

Farm. 9-278.

Foreclosure. 9-34 note.

Forgery. 9-409 note.

Gross. 9-216 note.

Implements. 9-1020 note.

Inadvertence. 9-1067.

Income. 9-1570.

Instruments. 9-1020 note.

Involuntary manslaughter. 9-221 note.

Joint. 9-426.

Last sickness. 9-459; 9-462 note.

Lose. 9-1384.

Machinery. 9-1380.

Maintain. 9-904.

Manslaughter. 9-215 note.

Moratorium. 9-7 note.

Mustered into service. 9-25 note.

Parade. 9-549.

Perils of the sea. 9-1307; 9-1314 note.

Private carrier. 9-1544.

Process. 9-24 note.

Procession. 9-549.

Public conveyance. 9-1544.

Public utilities. 9-1031; 9-1033 note.

Realizing any security. 9-35 note.

Reservist. 9-50 note.

Restaurant. 9-426; 9-429 note.

Restaurant keeper. 9-426.

Sight. 9-521.

Slander of title. 9-929.

Stock in trade. 9-1255; 9-1259 note.

Surface waters. 9-1200.

Taxation. 9-1557.

Term. 9-288.

Tools. 9-1020 note.

Utensils. 9-1020 note.

Vagrancy. 9-1361.

Victualing house. 9-429 note.

Victuals. 9-429 note.

Volunteer. 9-50 note.

Weiner. 9-426.

Wilful. 9-1374.

WORKMEN'S COMPENSATION.

Operation of automobile or automobile truck as a hazardous occupation. 9-1382 (case p. 1380).

Heavy italic type is used for annotations; roman type for cases.

Provision denying compensation for injury through wilful failure to use guard, or safety appliance. 9-1377 (case p. 1374).

Meaning of word "wilful." 9-1374.

WORK OR FIGHT LAWS.

See VAGRANCY.

WRIT AND PROCESS.

Appointment of receiver for railroad as affecting service of process on agent or employee in action against company. 9-228 (case p. 228).

Notice of probate in fictitious name, 9-1119.

The dash in each citation stands for A.L.R.

